

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JOHN CHANG and REBECCA ZHU, as)	
Surviving Parents of Joshua Chang, and)	
REBECCA ZHU as the Personal Representative)	
Of the Estate of Joshua Chang,)	
Plaintiffs,)	
)	
v.)	CIVIL ACTION FILE
)	NO. 18-EV-004442-E
CITY OF MILTON,)	
Defendant.)	

**ORDER DENYING DEFENDANT’S MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT**

This action comes before the Court on Defendant City of Milton’s motion for judgment notwithstanding the verdict and motion for new trial, filed on July 17, 2023.¹ Plaintiff filed a response in opposition on August 21, 2023. The matter came for hearing on August 23, 2023.

Background

This action arises out of a fatal, one-vehicle crash, occurring on November 19, 2016. Joshua Chang, a senior at Yale visiting his parents during his Thanksgiving break, veered off Batesville Road and collided with a decorative planter located in the right-of-way in the City of Milton. The planter, a tire tractor surrounded with stone masonry and filled with dirt, had been in the location prior to the incorporation of Defendant City of Milton in 2006.

On December 13, 2022, the Court entered an order denying Defendant’s motion for summary judgment on the basis of sovereign immunity and the alleged contributory negligence of Plaintiff. On December 20, 2022, the Court granted Defendant’s request for a certificate of immediate review. The Georgia Court of Appeals denied Defendant’s application for interlocutory review on January 23, 2023.

The civil action was called to trial on Thursday, June 8, 2023, but due to a *voir dire* panel with a significant number of statutory exemptions, the panel size was reduced below the threshold from which a minimum twelve-person jury could be mustered. The civil action recommenced on Monday, June 12, 2023, Judge Jeanette Little, then presiding. Jurors were selected and trial

¹ For clarity, the Court will address Defendant’s motion for new trial in a subsequent order.

commenced on Monday, June 12, 2023. The presentation of evidence and argument concluded on June 15, 2023 and the jury rendered its verdict that same evening.

Issue

Defendant's motion for judgment notwithstanding the verdict asserts, once again,² that judgment is warranted on Plaintiffs' claims for negligence and nuisance due to sovereign immunity.

Motions for Judgment Notwithstanding: Standard of Review

"When a jury returns a verdict, the verdict must be affirmed on appeal if there is any evidence to support it, and [such] evidence is to be construed in a light most favorable to the prevailing party with every presumption and inference in favor of sustaining the verdict." Yash Solutions, LLC., v. New York Global Consultants Corp., 352 Ga. App. 127, 132 (2019)(quoting Green v. Key Custom Homes, Inc., 302 Ga. App. 800, 802 (2010)). Motions for judgment notwithstanding the verdict permit a limited and narrow post-verdict opportunity for the trial court to revisit those legal questions previously raised by the motion for directed verdict. Avion Sys. v. Bellomo, 338 Ga. App. 141, 144-145 (2016)(citing Southern Land Title v. North Ga. Title, 270 Ga. App. 4, 7-8 (2004)).

The Evidence Adduced at Trial

Defendant City of Milton's ordinances required that its roadways be maintained in such a manner to provide a designated "clear zone" free of obstructions within ten feet on either side of the roadway. The applicable ordinance specifies that such clear zones lessen the chances of serious injury where a driver runs off the road:

- (a) Experience has shown that motorists occasionally run off the roadway and providing a traversable recovery area can lesson serious injury. AASHTO publishes a Roadside Design Guide that should be used as a reference when designing driveways.
- (b) Table 15 provides the clear zone distances as contained in the Roadside Design Guide. Driveways must be designed so that all areas within the roadway right-of-way have clear zones as defined in the following Table 15.
- (c) All areas located within the clear zones should remain clear of obstructions such as bridge abutments, poles, trees, etc. If obstructions are unavoidable, the

² The issue was raised and addressed in Defendant's motion for summary judgment and two motions for directed verdict at trial.

design should include appropriate protection such as break-away design, guardrail installation, safety end treatments on culverts, etc. The Roadway Design Guide includes a table for horizontal curve adjustments, where the clear zone correction factor is applied to the outside of curves only. Curves flatter than a 2,860-foot radius do not require an adjusted clear zone.

