THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

CASE NUMBER S09G1224

Plant Improvement Company, Inc., d/b/a Seaboard Construction Company,

Appellant

(Defendant below)

v.

Lakeisha Nicole Hamilton-King, et al.

Appellees

(Plaintiffs below)

APPELLANT'S BRIEF

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I. ISSUE PRESENTED

The Court of Appeals reversed Seaboard's award of summary judgment on the ground that the plaintiffs had produced sufficient evidence of Seaboard's alleged negligence in the form of testimony from an expert witness. That holding rested upon the conclusion that the trial court abused its discretion by relying on federal case law in excluding that expert's testimony. However, Georgia courts are statutorily authorized to draw upon federal case law in considering the admissibility of expert opinion evidence. Therefore, did the Court of Appeals err by reversing the exclusion of the expert's testimony and by finding that the plaintiffs therefore have sufficient evidence to overcome summary judgment?

II. STATEMENT OF JURISDICTION

This Court has jurisdiction to consider this appeal from the Georgia Court of Appeals pursuant to Article VI, Section VI, Paragraph V of the Georgia Constitution and O.C.G.A. § 5-6-15.

III. DECISION APPEALED

Appellant appeals the opinion of the Georgia Court of Appeals issued on March 23, 2009, in *Hamilton-King, et al. v. HNTB Georgia, Inc., et al.*, Case Number A08A2246.

IV. INTRODUCTION

Although the particular question presented by this appeal is whether the trial court erred by granting summary judgment in favor of Plant Improvement Company, Inc. ("Seaboard"), that question inevitably turns upon whether the trial court manifestly abused its discretion by excluding the testimony of the plaintiffs' expert witness. In this regard, although plaintiffs allege that Seaboard was negligent, their sole evidence of negligence is the testimony of their expert witness. The trial court excluded that expert's testimony and, as a result, granted summary judgment to Seaboard. But, the Court of Appeals later held that the trial court had abused its discretion by doing so and reversed the grant of summary judgment. The lower appellate court's holding that the trial court had abused its discretion rested upon the conclusion that the trial court had placed undue reliance upon federal case law, including *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Notably, however, O.C.G.A. § 24-9-67.1 authorizes trial courts to draw upon *Daubert* and its progeny. Thus, the Court of Appeals ruled that the trial court had abused its discretion *by doing something that it was statutorily authorized to do*. This Court should ultimately reverse the Court of Appeals and hold that the trial court acted within its discretion by excluding the expert, and therefore, that the trial court correctly ruled that plaintiffs have insufficient evidence to overcome summary judgment.

V. STATEMENT OF FACTS AND PROCEEDINGS BELOW

Seaboard contracted with the G.D.O.T. to perform road-widening work on Interstate 95 in Glynn County near the Glynn County and Camden County border. R-6-7; 58. That portion of Interstate 95 included the Little Satilla River bridge. R-7; 58. On the night of April 10, 2004, Lakeisha Hamilton, Johnny Hamilton, Jr., and Justin Hamilton were traveling over that bridge when another vehicle nearly struck their vehicle. Hamilton-King dep., p.49.[1] In an attempt to avoid a collision with the other car, Ms. Hamilton-King (who was driving the Hamilton vehicle) swerved to the left, which caused the Hamilton vehicle to hit a concrete barrier and ultimately to become disabled on the bridge. *Id.* at pp.47 - 50. The Hamiltons then exited their vehicle and stood in the lanes of travel on I-95 even though they were no more than 16 feet from a safe refuge on the other side of the Jersey barriers. Kriemelmeyer 12/7/06 dep., pp.28, 118.

A short time later (while the Hamiltons were still standing on the bridge near their vehicle), an off-duty police officer passed by the scene of the accident and decided to render assistance. Mitchell dep., p.30; Exhibit 2. The officer parked his vehicle near the end of the bridge and began walking toward the Hamiltons with a flashlight and reflective vests. Mitchell dep., p.41. Upon arriving at the

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[1] Because the deposition transcript page numbers were not included in the pagination of the appellate record, citations within this brief to depositions shall refer to the page numbers of the transcripts themselves.

Hamiltons' vehicle, the officer requested that someone assist him with warning the on-coming traffic. Hamilton-King dep., pp.61 - 62. Johnny Hamilton offered his assistance and, after putting on a reflective vest, accompanied the officer as he began to walk southward in the northbound lanes of the bridge. Hamilton-King dep., pp.61 - 62. At that point, a van driven by Terry Nicholson struck the officer, Johnny Hamilton, and the Hamilton vehicle. Lakeisha Hamilton and Justin Hamilton were then struck either by the van or by the Hamilton vehicle after it was set into motion as a result of the impact from the van. Hamilton-King dep., p.77.

