IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

[redacted] as administrator of the estate of [redacted] and as guardian of J.H. and T.H., *Plaintiff,* v. MARTIN-ROBBINS FENCE COMPANY, GEORGIA DEPARTMENT OF TRANSPORTATION, ARCADIS U.S., INC. and JOHN DOES 1-10, *Defendants.*	Civil Action No.: [redacted]
[redacted] and [redacted] *Plaintiffs,* v. GEORGIA DEPARTMENT OF TRANSPORTATION and MARTIN-ROBBINS FENCE COMPANY, and ARCADIS U.S., INC. *Defendants.*	Civil Action No.: [redacted]

DEFENDANT GEORGIA DEPARTMENT OF TRANSPORTATION'S BRIEF IN FURTHER SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

COMES NOW Defendant Georgia Department of Transportation ("GDOT") and files this brief in further support of its motion to dismiss for lack of subject matter jurisdiction under O.C.G.A. § 9-11-12(b)(1).

GDOT showed in its initial brief that Plaintiffs cannot meet their burden to effect a waiver of sovereign immunity pursuant to the GTCA. Plaintiffs' response materials do not

support their burden of proof, with the result that this Court should dismiss their lawsuit for lack of subject matter jurisdiction. Plaintiffs attempt to reframe their claims for relief in order to circumvent the State's sovereign immunity. But, under settled Georgia law, it is the underlying (and allegedly) negligent acts or omissions at issue, and the substance of the alleged losses related to such acts or omissions, which determine the threshold matter of sovereign immunity. Here, under that standard, Plaintiffs' lawsuit should be dismissed for lack of subject matter jurisdiction. [1]

In particular, Plaintiffs attempt to effect a waiver of sovereign immunity by sidestepping GDOT's contracts with MR and Arcadis and instead contend that GDOT owed extra-contractual legal duties to Plaintiffs concerning inspection and maintenance of the subject guardrail, the very duties GDOT delegated to its independent contractors, which GDOT allegedly breached. But Georgia courts have long recognized that State agencies like GDOT can validly delegate their legal duties to, as here, maintain and inspect a state highway through contracts with independent contractors. The GTCA specifically provides the State preserves its sovereign immunity with respect to alleged torts committed by an independent contractor. Plaintiffs' insistence that GDOT's authority to contract with independent contractors is narrowly construed is contrary to settled Georgia law. Likewise, Plaintiffs' insistence that this Court should disregard the unambiguous written contracts and instead find that the State waived its sovereign immunity by allegedly negligently maintaining and/or inspecting the subject guardrail is inconsistent with Georgia law and would undermine the purpose of the GTCA. *See* GDOT MTD at 7-10, 14-19.

Likewise, Plaintiffs' attempts impose a legal duty on GDOT on the theory that GDOT voluntarily reassumed the duties to inspect or maintain the guardrail should be disregarded as

[1] Plaintiffs have dismissed their claim for "nuisance" against GDOT and, accordingly, that claim is not addressed in this reply brief. *See* Plfs' Resp. at 27; GDOT MTD at 27-28.

irrelevant to their burden of proof to effect a waiver of sovereign immunity. These claims also are contrary to the GTCA and settled Georgia law which provides that the State only can be subject to legal duties in the same manner as a private party would be. O.C.G.A. § 50-21-23(a). Discussion, *infra*.[2]

In short, the two Contracts related to maintaining and inspecting the guardrail are the exclusive source of GDOT's role vis-à-vis MR and Arcadis as well as the exclusive source of GDOT's rights to enforce, suspend, and/or terminate either of the Contracts. Once GDOT permitted MR to maintain the guardrail through the contractual Notice to Proceed (GDOT MTD at 6-7), GDOT retained no extra-contractual duties to maintain or inspect the subject guardrail. The same is true with respect to GDOT's contract with Arcadis to inspect the guardrail. *See* GDOT MTD at 6-7 (discussing the Standard Specifications and pertinent contractual terms). As Andy Doyle testified, the subject roadway was MR's worksite. *Id*. Plaintiffs' expert Mr. Hill

