

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;
ARCADIS U.S., INC.; GEORGIA
DEPARTMENT OF TRANSPORTATION;
and JOHN DOES 1-10,

Defendants.

Civil Action No.: [REDACTED]

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT GDOT'S MOTION TO DISMISS

1. Introduction

This is a wrongful death case. The case arises from the failure of Martin Robbins Fence Company ("Martin Robbins"), Arcadis U.S., Inc. ("Arcadis"), and the Georgia Department of Transportation ("GDOT") (collectively, "Defendants") to fulfill their contractual, statutory, and common law duties to timely identify and repair damaged guardrail. As to GDOT, the crux of the case is this: GDOT was legally required to maintain the subject guardrail but failed to do that. Specifically, GDOT employees drove past the subject guardrail in its nonfunctional condition (while supposedly looking for damaged guardrail) *hundreds* of times over an eight-month period before doing anything about it.

Instead of maintaining the subject guardrail by timely identifying and repairing damaged guardrail, GDOT and the other Defendants left a section of guardrail on I-85 in "nonfunctional"

condition for at least ten months. The guardrail had been nonfunctional since at least August of 2017, as shown by images from Google Maps Street View. On April 18, 2018, GDOT finally notified Arcadis that the subject guardrail was nonfunctional. When Arcadis finally relayed that information to Martin Robbins on April 20, 2018, Martin Robbins failed to repair the guardrail within the contractually-required 21 day period. When a vehicle struck that nonfunctional guardrail 45 days later, on June 3, 2018, the guardrail still had not been repaired, and as a result it could not keep the vehicle in the roadway. Because the guardrail was already damaged, the vehicle ramped over the guardrail and rotated into a camera pole. The impact killed [REDACTED] and catastrophically injured [REDACTED]. It is undisputed that if the guardrail had been properly maintained, the vehicle would not have struck the camera pole.¹

An overhead photograph of the vehicle taken after the wreck shows the damage caused by the pole:



¹ Earnhart 07/01/21 Dep., 21:20-25 (“Q. If the guardrail that the Sorento truck had been in good repair, would the Sorento have struck the camera pole? A. No.”) (Ex. A); *see also* Kent Dep., 11:18-24 (Ex. B).

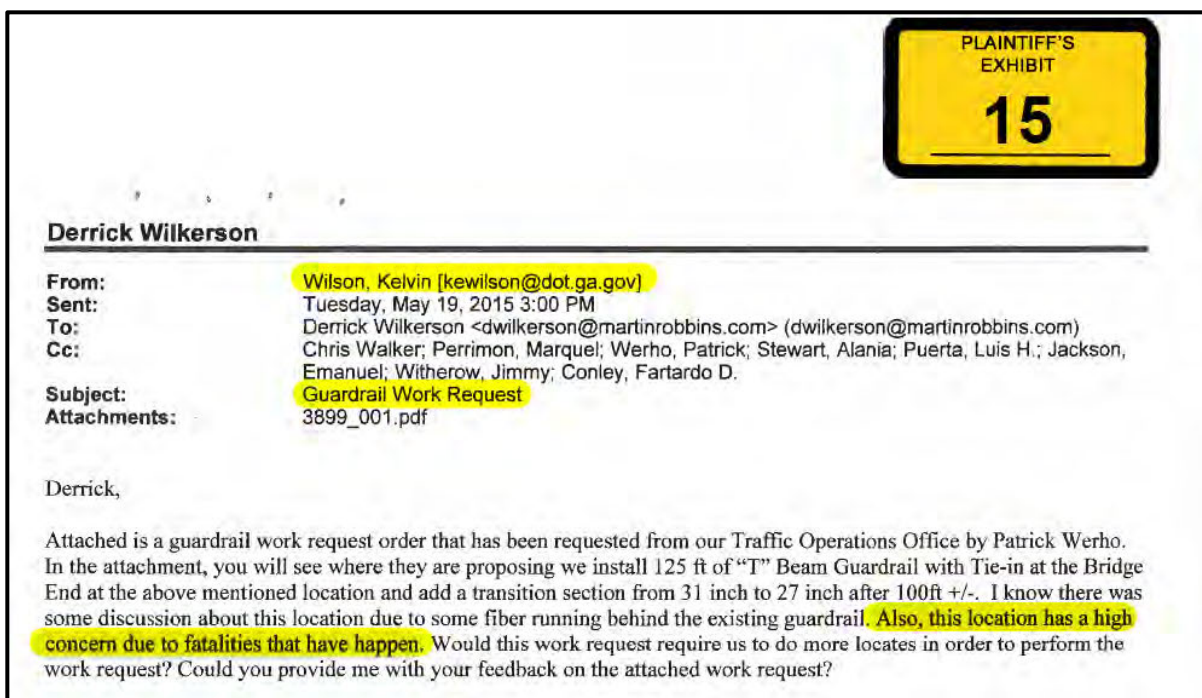
Plaintiff's Trial Ex. 8. As the photograph shows, the area in which [REDACTED] was seated was destroyed in the wreck.

A photograph of the subject guardrail taken only one month before the subject wreck shows the poor condition of the guardrail.



Plaintiff's Trial Ex. 1

GDOT knew the subject guardrail was a risk long before the subject wreck. As of May 19, 2015 – over three years before the wreck – GDOT warned Martin Robbins that the subject guardrail was “a high concern due to fatalities that have happened,” as shown in the email below:



Plaintiff's Trial Ex. 15.

GDOT's motion should be denied for two reasons. First, GDOT's immunity is waived because the Georgia Tort Claims Act waives sovereign immunity for GDOT's negligent inspections of state property (including the failure to inspect), and none of the exceptions enumerated in O.C.G.A. § 51-21-24 apply. *See* O.C.G.A. §§ 50-21-23(a), 50-21-24. Second, abundant evidence shows that GDOT negligently failed to maintain the subject guardrail, as was its statutory duty under O.C.G.A. § 32-2-2. Because sovereign immunity does not apply and the evidence supporting GDOT's liability is not only sufficient but overwhelming, GDOT's motion must be denied.