In their complaint, the Hamiltons assert that they are entitled to recover from Seaboard on the ground that Seaboard breached a duty of care by failing to "implement[] the contract and specifications provided it by the DOT, in accordance with generally accepted standards in effect at the time of construction." R-12. More specifically, the Hamiltons claim that Seaboard failed to "implement proper lighting in the subject work area and proper signage leading up to the work area, as required by the MUTCD." R-12. In support of those allegations, the Hamiltons originally relied upon the purported expert opinion of Harry Kriemelmeyer, Jr., who opined in an affidavit attached to the complaint that Seaboard had failed to utilize appropriate signage in and around the subject work zone. R-28 - 31. However, at his deposition, Mr. Kriemelmeyer testified that he did not actually know whether any alleged lack of signage caused or contributed to

either the first or second collision. Kriemelmeyer 12/7/06 dep., pp.72 - 73, 84, 116. He also testified (in direct contradiction of the allegations in the complaint and the opinion of the Hamilton's subsequent expert witness) that lighting was *not* required at the bridge work site. Kriemelmeyer 12/7/06 dep., pp.92 - 93.

Because the Hamiltons' own expert had failed to substantiate their allegations of engineering negligence, Seaboard filed a motion for summary judgment. R-392. In response, the Hamiltons filed a brief asserting that Mr. Kriemelmeyer's testimony did, in fact, create a question of fact. R-464. Despite their contentions in that brief, the Hamiltons were apparently concerned by the inadequacies of Mr. Kriemelmeyer's testimony inasmuch as they subsequently retained a new expert witness—Jerome Thomas.

While Seaboard's summary judgment motion remained pending, Seaboard and co-defendant HNTB Georgia, Inc.,[2] deposed Mr. Thomas, who testified that he has only two opinions with respect to this case. More specifically, he testified, as follows:

> Q Basically if I understand what you've said is you've got two opinions, that a shoulder should have been provided, or if the shoulder couldn't have been provided, lighting should have been provided so that the—the bridge would have been illuminated?
> A Yes.
> Q That's what your opinions boil down to, those two things?
> A Yes, yes.

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[2] HNTB also has an appeal pending in this Court.

Q And that's after reviewing all the materials that we've talked about, those are the two opinions that—that you're prepared to offer at the trial of this case?
A That's correct.
Q And no others, right, as of right now?
A As of right now, no.[3]

Thomas dep., pp.462 - 463.

Following the deposition of Mr. Thomas, Seaboard filed a motion to exclude his testimony because it did not meet the standard for admissibility under O.C.G.A. § 24-9-67.1. R-693. HNTB also filed a motion to exclude his testimony, as well as its own motion for summary judgment. R-718, 737. On March 27, 2008, the Superior Court of Glynn County entered an order granting the motions filed by Seaboard and HNTB to exclude the testimony of Mr. Thomas. R-4159. In that order, the trial court took note of its "broad latitude" in determining the reliability of expert testimony and observed that the expert "was unable to cite any recognized treatise or other source material to support his belief that under readily ascertainable and verifiable standards recognized by practitioners in that field, something about the accident site was below standard." R-4165 - 66. The trial court also cited the factors articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). R-4156 - 66. Based upon its

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[3] Although the Court of Appeals wrote that Mr. Thomas proffered additional opinions in this case, this excerpt from his deposition makes clear that he ultimately limited his opinions to these two.

application of those factors, the trial court concluded that the expert's testimony was not sufficiently reliable and granted the motion to exclude his testimony. R-4168. The trial court's order also granted the motions for summary judgment because, without the testimony of Mr. Thomas, the Hamiltons had no evidence to establish that Seaboard or HNTB breached the relevant standard of care. R-4159.

The Hamiltons then appealed to the Georgia Court of Appeals, which reversed the trial court in *Hamilton-King v. HNTB Ga., Inc.*, 296 Ga. App. 864 (2009). In that opinion, the Court of Appeals faulted the trial court for its "enthusiastic embrace" of its "gatekeeper" role under *Daubert*. *Id.* at 866. More specifically, the lower appellate court accused the trial court of wrongly interpreting O.C.G.A. § 24-9-67.1 "to mean that an expert's opinions are not admissible under Georgia law unless they meet the factors used by the Supreme Court in *Daubert*." *Id.* at 868. The Court of Appeals went on to hold that the portion of O.C.G.A. § 24-9-67.1 allowing courts to draw upon *Daubert* and its progeny is "merely a permissive suggestion" and that the trial court had abused its discretion by applying those factors to the evidence at-issue. *Id.* Once the lower appellate court concluded that Mr. Thomas's testimony was admissible, it summarily concluded that "summary judgment is no longer authorized." *Id.* at 869.

VI. ENUMERATION OF ERRORS

1. The Georgia Court of Appeals erred by reversing the trial court's exclusion of the testimony of Mr. Thomas.

2. The Georgia Court of Appeals erred by reversing the award of summary judgment in favor of Seaboard.

VII. STANDARD OF REVIEW

The standard of review for reviewing a trial court's decision to award summary judgment is the *de novo* standard. *Artlip v. Queler*, 220 Ga. App. 775 (1996). However, a decision regarding the admissibility of expert opinion testimony will not be disturbed "absent a manifest abuse of discretion." *Ga. DOT v. Baldwin*, 292 Ga. App. 816 (2008).