[2] Plaintiffs provide in their response that they are no longer asserting any negligent design claims. Plfs' Resp. at 23-24. GDOT refers to, and incorporates by reference, the arguments and case law in its initial brief for its discussion of the State's preservation of sovereign immunity pursuant to the GTCA's "design exception" to the extent Plaintiffs reassert such claims or offer arguments concerning negligent maintenance or inspection that implicate the GTCA's design exception. GDOT's arguments concerning negligent design mainly referred to Plaintiffs' claims concerning the placement of the pole in proximity to the guardrail, as well as claims concerning the failure to post certain "warning" signage concerning the guardrail. The cases to which the [redacted] Plaintiffs cite, *Drawdy v. DOT*, 228 Ga. App. 338, 339 (1997) and *Adams v. Coweta Cty.*, 208 Ga. App. 334, 335-37 (1993) (*see* Plfs' Resp. at 26), to contend that their claims are for negligent maintenance of the guardrail, are inaposite. Under the particular facts of *Drawdy*, the Court found that the allegations only involved negligent maintenance and repair (as opposed to design) of the roadway (and, regardless, did not involve GDOT's delegation of such duties to independent contractors). *Adams* involved negligent maintenance claims brought against a county, thus not implicating the GTCA's design exception. *Adams*, 208 Ga. App. at 334. In addition, *Adams* concerned a motion to dismiss pursuant to O.C.G.A. § 9-11-9.1, which, likewise, involves a different standard than applies to an expert affidavit in support of a motion to effect a waiver of sovereign immunity under the GTCA's design exception. *Adams*, 208 Ga. App. at 335-37.

agreed that MR and Arcadis were GDOT's independent contractors as provided in the written, executed Contracts.[3] *Id.* at 12.

The Plaintiffs were not parties to, or third party beneficiaries of, either of the Contracts. And, GDOT had the right, but not the obligation, including not to the Plaintiffs, to enforce the Contracts, or to suspend or terminate the Contracts if its independent contractors were not performing the work pursuant to the Contracts. GDOT MTD at 6-7, 16-17. The State has preserved its sovereign immunity with respect to claims, for example, that it negligently inspected its contractors' work or that it should have suspended or terminated a contract if a contractor was not sufficiently performing its work. *Cf*. Plfs' Resp. at 12-15.

In addition to preserving the State's immunity for alleged torts committed by independent contractors, the GTCA also contains two exceptions to the waiver of sovereign immunity which apply here, the "inspection" and "licensing" exceptions. *See* GDOT MTD at 15-20. Georgia courts broadly construe these exceptions, including related to these sorts of contracts. This broad construction is consistent with the underlying purposes of the GTCA. *Id*. In this way, the State can preserve its sovereign immunity with respect to how and when it inspects a contractor's work, actions it might take in response to an inspection, and with respect to how and when (if at all) it suspends or terminates the contracts subject to the Notice to Proceed (which operates as a permit, *see id*. at 6-7, 16). Plaintiffs misread Georgia cases construing these exceptions and rely on cases that are factually distinguishable and thus irrelevant. Discussion, *infra*.

Plaintiffs' attempts to reframe their claims and disregard the Contracts are irrelevant to their burden of proof on this motion. Plfs' Resp. at 16. Also irrelevant is Plaintiffs' attempt to

[3] *See* GDOT MTD at 12; Ex.5, Hill Aff. ¶ 7(f)-(g), 8(a)-(b)); GDOT MTE (Hill), at 11, 14-15. Hill criticizes how GDOT fulfilled its contractual responsibilities. Ex. 9, Hill Dep.); GDOT MTE at 15-19

misconstrue the procedural standards that apply to GDOT's motion. Plaintiffs have the burden of proof on this motion and this jurisdictional issue should be decided preliminarily. Discussion, *infra*. Accordingly, this Court can find, as a matter of law, that the Plaintiffs have not met their burden of proof to effect a waiver of sovereign immunity pursuant to the GTCA and, as a result, this Court lacks subject matter jurisdiction over this case.

I. ARGUMENT AND CITATION OF AUTHORITIES

A. Introduction

While, on the one hand, Plaintiffs acknowledge, as they must, GDOT's delegation of its maintenance and inspection duties to MR and Arcadis, Plaintiffs then offer a sleight-of-hand approach to try to re-impose on GDOT the very legal duties it delegated to its independent contractors.[4] Plaintiffs refer to GDOT's statutory duties pursuant to O.C.G.A. § 32-2-2 (*i.e.* ignoring that GDOT delegated the pertinent duties), attempt to distinguish settled law broadly construing the State's preservation of immunity pursuant to the GTCA, and offer the inapplicable legal theory that, allegedly, GDOT voluntarily reassumed its duties to maintain and inspect the guardrail. None of these approaches supports Plaintiffs' burden of proof on this motion.

Plaintiffs cannot meet their burden of proof by simply reframing their claims for relief. Rather, following settled Georgia law, this Court should consider whether the alleged acts or omissions that produced the alleged losses are those for which the State has preserved its immunity pursuant to the GTCA. *See, e.g.*, *DOT v. Jarvie*, 329 Ga. App. 681, 685 (2014)

[4] GDOT denies that it breached any legal duties to Plaintiffs and that any such alleged breach proximately caused the subject accident. But, for purposes of this jurisdictional motion, GDOT focuses on Plaintiffs' failure to meet their burden of proof to effect a waiver of sovereign immunity. In short, without identifying a legal duty GDOT owed to Plaintiffs (an essential element of their negligence claims), they cannot effect a waiver of sovereign immunity in this case.