2. Facts

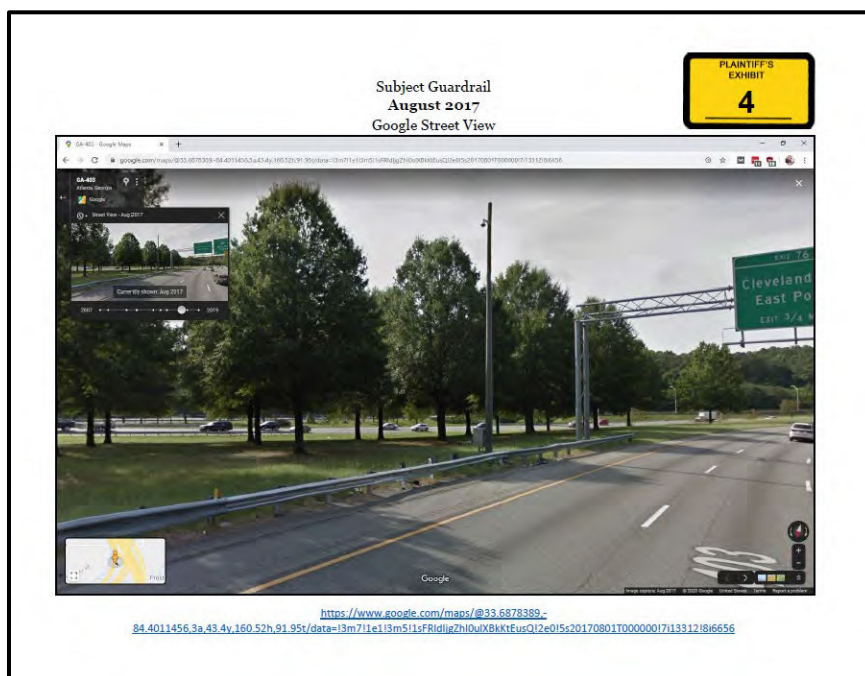
2.1. The subject guardrail was nonfunctional for at least ten months.

Defendants should have identified and repaired the subject guardrail long before the subject wreck. The subject wreck happened on June 3, 2018.² The undisputed evidence shows that the subject guardrail had been nonfunctional since at least August 2017 – *ten months* before [REDACTED] died.³ Witnesses for each party, *including* GDOT, have testified that the subject guardrail was non-functional in August 2017, September 2017, and January 2018 based on the images from Google Street View⁴ shown below. (These three months are the only months for which Google provides Street View images in the relevant period.)

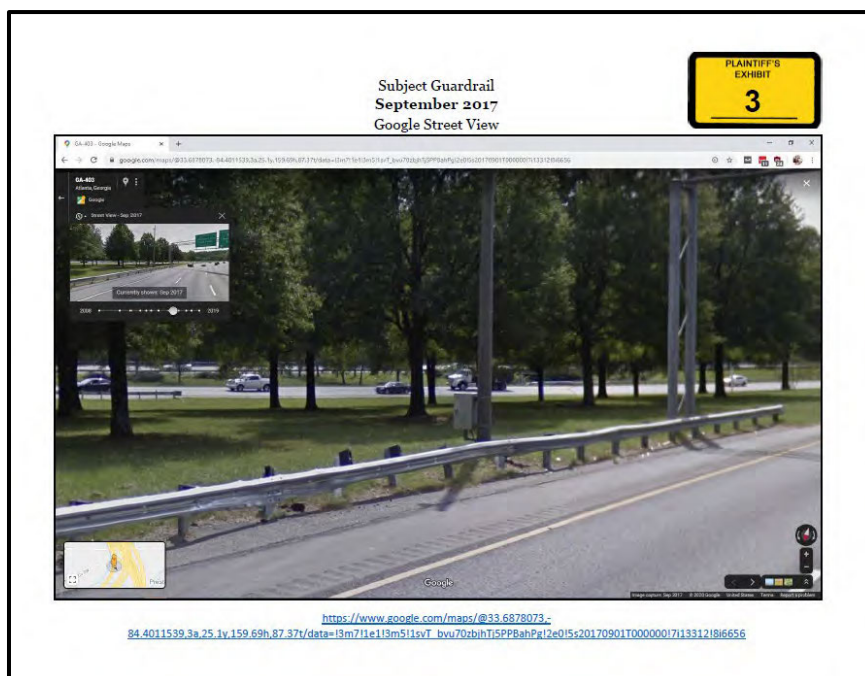
² See Police Report (Ex. C).

³ Martin-Robbins Resp. to Pl's 4th Req. for Admissions, No. 2 (Ex. D).

⁴ These images from Google Maps Street View are admissible for two reasons. First, they have been authenticated by witnesses. See *Clark v. City of Atlanta*, 322 Ga. App. 151, 153-54 (2013) (finding Google Map image authenticated by a witness to be admissible). Second, the Court can take judicial notice of a Google Maps image. See *Todd v. Carstarphen*, 2017 WL 655756, at *4 n. 14 (N.D. Ga. Feb. 17, 2017) (taking judicial notice of Google images); see also *Olem Shoe Corp. v. Washington Shoe Corp.*, 591 F. App'x 873, 884 n. 14 (11th Cir. 2015) (relying on screen shot of Google Maps showing store location); *United States v. Proch*, 637 F.3d 1262, 1266 (11th Cir. 2011) (taking judicial notice of a map); *Permenter v. Fedex Freight, Inc.*, No. 7:14-CV-104 (HL), 2016 WL 878496, at *2 (M.D. Ga. Mar. 7, 2016) (relying on *United States v. Proch* to take judicial notice of Google Maps as a source whose accuracy cannot be reasonably questioned); accord Matt Kahn, Proving Constructive Knowledge with Google Maps, *The Verdict Magazine*, Georgia Trial Lawyers Association (Winter 2019) (Ex. E).



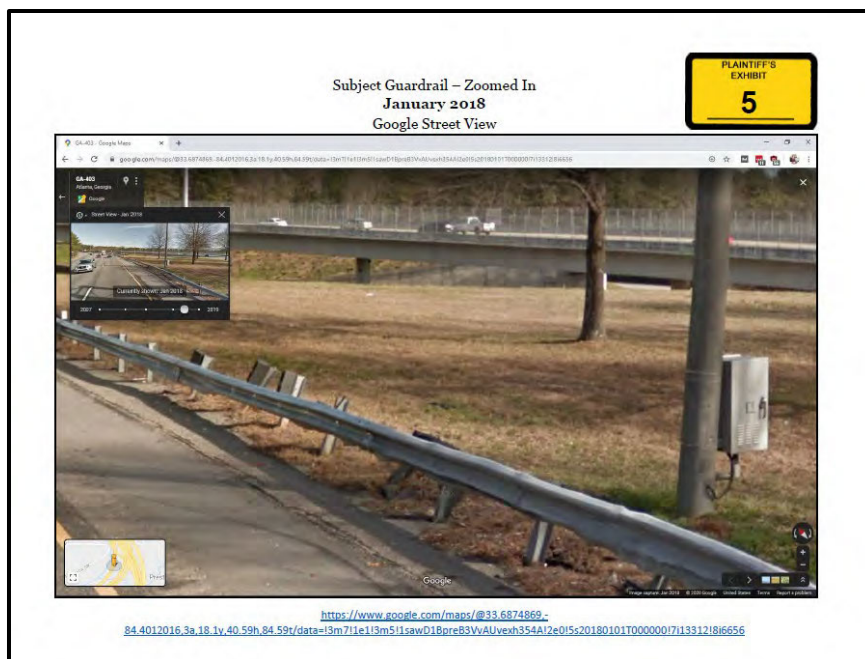
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⁵ Martin Dep., 29:15-24 (Ex. F).

