

IN THE SUPERIOR COURT OF GLYNN COUNTY

STATE OF GEORGIA

LAKEISHA NICHOLE)
HAMILTON-KING, Individually)
and as Administratrix of the Estate)
of Johnny Hamilton, Jr., Deceased,)
and JUSTIN HAMILTON,)

Plaintiffs,)

vs.)

CIVIL ACTION NO. CE06-00166-063

HNTB GEORGIA, INC., and)
PLANT IMPROVEMENT)
COMPANY, INC., d/b/a)
SEABOARD CONSTRUCTION)
COMPANY,)

Defendants.)

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Jane B. Pennington
CLERK SUPERIOR COURT

ORDER

This case is before the Court on Defendants' motions to exclude the testimony of Jerome Thomas, who has been proffered as an expert witness by Plaintiffs, and on Defendants' motions for summary judgment. Since the determination of whether the proffered testimony meets the standards for expert testimony established by O.C.G.A. § 24-9-67.1 is relevant to the summary judgment motions, the Court will consider the pending motions together.

WITNESS JEROME J. THOMAS, P.E.

Jerome Thomas testified that Defendants were negligent in configuring the area where Plaintiffs and the late Mr. Hamilton were struck by a vehicle while they were on an interstate highway bridge. They had exited their vehicle after it was involved in a one-vehicle accident, allegedly caused by a phantom vehicle. In his deposition testimony, viewed in the light most favorable to Plaintiffs as asserted in their brief opposing summary judgment, Mr. Thomas said that in his opinion the bridge should have had lighting if shoulders were not provided, the speed limit on the bridge was too high, it was unsafe for pedestrians to cross the interstate highway at night, the edge of the bridge should have had reflecting devices, the pavement stripping was deficient, the construction project lacked appropriate signage, barriers used on the project were deficient, and there had been no check of the effectiveness of the traffic control plan for night driving. Even before the Georgia General Assembly amended the expert witness statute and directed that in civil cases the qualifications of expert witnesses are to be determined in the same manner as done by federal courts applying United States Supreme Court precedent on that issue, O.C.G.A. § 24-9-67.1(f),¹ it was

¹ Notwithstanding this provision, the opinions of the federal courts, including the United States Supreme Court, which interpret federal law governing expert witnesses are not binding authority in Georgia, they are merely persuasive. Mason v. Home Depot USA, Case No S07A1486, Ga. Sup. Ct., 3/10/08, 2008 WL 622969.

the law in Georgia that "expert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; i.e., the conclusion is beyond the ken of the layman." Jefferson Pilot Life Insurance Company v. Clark, 202 Ga. App. 385, 392 (1991). Lay persons would not require expert testimony to conclude, in a generic, non-technical sense, that better lighting makes highways safer, or that strictly enforced speed limits will reduce accidents, or that crossing busy highways is dangerous. However, evidence that a roadway would have been safer if certain measures had been undertaken answers only half the question posed in cases of this kind. The second half of the question, whether those enhanced safety-related measures are generally taken by reasonably prudent parties responsible for highway construction projects, can be established only by expert testimony. The proffered testimony of Mr. Thomas is admissible on these matters if Plaintiffs meet their burden of establishing that he is a qualified practitioner in a discipline whose practitioners are competent to render opinions on the standard of care applicable to highway construction projects, and if his opinions are the product of reliable scientific principles and methods which have been reliably applied to the facts of the case. O.C.G.A. § 24-9-67.1(b)(2), (3).

Mr. Thomas testified that he retired in 1990, after working for about thirty-three years for the New York State Department of Transportation. His work there included design work, research and development and policy development, and he was in charge of a regional highway and operations maintenance division. For approximately a year and half he was as director of the bridge maintenance group for the New York State Thruway Authority. After retiring, he worked in a city public works department, a local airport authority where he was involved in the road system. During his tenure in those jobs, he appeared as an expert witness for his employer on one occasion, involving a tree which fell onto a road. He testified that he believes he is qualified as an expert in highway and bridge civil engineering; he disclaimed expertise in accident reconstruction. Mr. Thomas did not state that he had ever been personally responsible for deciding what temporary traffic control measures were to be taken during the construction phase of highway projects, or that he ever rejected a proposed set of traffic control measures contained in the plans he reviewed as part of his employment.