(discussed, *infra*), *overruled on other grounds by*, *Rivera v. Washington*, 298 Ga. 770 (2016); *Davis v. Standifer*, 275 Ga. App. 769, 774 (2005) ("In determining whether the exception [pursuant to O.C.G.A. § 50-21-24] applies, our focus is not on which particular state law causes of action a plaintiff has set forth in her complaint, but rather on the underlying conduct that allegedly caused the plaintiff's loss.").

For the reasons below, Plaintiffs' responsive materials do not support their burden of proof to effect a waiver of sovereign immunity.

B. Legal Standards Applicable to Plaintiffs' Burden To Effect A Waiver of Sovereign Immunity Under the GTCA.

GDOT in its initial brief provided the legal background and applicable law concerning the GTCA. GDOT MTD at 7-10. GDOT here responds to Plaintiffs' attempts to evade or shift to GDOT their burden of proof. Plaintiffs have the burden of proof to establish a waiver of sovereign immunity by a preponderance of the evidence. *Id*. at 8-9; *Dep't of Public Safety v. Johnson*, 343 Ga. App. 22, 24 (2017). And, as Georgia courts routinely have held, the jurisdictional issue should be decided as a threshold matter because without jurisdiction the Court lacks the "authority to decide the merits of a claim that is barred." *McConnell v. Department of Labor*, 302 Ga. 18, 18-19 (2017):

> The applicability of sovereign immunity . . . to claims brought against the State is a jurisdictional issue. Indeed "[s]overeign immunity … like various other rules of jurisdiction and justiciability … is concerned with the extent to which a case properly may come before a court at all." *Lathrop v. Deal*, 301 Ga. 408, 432 (III) (B) (801 SE2d 867) (2017). Therefore, . . . the applicability of sovereign immunity is a threshold determination, . . . and, if it does apply, a court lacks jurisdiction over the case and, concomitantly, lacks authority to decide the merits of a claim that is barred.

McConnell, 302 Ga. at 18-19. Plaintiffs' references to treating this motion as one made pursuant to O.C.G.A. § 9-11-12(b)(6) where the court must assume the facts set forth in Plaintiffs'

complaint. But that is not the standard applicable to a motion made pursuant to O.C.G.A. § 9-11-12(b)(1). GDOT MTD at 8-9.

The Court's jurisdictional analysis in *Douglas Cty. v. Hamilton State Bank,* 340 Ga. App. 801 (2017), on which Plaintiffs rely, does not apply here. *See* Plfs' Resp. at 16. First, that case did not concern the GTCA or even a jurisdictional motion to dismiss based on sovereign immunity. *Douglas* concerned a jurisdictional challenge based on the plaintiffs' failure to exhaust administrative remedies pursuant to a federal statute prior to bringing its lawsuit. *Douglas,* 340 Ga. App. at 801. Second, *Douglas* concerned an appellate court's review of a "facial challenge" to subject matter jurisdiction in which the Court, in that case, explained (relying on another case not involving sovereign immunity or the GTCA), that courts construe the pleadings in the light most favorable to the nonmoving party with any doubts resolved in that party's favor. *Id*. at 802. Thus, in particular given the settled Georgia law discussed above, *Douglas* should be limited to its facts and does not apply here.

Likewise, Plaintiffs' reference to the Court's application of the "any evidence" standard in *DOT v. Kovalcik,* 328 Ga. App. 185, 186 (2014) (*cited in* Plfs' Resp. at 16), is inapplicable here. Discussion, *supra.* Regardless, Plaintiffs' reference is a misstatement of the *Kovalcik* Court's holding. The *Kovalcik* Court merely held that the *de novo* standard of review applies and that "factual findings by the trial court in support of its legal decision are sustained if there is evidence authorizing them." *Kovalcik,* 328 Ga. App. at 186.

Under the applicable procedural standards, Plaintiffs have not met their burden of proof to effect a waiver of sovereign immunity in this case, with the result that this Court lacks subject matter jurisdiction over this case.

C. The State Has Preserved Its Sovereign Immunity For the Torts of Independent Contractors.

The crux of Plaintiffs' claims (regardless of how they label them) is that the State should be liable for alleged torts committed by MR and/or Arcadis. *See* GDOT MTD at 17. Plaintiffs allege that GDOT negligently maintained and inspected the subject guardrail but GDOT delegated those duties to MR and/or Arcadis. *Id*. at 6-7, 14; *Ga. DOT v. Wyche*, 332 Ga. App. 596, 599-600 (2015); *Johnson v. Ga. Dept. of Human Resources*, 278 Ga. 714, 716 (2004).

