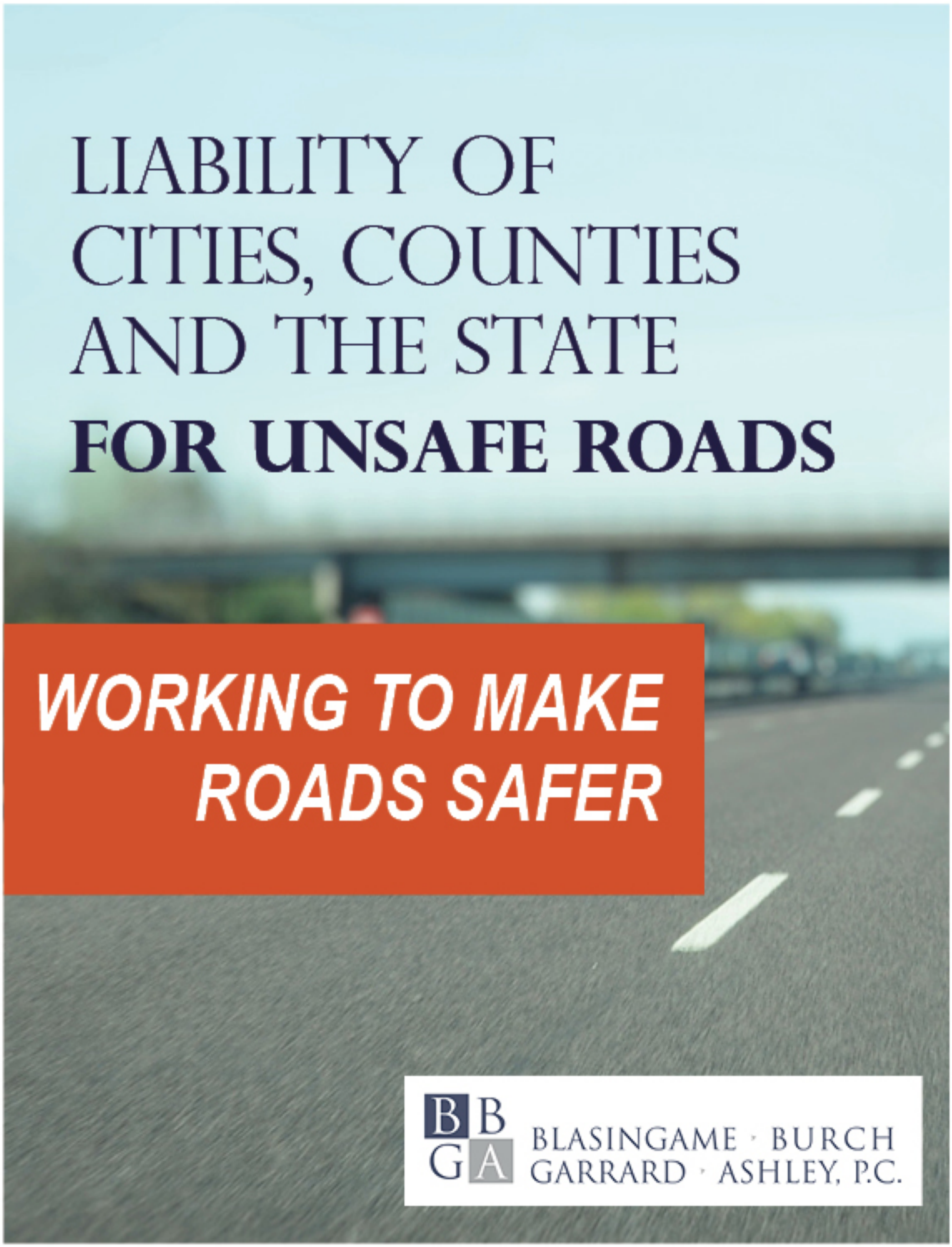

LIABILITY OF CITIES, COUNTIES AND THE STATE **FOR UNSAFE ROADS**

WORKING TO MAKE ROADS SAFER

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Liability of Cities, Counties and The State For Unsafe Roads

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Georgia has over 100,000 miles of public roads, many of them in lousy shape. The Georgia Department of Transportation has estimated the state needs an extra billion dollars **per year** simply to maintain our existing roads.[1] Until our state and local governments get serious about tackling this maintenance backlog, there will be an increasing number of wrecks caused by defective and unsafe roads. This paper discusses WHEN cities, counties and the Georgia Department of Transportation are liable for unsafe roads; discovery and litigation tactics on HOW to prove liability is a topic for another day.