VIII. ARGUMENT AND CITATION OF AUTHORITY

Although the ultimate issue presented by this appeal is whether the Court of Appeals erred in reversing the trial court's award of summary judgment, that issue turns entirely upon the propriety of the trial court's decision to exclude the testimony of Mr. Thomas. After all, Seaboard's summary judgment motion rested primarily upon the fact that plaintiffs have produced no other purported evidence of Seaboard's negligence. Furthermore, the Court of Appeal's reversal of the grant of summary judgment rested completely upon its conclusion that the expert testimony was admissible. As a result, this brief cannot address the propriety of the

summary judgment award without primarily focusing upon the expert witness issue.

As discussed in the following subsections, abundant federal case law supports the trial court's conclusion that Mr. Thomas's opinions should not be admissible. Furthermore, Georgia trial courts are statutorily permitted to draw upon federal case law when considering admissibility of expert testimony. Therefore, the trial court did not abuse its discretion by relying upon such case law, and the Court of Appeals decision ought to be reversed.

A. Mr. Thomas's Opinions Do Not Meet *Daubert*'s Reliability Requirement.

The starting point for analysis of the admissibility of any expert opinion under Georgia law is O.C.G.A. § 24-9-67.1. That statute provides, in relevant part, the following:

> (b) If scientific, technical, or other specialized knowledge will assist the trier of fact in any cause of action to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:
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> (1) The testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial;
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> (2) The testimony is the product of reliable principles and methods; and
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> (3) The witness has applied the principles and methods reliably to the facts of the case.

O.C.G.A. § 24-9-67.1(b). This provision essentially incorporates *Daubert*'s reliability standard into Georgia law; in fact, the statute explicitly directs Georgia courts to "draw upon" *Daubert* and other federal case law. O.C.G.A. § 24-9-67.1(f).

Under *Daubert* analysis, trial courts have "the responsibility of acting as gatekeepers to exclude unreliable expert testimony." Fed. R. of Evid. 702, official comment. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. As gatekeeper, "the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case." Fed. R. of Evid. 702, official comment. "If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. . . . *The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.*'" *Id.* (emphasis supplied). In *Daubert*, the Supreme Court articulated five factors for courts to consider when performing their gatekeeping function. The first is the "key question [of] . . . whether a theory or technique . . . can be (and has been) tested." *Daubert*, 509 U.S. at 593. The second is "whether the theory or technique has been subjected to peer review and publication." *Id.* The third is "the known or potential rate of error" of the technique used to test the theory. *Id.* at

594. The fourth is the "existence and maintenance of standards and controls" used in testing the theory. Fed. R. of Evid. 702, official comment. The final factor is "whether the technique or theory has been generally accepted in the scientific community." *Daubert*, 509 U.S. at 594.

As is evident, most of the above-listed factors generally relate to the testing of an expert's opinion or theory; indeed, *Daubert* instructs that whether a theory can be or has been tested is the "key question." *Daubert*, 509 U.S. at 593. Here, however, Mr. Thomas' opinions do not appear to be the sort of opinions that can be subjected to empirical testing. Still, some of the *Daubert* factors certainly can be applied. For example, it is possible to inquire whether Mr. Thomas' opinions regarding shoulders and lighting have "been subjected to peer review and publication" and have "been generally accepted" in the engineering community. Additionally, one should bear in mind that an underlying theme in all of the *Daubert* factors is whether the expert has "reliably" applied the relevant principles to the facts of the case. Thus, *Daubert* analysis of purported expert opinions such as those of Mr. Thomas should require one to generally ask whether industry standards and publications support Mr. Thomas' opinions regarding shoulders and lighting and whether Mr. Thomas has reliably applied the applicable traffic control regulations and standards to the bridge construction site at-issue. However, when one does so, it is clear that Mr. Thomas can cite no publication or governing

regulation that would have required shoulders or lighting on the bridge. For example, Mr. Thomas admits that the Manual of Uniform Traffic Control Devices ("MUTCD") is the "basic standard" for traffic control. Thomas dep., pp.261 - 262. But, he can point to no provision of the MUTCD that explicitly required the bridge to have a shoulder or lighting. Rather, Mr. Thomas essentially opines that the MUTCD requires the exercise of "engineering judgment" and that such judgment should have compelled either a shoulder or lighting. For example, he testified as follows:

> Q . . . In this 75 or 80 pounds of documents, is there anywhere that sets out a requirement for a construction project such as this bridge construction project to provide for shoulders?
> A No, I don't think so, no. *I'm sure if it had required it, [the defendants] would've done it.*

Thomas dep., p.146 (emphasis supplied). This testimony was later reiterated.