As Andy Doyle testified, referring to the MR Contract:

> It was [MR's] jobsite. The first people out there to repair the guardrail should have been [MR]. If anybody else . . . GDOT . . . went out there to work on it . . . [MR] would have probably had concerns with us getting in their way or having problems in the contract.

GDOT MTD at 6-7 (Ex. 10, Doyle Dep. 55:5-22.). The Arcadis Contract reflects the same delegation of duties. GDOT MTD at 7. Georgia courts routinely find and hold that such contracts provide protection from liability to the contracting party that delegates its legal duties to the independent contractor. *Id*. at 14-15. None of the exceptions that would remove such protection applies. *Id*. And, the GTCA provides that the State preserves its immunity for torts committed by independent contractors or consultants. *Id*.[5] Plaintiffs do not allege ambiguity in any of the contractual terms related to GDOT's contractual role, rights or responsibilities.

[5] Accordingly, the [redacted] Plaintiffs' references to *Welch v. Ga. DOT* , 283 Ga. App. 903, 904 (2007) (referring to GDOT's responsibilities pursuant to O.C.G.A. § 32-2-2), and *Dep't of Transp. v. Brown*, 218 Ga. App. 178, 182 (1995) (referring to GDOT's statutory obligations pursuant to O.C.G.A. § 32-2-2 as "intended to benefit all of the citizens of the state") (*see* Plfs' Resp. at 17), are irrelevant to the analysis of the State's preservation of sovereign immunity in this case because GDOT delegated its duties to maintain and inspect the guardrail to independent contractors.

In short, the substance of Plaintiffs' claims here against GDOT are derivative of claims they would allege against MR or Arcadis. Their claims of active negligence are not viable[6] and, regardless, in substance allege only that GDOT failed to catch or act upon the alleged negligence of MR or Arcadis. *See, e.g.*, GDOT MTD at 17.

D. The State Has Preserved Its Sovereign Immunity Under the "Licensing Exception" and "Inspection Exception," O.C.G.A. §§ 50-21-24 (9) & (8).

GDOT provided in its motion to dismiss that the State also has preserved its immunity pursuant to the GTCA's inspection and licensing exceptions. GDOT MTD at 15-22 (citing cases); O.C.G.A. § 50-21-24 (8) & (9). By virtue of GDOT's Contracts with MR and Arcadis -- and its issuance of a Notice to Proceed -- (as discussed, *supra*), GDOT "authorized" or "permitted" MR (and Arcadis) to perform work on I-85, including with respect to the subject guardrail.[7] GDOT MTD at 15-20. GDOT's role was limited to monitoring and/or inspecting the

[6] As an aside, Plaintiffs misstate the standard applicable to a claim of "negligent maintenance," contending that, pursuant to O.C.G.A. § 32-2-2, GDOT "must inspect and repair damaged guardrail." Plfs' Resp. at 18-19. First, as noted, GDOT is permitted to delegate such duties and did so in this case. Thus, this Court need not consider the merits of Plaintiffs' negligent maintenance and inspection claims because there is no proof that GDOT had legal duties to maintain or inspect the subject guardrail. Second, even if GDOT was responsible for inspecting and maintaining the guardrail in this case (which it was not), to prove negligent maintenance, Plaintiffs would have the burden to prove "breach of duty by the DOT" including "evidence of the proper maintenance standard, the deviation from that standard, and the causal connection between the deviation and the collision." *Johnson v. Georgia Dep't of Transp.*, 245 Ga. App. 839, 839 (2000); GDOT MTD at 19-20.Plaintiffs have not offered any evidence of the particular maintenance or inspection standards to which GDOT was subject including, *e.g.*, the particular time requirements for repairing or replacing guardrail. O.C.G.A. § 32-2-2 does not reference the applicable standards. *See* GDOT MTD at 20-21. And neither does Plaintiffs' repeated references to GDOT employees driving by the guardrail or testifying to being the "first set of eyes" for inspecting the guardrail create any applicable legal duty of care or GDOT maintenance or inspection standards. *Cf.* Plfs' Resp. at 25.

[7] The "licensing exception" provides: "Licensing powers or functions, including, but not limited to, the issuance, denial, *suspension, or revocation* of or the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization[.]"

contractors' work to ensure that GDOT received the work for which it had contracted and to suspend the parties' authorizations if GDOT was aware of a breach. *See id*. at 4-7. For the reasons below, both the licensing and inspection exceptions apply here, regardless of how Plaintiffs label their negligence claims.

Turning first to the GTCA's inspection exception, it covers the very (alleged) actions and omissions concerning which Plaintiffs contend waives the State's immunity here: "Inspection powers or functions, *including failure to make an inspection or making an inadequate or negligent inspection of any property other than property owned by the state* to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety[.]" O.C.G.A. § 50-21-24(8).