It could be argued that during his career, Mr. Thomas was the equivalent of a corporate CEO who reviews accounting statements and makes decisions in reliance upon them. Such experience would not qualify a CEO as an expert in accounting. Reviewing plans which included traffic control measures designed by others would

not qualify Mr. Thomas as an expert in traffic control measures at construction sites, absent a showing he had held and exercised authority over that element of the plans he reviewed. However, subsequent to his retirement Mr. Thomas has endeavored to become an expert witness, and in that endeavor he has gained some knowledge about the standards applicable to traffic control measures at construction sites, by becoming familiar with manuals relied upon by persons responsible for making decisions concerning such measures. Under Georgia law, expert testimony can be given by “a witness qualified as an expert by knowledge, skill, experience, training, or education,” O.C.G.A. § 24-9-67.1(b), assuming the above-cited requirements for reliable methodology and reliable application of scientific principles are met. The Court acknowledges that the General Assembly has mandated a narrow construction of the expert witness statute, to keep our courts free of “expert evidence that would not be admissible in other states.” O.C.G.A. § 9-24-67.1(f). However, the Court concludes that the education and work experience of Mr. Thomas provided him with skills that permit him to understand and interpret manuals and related materials which are relevant to the standard of care for designers of traffic control measures, even though he may not have been directly involved with that issue during his working years. If the “education” component of the expert witness qualification statute can be satisfied by self-study by a person in a related field, Mr. Thomas is at least

marginally qualified to testify as an expert on traffic control measures on highway construction sites.

The Court has carefully reviewed the deposition testimony of Mr. Thomas. He acknowledged that the traffic control plan in place where Plaintiffs' claims arose met the minimum standards of the Manual of Uniform Traffic Control Devices.² That Manual, according to Mr. Thomas, contains the standards relied upon for traffic control at highway construction projects.³ However, he testified that while there is nothing in that Manual or other relevant literature which mandates shoulders or lighting on bridges being constructed or widened, the Manual requires the persons responsible for traffic control to "use engineering judgment."⁴ It is the exercise of such judgment that is the foundation of the testimony of Mr. Thomas.

The Court has considered the application of "engineering judgment" by Mr. Thomas to the facts of this case. As noted in General Electric Company v. Joiner, 522 U.S. 136, 147, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997), "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A

² Deposition of Jerome J. Thomas, p. 267, l. 3 - 6.

³ Id., p. 261, l. 24 - p. 262, l. 2.

⁴ Id., p. 262, l. 8 - p. 263, l. 15.

court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” As noted above, merely stating the obvious, which is that if the bridge had had a ten foot shoulder it is likely the injured parties would have been on it rather than in a traffic lane, is not a proper subject for expert testimony. What matters is whether the configuration of the bridge violated the standard of care applicable to such projects. Mr. Thomas 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. He merely noted that the literature he had reviewed indicated that additional safety measures could have been taken.

Under Georgia law, the admissibility of expert testimony is determining by considering “whether the specialized theory or technique has been or can be tested, the theory's general acceptance in the expert community, rate of error, and peer review.” Moran v. Kia Motors America, Inc., 276 Ga. App. 96, 98 (2005), citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). If bridge construction projects which lack shoulders and/or lighting are inherently defective, it would be expected that on a highly-traveled highway such as Interstate 95, there would have been a series of similar accidents, which would in essence be test results which would validate the expert's opinion of

sub-standard traffic control measures. Mr. Thomas could not produce evidence on that issue. The Court's review of the documents relied upon by Mr. Thomas does not show that his belief that a failure to provide for adequate shoulders and/or lights on bridge construction projects violates the standard of care has been generally accepted. At most, those materials showed only what could be done, as opposed to what had to be done to meet the standard of care. An expert should be able to demonstrate how errors in his opinions (and the opinions of comparably skilled experts) would become known. Mr. Thomas offered no testimony which suggested how to quantify or objectively evaluate "engineering judgment" so that error rates in the exercise of that judgment could be ascertained.