⁶ Martin Robbins 30(b)(6) Dep., 196:20-197:20 (Ex. G); Anderson 30(b)(6) Dep., 23:2-25 (Ex. H); Martin Dep., 29:6-14; Kent Dep., 24:6-24; Thrasher Dep., 34:17-35:4 (Ex. I); Hendon 30(b)(6) Dep., 61:16-62:6 (Ex. J).



On April 18, 2018, a GDOT employee took a photograph of the subject guardrail and emailed it to Arcadis. By that date, the subject guardrail was nearly flattened in places, as shown in GDOT's photo below.



⁷ Martin Robbins 30(b)(6) Dep., 198:14-199:4; Anderson 30(b)(6) Dep., 24:22-25:13; Martin Dep., 33:20-34:6; Kent Dep., 25:13-26:2; Thrasher Dep., 39:12-40:5; Hendon 30(b)(6) Dep., 60:18-61:14.

⁸ Plaintiff's Trial Ex. 221 (Ex. K).

Two days *after* GDOT took the above photograph and sent it to Arcadis, Arcadis finally acted. On April 20, 2018, based on GDOT's photograph, Arcadis gave Martin Robbins notice that the subject guardrail was nonfunctional and that it needed to be repaired no later than May 11, 2018.⁹ But Martin Robbins did not repair the subject guardrail until June 4, 2018, which was 45 days later.¹⁰ The subject collision had occurred on the preceding day – June 3, 2018.

2.2. The non-functional guardrail didn't do its job.

Guardrail is “first and foremost a safety barrier intended to shield a motorist who has left the roadway.”¹¹ When functional, guardrail, “can make roads safer and lessen the severity of crashes.”¹² According to GDOT's expert, “guardrail is there to protect a car that leaves the roadway, to try to protect it from a hazard behind the guardrail.”¹³ The guardrail in this case was “nonfunctional” and, therefore, unable to protect [REDACTED] from the hazard behind it.

On June 3, 2018, [REDACTED] was the passenger of a Kia Sorrento traveling on I-85 South.¹⁴ After a collision with another vehicle, the Sorrento lost control and entered a counter-clockwise yaw.¹⁵ The Sorrento slid, remaining on all four wheels, and struck a portion of nonfunctional guardrail.¹⁶ Because the guardrail was nonfunctional, it failed to keep the car in

⁹ Martin Dep., 34:18-22, 37:9-11; Flanders 30(b)(6) Dep., 42:4-7 (Ex. L).

¹⁰ Martin Robbins 30(b)(6) Dep., 204:15-17.

¹¹ Doyle Dep., 52:3-9 (Ex. M).

¹² Doyle Dep., 52:19-15.

¹³ Doyle Dep., 52:16-20.

¹⁴ Police Report.

¹⁵ Earnhart 07/21/21 Dep., 53:23-55:1, 66:14-67:3, 73:1-74:2, 75:24-76:9 (Ex. N).

¹⁶ Earnhart 07/01/21 Dep., 22:7-9; Earnhart 07/21/21 Dep., 108:5-16; Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 2 (Ex. O); Kent Dep., 10:7-16.

the roadway.¹⁷ Instead, the guardrail tripped the Sorrento, causing the Sorrento to ramp *over* the guardrail toward the camera pole that stood close behind the guardrail.¹⁸

The wreck sequence can be seen below in screen shots from Plaintiff's reconstruction animation. The general accuracy of this reconstruction animation has been confirmed by Plaintiff's reconstruction expert *and* GDOT's reconstruction expert.¹⁹ Neither Martin Robbins nor Arcadis have presented any expert reconstruction testimony to challenge the animation. A link to the full animation is available for the Court in this footnote.²⁰

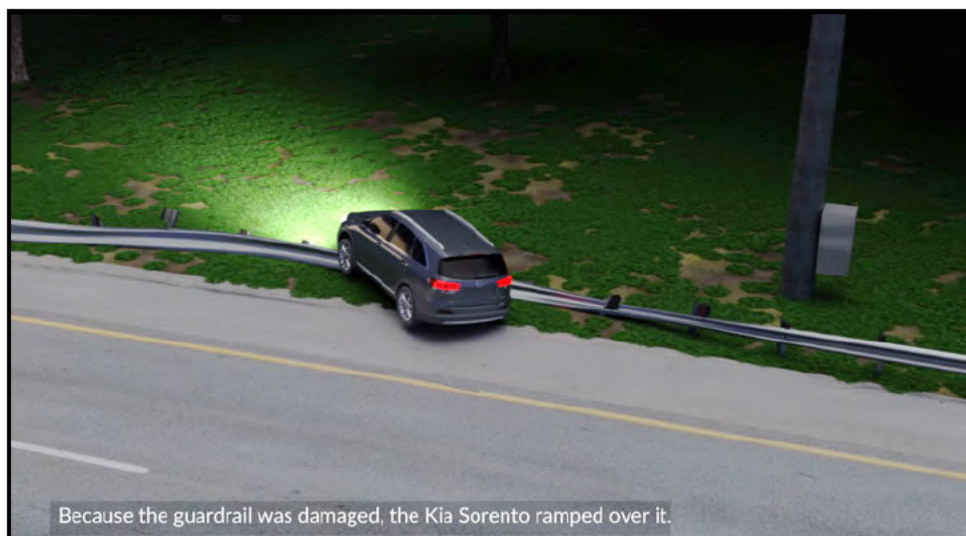


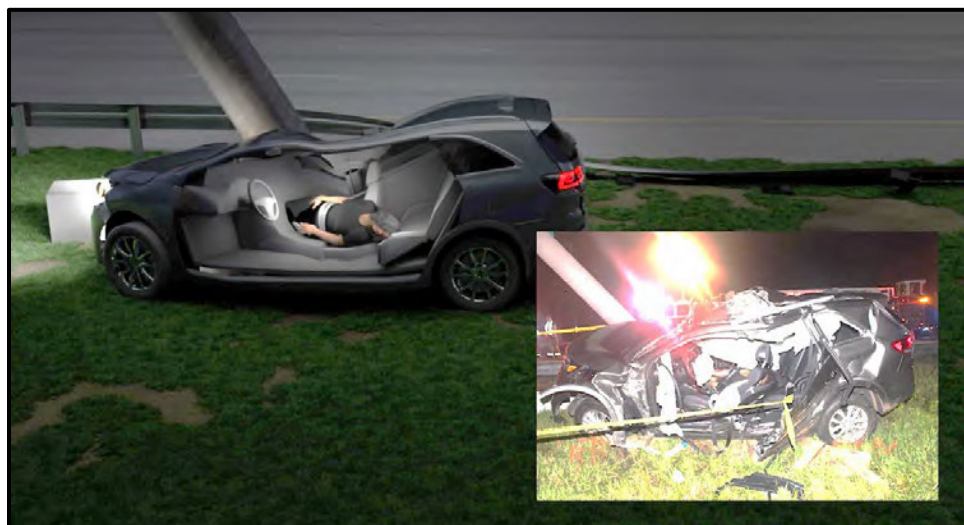
¹⁷ Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 3; Kent Dep., 10:17-24.