> Q . . . [T]here isn't anything concerning the shoulders, the lights, or the signage out there that violates the plans, specifications or manual on uniform traffic control devices, is there?
> A Well, as I explained last time, the Manual of Uniform Traffic Control Devices makes it a point to highlight the fact that what's in the manual is not the bottom line. It is not the end all. That you have to use engineering judgment depending on the conditions that you find yourself in. So I would just say that engineering judgment is part of the traffic control plan.
> . . . . .
> Q Okay. As we discussed, the MUTCD as written does not prohibit, prevent, or in any way is it violated by the plans, specifications and traffic control plan in this case, is it?
> A No, but it— it— it encourages the user to make sure that they use their engineering judgment to relate to the situation they're

encountering. And that's why in this case with such a long bridge without shoulders, you have to go beyond the idea of, well, we can put the barriers close or we don't need lights and so on, or reflectors.
Q Which is your opinion, but there is nothing in the written language of the MUTCD that requires that, is there?
. . . . .
A It again, it—it tells the user that you must use engineering judgment . . . .

Thomas dep., pp.259 - 261.

Similarly, he later testified specifically with respect to shoulders as follows:

Q The MUTCD provides specific written requirements with regard to shoulders, does it not?
A It requires minimums to build upon, if needed.
Q . . . And the minimums which the MUTCD, the federal standard, sets forth does not specifically require shoulders in this case, does it?
. . . . .
A It doesn't address that.

Thomas dep., pp.265 - 266.

Defense counsel also asked Mr. Thomas whether any governing regulations or standards outside of the MUTCD required shoulders, and Mr. Thomas was again unable to cite *any* authority. For example, when asked whether any provision of the Georgia Department of Transportation Bridge and Structures Design Policy Manual required shoulders on the bridge at-issue, Mr Thomas said, "I don't know if somewhere in here, in– within this document, there is such a requirement or– or something saying you don't even have to do it. I– I don't see

anything. I– I don't know if it's in here or not." Thomas dep., pp.277 - 278. When pressed further on that issue, he gave the following testimony:

> Q . . . . So you admit then that having gone through [the Georgia D.O.T. Bridge and Structures Design Policy], there isn't anything in there that supports your opinion that [shoulders] are required?
> A I don't know whether going through this document a second time would show me something. Again, tremendous number of documents. I could have overlooked a paragraph, yeah.
> Q But, I mean, you spent a hundred and thirty-four hours going through these documents, and that's what you've billed for.
> A That's right.

Thomas dep., pp.278 - 279.

Mr. Thomas also conceded that the Georgia Department of Transportation Design Memos did not require shoulders on the bridge at-issue. Rather, he can only say, at most, that the Design Memos do not prohibit shoulders. In this regard, he testified, "I don't think in any way [the Design Memos are] saying you can't– you– you shouldn't put shoulders. What they're saying is you need at least 12-foot– two 12-foot lanes to maintain traffic flow. They're just not addressing the concept of shoulders." Thomas dep., p.281. Further questioning revealed that Mr. Thomas' real complaint was not with the failure of Seaboard to have provided shoulders, but instead with the failure of the Georgia D.O.T.'s Design Manual and Design Memos to require shoulders. In criticizing the failure to of the Design Manual and Design Memos to require shoulders, he stated, "It should be specified. That would be far better if it were." Thomas dep., p.282.

Moreover, Mr. Thomas admitted that the plans and specifications for the project, which were approved by the D.O.T., did not call for shoulders on the bridge. Thomas dep., pp.284 - 285. In fact, he could identify nothing about the bridge at-issue that was not in accordance with the traffic control plan that was approved by the D.O.T.

> Q . . . Now, that traffic control plan was approved August 26, 2002, by the State of Georgia Department of Transportation; correct?
> A Yes.
> Q Okay. Is there anything in this construction site in the traffic control plan on the day of the accident that is not in accordance with the traffic control plan approved by the D.O.T.?
> A I mean, I can't make a statement that that's– everything was in accordance on that day. I just– I can't. I wasn't there, I didn't inspect it.
> Q Okay. Did you find anything in your investigation in a hundred and thirty-four hours you put going through these documents that reflects anything at the time of the accident was not– that was not in accordance with this traffic control plan?
> A No.

Thomas dep., p.317. Similarly, he testified at another point in the deposition as follows:

> Q . . . Was there– was this lack of shoulder any deviation from the plans and specifications for this bridge that were approved by the DOT?
> A No . . . .

Thomas dep., p.72. He further admitted that it appears to have been a common practice *not* to provide shoulders on bridges during the widening of I-95 through Georgia. Thomas dep., pp.292 - 293.

In addition, Mr. Thomas could not recall *ever* having seen any construction plans that called for maintaining a shoulder across a bridge during construction.