I. What Sort of Defects Are We Talking About?

- Potholes, broken and uneven pavement;
- Steep drop-offs on the shoulder of the road;
- Inadequate sightlines at intersections;
- Improper drainage leading to puddling or standing water in roads;
- Missing stop signs, speed limit signs and other traffic control signs;
- Missing guardrails, barriers and lane dividers;
- Broken / malfunctioning traffic control devices;
- Inadequate lighting;
- Overgrown vegetation blocking stop signs and sight lines;
- Trees or other obstructions too close to the road;

II. Who's The Correct Defendant?

The first step in these cases is figuring out who the correct defendant or defendants are. Most of the time this will be pretty straightforward. If the street is within

[1] The Georgia Legislature recently passed a transportation-funding bill, which is expected to raise over $900 million per year in new revenue for road maintenance.

city limits, it's typically owned and maintained by the city and your case is against the city. If it's not within city limits, it's usually the county and your case is against the county. If it's a state route or interstate it's usually the state and your case is against the Georgia Department of Transportation.

But things can get tricky when you have a state highway or county road that runs through city limits. Cities can be liable for defects on state or county roads within their city limits if they constructed or agreed to maintain the road. O.C.G.A. § 32-4-93(b).

You may also occasionally run into a situation where state routes have been transferred from the state highway system to the county road system or city street system (or vice versa), as in Dept. of Transp. v. Smith, 210 Ga. App. 471 (1993).

If you have any doubt on whose is the proper defendant, proceed as if all are.

III. Other Considerations In Determining The Correct Defendant

If your wreck involves an active construction zone, the general contractors and subcontractors may have liability. Proceed as if they are defendants.

If your wreck involves a recently completed road project, the acceptance doctrine may bar any claims against contractors. However, there are often issues of fact as to when the project was completed and accepted by the DOT, county or city. Johnson v. E.A. Mann & Co., 273 Ga. App. 716 (2005). Proceed as if the contractors are defendants until you are able to determine whether the acceptance doctrine applies.

IV. Ante Litem Notices

Once you've figured out who your defendant is, send out ante litem notices. The deadlines are as follows:

- Cities: 6 months

- Counties: 12 months
- State: 12 months

Be aware of two recent changes to the law governing ante litem notices. First, in 2014 the Legislature amended O.C.G.A. § 36-33-5 to require that the ante litem notices to municipalities state "the specific amount of the monetary damages being sought." Second, in Board of Regents v. Myers, 295 Ga. 843 (2014) the Supreme Court set out new requirements for ante litem requirements for claims against the state. Best practice is to follow the requirements in Myers for ante litem notices against cities and counties as well.

V. Liability of Cities

A city is liable for defects in roads **in its municipal street system** when it has negligently constructed or maintained the road or has actual or constructive notice of the defect. O.C.G.A. § 32-4-93(a).

A city is liable for defects in roads **in the county or state road system** when it constructed or agreed to perform maintenance on the road. O.C.G.A. § 32-4-93(b). Further, cities are also responsible for "non-significant" maintenance of state roads within their city limits. O.C.G.A. § 32-2-2(a)(1). If a city does maintenance work on a state or county road within its city limits, that may defeat summary judgment on whether the city agreed to maintain the road. See City of Atlanta v. Kovalcik, 329 Ga. App. 523 (2014).

Defects include those created by city employees, other people, forces of nature, time and include objects adjacent to and over the street. Roquemore v. City of Forsyth, 274 Ga. App. 420 (2005)

a. Practice Pointers

If your wreck was caused by defective construction or maintenance such as improper drainage or steep drop-offs on the shoulder of the road you'll probably need to get an expert involved to establish a breach of the standard of care.

If your wreck was caused by a road defect such as potholes or missing traffic signs, be prepared to prove that the city has actual or constructive notice of the defect.