¹⁸ Earnhart 07/01/21 Dep., 21:13-18; Earnhart 07/21/21 Dep., 128:18-129:1; Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 3; Kent Dep., 10:17-24.

¹⁹ Earnhart 07/01/21 Dep., 20:7-21:2 (authenticating reconstruction animation); Pl.'s 1st Suppl. Resp. to Def.'s ROGs, Opinion No. 1; Earnhart 07/21/21 Dep., 90:10-91:4 (explaining involvement in creating animation); *see also* Kent Dep., 12:24-14:11 (testifying to accuracy of the animation).

²⁰ <https://www.dropbox.com/s/5b1wtzt8xadusgh/Reconstruction%20Animation.mp4?dl=0>





Decedent [REDACTED] was a front-seat passenger in the Kia Sorrento. Her side of the car slammed into the camera pole.²¹ The car bent around the pole.²² The pole ripped through the occupant area.²³ [REDACTED] seating area was demolished.²⁴ She was killed.²⁵

The Fulton County Medical Examiner opines that “[REDACTED] died due to generalized blunt force injuries as evidenced by injuries of her brain, lungs, liver, and spleen, and multiple skeletal fractures. Specifically, the cause of death was blunt force trauma when the Kia Sorrento hit the fixed utility pole off the shoulder of the highway.”²⁶

2.3. GDOT was responsible for maintaining the subject guardrail.

Under Georgia law, GDOT is responsible for maintaining the state highway system, including the guardrail at issue.²⁷ *See* O.C.G.A. § 32-2-2. GDOT’s responsibilities are based on its obligation to “provide a safe highway system” for the traveling public.²⁸ “GDOT has the authority to hire third-party contractors to fulfill [its] duties” to the traveling public.²⁹ To that end, GDOT hired contractors Defendants Martin Robbins and Arcadis to help with its maintenance duties.³⁰ However, hiring contractors did not absolve GDOT of its duties to ensure

²¹ Earnhart 07/01/21 Dep., 21:13-18; Pl.’s 1st Suppl. Resp. to Def.’s ROGs, Opinion No. 3; Kent Dep., 10:21-24.

²² Earnhart 07/21/21 Dep., 16:8-14, 20:22-21:3.

²³ Earnhart 07/21/21 Dep., 16:8-14, 20:22-21:3.

²⁴ Earnhart 07/21/21 Dep., 16:8-14, 20:22-21:3; Plaintiff’s Trial Ex. 8.

²⁵ *See* Sullivan Declaration ¶ 10 (Ex. P); *see also* Fulton County Medical Examiner’s Report (Ex. Q) (identifying the cause of death as “[g]eneralized blunt force injuries” after striking “a fixed object.”)

²⁶ Sullivan Declaration ¶ 10.

²⁷ Flanders 30(b)(6) Dep., 18:1-10, 19:9-18; Hill Dep., 70:18-71:7 (Ex. R).

²⁸ Flanders 30(b)(6) Dep., 18:21-19:7.

²⁹ Flanders 30(b)(6) Dep., 18:11-17.

³⁰ Martin Dep., 13-18; Young 30(b)(6) Dep., 78:4-19 (Ex. S); Wilson Dep., 129:14-18, 137:6 – 139:15 (Ex. T); Plaintiff’s Trial Ex. 230 (Arcadis’ contract with GDOT) Ex.U; Plaintiff’s Trial Ex. 231 (Arcadis Task Order # 2) (Ex. V); Hendon 30(b)(6) Dep., 19:9-20:10, 22:15-17.

that the guardrail was maintained. *See Georgia Dep't of Transp. v. Delor*, 351 Ga. App. 414, 419 (2019); *accord Georgia Dep't of Transp. v. Kovalcik*, 328 Ga. App. 185, 188 (2014). Both contractors breached those duties.

Arcadis was responsible for identifying damaged guardrail and telling GDOT and Martin Robbins about it.³¹ To fulfill its duty, Arcadis hired inspectors to drive along the state highway system looking for damaged guardrail.³² The inspectors were “not expected to know the technical specifications of the repair process.”³³ The inspectors were only supposed to find and report damaged guardrail.³⁴ *Each day*, Arcadis was supposed to send photographs and GPS coordinates of damaged guardrail it had found to GDOT and Martin Robbins.³⁵ That is, Arcadis had a duty to identify damaged guardrail on a *daily* basis.³⁶

Arcadis was GDOT’s “second set of eyes” for monitoring guardrail.³⁷ That is, GDOT remained the “first set of eyes,” as GDOT’s expert testified.³⁸ To that end, GDOT had maintenance employees who were supposed to identify damaged guardrail seen in the field.³⁹ Specifically, at least one GDOT employee drove “by the subject guardrail with eyes on it for the purpose of . . . inspecting it or determining whether it needs repair” several times each week.⁴⁰

³¹ Martin Dep., 13-18; Young 30(b)(6) Dep., 78:4-19; Wilson Dep., 129:14-18, 137:6-139:15; Plaintiff’s Trial Ex. 230 (Arcadis’ contract with GDOT); Plaintiff’s Trial Ex. 231 (Arcadis Task Order #2); Hendon 30(b)(6) Dep., 19:9-20:10, 22:15-17.

³² *Id.*

³³ Wilson Dep., 127:24-128:7; Plaintiff’s Trial Ex. 200 (meeting minutes from 03/13/18) (Ex. W); Anderson 30(b)(6) Dep., 14:11-18 (“It does not require a professional engineer to identify damaged guardrail.”).

³⁴ Anderson 30(b)(6) Dep., 15:20-16:2, 21:2-6; Hendon 30(b)(6) Dep., 19:9-20:10, 27:24-28:9.

³⁵ Wilson Dep., 124:14-125:4; Hendon 30(b)(6) Dep., 69:2-8; *see also* Plaintiff’s Trial Ex. 200.

³⁶ *Id.*

³⁷ Doyle Dep., 32:11-33:14.

³⁸ Doyle Dep., 32:11-33:14.

³⁹ Hendon 30(b)(6) Dep., 24:16-21; Moore 30(b)(6) Dep., 45:7-25 (Ex. X).

⁴⁰ Moore 30(b)(6) Dep., 47:12-21.

Despite driving by the subject guardrail hundreds of times, GDOT failed to identify the subject guardrail as nonfunctional for at least eight months.