> Q Had you ever seen in your entire life a set of temporary construction– or plans for temporary staging traffic control that showed a shoulder being maintained for– during construction over a bridge?
> A I mean, there may have been a circumstance where it would have been, you know, there's no need not to have the shoulder, so it wasn't removed. So in that case, you'd say yes, but not applied directly to it, if you follow me on that.
> Q You don't recall ever reviewing a set of plans where during traffic shifting across a bridge, they purposefully maintained a shoulder during temp– during construction?
> A I guess I'm merely saying I don't recall that . . . .

Thomas dep., pp.442 - 443.

Finally with respect to the issue of shoulders, Mr. Thomas admitted that nothing in the standards promulgated by the American Association of State Highway and Transportation Officials (AASHTO) required shoulders on the bridge at-issue. Thomas dep., p.390. Thus, Mr. Thomas ultimately had to admit that he is aware of no publication that would have required or explicitly suggested having shoulders on the bridge at the time of the accident.

> Q I may have missed something, . . . but you've got all these publications and all these written materials that you brought or you sent down here that we've reviewed and spent a couple of days going through. I don't recall there being one written requirement that shoulders be provided during the construction across a bridge.
> A Yeah. Well, as– *there is no standard for it.* We talked about that.

Thomas dep., p.444 (emphasis supplied).

Turning to Mr. Thomas' opinion that lighting should have been provided if there were no shoulders, he was likewise unable to cite any governing regulation that would have required lights. Moreover, he could not point to any publication that explicitly suggested that lighting should be provided at a construction site such as the one at-issue. For example, with respect to the MUTCD, Mr. Thomas conceded that the relevant section of the MUTCD only requires temporary lighting when construction workers are working on the bridge at night. Thomas dep., p.271. However, construction workers were not working on the bridge at night in this case; therefore, Mr. Thomas could not opine that that section of the MUTCD was breached. Rather, he merely stated that the MUTCD did not "preclude" the use of additional lighting. Thomas dep., p.271. Thus, Mr. Thomas ultimately conceded that he was aware of no publication or governing regulation that would have required lighting on the bridge. Specifically, he testified as follows:

> Q [O]f all this paper that we've got, all these manuals, all these documents, *there's not one shred of paper that supports your opinion that under these circumstances, lighting had to be provided on this bridge, is there*?
> A *No, no*, that– no, and we've agreed to that.

Thomas dep., p.447 (emphasis supplied).

As the above-quoted portions of his deposition make clear, Mr. Thomas relied upon no recognized authority or publication in concluding that defendant

Seaboard should have provided shoulders or lighting. Furthermore, he actually admitted that the traffic control plan and safety precautions at the site of the accident met the requirements of the MUTCD. Thomas dep., pp.312 - 313. Thus, the only authority for Mr. Thomas' conclusions is his own sense of "engineering judgment"—an undefined standard of care that he never articulated and that finds no support in any industry standard, regulation, or publication of which Mr. Thomas is aware. Such opinions are a shining example of *ipse dixit* testimony—i.e., the expert claims that something is so merely because he says that it is so.

Though there is no Georgia case law (other than the lower appellate court's decision in this litigation) addressing the admissibility of *ipse dixit* testimony in the wake of O.C.G.A. § 24-9-67.1, federal courts have repeatedly tackled that issue and have routinely excluded such testimony. For example, one federal circuit court of appeals has held, "Without more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible." *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 424 (5th Cir. 1987). The Eleventh Circuit has similarly stated, "Reliability cannot be established by the mere *ipse dixit* of an expert." *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004). *Accord Nimely v. City of New York*, 414 F.3d 381, 396-397 (2d Cir. 2005) ("[W]hen an expert opinion is based on data, a methodology, or studies that are simply

inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony."); *United States v. Thomas*, 2006 U.S. Dist. LEXIS 3266 (D. Md. 2006) ("Clearly, *Daubert* and *Kumho Tire Co.*, as well as Rule 702, require that expert opinion evidence be connected to existing data by something more than a chain of dubious inferences that amount to an expert's assertion that 'it is so because I say it is so.'").

As the above-cited federal authorities make clear, *Daubert* requires that an expert rely upon at least *some* authority other than a personal opinion in reaching his ultimate conclusions. But, Mr. Thomas never cites any authority for his bold propositions. Rather, he cites only his own personal "engineering judgment."[4] If an expert's own personal sense of judgment were enough to satisfy the rigors of *Daubert* (and, hence, O.C.G.A. § 24-9-67.1), then Seaboard can envision almost no case where an expert would be excluded. In fact, the trial court warned of such a result if testimony like Mr. Thomas's were deemed admissible. As the trial court