[T]he law grants a district court the same broad latitude when it decides how to determine reliability [of expert testimony] as it enjoys in respect to its ultimate reliability determination." Kumho Tire Company, LTD. v. Carmichael, 526 U.S. 137, 141, 119 S.Ct. 1167, 143 L.Ed. 2d 238 (1999). In this case, the Court starts with the undisputed fact, as shown by the testimony of Mr. Thomas, that according to the most relied-upon text in the field, established minimum standards for traffic control had been met at the site involved in this case. To conclude that the trier of fact would be authorized to impose liability on someone other than the driver who struck the injured parties on the highway, notwithstanding Defendants' compliance with established

traffic control minimum standards, the Court would require expert testimony that included verifiable references to similar projects, at which different measures were found by recognized experts to be necessary, as opposed to optional, under the circumstances presented. 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.

It is no longer the law in Georgia that "nothing more is required to entitle one to give testimony as an expert than that he has been educated in the particular trade or profession." Macon Railway and Light Company v. Mason, 123 Ga. 773 (1905). Nor it is the law that "whether [an expert's] learning, skill, and experience really entitle his testimony to be considered as that of an expert is at last to be determined by the jury." Clary v. State, 8 Ga. App. 92 (1910). This is so because the General Assembly, like the Supreme Court of the United States, has recognized that "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." Daubert v. Merrell Dow Pharmaceuticals, Inc., *supra*, 509 U.S. at 595. In the absence of evidence that an expert's opinion is grounded in generally accepted

standards and subject to validation or testing by objective means, or to peer review, what is proffered as expert opinion is nothing more than “subjective belief or unsupported speculation.” *Id.* at 590. The Court must conclude that the opinions of Mr. Thomas, which he concedes to be the products of his exercise of “engineering judgment” and which, under the evidence presented, cannot be validated against accepted standards, tested, or reviewed, are not reliable, as that term is used in O.C.G.A. § 24-9-67.1(b)(2) and (3), and they are therefore inadmissible.

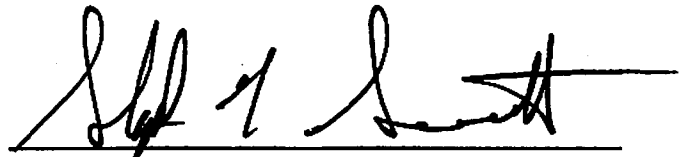
DEFENDANTS’ MOTIONS FOR SUMMARY JUDGMENT

The liability of the driver of the vehicle that struck Plaintiffs is not at issue in this case. To recover damages from the Defendants, Plaintiffs must show that the Defendants were negligent in some manner, and that such negligence caused the harm they sustained. Whether the traffic control measures on a highway construction project were designed or constructed negligently is an issue which cannot be left to the speculation of the trier of fact. The applicable principle is a familiar one.

Favorable inferences may be drawn by the court on behalf of the plaintiff, since the granting of a motion for summary judgment deprives the non-moving party of his constitutional right to trial by jury. Summary judgment cannot deprive a party of the opportunity to have a trial of a genuine issue as to any material fact. However, an inference cannot be based upon evidence which is too uncertain or speculative or which raises merely a conjecture or possibility.

Garrett v. Nationsbank, N.A., 228 Ga. App. 114, 116 (1997). The evidence offered by Plaintiffs in opposition to Defendants' motions for summary judgment, unsupported by expert testimony which could be found by the trier of fact to both establish the standard of care for construction site traffic control measures and violations thereof by Defendants, is insufficient to create a material issue of fact on the question of Defendants' liability to Plaintiffs. Therefore, Defendants' motions for summary judgment are GRANTED and this action is DISMISSED.

SO ORDERED, this 26th day of March 2008.



STEPHEN G. SCARLETT
Judge, Superior Courts
Brunswick Judicial Circuit