With respect to the licensing exception (O.C.G.A. § 50-21-24(9)), GDOT discussed how it applies here in its initial brief. GDOT MTD at 15. With respect to the inspection exception, Plaintiffs focus on the exception within such exception for state property because I-85, and the subject guardrail, are state property. *See* O.C.G.A. § 50-21-24(8). But in this case, GDOT inspected the contractors' *work* on its property pursuant to the applicable Contracts, not the state property (*i.e.*, the guardrail). GDOT MTD at 18-19. Plaintiffs' negligence claims essentially concern whether GDOT, in monitoring its contractors' work, including driving by the subject guardrail, should have reacted differently than it did. Plaintiffs argue that GDOT allegedly knew MR was not doing its job to maintain the guardrail and, on its own initiative, GDOT should have had the guardrail repaired and/or "hired additional contractors." Plfs' Resp. at 14-15, 18-21.

O.C.G.A. § 50-21-24(9) (emphasis supplied). Thus, this exception bars Plaintiffs' claims that GDOT was negligent in failing to terminate the contract (which was subject to the Notice to Proceed permit, *see* GDOT MTD at 6-7, 16-18).

Plaintiffs' claims fall squarely within the inspection exception. In *Jarvie*, 329 Ga. App. at 684, for example, the facts of which are discussed in GDOT's initial brief (GDOT MTD at 19), the plaintiffs alleged that GDOT allowed the independent contractor to conduct its work in a dangerous manner and failed to properly monitor its work.

The Court held:

> The plaintiffs argue that the DOT's on-site monitoring of the construction operations . . . amounts to inspection of State property not covered by the inspection powers exception. But the conduct in this case amounts to oversight of construction activities for purposes of administering the contract, and it does not amount to an inspection of State property . . . as contemplated by the language of OCGA § 50-21-24 (8). Absent a clear legislative directive, we decline to extend the waiver of sovereign immunity to include independent contractors' conduct *even if a State actor in some way attempts to ensure that contractors are operating safely on a State-approved project.* We emphasize that our conclusion is premised on the fact that the plaintiffs' claims are not based on a failure to detect during a project inspection a hidden defect or a deviation from approved plans or regulatory standards. Rather, the plaintiffs' claims arise from the obvious risks associated with the decision to locate the stockpile in the median. "Nomenclature notwithstanding, the substance of a claim must be considered, and a party cannot do indirectly what the law does not allow to be done directly."

Jarvie, 329 Ga. App. at 684 (emphasis supplied). As *Jarvie* shows, Plaintiffs cannot avoid the broad construction of the GTCA's inspection exception by alleging that GDOT was inspecting its own property at MR's worksite, as opposed to inspecting the work for which it contracted. *See also Sommers Oil Co. v. Georgia Dep't of Agric.*, 305 Ga. App. 330, 331-32 (2010) (GDOT MTD at 18) (holding that, although plaintiff "couched its claim as a claim for negligent supervision," the essence of the claim involved defendant's failure to properly inspect the fuel stations at issue and failure to revoke their permits, thus barring such claims under both O.C.G.A. § 50-21-24 (8) & (9)); *cf.* Plfs' Resp. at 22 (contending that it is not claiming negligent supervision because they claim GDOT retained the duties to maintain and inspect the guardrail, yet also claiming that GDOT turned a blind eye toward MR not doing its job). As *Jarvie* and

Sommers provide, Courts consider the essence of the plaintiff's claims in determining whether the plaintiff met his burden of proof to effect a waiver of sovereign immunity. GDOT MTD at 18. Here, Plaintiffs simply try to reframe their claims to impose legal duties on GDOT but, in substance, those claims refer to alleged torts committed by MR and/or Arcadis.

The cases on which Plaintiffs rely are of no help to them. *See* Plfs' Resp. at 24. In *Dept. of Transp. v. Kovalcik*, 328 Ga. App. 185, 190-191 (2014) (Plfs' Resp. at 24), GDOT contracted with the City of Atlanta to redesign of a portion of GDOT's highway, Peachtree Road. *Id.* at 186. As part of the project, GDOT contracted with a private company for construction, engineering, and inspection services. *Id.* Several months later, the decedent died when her vehicle collided with a concrete divider in the redesigned portion of Peachtree Road. *Id.*

The Court affirmed the denial of GDOT's motion to dismiss, concluding that, despite GDOT's sovereign immunity for "the acts of independent contractors," "the mere presence of contractors performing services on behalf of the DOT does not relieve the DOT from potential liability" for "failing to ensure," under the GTCA's "inspection exception" (O.C.G.A. § 50-21-24(8)), that its highway "was safe for use by the public." *Kovalcik*, 328 Ga. App. at 188-90. The *Kovalcik* Court also analyzed the State's potential immunity under O.C.G.A. § 50-21-24(9). *Kovalcik*, 328 Ga. App. at 189-91. The Court found "to the extent that any of the Kovalciks' claims are predicated on the DOT's improper authorization of the plans or Project, the DOT is immune." *Id*. at 190-91.