Martin Robbins was responsible for inspecting and repairing the guardrail, usually after being notified of damaged sections by Arcadis or GDOT.⁴¹ GDOT's contract with Martin Robbins defined "nonfunctional" guardrail as damaged guardrail with three or more consecutive bent, broken, or separated posts.⁴² Martin Robbins was supposed to repair "nonfunctional" guardrail within 21 days of receiving notice.⁴³ Martin Robbins was also authorized and encouraged to identify damaged guardrail while it was out making other repairs, and Martin Robbins frequently did so.⁴⁴

2.4. GDOT knew that the contractors were not doing their job.

GDOT *knew* that Martin Robbins was not doing its job.⁴⁵ Dating back to September in 2016, GDOT knew that Martin Robbins' performance was unsatisfactory.⁴⁶ For example, on September 9, 2016, GDOT expressed the following concern in a letter to Martin Robbins:

Dear Mr. Wilkerson:

The Department is concerned with Martin-Robbins performance with repairing attenuators, guardrail, and cable barriers in the time frames stated within the contracts. Please provide the Department with your plan of action to repair attenuators, guardrail, and cable barriers within the time frames stated within the contracts. Martin-Robbins is expected to provide all

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⁴¹ Young 30(b)(6) Dep., 39:3-12; Martin Dep., 10:13-18; Martin-Robbins Resp. to Pl's 2nd Req. for Admissions, No. 39; Martin Dep., 10:13-21; *see also* Plaintiff's Trial Ex. 12.

⁴² Martin Dep., 32:16-33:19; Flanders 30(b)(6) Dep., 41:9-15; Plaintiff's Trial Ex. 12; Plaintiff's Trial Ex. 13; Plaintiff's Trial Ex. 14.

⁴³ Martin Dep., 34:7-17; *see also* Plaintiff's Trial Ex. 12 at 66-67; Martin Robbins 30(b)(6) Dep., 184:14-185:3; Hendon 30(b)(6) Dep., 43:5-10; 2nd Supp. Hill Aff. ¶ 5 (Ex. Y).

⁴⁴ Hendon 30(b)(6) Dep., 231:12-234:14.

⁴⁵ Moore 30(b)(6) Dep., 54:25-61:8, 62:5-15; Young 30(b)(6) Dep., 23:10-23.

⁴⁶ Moore 30(b)(6) Dep., 54:25-55:11 (reviewing default letter dated 09/09/16).

⁴⁷ Moore 30(b)(6) Dep., 54:25-55:11; *see also* Pl.'s Trial Ex. 30.

In the twenty-one months leading up to the subject wreck, GDOT had sent Martin Robbins at least **five letters** and **thirteen emails** complaining about Martin Robbins's failure to timely repair damaged guardrail.⁴⁸ On April 17, 2018, less than two months before [REDACTED] died, GDOT once again told Martin Robbins that it was failing to meet its obligations under the contract.⁴⁹ On May 15, 2018, GDOT yet again told Martin Robbins that it was failing to timely repair damaged guardrail and therefore in default of the contract.⁵⁰ It was also evident that Arcadis was failing to timely identify damaged guardrails, because some stretches of guardrail – such as the subject guardrail – sat damaged for many months without being identified as needing repair. Despite having the ability to hire additional contractors, GDOT did not.⁵¹ In other words, GDOT remained idle with knowledge that its duty to the traveling public was not being discharged.

3. Legal Standards

3.1. Sovereign Immunity

GDOT is not protected by sovereign immunity. The Georgia Constitution authorizes the General Assembly to waive the state's immunity from suit. Ga. Const. art. I, § 2, ¶ IX (“The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.”). The Georgia Tort Claims Act generally waives immunity for

⁴⁸ See Moore 30(b)(6) Dep., 56:17-60:15 (testifying about default letters sent on 09/09/16, 03/27/17, 04/27/17, 04/17/18, and 05/15/18); *see also* Moore 30(b)(6) Dep., 63:22-70:25 (testifying about thirteen “delinquency” emails to Martin Robbins).

⁴⁹ Moore 30(b)(6) Dep., 59:15-60:9; Plaintiff's Trial Ex. 34.

⁵⁰ Moore 30(b)(6) Dep., 60:12-:61:8, 62:5-15; Plaintiff's Trial Ex. 35.

⁵¹ See Plaintiff's Trial Ex. 12 at 2 (“The Contract is not exclusive. The Department reserves the right to select other contractors to provide similar services . . .”).

GDOT's torts subject to certain exceptions. O.C.G.A. § 50-21-23(a); *see also Dep't of Transp. v. Kovalcik*, 328 Ga. App. 185, 188 (2014). If no exception applies, then sovereign immunity has been waived.

The law is clear that GDOT is *not* immune from suit for the negligent inspection of the state highway system. *See* O.C.G.A. § 50-21-24(8); *see also Kovalcik*, 328 Ga. App. at 188 (holding that immunity was waived based on GDOT's role in inspecting a state roadway to detect hazards); *Georgia Dep't of Transportation v. Delor*, 351 Ga. App. 414, 419 (2019) (same relying on *Kovalcik*). None of the exceptions apply in this case.

3.2. Challenge to subject matter jurisdiction

A claim of sovereign immunity is a challenge of the trial court's subject matter jurisdiction. *Kovalcik*, 328 Ga. App. at 189–90. On a motion to dismiss based on lack of subject matter, the trial court must construe the record “in the light most favorable to the nonmoving party with any doubts resolved in that party's favor.” *Douglas Cty. v. Hamilton State Bank*, 340 Ga. App. 801, 802, (2017). Georgia's appellate courts apply the deferential “any evidence” rule to the trial court's factual findings. *Kovalcik*, 328 Ga. App. at 186.

Under that standard, the Court must view the evidence in Plaintiff's favor. *Hamilton*, 340 Ga. App. at 802. If, viewing the evidence favorably to Plaintiff, the Court finds “any evidence” showing that GDOT owned the subject guardrail, was responsible for maintaining it, and negligently performed its obligations, GDOT's motion must be denied. *Kovalcik*, 328 Ga. App. at 186. The abundant evidence in this case defeats GDOT's claim of immunity by a country mile.

4. Argument

GDOT's motion should be denied for two reasons. First, the Georgia Tort Claims Act waives sovereign immunity for GDOT's negligent inspections of state property (including the failure to inspect), and none of the exceptions apply. *See* O.C.G.A. §§ 50-21-23(a), 50-21-24(8). Second, abundant evidence shows that GDOT breached its statutory duty to maintain the subject guardrail under O.C.G.A. § 32-2-2. Because the evidence supporting GDOT's liability is not only sufficient but overwhelming, GDOT's motion must be denied.

4.1. GDOT's immunity is waived.

The Georgia Tort Claims Act generally waives immunity for GDOT's torts subject to certain exceptions. O.C.G.A. § 50-21-23(a); *see also Kovalcik*, 328 Ga. App. at 188. Because no exception applies here, sovereign immunity has been waived. Specifically, despite GDOT's arguments to the contrary, neither the "inspection exception," the "licensing exception," nor the "roadway design exception" apply. *See* O.C.G.A. § 50-21-24(8)-(10). Therefore, GDOT may be validly sued.