VI. Liability of Counties

Cases against counties are much tougher than against cities and the state. A county is generally immune from suit due to sovereign immunity. While county employees are protected by qualified immunity / official immunity, they may be held liable if they negligently perform a ministerial act and have **actual notice** of a road defect. Barnard v. Turner County, 306 Ga. App. 235 (2010)

a. What's a Ministerial Act?

The key to establishing a county employee had a ministerial duty is to prove there is a policy requiring action in a specific situation. If there's no policy or procedure requiring action, there's no ministerial duty and no liability. Whether a duty is ministerial or discretionary is made on a case-by-case basis. McDowell v. Smith, 285 Ga. 592 (2009)

The Court of Appeals has defined ministerial and discretionary acts as follows:

> A ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. A discretionary act calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed. Procedures or instructions adequate to cause an act to become merely ministerial must be so clear, definite and certain as merely

> to require the execution of a relatively simple, specific duty.
>
> Effingham County v. Rhodes, 307 Ga. App. 504 (2010)

b. **Cases Where Court Has Found Violation of Ministerial Duty**

In the following situations, the courts have found that county employees were not entitled to qualified immunity/official immunity because a ministerial duty existed and that a county employee had actual notice of a defect:

- County employee had actual knowledge of flooded road from improperly maintained drainage ditches and failed to warn drivers of hazard. Testimony that departmental policy required fixing drainage problem and warning drivers. Barnard v. Turner County, 306 Ga. App. 235 (2010),
- County had policy to investigate complaints regarding safety or traffic conditions on roads. Factual dispute about actual notice to county employee. Wanless v. Tatum, 244 Ga. App. 882 (2000).
- County policy requiring employees to inspect roads was ministerial duty but no evidence county employee negligently inspected roads. Phillips v. Walls, 242 Ga. App. 309 (2000).
- County employee had actual notice of tree blocking road and county policy required road superintendent to remove trees obstructing county roads or to provide warnings of danger. Lincoln County v. Edmonds, 231 Ga. App. 871 (1998).
- County commission directed county employee to close bridge and bridge was closed in negligent manner. Joyce v. Van Arsdale, 196 Ga. App. 95 (1990).

- County employee had actual knowledge of stop sign down at intersection and policy required employee to replace and maintain stop signs. 2

a. Practice Pointers

Request the county's policies and procedures on road construction, inspection and maintenance. However, many counties do not have written policies. If that's the case, you'll need to establish through deposition testimony or other evidence that the county had a black and white rule that county employees violated or that the county gave an employee a directive – such as closing a bridge or replacing a missing stop sign – that was not followed.

VII. Liability of the State / Georgia Department of Transportation

Cases against the Georgia Department of Transportation are governed by the Georgia Tort Claims Act, g *et seq*. The three most frequent theories of liability for road defect cases under the Tort Claims Act are:

Design standards liability: roads, intersections, etc. that are not built in substantial compliance with generally accepted engineering or design standards in effect at the time of construction; O.C.G.A. § 50-21-24(10);

- Negligent maintenance: for negligently maintaining roads so that they are not in substantial compliance with their original design. mphysical precedent only)
- General road defects: defects such as potholes, broken pavement, trees in the road, missing stop signs, malfunctioning traffic signals, etc that the DOT has actual or constructive notice of;

Frequent defenses to road defect cases under the Tort Claims Act are:

- Inspection powers exception: the DOT has no liability for inspecting or failing to inspect property **it does not own**. O.C.G.A. § 50-21-24(8). The appellate courts have found the DOT not liable under the inspection exception as follows:
    - No liability for failing to inspect construction work during **active** paving project. Dept. of Transp. v. Wyche, 2015 WL 3895645 (2015).
    - No liability for on-site monitoring of construction operations during **active** construction project. Dept. of Transp. v. Jarvie, 329 Ga. App. 681 (2014)
    - However, the inspection powers exception did not apply in a case where the State owned the roadway and the construction project had been completed. Dept. of Transp. v. Kovalcik, 328 Ga. App. 185 (2014)
- Licensing powers exception: the DOT has no liability for issuing any permit, certificate, approval, order, etc. O.C.G.A. § 50-21-24(9). The appellate courts have found the DOT not liable under the licensing powers exception as follows:
    - Authorizing a county's request to install traffic light. Murray v. Dept. of Transp., 284 Ga. App. 263, 266 (2007);
    - Refusing to issue the permit for a traffic signal in a timely manner. Dept. of Transp. v. Cox, 246 Ga. App. 221 (2000);
    - Approval of contractor's constructions plans. Dept. of Transp. v. Kovalcik, 328 Ga. App. 185 (2014);
    - Approval of traffic control plans for construction project. Dept. of Transp. v. Owens, 330 Ga. App. 123 (2014);
- No duty to upgrade: the DOT has no liability for failing to upgrade or improve a road or intersection to comply with current design standards. Dept. of Transp. v.