Milton, Georgia Ordinances, § 48-425(a) – (c), Aug. 9, 2016. Furthermore, placement of items in the right of way is specifically prohibited by Defendant’s ordinances. Id., § 48-584(a). As to existing installations in the right-of-way, such are “subject to safety evaluations and must be relocated outside of the right-of-way when major repairs or replacement occurs.” Id. § 48-585(b)(2). “Major repairs” and “replacement” is not specifically defined in the Defendant’s ordinances. However, “maintenance” is defined as to include resurfacing, roadside trash pickup, grass cutting, and shoulder repair. Id. § 48-535.³

In her deposition testimony, Sara Leaders, Defendant’s transportation engineer and 30(b)(6) designee, stated that Defendant was responsible for maintenance of the clear zones such as grass cutting and dead animal removal on Batesville Road. (Leaders Depo.I, pp. 66-68). Additionally, Defendant repaved Batesville Road in 2012. (Id., p. 152). Ms. Leaders testified in her deposition that Defendant’s employees otherwise responsible for safety inspections were not inspecting existing installations. (Id., pp. 134-135). Finally, Ms. Leaders further testified that the applicable code at the time of Joshua Chang’s vehicular collision with the planter classified fixed objects in the right-of-way as hazards: “the code at the time said fixed objects are hazards.” (Id.).

During her cross examination at trial, Ms. Leaders disputed that it was Defendant’s responsibility to remove dead animals from the road or mow the right-of-way in which the planter was located. Ms. Leaders testified at trial that she could not recall whether the shoulder of the road extended to the full extent of the right-of-way and further testified that she was not responsible for interpreting the Defendant’s ordinances as Defendant’s transportation engineer. (TT, Day 3, pp. 233-240). Because the bulk of her trial testimony elicited through cross-examination contradicted her prior deposition testimony, Ms. Leaders’s original, video deposition testimony and previously filed, sworn affidavit were both presented for impeachment purposes without objection. (Id., pp. 234-236).

³ While Plaintiffs withdrew their claim for negligence per se and Defendant asserts that its ordinances do not establish a ministerial duty, the ordinances themselves are admissible for the purpose of delineating the extent of Defendant’s street and sidewalk system, and its precise boundaries as set forth by its own ordinances and actions in maintaining it.

In her prior video deposition testimony, Ms. Leaders agreed that Defendant was responsible for mowing around the planter, that Defendant had entered a contract with a third-party to mow and maintain the area, that Defendant had removed dead animals from the road and right-of-way, and that the application of the Defendant's ordinances would have required removal of the planter. (*Id.*). In her sworn affidavit filed in support of Defendant's May 12, 2023 motion for summary judgment, Ms. Leaders averred that she is the public works director and former traffic engineer for Defendant, that the information provided in the affidavit is information "readily available to [her] in the ordinary course and scope of [her] employment with the City of Milton as the Public Works Director," and that she is familiar with the Defendant's ordinances. (Def. Mot. Summ. J., Leaders Aff.). Ms. Leaders's affidavit contains several conclusions regarding the application of Defendant's ordinances within the scope of her employment and knowledge as the Defendant's traffic engineer and director of public works. (*Id.*, ¶¶ 12, 13, 18, 19, and 20-30).

When asked on direct examination if he had reviewed guidelines or reference materials about whether the planter would need to be removed, Defendant's expert witness Wayne Smith testified that "the city's ordinance would, in fact, require that to be removed." (TT Day 2, p. 191). In the many examples cited by Mr. Smith of objects that are commonly located in the right of way, none were purely decorative. Instead, all of Mr. Smith's examples of items commonly located in right of ways performed some sort of function: traffic-related road signs, utility poles, water lines, and storm drains. (*Id.*, p. 195-196). On cross examination, Mr. Smith testified that the planter provided no utility to the traveling public nor to Defendant City of Milton, that it was located on the shoulder of the road, in the right of way, and that it needed to be removed. (*Id.*, pp. 207-208). In light of the ten years between the incorporation of Defendant and the date of Mr. Chang's wreck, Defendant's own expert testified that Defendant had more than ample time to inspect and address the planter located in the shoulder. (*Id.*, p. 210).