4.1.1. The "inspection exception" does not apply.

GDOT's immunity is waived when it negligently inspects its own property for hazards. O.C.G.A. § 50-21-24(8); *accord Kovalcik*, 328 Ga. App. at 188 ("[I]mmunity is waived to the extent that the DOT's role included inspection of the State roadway and intersection itself to detect hazards or to determine compliance with laws, regulations, codes, or ordinances."). The plain language of the "inspection" exception demonstrates the waiver of GDOT's immunity in this case. The "inspection" exception provides:

[t]he state shall have no liability for losses resulting from . . . [i]nspection 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) (emphasis added).

Therefore, the “inspection” exception requires a three-part inquiry. The first part is whether the state owns the property. *Id.* The second part is whether the state was inspecting (or should have been inspecting) its property for hazards to the traveling public. *See* O.C.G.A. § 50-21-24(8); *Kovalcik*, 328 Ga. App. at 188. As to the third part, if a hazard was present that an inspection should have revealed, GDOT can be held liable for negligent maintenance. *See id.* Where each part is satisfied, as is the case here, then the exception does *not* apply, GDOT’s immunity is waived, and GDOT can validly be sued.

Here, GDOT’s immunity is waived because each of the three elements are satisfied. The first element – whether the state owns the property – is satisfied because the state indisputably owned the subject guardrail.⁵² *See, e.g., Georgia Dep’t of Transportation v. Delor*, 351 Ga. App. 414, 419 (2019) (“[I]t is undisputed that the road in question – State Route 24 – is identified by statute as part of the State highway system.”); *accord Kovalcik*, 328 Ga. App. at 188 (“Peachtree Road, a State route, is a roadway owned by the State.”); *cf. Diamond v. Dep’t of Transp.*, 326 Ga. App. 189, 191 (2014) (finding immunity not waived under the “inspection” exception because the accident occurred on county-owned land).

The second element – whether the state should have been inspecting the property for hazards – is also satisfied. Because the state owned the subject guardrail, GDOT had a duty to maintain the subject guardrail.⁵³ *See* O.C.G.A. § 32-2-2. To maintain guardrail, GDOT must

⁵² *Flanders* 30(b)(6) Dep., 19:9-18.

⁵³ *Flanders* 30(b)(6) Dep., 18:1-10 (“Q. . . . GDOT has a duty to maintain guardrails? A. On the state highway system, yes.”)

inspect and repair damaged guardrail.⁵⁴ In other words, GDOT should have been inspecting the subject guardrail for hazards. Indeed, GDOT's own expert, Maintenance Engineer Andy Doyle, testified that GDOT was the "first set of eyes" for looking for damaged guardrail.⁵⁵ Of course, that is why GDOT had employees driving past the subject guardrail several times each week looking for damage.⁵⁶

The third element – whether an inspection would have revealed a hazard – is also satisfied for two reasons. First, the undisputed evidence shows that the subject guardrail was a hazard in its nonfunctional condition. The witnesses in this case, *including GDOT's own employees*, agree that the subject guardrail was a hazard in its nonfunctional condition.⁵⁷ GDOT's own engineer admitted that nonfunctioning guardrail can pose a danger to the traveling public.⁵⁸ Kelvin Wilson, GDOT's Maintenance Contract Manager, testified that damaged guardrails can be a danger to motorists:

6	Q	Would you agree that damaged guardrail can be a
7		danger to motorists on the interstate systems?
8	MS. WILLIAMSON:	Object to the form.
9	MS. HAYTER:	Join.
10	THE WITNESS:	Yeah, I would.

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Arcadis Inspector Calvin Thrasher also agreed that the subject guardrail was dangerous in its nonfunctional condition:

⁵⁴ See Flanders 30(b)(6) Dep., 23:6-21.

⁵⁵ Doyle Dep., 32:11-33:14.

⁵⁶ Moore 30(b)(6) Dep., 47:12-21.

⁵⁷ See Flanders Dep., 38:13-19, 38:21-39:2, 45:8-13, 45:22-46:3; Wilson Dep., 125:6-10, 135:6-10; Thrasher Dep., 43:3-7.

⁵⁸ Flanders Dep., 38:13-19, 38:21-39:2, 45:8-13, 45:22-46:3.

⁵⁹ Wilson Dep., 125:6-10, 135:6-10.

3	Q	Sir, does the guardrail in Plaintiff's
4		Exhibit 1 look dangerous to you?
5	A	Yeah.
6	Q	Yeah, it does, doesn't it?
7	A	Yeah.

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Second, the evidence shows that GDOT employees drove past the subject guardrail several times each week for the eight months before it finally reported the subject guardrail.⁶¹ In other words, had GDOT properly inspected the subject guardrail, it would have noticed the hazard. Because GDOT owned the subject guardrail but failed to adequately inspect it for hazards, the “inspection” exception does *not* apply. Because the “inspection” exception does not apply, GDOT’s immunity is waived, and it can validly be sued.

Kovalcik is instructive and requires a finding that the “inspection exception” does not apply – i.e., that GDOT’s immunity is waived. In *Kovalcik*, a young woman died in a car accident on Peachtree Road when her car hit a dangerously placed concrete divider, causing the car to roll over. *Id.* at 186. Several months before the accident, GDOT had performed an inspection of the state roadway. *Id.* The family sued GDOT for negligence, alleging that it “fail[ed] to ensure the roadway was safe for use by the public,” among other things. *Id.* at 187. Just like in this case, GDOT moved to dismiss based on a claim of sovereign immunity. *Id.* The trial court denied GDOT’s motion for the same reasons the Court should deny GDOT’s motion in this case.

The *Kovalcik* analysis plainly applies here. First, the state indisputably owned the subject guardrail, just as the state owned the roadway in *Kovalcik*. *Id.* at 188. Therefore, here, as in

⁶⁰ Thrasher Dep., 43:3-7.

⁶¹ Moore 30(b)(6) Dep., 47:12-21.

Kovalcik, the first element is satisfied. Second, GDOT was legally responsible for maintaining the subject guardrail, which included inspecting the subject guardrail for hazards, just as GDOT was responsible for inspecting the roadway in *Kovalcik*. *Id.* Therefore, here, as in *Kovalcik*, the second element is satisfied. Third, GDOT failed to adequately inspect the subject guardrail for hazards by driving past the subject guardrail in its nonfunction condition hundreds of times but not reporting it, just as it failed to inspect the roadway for hazards in *Kovalcik*. *Id.* Therefore, here, as in *Kovalcik*, the third element is satisfied.