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[4] The problem with allowing Mr. Thomas to rely upon nothing more than his personal sense of engineering judgment is magnified when one considers that he has no personal experience whatsoever concerning the following matters: (1) bridge construction (Thomas dep., p.439); (2) bridge design (*Id.*); (3) design of traffic control plans for any type of construction site, including bridges (*Id.* at p.440); (4) reviewing traffic control plans (*Id.* at p.442); (5) assessing whether shoulders should be provided during a construction project (*Id.*); or (6) determining whether a bridge should be illuminated during construction (*Id.* at p.468). In light of his lack of experience in these matters, it does not appear that he has any experience from which he could even have developed a sense of "engineering judgment" relevant to the issues in this case.

stated, "allowing experts to testify that a failure to take measures beyond those which are generally accepted violates the standard of care based solely upon their exercise of 'professional judgment' would render expert testimony admissible in every instance it is offered." R-4167. To avoid such a result, *Daubert* and its progeny require more than simply taking an expert's word for it before a court is allowed to affix the label of "expert" to a witness. Thus, the trial court correctly applied *Daubert* and its progeny and rightly concluded that the plaintiffs failed to meet their burden in establishing that Mr. Thomas's testimony is admissible.

Finally with respect to the issue of whether Mr. Thomas's testimony meets the *Daubert* standard, Seaboard wishes to preemptively address two arguments that plaintiffs may make in their brief to this Court. First, plaintiffs may argue that Mr. Thomas expressed opinions other than those regarding shoulders and lighting. However, that contention is belied by the fact that Mr. Thomas himself ultimately testified that he was limiting his opinions to those concerning shoulders and lighting.

> Q Basically if I understand what you've said is you've got two opinions, that a shoulder should have been provided, or if the shoulder couldn't have been provided, lighting should have been provided so that the—the bridge would have been illuminated?
> A Yes.
> Q That's what your opinions boil down to, those two things?
> A Yes, yes.

Q And that's after reviewing all the materials that we've talked about, those are the two opinions that—that you're prepared to offer at the trial of this case?
A That's correct.
Q And no others, right, as of right now?
A As of right now, no.

Thomas dep., pp.462 - 463. Because he testified that he was limiting his opinions in that regard and because plaintiffs never supplemented Mr. Thomas's deposition, this Court should not consider any other opinions that plaintiffs may claim that he espoused. *See Hunter v. Nissan Motor Co.*, 229 Ga. App. 729, 732 (1997) (stating that the duty to amend discovery responses applies to oral depositions). Furthermore, any other opinions allegedly provided by Mr. Thomas suffer from the same lack of authority plaguing his conclusions regarding shoulders and lighting.

A second likely response from plaintiffs will be an attempt to rehabilitate Mr. Thomas's opinions by arguing that they are, in fact, supported by industry standards or regulations that Mr. Thomas was unable or failed to cite either during his deposition or via a subsequent affidavit. A very serious problem with such a tactic is that neither plaintiffs nor their attorneys are experts in the relevant engineering field. Thus, they are in no position to consult a publication and opine for this Court whether it does or does not support a conclusion that is clearly within the province of an expert. An even more serious problem with such a

potential approach by plaintiffs is that Mr. Thomas himself did not cite those authorities as support for his conclusions and apparently did not rely upon them. If any authorities do, in fact, support Mr. Thomas' particular opinions in this case, then Mr. Thomas could certainly have said so during his deposition. However, he did not. Plaintiffs cannot now rehabilitate the testimony of Mr. Thomas by citing and quoting provisions that Mr. Thomas may not have even read or considered. In this regard, O.C.G.A. § 24-9-67.1(b) makes clear that an expert's testimony must be "the *product* of reliable principles and methods" and the expert himself must have "applied the principles and methods." (Emphasis supplied.) Thus, analysis of the testimony's admissibility must necessarily focus upon the principles relied upon *by the expert* and how *the expert* applied those principles. Conversely, one should *not* analyze the reliability of principles that the expert did not rely upon and whether those principles would conceivably support the expert's conclusions.

B. Because Federal Case Law Supports the Trial Court's Conclusion That Mr. Thomas's Testimony Is Inadmissible and the Trial Court Was Permitted to Consider That Case Law, the Trial Court Did Not Mainfestly Abuse its Discretion by Excluding the Testimony.

As discussed in the preceding section, ample federal decisions applying the *Daubert* standard have held that *ipse dixit* testimony such as Mr. Thomas's is inadmissible. As also noted, the appellate courts of this state have not heretofore

(other than in the Court of Appeals opinion in this case) grappled with the admissibility of such testimony in the wake of O.C.G.A. § 24-9-67.1.[5] Thus, when the trial court confronted the motion to exclude Mr. Thomas's testimony in this case, it took note of relevant federal case law applying the *Daubert* standard and correctly concluded that, under those cases, Mr. Thomas's testimony should not be admitted. In criticizing that conclusion and ruling that the trial court had abused its discretion, the Court of Appeals took aim at, first, the trial court's general invocation of the *Daubert* standard and, second, the trial court's particular application of *Daubert*. As a result, the Court of Appeals appears to have disregarded the manifest abuse of discretion standard and to have called into question the authority of trial courts to rely upon federal case law pursuant to O.C.G.A. § 24-9-67.1.