Thus, *Kovalcik* is factually distinguishable from here, where the substance of Plaintiffs' claims allege that GDOT did not properly oversee MR's (or Arcadis's) work. Plaintiffs do not allege that the State inspected its own property where MR also happened to be performing services, as in *Kovalcik*, 328 Ga. App. at 188-91. Rather, Plaintiffs particularly criticize GDOT

for observing and inspecting the very same guardrail that MR or Arcadis was responsible for inspecting. Thus, *Kovalcik* does not apply here.

DOT v. Delor, 351 Ga. App. 414, 418 (2019) (*cited in* Plfs' Resp. at 12-13, 25-26), on which Plaintiffs rely to claim that GDOT is liable for negligently executing its maintenance or inspection duties, also is inaposite. There, after a subcontractor completed its construction work on a railroad crossing, the Court held that GDOT could be liable for its own decision to open the crossing, which the Court construed as an inspection of State property. *Delor*, 351 Ga. App. at 415-20 (citing O.C.G.A. §§ 50-21-24(8) & (9)). Like *Kovalcik*, *Delor* concerned the scenario, distinguishable from this case, where GDOT inspected state property on which independent contractors happened to be working. *Delor*, 351 Ga. App. at 418-19. *Delor* thus is distinguishable from this case for the same reasons discussed above.

Likewise, Plaintiffs insist they are not claiming that GDOT is liable for "negligent supervision" (Plfs' Resp. at 22), and that, therefore, cases like *Cox* and *Sommers* are distinguishable. GDOT MTD at 16, 18. But, Plaintiffs have provided no relevant evidence that GDOT cannot or did not delegate its duties to maintain and inspect the guardrail to MR and/or Arcadis. Plaintiffs' references to how often GDOT drove by the guardrail or whether it allegedly considered itself the "first set of eyes" are irrelevant (and amount to speculation) because here, the unambiguous contractual language controls. Plfs' Resp. at 13; Discussion, *supra*. Plaintiffs' attempts to impose extra-contractual duties on GDOT through such speculative inferences should be disregarded.

Similarly, Plaintiffs cannot avoid that, pursuant to the Contracts' enforcement mechanisms, GDOT had the right to ensure it was getting the work for which it contracted, but it did not have the duty (much less a legal duty to Plaintiffs who were not parties to either of the

Contracts) to exercise these rights, or in any particular way.[8] And the same is true concerning GDOT's right to suspend or terminate the Contracts. Discussion, *supra*; O.C.G.A. § 50-21-24(9).

The *Comanche* Court's analysis also is instructive on this point. GDOT MTD at 18. *Comanche Construction, Inc. v. Ga. Dept. of Transp.*, 272 Ga. App. 766 (2005) (cited in Plfs' Resp. at 21), involved an automobile wreck in a construction zone detour route on a project performed by Comanche, a private contractor. Comanche argued that GDOT was statutorily precluded from delegating, through contract, its obligation to design traffic control plans and erect traffic control devices for GDOT construction projects on public roads. The Court also explained that the inspection exception also applies even when, after an inspection, GDOT decides to take corrective action on its own initiative: "Certainly, the legislature did not intend to limit the State's immunity to inspections involving no request for subsequent remedial work." *Comanche Constr., Inc.*, 272 Ga. App. at 769.

The *Comanche* Court also noted, relevant here:

> According to Comanche, DOT had an ultimate, nondelegable duty to design the traffic control plan in this case and thus cannot hide behind the inspection exception. We find this argument unpersuasive. In reviewing Comanche's claim,

[8] To the extent Plaintiffs' claims related to negligent inspection can be construed to concern breach of a contractual duty found in the Contract, GDOT would not be liable to Plaintiff for any such breach because Plaintiffs are not in privity with the contracting parties. O.C.G.A. § 51-1-11(a); *Jai Ganesh Lodging, Inc. v. David M. Smith, Inc.*, 328 Ga. App. 713, 719-20 (2014); *Westbrook v. M & M Supermarkets*, 203 Ga. App. 345, 346 (1992); *see* O.C.G.A. § 51-1-11(a) ("if the tort results from the violation of a duty which is itself the consequence of a contract, the right of action is confined to the parties and those in privity to that contract, except in cases where the party would have a right of action for the injury done independently of the contract ...."). And, as a matter of law, motorists are not third party beneficiaries to a road construction contract. *Ogles v. E.A. Mann & Co.*, 277 Ga. App. 22, 27-28 (2005). Thus, Plaintiffs cannot claim to have relied on GDOT's monitoring of MR's Work under the Contract, which it performed pursuant to its contractual rights, not for the benefit of motorists, including Plaintiff And, Plaintiffs have identified no "right of action" for "injury done independently of the contract" (*Westbrook*, 203 Ga. App. at 346), because the duties which Plaintiffs claim were breached by GDOT all are part of the MR and/or Arcadis Contracts.