The cases GDOT relies upon for interpreting the “inspection” exception to the waiver of sovereign immunity are easily distinguishable because none of them involve an inspection of state-owned property. For example, in *Comanche Construction v. Georgia Department of Transportation*, the plaintiff sued GDOT and its contractor for injuries following a motor vehicle collision. 272 Ga. App. 766, 766 (2005). The plaintiff alleged that GDOT was liable for negligently inspecting its contractor’s traffic control plan. *Id.* Just like this case, GDOT claimed immunity under the “inspection exception.” *Id.* at 768. In that case, the Court of Appeals found that the “inspection exception” applied because “[the contractor] ‘handled all aspects’ of designing the plan . . .” *Id.* at 769. In other words, unlike in this case, GDOT was not inspecting its *own* property. *See* O.C.G.A. § 50-21-24(8). Rather, the inspection involved the contractor’s traffic plan, which was not state-owned property.

In this case, unlike *Comanche Construction*, GDOT was responsible for inspecting its own property for hazards as the “first set of eyes” for monitoring damaged guardrail. GDOT’s representative testified that GDOT employees drive “by the subject guardrail with eyes on it for the purpose of . . . inspecting it or determining whether it needs repair” several times each

week.⁶² Similarly, the witnesses all admit that the subject guardrail was a hazard in its nonfunctional condition. Therefore, the “inspection exception” does not apply. None of GDOT’s cases involve an inspection (or more aptly, a failure to inspect) *by GDOT* of *state-owned property* for hazards that was performed in a negligent manner. Because this case involves all of those things, GDOT’s cases are distinguishable.

4.1.2. The “licensing exception” is irrelevant

None of Plaintiff’s claims fall within the purview of the “licensing exception.” The “licensing exception” provides that the state is immune from suits arising from “[l]icensing 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.” O.C.G.A. § 50-21-24(9). The Court of Appeals has held that the licensing exception applies to claims that a state entity negligently issued a permit to a contractor or negligently supervised its contractors. *See Sommers Oil Co. v. Georgia Dep’t of Agr.*, 305 Ga. App. 330, 332 (2010) (holding state immune from negligent supervision claim under licensing exception); *see also Dep’t of Transp. v. Cox*, 246 Ga. App. 221, 224 (2000) (holding state immune for issuance of a construction permit). Plaintiff does not make those claims.

This is a negligent maintenance case. While GDOT very well may have negligently supervised its contractors, that is not the basis on which Plaintiff seeks to hold GDOT liable. *See Sommers*, 305 Ga. App. at 332. Nor is GDOT’s liability rooted in its decisions to issue the contracts or its failure to terminate them after months of noncompliance. *Cox*, 246 Ga. App. at 224. Rather, Plaintiff’s claims are based on GDOT’s *own* negligent maintenance – i.e., GDOT’s

⁶² Moore 30(b)(6) Dep., 47:12-21.

failure to identify or repair guardrail that had been nonfunctional for ten months. The evidence supporting Plaintiff's negligent maintenance claim against GDOT is overwhelming. Therefore, the "licensing exception" is not applicable here.

4.1.3. The "roadway design exception" is irrelevant.

Plaintiff does not intend to bring a roadway design claim against GDOT at the trial of this case. The "roadway design" exception provides the state with immunity for "[t]he plan or design for construction of or improvement to highways, roads, streets, bridges, or other public works where such plan or design is prepared in substantial compliance with generally accepted engineering or design standards in effect at the time of preparation of the plan or design." O.C.G.A. § 50-21-24(10).

Plaintiff's claims against GDOT sound in ordinary negligence based on the negligent failure to maintain the subject guardrail. The Court of Appeals has distinguished negligent *maintenance* cases from negligent *design* cases. *E.g.*, *Drawdy v. Dep't of Transp.*, 228 Ga. App. 338, 339 (1997); *Adams v. Coweta County*, 208 Ga. App. 334, 336 (1993). Because Plaintiff does not intend to pursue a roadway design claim, the "roadway design" exception is not applicable.

To the extent Plaintiff pleaded a roadway design claim in her First Amended Complaint, Plaintiff hereby withdraws those allegations and any claim based on roadway design. *See* Pl.'s FAC ¶ 53; *see also* Hill Dep., 67:7 ("I'm not offering and [sic] a design opinion.").

4.1.4. Summary of argument.

The State of Georgia waived its sovereign immunity in O.C.G.A. § 50-21-23. No exception to that waiver applies – neither the "inspection," "licensing," nor "roadway design"

exceptions apply to Plaintiff's negligent maintenance claim against GDOT. Therefore, sovereign immunity does not bar the claim, and GDOT's motion should be denied.

4.2. GDOT is liable for its own negligence.

The evidence shows that GDOT negligently maintained the subject guardrail. The elements of negligence are: (1) "[a] duty, or obligation, recognized by law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks," (2) "[a] failure on his part to conform to the standard required," (3) "[a] reasonable close causal connection between the conduct and the resulting injury," and (4) "[a]ctual loss or damage resulting to the interests of the other." *Lau's Corp. v. Haskins*, 261 Ga. 491, 492, abrogated on other grounds by *Robinson v. Kroger Co.*, 268 Ga. 735 (1997)). Plaintiff has satisfied each element.

4.2.1. GDOT owed a duty to the traveling public.

As to the first element – duty – GDOT has a statutory duty to maintain the state highway system.⁶³ See O.C.G.A. § 32-2-2(a)(1) ("The department . . . shall have control of and responsibility for all . . . maintenance, or any other work upon the state highway system . . ."). GDOT's duty is owed to, and benefits, the traveling public.⁶⁴ GDOT can hire contractors to help fulfill its duty, but the duty still ultimately lies with GDOT.⁶⁵ See *Delor*, 351 Ga. App. at 418; see also *Kovalcik*, 328 Ga. App. at 191. Because the subject guardrail was a part of the state highway system,⁶⁶ GDOT had a duty to keep the guardrail maintained. GDOT's duty included

⁶³ Flanders 30(b)(6) Dep., 18:1-10, 23:6-10, 25:5-9.

⁶⁴ Flanders 30(b)(6) Dep., 18:21-19:1.

⁶⁵ Flanders 30(b)(6) Dep., 18:11-17; Hendon 30(b)(6) Dep., 24:16-21.