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[5] The Court of Appeals erroneously stated a previous Georgia decision had held that an expert's personal opinion is sufficient to merit admissibility. The case cited by the Court of Appeals was *Brady v. Elevator Specialists*, 287 Ga. App. 304 (2007). However, in *Brady*, the expert did *not* offer an opinion with no support other than his personal judgment. To the contrary, the *Brady* expert (who had over 30 years of experience in maintaining and repairing elevators) testified that the maintenance of an elevator fell below the industry standard; thus, he was using the industry standard rather than his subjective opinion to establish the standard of care. Here, on the other hand, Mr. Thomas *never* testified that the industry standard would have been to install shoulders or lighting. In fact, he testified that the opposite appeared to be true. Thomas dep., pp.292 - 293 (stating that it was common for bridges not to have shoulders during the widening of I-95 in Georgia).

As already repeatedly noted, O.C.G.A. § 24-9-67.1(f) explicitly authorizes courts to draw upon *Daubert* and its progeny. Nonetheless, the appellate court admonished the trial court that O.C.G.A. § 24-9-67.1(f) is "merely a permissive suggestion that courts consider federal interpretations" and that it "contains no words of command." 296 Ga. App. 864, 868. While it is no doubt true that the state legislature has not *required* Georgia courts to follow federal decisions, that does not change the fact that courts are *permitted* to apply *Daubert*; if they are permitted to do so, then they are clearly acting within their discretion by doing so. In fact, both this Court and the Georgia Court of Appeals have previously held that a trial court did *not* abuse its discretion by applying the *Daubert* factors. *E.g., Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271 (2008); *Moran v. Kia Motors America, Inc.*, 276 Ga. App. 96 (2006).[6] Additionally, in *Kumho Tire* (to which O.C.G.A. § 24-9-67.1(f) explicitly refers), the Supreme Court held that courts may—as the trial court here did—apply the *Daubert* factors to engineering experts. Specifically, the Supreme Court wrote the following in *Kumho Tire*:

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[6] It is difficult to discern how the factors applied in *Moran* were any different than those used by the trial court in this case. In this regard, the *Moran* trial court assessed whether the expert's theory or technique had been or could be tested, the theory's general acceptance in the expert community, the rate of error with respect to the expert's technique, and the existence of any peer review of the expert's technique. Here, the trial court applied all of those same factors to Mr. Thomas's opinion.

> The petitioners ask more specifically whether a trial judge determining the admissibility of an engineering expert's testimony may consider several more specific factors that *Daubert* said might "bear on" a judge's gate-keeping determination. These factors include:
>
> — Whether a "theory or technique . . . can be (and has been) tested";
> — Whether it "has been subjected to peer review and publication";
> — Whether, in respect to a particular technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and
> — Whether the theory or technique enjoys "general acceptance" within a "relevant scientific community."
>
> Emphasizing the word "may" in the question, we answer that question yes.

Kumho Tire, 526 U.S. at 149-150 (quoting *Daubert*, 509 U.S. at 592 - 94). The Court also wrote, "[W]hether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Kumho Tire*, 526 U.S. at 153. In light of that holding from the Supreme Court, the Court of Appeals should not have held that the trial court manifestly abused its discretion merely by applying *Daubert*.

Turning to the lower appellate court's complaints regarding *how* the trial court applied the *Daubert* factors, the appellate court appears to believe that the trial court applied those factors too rigidly. In this regard, the Court of Appeals emphasized that "the inquiry envisioned by the federal rule on expert testimony is flexible." 296 Ga. App. 864, 868. But, nothing in the trial court's opinion indicates

that it rigidly applied the *Daubert* factors. Rather, in support of its decision, the trial court pointed out the inability of Mr. Thomas "to cite any recognized treatise or other source material to support his belief that under readily ascertainable and verifiable standards recognized by practitioners in that field, something about the accident site was below standard." R-4165. Thus, the trial court's decision did not rest upon the rigid application of any set of factors; it was based upon the blunt fact that Mr. Thomas had nothing other than his personal opinion to substantiate his conclusions.[7]

Furthermore, regardless of whether an appellate court agrees with how a trial court determines the admissibility of expert testimony, the manner in which a trial court reaches its decision is entitled to the same level of discretion as its ultimate conclusion. "[T]he law grants a [trial] court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate

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[7] The lower appellate court also criticized the trial court for allegedly requiring Mr. Thomas to provide data showing that other accidents have occurred on the subject portion of I-95 due to a lack of shoulders or lighting. That criticism, however, mischaracterizes the trial court opinion. The trial court discussed the lack of evidence of other accidents only after noting that no standards, regulations, or other publications supported Mr. Thomas's opinions. The point being made by the trial court was that even in the absence of publications to support his opinions, Mr. Thomas's testimony would have potentially been admissible if he could have pointed to empirical data showing that bridges without shoulders and lighting are statistically less safe than other portions of I-95. Thus, that discussion by the trial court further illustrates that it was not rigidly applying the *Daubert* factors. Instead, it was exploring any potential basis for allowing the testimony to be admitted.

reliability determination." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999) (emphasis in original). "[T]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id.* at 152. Thus, the Georgia Court of Appeals should not have reversed the trial court regardless of whether it disagreed with its ultimate decision that Mr. Thomas's testimony is inadmissible.