> we are guided by two principles. First, "where the language of [a] statute is plain and unambiguous, and does not lead to contradictory, absurd, or wholly impracticable results, it is the sole evidence of legislative intent and must be construed according to its terms." *Second, this Court generally is unwilling to impose a nondelegable, affirmative duty upon a State entity absent clear statutory language that the legislature intended to establish such duty.*

Id. at 769-70 (emphasis supplied).

Likewise here, Plaintiffs claim that because GDOT "continu[ed] to actively monitor the guardrail" (Plfs' Resp. at 25) and was, allegedly, the "first set of eyes" with respect to Arcadis's work, that this amounted to a waiver of sovereign immunity under the inspection exception. But, following *Comanche*, even if, hypothetically, GDOT decided to act as a "first set of eyes" or "actively monitor guardrail" (Plfs' Resp. at 13) "on its own initiative" (*Comanche,* 272 Ga. App. at 769), these actions were part of GDOT's contractual rights, to inspect the guardrails to ensure that MR was doing its job under the Contract. *See also* GDOT MTD at 6-7, 16-17. Plaintiffs attempt to transform these actions (if they occurred) into an extra-contractual inspection of State property pursuant to O.C.G.A. § 50-21-24(8) should be disregarded as inconsistent with the State's preservation of immunity pursuant to the GTCA.

In short, given the valid and enforceable Contracts, references to what GDOT duties may have been had it not delegated those duties to MR and/or Arcadis are irrelevant to Plaintiffs' burden of proof on this motion. Plaintiffs cannot contend, on the one hand, that GDOT acted negligently in not, *e.g.*, doing MR's work on its own, doing MR's work but doing it badly, or terminating MR's contract -- and on the other hand contend that these claims are not covered under the GTCA's immunity protections because Plaintiffs did not choose to call them, *e.g.*, "negligent supervision."

Accordingly, the State has preserved its sovereign immunity with respect to such claims, as discussed above.

E. The State Has Preserved Its Immunity In This Case With Respect to Plaintiffs' Claim For Negligent Undertaking of A Duty To Inspect the Guardrail.

Plaintiffs for the first time in their response materials advance a negligence claim found in the Restatement of Torts, § 324A (and recognized by Georgia courts as a viable cause of action in applicable circumstances), referred to as "negligent performance of an undertaking." Plfs' Resp. at 25-26. Plaintiffs cite *Huggins v. Aetna Cas. & Sur. Co.*, 245 Ga. 248 (1980) (Plfs' Resp. at 25-26),[9] where the Court held that, pursuant to section 324A(c), an employee could bring a negligence claim against the employer's insurance company for negligent inspection of a machine that injured the employee. The Court found that, even though the inspection was done for the employer's (but not the employee's) benefit, the insurance company was presumed to know its safety inspection also was for the benefit of the employee.

Huggins does not apply here. In this case, there is no analogous relationship between Plaintiffs and GDOT such that GDOT would be held to have known its inspections of MR's work was done for Plaintiffs' benefit and that Plaintiffs could so rely. Regardless, GDOT inspected MR's work pursuant to the MR Contract, not for Plaintiffs' safety. *See* Discussion, *infra*. And the same is true with respect to Arcadis.

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[9] One who undertakes, gratuitously or for consideration, to render *services to another which he should recognize as necessary for the protection* of a third person or his things, is subject to liability to the third person for *physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if* (a) his failure to exercise reasonable care increases the risk of such harm, *or* (b) he has undertaken to perform a duty owed by the other to the third person, *or* (c) the harm is suffered because of reliance of the other or the third person upon the undertaking. *Huggins*, 245 Ga. at 249 (quoting Restatement (Second) of Torts § 324A (emphasis supplied)).

Regardless, motorists are not third party beneficiaries of these sorts of contracts, nor do Plaintiffs claim that any contractual terms provide an intent to protect the Plaintiffs (or motorists generally) from physical injury. *See Anderson v. Atlanta Comm. for the Olympic Games*, 273 Ga. 113, 117 (2000) ("in personal injury cases, an injured party may not recover as a third-party beneficiary for failure to perform a duty imposed by a contract unless it is apparent from the language of the agreement that the contracting parties intended to confer a direct benefit upon the plaintiff to protect him from physical injury. . . ").