Applicable Law: Negligence, Nuisance, and Sovereign Immunity

Having previously ruled on the issue of sovereign immunity, once in the December 13, 2022 order denying Defendant's motion for summary judgment, and twice on Defendant's motions for directed verdict made at trial, the Court necessarily incorporates the legal citation and analysis from those prior rulings.

Defendant City of Milton relies heavily on Smith v. City of Roswell, 361 Ga. App. 853 (2021) in its motions for directed verdict made at trial and does so now in its motion for judgment

notwithstanding the verdict. In Smith, the Georgia Court of appeals determined that municipalities do not have a ministerial duty to remove mailboxes that were not in a roadway. Analogizing Smith to the instant civil action, Defendant concludes that it did not have any ministerial duty to remove a decorative stone and concrete planter that it otherwise maintained in a public right-of-way. However, Defendant's conclusion ignores the analysis employed by the Smith Court in determining whether an alleged defect was within the city's street and sidewalk system:

Where a plaintiff alleges that the defective condition which caused injury was located on a part of the city's street and sidewalk system, there must be some evidence that the defect was located in an area accepted by the city, either expressly or by implication, for use as a street or sidewalk before the city can be charged with liability for negligently failing to maintain the area in a reasonably safe condition.

Id., (quoting City of Alpharetta v. Hamby, 352 Ga. App. 511, 515-516 (2019)). Furthermore, defects in the public roads may "include defects outside of the roadway that directly impede travel on a public road" as well as defects located in unpaved right of ways. Id., (quoting Mayor & Aldermen of Savannah v. Herrera, 343 Ga. App. 424, 429 (2017)). Such defects may "include objects adjacent to, and suspended over, the municipality's streets and sidewalks, the presence of which renders the use of these thoroughfares more hazardous." Herrera, *supra*, at 429. Finally, unlike the mailboxes in Smith, which served a specific and important purpose for residents and the United States Postal Service, the undisputed trial testimony of Defendant's own expert established that the decorative planter served no purpose and provided no utility to members of the public or Defendant City of Milton.


Turning to the issue of nuisance, the Georgia Supreme Court has set forth three guidelines for identifying actionable claims for municipal nuisance: "(1) the defect or degree of misfeasance must be to such a degree as would exceed the concept of mere negligence; (2) the act must be of some duration; and (3) the municipality failed to act within a reasonable time after knowledge of the defect or dangerous condition." Gatto v. City of Statesboro, 312 Ga. 164, 171 (2021)(quoting City of Bowman v. Gunnells, 243 Ga. 809, 811 (1979)), internal quotations omitted. The Gatto Court clarified that because "a municipality's liability is grounded in its exercise of some degree of dominion or control over the property giving rise to the alleged nuisance, whether by virtue of ownership or the assumption of responsibility for its maintenance or operation," a municipality is not liable for its "discretionary decision not to act to abate a nuisance caused by a private party and maintained on private property." Id. at 171 and 173.

The civil action at bar is readily distinguishable from the circumstances in Gatto. As discussed *supra*, the Defendant's own expert, Mr. Wayne Smith, opined that in the intervening ten years between the Defendant's incorporation and Joshua Chang's death, that Defendant had ample time to conduct safety inspections and remove the planter otherwise located in the right-of-way. Defendant's 30(b)(6) witness, impeached multiple times in trial, provided contradictory testimony that the planter was in place for ten years prior to the accident, that Defendant maintained the area around the planter, that Defendant was responsible for maintaining the area, and that major repairs, including resurfacing of the roadway, had occurred which should have triggered removal of the planter.

Conclusion

In light of applicable law, the testimony of Defendant's own witnesses at trial, and the verdict rendered by the jury on June 12, 2023, the Court finds that there is sufficient evidence supporting the verdict. As a result of the foregoing, Defendant's motion for judgment notwithstanding the verdict is DENIED.