⁶⁶ Flanders 30(b)(6) Dep., 19:9-18.

finding and causing damaged guardrail to be repaired.⁶⁷ See O.C.G.A. § 32-2-2. Specifically, GDOT maintenance employees were supposed to identify damaged guardrail seen in the field.⁶⁸ At least one GDOT employee drives “by the subject guardrail with eyes on it for the purpose of . . . inspecting it or determining whether it needs repair” several times each week.⁶⁹

Hiring contractors does *not* absolve GDOT of its statutory duty. See *Delor*, 351 Ga. App. at 418 (“[T]he presence of contractors performing services on behalf of [GDOT] *does not* relieve [GDOT] from potential liability for its own actions.”); see also *Kovalcik*, 328 Ga. App. at 191 (same). The evidence is clear that GDOT was actively inspecting guardrail, and therefore GDOT had a duty to do so with reasonable care. Although GDOT hired Arcadis to be its “second set of eyes” for monitoring guardrail,⁷⁰ GDOT remained the “first set of eyes,” as GDOT’s own expert testified.⁷¹ To that end, GDOT had maintenance employees who were supposed to identify damaged guardrail seen in the field.⁷² Specifically, at least one GDOT employee drove “by the subject guardrail with eyes on it for the purpose of . . . inspecting it or determining whether it needs repair” several times each week.⁷³ GDOT nonetheless failed to identify the subject guardrail.

Even if the Court were to assume that GDOT was absolved of its duties by hiring a contractor (a proposition that is contrary to well established law), GDOT voluntarily re-assumed the duty under the Restatement of Torts § 324A by continuing to actively monitor guardrail. See *Huggins v. Aetna Cas. & Sur. Co.*, 245 Ga. 248, 248 (1980) (adopting the doctrine of negligent

⁶⁷ Flanders 30(b)(6) Dep., 19:9-18, 23:6-21

⁶⁸ Hendon 30(b)(6) Dep., 24:16-21; Moore 30(b)(6) Dep., 45:7-25.

⁶⁹ Moore 30(b)(6) Dep., 47:12-21.

⁷⁰ Doyle Dep., 32:11-33:14.

⁷¹ Doyle Dep., 32:11-33:14.

⁷² Hendon 30(b)(6) Dep., 24:16-21; Moore 30(b)(6) Dep., 45:7-25.

⁷³ Moore 30(b)(6) Dep., 47:12-21.

undertaking under the Section 342A of the Restatement of Torts). Therefore, GDOT still bore the duty to inspect and maintain guardrail in a non-negligent way.

4.2.2. *GDOT breached its duty to the traveling public.*

As to the second element of negligence – breach – the evidence shows that GDOT negligently executed its duties. Where GDOT negligently executes its duties, it is liable to the people it injures. *Delor*, 351 Ga. App. at 418; *Kovalcik*, 328 Ga. App. at 191. The subject guardrail existed in a non-functional condition for at least ten months before the subject wreck.⁷⁴ From (at least) August 2017 through April 18, 2018, GDOT failed to report the nonfunctional guardrail, meaning GDOT drove past the subject guardrail hundreds of times in the eight-month period before it reported the subject nonfunctional guardrail to Arcadis.⁷⁵ Stated differently, GDOT was itself negligent in its failure to adequately inspect and maintain the subject guardrail.

GDOT's negligence is made even more egregious because it *knew* that its contractors were not doing their jobs, and *still* failed to perform its duty to the traveling public. While GDOT is allowed to delegate duties to a contractor and is not vicariously liable for its contractor's actions, it cannot bury its head in the sand once it delegates its work.⁷⁶ GDOT *knew* that the contractors were not doing their jobs.⁷⁷ In the twenty-one months leading up to the subject wreck, GDOT had sent Martin Robbins at least **five letters** and **thirteen emails** complaining about the failure to perform its obligations under the contract.⁷⁸ Similarly, GDOT knew that Arcadis was not doing its job because lengthy stretches of guardrail – including the

⁷⁴ Martin Dep., 29:15-24.

⁷⁵ Moore 30(b)(6) Dep., 47:12-21.

⁷⁶ See Wilson Dep., 129:2-7 (GDOT expects contractors to do their jobs).

⁷⁷ See Moore 30(b)(6) Dep., 54:25-61:8, 62:5-15; Young 30(b)(6) Dep., 23:10-23.

⁷⁸ See Moore 30(b)(6) Dep., 56:17-60:15 (testifying about default letters sent on 09/09/16, 03/27/17, 04/27/17, 04/17/18, and 05/15/18); see also Moore 30(b)(6) Dep., 63:22-70:25 (testifying about thirteen “delinquency” emails to Martin Robbins).

subject guardrail – sat damaged for many months without being reported. Although Plaintiff does not seek to hold GDOT vicariously liable for its contractors’ misconduct, GDOT *is* liable for its own breach of its duty to maintain guardrails. *See* O.C.G.A. § 32-2-2. If GDOT’s contractors are not doing their job (as GDOT knew) but GDOT still does nothing to fulfill its statutory duties, then GDOT is liable for its own negligence.⁷⁹

4.2.3. GDOT’s breach caused Plaintiff’s damages.

As to the third and fourth elements of Plaintiff’s negligence claim – causation and damages – the evidence shows that if the subject guardrail had been in a reasonably functional condition (as opposed to nonfunctional), Plaintiff’s vehicle would not have left the roadway or struck the camera pole.⁸⁰ In other words, but for the nonfunctional guardrail, Plaintiff would have survived. Instead, the subject guardrail vaulted the Kia Sorrento into a concrete pole, killing [REDACTED] and catastrophically injuring [REDACTED]. Plaintiff seeks to hold GDOT accountable for its *own* negligence. *Delor*, 351 Ga. App. at 418; *Kovalcik*, 328 Ga. App. at 191.

4.3. Plaintiff withdraws her nuisance claim against GDOT.

Plaintiff withdraws her nuisance claim as to GDOT. In a recent decision, the Georgia Court of Appeals held that “[s]overeign immunity bars any action for personal injury or wrongful death . . . arising from nuisance or inverse condemnation.” *Beasley v. Georgia Dep’t of Corr.*, 360 Ga. App. 33, 37 (Nov. 2, 2021) (citation omitted). In light of this recent decision, Plaintiff withdraws the nuisance claim against GDOT.

⁷⁹ Hill Dep., 73:6-74:13.

⁸⁰ Earnhart 07/01/21 Dep., 21:20-25, 22:2-8.

5. Conclusion

GDOT's motion should be denied for two reasons.

First, the Georgia Tort Claims Act waives sovereign immunity for GDOT, and none of the exceptions enumerated in O.C.G.A. § 51-21-24 apply. Specifically, the evidence shows that state owned the subject guardrail, but GDOT was negligent in its inspection of the subject guardrail. Because none of the exceptions apply, sovereign immunity has been waived and GDOT can validly be sued. *See* O.C.G.A. §§ 50-21-23(a), 50-21-24(8).

Second, because immunity has been waived and abundant evidence shows that GDOT negligently failed to maintain the subject guardrail, as was its statutory duty under O.C.G.A. § 32-2-2, GDOT must be held responsible for its *own* negligence. *See Delor*, 351 Ga. App. at 418.

Respectfully submitted this 24th day of December 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the undersigned has this day electronically filed the within and foregoing ***PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT GDOT'S MOTION TO DISMISS*** with the Clerk of Court using the Odyssey e-filing system which will send e-mail notification of such filing to the following counsel of record:

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