Crooms, 316 Ga. App. 536 (2012)(physical precedent only); Daniels v. Dept. of Transp., 222 Ga. App. 237 (1996)(physical precedent only)

a. Practice Pointers

Design standards cases are essentially professional malpractice cases. You'll need an expert to prove that the road or intersection did not substantially comply with engineering and design standards in effect at the time it was built. So if the road was built in 1960, you have to prove it did not substantially comply with design standards in effect in 1960. If the intersection was built in 1995, you have to prove it did not substantially comply with design standards in effect in 1995.

While the DOT has no duty to upgrade a road or intersection to comply with current design standards, if it does so the upgrade must substantially comply with generally accepted standards in effect at the time. Crooms, Daniels. Note that "moderate" restriping, widening and repaving of an existing road does not require updating other road design issues such as adequate sight distance or shoulder slope – though the restriping, widening and repaving must be substantially in compliance with existing design standards. However, when an upgrade alters the "geometrics" of a road and substantially affects other road design issues the entire road upgrade must be built in substantial compliance with existing design standards. Steele v. Dept. of Transp., 271 Ga. App. 374 (2005).

If your wreck was caused by a failure of the DOT to maintain the road in substantial compliance with the original design – such as the road wearing down over time and affecting the drainage - you'll likely need an expert.

If your wreck was caused by a road defect like a pothole, missing stop sign or malfunctioning traffic signal, you'll need to prove actual or constructive notice of the defect. Note that under O.C.G.A. § 50-21-24(8) the DOT can be held liable for failure to inspect property **that it owns**, so dig into the DOT's inspection procedures and whether they should have discovered the defect.

VIII. Nuisance

Nuisance is another legal theory that should be evaluated when looking at a road defect case. While a city may be held liable for personal injuries caused by a nuisance,[2] a county may not.[3] The Georgia Supreme Court has set out three factors to determine what constitutes a 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 the maintenance of the act or defect must be continuous or regularly repetitious;"
3. "the city must have failed to act within a reasonable time after knowledge of the defect or dangerous condition."

City of Bowman v. Gunnells, 243 Ga. 809 (1979); Thompson v. City of Fitzgerald, 248 Ga. App. 725 (2001).

If you can prove that your wreck was caused by a hazard that had been there for some time and the city knew about it, you should get your nuisance claim to the jury.

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[2] City of Social Circle v. Sims, 228 Ga. App. 582 (1997); Riggins v. City of St. Mary's, 264 Ga. App. 95 (2003).

[3] Canfield v. Cook County, 213 Ga. App. 625 (1994); Bailey v. Annistown Road Baptist Church, Inc., 301 Ga. App. 677 (2009) However, counties may be liable for a nuisance when it amounts to a taking of private property. Id.

The appellate courts have found nuisances in the following situations:

- A traffic light at an intersection that had not been working for two weeks. Town of Fort Oglethorpe v. Phillips, 224 Ga. 834 (1968);
- Stop sign at intersection that had been missing for a week. Carter v. Mayor etc. of Savannah, 200 Ga. App. 263 (1991)
- Power pole located too close to street interfering with driving on street. Pole had been located there for many years. Kicklighter v. Savannah Transit Authority, 167 Ga. App. 528 (1983);
- A tree protruding into street. Mayor etc. of Savannah v. AMF, Inc., 164 Ga. App. 122 (1982);

IX. Conclusion

These are tough but interesting cases to litigate and try. Careful case selection is the key to success, as these cases are motion-heavy and the defense will make you beat a motion to dismiss or a motion for summary judgment in just about every case. Done right, you'll get a satisfying result for your client AND help make our roads and streets safer for everyone.