SO ORDERED this 21st day of September, 2023.


Jane Morrison, Judge
STATE COURT OF FULTON COUNTY

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JOHN CHANG and REBECCA ZHU, as)	
Surviving Parents of Joshua Chang, and)	
REBECCA ZHU as the Personal Representative)	
Of the Estate of Joshua Chang,)	
Plaintiffs,)	
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v.)	CIVIL ACTION FILE
)	NO. 18-EV-004442-E
CITY OF MILTON,)	
Defendant.)	

ORDER DENYING DEFENDANT’S MOTION FOR NEW TRIAL

This action comes before the Court on Defendant City of Milton’s motion for new trial, filed on July 17, 2023.¹ Plaintiff filed a response in opposition on August 21, 2023. The matter came for hearing on August 23, 2023. The Court has previously reviewed this civil action’s background and trial proceedings in its September 21, 2023 order denying Defendant’s motion for judgment notwithstanding the verdict and incorporates that order herein.

Issue

Defendant’s motion for new trial asserts error on the part of the trial court for 1) denying Defendant’s motion for summary judgment; 2) allowing witnesses to testify regarding Defendant’s municipal ordinances establishing and defining Defendant’s roadway and side-walk systems; and 3) failing to excuse *voir dire* panelist Kumar for cause.

Motions for New Trial: Standard of Review

Georgia appellate courts review judgments entered by trial courts under the “any evidence test” and questions of law are reviewed *de novo*. Boston Men’s Health Ctr., Inc. v. Howard, 311 Ga. App. 217, 218 (2011)(citing Horan v. Pirkle, 197 Ga. App. 151 (1990) and Suarez v. Halbert, 246 Ga. App. 822 (2000)). In reviewing records of trial proceedings, Georgia courts cannot “be expected to take pilgrimages into records in search of error without the compass of citation and argument.” Yash Solutions, LLC., v. New York Global Consultants Corp., 352 Ga. App. 127, 137

¹ Filed as a motion for judgment notwithstanding the verdict and for new trial, the Court addressed the issues separately and entered an order denying Defendant’s motion for JNOV on September 21, 2023.

(2019). Instead, the party alleging error bears the burden of showing such error “affirmatively in the record.” *Id.* (quoting, Bennett v. Quick, 305 Ga. App. 415, 416 (2010)).

*The Denial of Defendant’s Motion for Summary Judgment
& the Striking of Panelist Kumar*

The Court entered an order denying Defendant’s motion for summary judgment on the basis of sovereign immunity and the alleged contributory negligence of Plaintiff on December 13, 2022. Finding that the issue presented was worthy of interlocutory review, the Court granted Defendant’s request for a certificate of immediate review. The Court subsequently denied Defendant’s two motions for directed verdict made at trial as well as Defendant’s recent motion for judgment notwithstanding the verdict on this same issue.

The matter having been well-briefed and argued by Counsel at multiple stages of litigation, and well-reviewed and considered by this Court in previous rulings, the Court incorporates its consistent analysis and findings from these previous rulings on this issue. Furthermore, Defendant’s motion for new trial on the basis that the Court should have granted its motion for summary judgment, essentially requests the relief of a new trial by arguing that no trial should have occurred at all. As a result, Defendant’s motion for new trial on the basis that the Court erred in its failure to grant Defendant’s motion for summary judgment, is properly reviewed as a motion for reconsideration, directed verdict, or judgment notwithstanding the verdict. All of which, this Court has previously considered and denied.

Finally, a trial court’s denial of a motion for summary judgment becomes moot after verdict and judgment because Georgia appellate courts review the evidence upon the trial of the civil action. Preferred Women’s Healthcare, LLC., v. Sain, 367 Ga. App. 821, 824 n.7 (2023)(citing Kicklighter v. Woodward, 267 Ga. 157, 162 (1996)). The sufficiency of the evidence to authorize a verdict “must be determined on the basis of that submitted to and considered by the jury, not that which was before the trial court at the time [a party] file[d] her motion for summary judgment.” Cook v. Huff, 274 Ga. 186, 189 (2001).