Section 324A does not apply here for additional reasons. First, it does not apply to the State in the way Plaintiffs contend because courts will not impose a nondelegable affirmative duty on a State entity absent legislative intention to do so. *Comanche Constr., Inc.*, 272 Ga. App. at 769-70. This is particularly the case here, where O.C.G.A. § 32-2-2 does not preclude GDOT from delegating such duties to independent contractors. And, O.C.G.A. § 32-2-2(a) (1) does not affect, much less override, the State's sovereign immunity under the GTCA. GDOT MTD at 20-22. Plaintiffs "negligent undertaking" theory, contrary to Georgia law, would impose on GDOT an affirmative and nondelegable duty to protect Plaintiffs from personal injury.

Second, given GDOT's right under settled Georgia law to delegate its inspection and maintenance duties to independent contractors, finding that the State waived its sovereign immunity for "voluntarily reassuming a duty" would hold the State to a higher standard of care than a private party, which is in inconsistent with O.C.G.A. § 50-21-23. *See also Georgia DOT v. Smith*, 314 Ga. App. 412, 419 (2012) (GDOT should not "be held to a higher standard of care [than private individuals or entities] by reason of its responsibility to plan, manage, and maintain the state highway system under OCGA § 32-2-2"); GDOT MTD at 20-21;*Cf.* Plfs' Resp. at 23.

Regardless, this theory is based on unsupportable allegations that when GDOT (allegedly) regularly drove by the worksite and considered itself the "first set of eyes" with respect to inspecting MR's and Arcadis's work, it did so outside of the Contracts and thus "voluntarily reassumed" its duties to maintain and inspect the guardrail. The GTCA's protections specifically bar such claims as discussed, *supra*. Finding GDOT liable under Plaintiffs' theory would expose the State treasury to the very sorts of claims the GTCA was intended to protect against. GDOT MTD at 7-10.

Third, in *Herrington v. Gaulden,* 294 Ga. 285, 288 (2013), the Court explained that Section 324A (a) applies when "a nonhazardous condition is made hazardous through the negligence of a person who changed its condition or caused it to be changed. … Liability … does not attach for failing to decrease the risk of harm." *Id*. (citation omitted). All Plaintiffs claim here is that GDOT allegedly undertook to inspect the guardrail outside of its contractual rights to inspect MR's work, should have seen it was already in an allegedly hazardous condition, and should have had it repaired to "decrease the risk of harm." There is no allegation that GDOT created the alleged hazardous condition.

Fourth, Section 324A requires proof that the inspection was done for the benefit of the third person's safety and not for an unrelated purpose. *Bing v. Zurich Servs. Corp.*, 332 Ga. App. 171 (2015). Here, as noted, the inspections of the Contractors' work on the guardrail were performed pursuant to the Contract, not for Plaintiffs or motorists' safety. In *Bing*, for example, plaintiffs-workers, injured in an explosion at a sugar company, alleged that the Zurich, the insurance company which performed annual inspections there negligently failed to identify the threat of the explosion. *Id*. at 171-72. The plaintiffs alleged that Zurich undertook to perform

these inspections for the workers' safety. But the Court found that section 324A did not apply because Zurich performed the inspection for underwriting purposes:

> In order for Appellants to establish a prima facie case under [Section] 324A, there must be an undertaking by Zurich. [citation omitted] . . . Here, Zurich did not undertake the duty to perform inspections for Imperial . . . . [but] for insurance underwriting purposes. Section 324A of the Restatement will not support a cause of action based on the theory that a party who did not undertake to render services *should have* done so. [citation omitted]. . . . . Zurich is entitled to judgment as a matter of law on Appellants' negligent inspection claim based on Section 324A of the Restatement. Id.

Id. at 173 (emphasis added). Here, as in *Zurich*, there is no evidence that any inspection was performed for Plaintiffs' safety. Plaintiffs are left with claiming that GDOT should have done more (*see* Plfs' Resp. at 26-27) (which is not cognizable under Section 324A), but recognize, *inter alia*, that such claims are barred by sovereign immunity.

Thus, even if Plaintiffs had offered relevant evidence to support its contention that GDOT "voluntarily reassumed" its legal duties (much less legal duties it owed to the Plaintiffs, *see* Discussion, *supra*), the State has preserved its sovereign immunity with respect to Plaintiffs' negligent undertaking claim.

II. CONCLUSION

Based upon the foregoing, as well as for the reasons set forth in its initial brief, this Court should grant GDOT's motion to dismiss Plaintiffs' Complaint.

This 24th day of January, 2022.

[Signatures on following page]

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that I have this date served a copy of **DEFENDANT GEORGIA DEPARTMENT OF TRANSPORTATION'S BRIEF IN FURTHER SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**, File & Serve*Xpress* which will automatically send email notification of such filing to all Judges and opposing counsel of record:

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