As the foregoing makes clear, the decision of the Court of Appeals has not only raised the spectre of *ipse dixit* expert testimony now being admissible in Georgia courts, but also potentially created at least two serious problems with ramifications that extend far beyond the proceedings in this case. First, the appellate court has curtailed the level of discretion vested in trial courts to determine the admissibility of expert testimony. After all, it has reversed the trial court for applying factors that it was statutorily authorized to apply. Second, the opinion creates great uncertainty regarding how trial courts should now assess the admissibility of expert testimony. In this regard, the Court of Appeals opinion suggests that a trial court may abuse its discretion merely by attempting to apply *Daubert* factors to the testimony of an expert in a technical field. If that is the case, then trial courts are left with little guidance and apparently no standard, at all, to apply in assessing admissibility of such evidence. Thus, by reversing the trial court under the abuse of discretion standard and chastising it for its "enthusiastic

embrace" of its gatekeeper function, the Georgia Court of Appeals opinion may ultimately do much to transform the trial court's role as a gatekeeper into that of a welcoming committee fearful of turning any expert away.

C. If the Testimony of Mr. Thomas Is Inadmissible, Then Summary Judgment in Favor of Seaboard Is Required.

Once one has concluded that the trial court's exclusion of Mr. Thomas's testimony ought to be affirmed, the necessity of also affirming the award of summary judgment is apparent. In this regard, plaintiffs can not establish engineering negligence absent expert testimony. Any potential contention by plaintiffs to the contrary is refuted by O.C.G.A. § 9-11-9.1, which requires that claims for engineering malpractice be supported by expert opinion testimony. O.C.G.A. § 9-11-9.1(g)(21). *Accord Jackson v. DOT*, 201 Ga. App. 863, 865 (1991) ("[d]esigning roads requires 'engineering services' which have been described as the performance of professional services within the purview of O.C.G.A. § 9-11-9.1"). In short, plaintiffs cannot create a question of fact in this case absent expert opinion evidence; therefore, the exclusion of their proffered expert witness necessitates summary judgment in favor of Seaboard.

Conclusion

Ultimately, the trial court expressed the correct view on the question of whether an expert's personal sense of professional judgment is, standing alone,

sufficient to support the admission of that expert's opinion into evidence. Furthermore, the opinion of the trial court on that issue is supported by a clear consensus amongst the federal courts, which have routinely held that *ipse dixit* testimony is inadmissible. Unfortunately, the decision of the Georgia Court of Appeals undertakes no analysis of that legal principle or the federal cases establishing it. Instead, the Court of Appeals criticized the trial court for even applying those federal cases. Thus, the Court of Appeals has essentially shunned those federal cases holding that *ipse dixit* testimony from an expert is inadmissible and has even held that a trial court abuses its discretion if it merely applies the rationale of those cases. By doing so, the Court of Appeals has opened the door to allow into evidence any expert's testimony so long as the expert states that his testimony is—in his own professional opinion—true.[8] The Court of Appeals has thereby significantly diminished the gatekeeper role of trial courts. It has also

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[8] Seaboard again emphasizes that the trial court warned of such a result. In holding that Mr. Thomas's testimony is inadmissible, the trial court wrote,

> To hold otherwise would be an abandonment of the Court's role as "the gatekeeper of expert testimony," *Cotten v. Phillips*, 280 Ga. App. 280, 286 (2006), because allowing experts to testify that a failure to take measures beyond those which are generally accepted violates the standard of care based solely upon their exercise of "professional judgment" would render expert testimony admissible in every instance it is offered.

R-4168.

foiled "the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states." O.C.G.A. § 24-9-67.1(f). For these reasons, the Court of Appeals was incorrect in reversing the trial court's exclusion of Mr. Thomas's testimony and was likewise incorrect in reversing the award of summary judgment in favor of Seaboard. This Court should reverse the Court of Appeals and affirm the original rulings of the trial court.

This the 28th day of September, 2009.

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This is to certify that I have this day served a copy of the foregoing pleading by addressing same to:

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This the 28th day of September, 2009.

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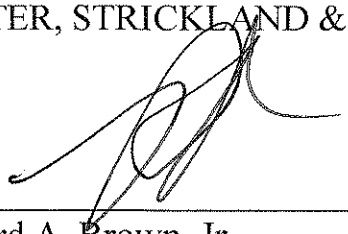

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