Though Defendant’s briefing refers to her as “Juror Kumar,” *voir dire* panelist Kumar did not serve as a juror in this civil action. Defendant asserts error in the Court’s failure to strike the *voir dire* panelist for cause. However, because *voir dire* panelist Kumar never served as a juror, Defendant has failed to show the requisite harm required to warrant a new trial. Willis v. State, 304 Ga. 686 (2018).

In light of applicable law and the record as a whole, Defendant’s motion for new trial on the alleged errors regarding summary judgment and *voir dire*, as addressed above, is DENIED.

Witness Testimony Regarding Defendant’s Ordinances

At the outset, Plaintiff did not pursue any claims for negligence *per se* against the Defendant at trial.² Properly framed within the context of Plaintiff’s claims for negligence and nuisance, the Defendant’s ordinances were admissible for multiple purposes.

Defendant’s ordinances established and defined its road and sidewalk system, established clear zones because “[e]xperience has shown that motorists occasionally run off the roadway and providing a traversable recovery area can lessen serious injury,” and included language regarding Defendant’s program for safety inspections of existing installation in the right-of-way. Milton, Georgia Ordinances §§ 48-425(a) – (c); 48-585(b)(2), Aug. 9, 2016. As a result, these ordinances were relevant, though not necessarily determinative, in the jury’s consideration of Plaintiff’s claims for negligence and nuisance. In light of their establishment of “clear zones,” Defendant’s ordinances were also relevant to Defendant’s assertion of contributory negligence on the part of decedent Joshua Chang.

Defendant has not cited to the trial transcript where specific opinion testimony was elicited regarding Defendant’s ordinances. Defendant’s motion for new trial asserts it made a continuing objection regarding the testimony of its 30(b)(6) designee, Ms. Sara Leaders.³ Initially, due to scheduling, Counsel planned to produce the testimony of Ms. Leaders via video deposition and Defense Counsel asked for a continuing objection as to the portions of her videotaped deposition that had previously been designated by them. (TT. Day 2, pp. 87-88).

In response to Defendant’s Counsel’s request for a continuing objection, the Court referred to the previous ruling on Defendant’s motion in limine: “So – but it’s already been ruled on and I’m not going to have to go back into that.” (*Id.*, p. 88). The Court subsequently reviewed the previously ruled-upon motion in limine⁴ and found “Judge [Morrison] has already denied this on [June 8, 2023] ... so that’s on the record now.” (*Id.*, p. 97). Once again, Defense Counsel asked

² Consolidated Pre-Trial Ord., entered May 19, 2023.

³ Def. Mot. New Trial, p. 20, footnote 53.

⁴ Defendant’s motion in limine i sought to exclude witnesses from testifying as to “their own personal interpretation of the [Defendant’s] ordinances. While the Court initially granted this motion in its on May 22, 2023, specifying that no witness shall offer “statutory interpretation,” it reconsidered its position at the start of trial on June 8, 2023, in light of Plaintiffs’ withdrawal of their claim for negligence *per se* and further hearing on the matter.

for a continuing objection, which the Court acknowledged by responding “Okay.” (*Id.*, pp. 97-98). However, the videotaped deposition of Defendant’s 30(b)(6) witness and its associated designations were not used at trial. Instead, Defendant’s 30(b)(6) witness Sara Leaders provided in-person testimony during the trial.

Turning to Defendant’s assertion regarding its continuing objection, it does not appear from the record that the Court granted Defense Counsel’s request for a continuing objection. *Hughes v. State*, 290 Ga. App. 475, 478 (2008)(objections are not continuing unless “counsel specifically requests a continuing objection and the trial court specifically grants a continuing objection”). Even assuming, *in arguendo*, that the Court granted Defendant’s request for a continuing objection, this does not relieve the party alleging error from its burden “to show [such error] affirmatively in the record.” *Yash, supra*. Defendant’s motion for new trial fails to identify the specific witness or specific testimony where a witness “opine[d] about the meaning of an ordinance at trial.”⁵ However, a cursory review of the direct examination of Defendant’s 30(b)(6) witness provides multiple instances where Defense Counsel sought the 30(b)(6) witness’s opinion or interpretation of Defendant’s ordinances which Defendant now asserts was inadmissible:

Q: [L]et’s just kind of go through the code based on your understanding of it. And I just kind of want to familiarize the jurors with generally, how your code works ... How does Section 48-19 relate to your job as you do it?

...

Q: [W]ould you mind reading that?

A: ‘The usable width of shoulder is the actual width that can be used when a driver makes an emergency or parking stop.’

Q: Okay. What – what does that mean?

...

Q: Okay. And could you read that underlined ... passage?

A: “... [I]t’s desirable to provide a graded shoulder wide enough that the vertical elements will be offset a minimum of two feet from the outer edge of the usable shoulder.”

Q: So what does that mean?

TT Day 3, p. 201; 207; 214.

During this direct examination, Defense Counsel specifically questioned Defendant’s 30(b)(6) witness regarding, not just the meaning of the ordinances, but her specific interpretation of Defendant’s ordinances and the industry guidelines they referenced:

⁵ *Id.*, p. 20

Q: Okay. And how does ... the concept of clear zone, as you interpret the guidelines relate to the definition of usable shoulder that we talked about earlier?

...

Q: [L]et me just sort of generally ask you about how you interpret the code section, just generally in terms of some overall concepts.

...

Q: As you interpret the code section, is the city of Milton a person as defined by 584?

...

Q: [I]n your interpretation of the code section, who do you believe that that code section regulates?

...

Q: Do you interpret that to meant that – that the City has to have a 30-day waiting period before it removes something?

TT Day 3, p. p. 216 – 218, 223.

It is well-settled Georgia law that where a party has “induced what he subsequently assigns as error, he will not be heard to complain of it on appeal.” Booker v. Older Americans Council of Middle Ga., Inc., 278 Ga. App. 407, 410 (2006). Having moved to exclude testimony regarding a witness’s interpretation of its ordinances, Defense Counsel elicited this exact opinion testimony on direct examination and now alleges error for the Court’s failure to exclude it. Finally, It is unclear how Defendant could maintain a continuing objection as to the inadmissibility of a witness’s interpretation of Defendant’s ordinances, where Defense Counsel solicited such testimony on direct examination.

It is not surprising that questioning Defendant’s former traffic engineer and current public works director involved the discussion of those ordinances which determined, impacted, and significantly controlled the scope and nature of her work. While Georgia law has consistently held that the legal construction of a statute or law is solely the province of the Court, there is a significant distinction to be made between that and a 30(b)(6) witness’s testimony regarding the impact of ordinances on her employment-related decision making and the entity for which she has been designated as a 30(b)(6) witness. Georgia’s evidence code recognizes that lay witnesses will sometimes be called upon to provide limited opinion testimony⁶ and sets forth the criteria for them to do exactly that.

⁶ While the bulk of cases cited by Defendant address matters regarding zoning ordinances, condemnation proceedings, or attorney’s fees, all of the cases pre-date the significant changes in Georgia evidentiary law brought about by Georgia’s adoption of the “new” evidentiary code in 2013.

Lay witness opinion testimony is permissible where it is:

- 1) Rationally based on the perception of the witness;
- 2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issues; and
- 3) Not based on scientific, technical, or other specialized knowledge within the scope of [O.C.G.A.] § 24-7-702.

O.C.G.A. § 24-7-701(a). Furthermore, otherwise admissible opinion testimony is not "objectionable because it embraces an ultimate issue to be decided by the trier of fact." O.C.G.A. § 24-7-704(a).

Conclusion and Order

Absent the "compass of citation" to the trial record otherwise required by Yash Solutions, *supra*, the Court is not required to sojourn into the record in search of error. A cursory review of the record indicates that though Defendant originally sought to exclude testimony regarding a witness's interpretation of an ordinance, Defendant later chose to elicit this exact same testimony only to allege error in its motion for new trial. In light of applicable law and the record as a whole, Defendant's motion for new trial is DENIED.

SO ORDERED this 26th day of September, 2023.


Jane Morrison, Judge
STATE COURT OF FULTON COUNTY