IN THE COURT OF APPEALS OF GEORGIA

Case No. A26A0421

LANEA SCOTT,

Appellant,

v.

EVANS DELIVERY COMPANY, INC., and MARVIN COLBERT,

Appellees.

BRIEF OF APPELLEES

P. Michael Freed, Esq.
Jennifer C. Adair, Esq.
FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway, Suite 1600
Atlanta, Georgia 30339
Phone: (770) 818-0000
michael.freed@fmglaw.com
jadair@fmglaw.com

Counsel for Appellees

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INTRODUCTION

Alexander Scott died when he drove his tractor-trailer into the rear of Marvin Colbert's tractor-trailer as it sat disabled in the emergency lane along Interstate 16. Mr. Colbert warned Mr. Scott and others of his truck's presence, activating his emergency flashers and placing three emergency triangles behind his vehicle. His efforts proved effective for nearly nine hours, during which every other driver who passed avoided Colbert's truck without incident.

Lanea Scott, Mr. Scott's surviving spouse, admitted that Colbert's truck was visible to oncoming traffic. Her expert witnesses agreed, testifying that Colbert's vehicle could have been seen "for a good ways," allowing Mr. Scott to perceive and react to it.

Yet Mr. Scott did *nothing* to avoid the collision. He never applied his brakes or decelerated, resulting in him striking Colbert's truck at 70 mph. He also made no effort to steer around Colbert's truck, despite no evidence that anything prevented him from doing so. Instead, he veered to the right up to eight inches over the fog line just before hitting Colbert's trailer. Ms. Scott, through counsel, conceded each of those facts. And again, her experts agreed. They testified that Mr. Scott could

have avoided the collision by steering to the left or simply maintaining his lane, even if the back left corner of Colbert's trailer protruded two feet into the lane.

A GPS device mounted in Mr. Scott's truck captured video of the accident. It reveals that Colbert's emergency flashers were visible to Mr. Scott for up to 14 seconds before the collision. It also confirms that Mr. Scott did not brake, decelerate, or attempt to maneuver his truck around Colbert's. It also shows that Mr. Scott drifted to the right toward Colbert's trailer moments before hitting it.

On these undisputed facts and others, the trial court entered summary judgment for Appellees. It held that Ms. Scott's claims were barred by their avoidable consequences defense because the record showed that Mr. Scott failed to use ordinary care to avoid the collision as a matter of law. That holds even if Appellees' negligence caused Colbert's truck to break down and to be positioned along the side of the road.

Accordingly, the trial court accepted Ms. Scott's allegations; most notably, that Colbert's trailer protruded at least two feet into the lane of travel, his emergency triangles were not properly placed, that Evans

Delivery Company failed to adequately train, monitor, or supervise Colbert or its dispatchers, and that Evans neglected to ensure the truck was in a safe working condition. Those allegations, even if true, do not conflict with the trial court's application of the avoidable consequences defense because that defense focuses on the plaintiff's conduct, not the defendants'. It presumes the defendants were negligent in creating the danger but examines whether the plaintiff used ordinary care to discover and avoid it.

By the same token, those allegations of negligence cannot trigger the willful and wanton exception to the defense of avoidable consequences. Ms. Scott points to no evidence that Appellees intended to harm Mr. Scott. The record is also devoid of any evidence rising to the level of wantonness, a slightly lower level of culpability than willfulness.

No reasonable juror could view the totality of the evidence and conclude that Mr. Scott could not have avoided the collision by simply using ordinary care. The video is damning. It, along with Ms. Scott's admissions and her experts' testimony, eliminates any dispute that Colbert's truck was visible in time for Mr. Scott to evade it. That same

evidence shows without contradiction that he made no effort to do so. The avoidable consequences doctrine thus bars Ms. Scott's claims as a matter of law.

STATEMENT OF THE CASE

I. Mr. Scott failed to avoid colliding with Colbert's truck.

Colbert's tractor lost power while driving eastbound in the left-hand lane of Interstate 16 around 8:00 p.m. on September 13, 2022. (V4-1000:25-1001:18; V41002:23-1003:2; V4-1471.) Colbert realized the truck was malfunctioning when, without warning, it decelerated, the check engine light came on, and the engine shut off. (V4-998:23-999:13; V4-1000:25-1001:18.) He reacted by turning on his emergency flashers and steering his tractor-trailer off the Interstate. (V4-1003:3-10; V4-1005:14-17.) The truck came to a stop in the emergency lane along the right-hand side of the road.[1] (V4-1477.) Colbert then exited his truck and placed three emergency warning triangles behind the trailer to alert other drivers of the vehicle's presence. (V4-965:5-966:8; V4-968:11-969:10; V4-1008:24-1009:1; V4-1538:91593:12; V4-1477-78.) His

[1] The parties dispute whether the back left corner of the trailer was completely to the right of the fog line. Appellees contend it was; Ms. Scott asserts otherwise.

emergency flashers remained on for the entire time the truck was stalled in the emergency lane. (V4-1036:2-4.)

Colbert attempted to assess and fix the tractor. He called his friend and business partner, Willie Johnson, to help.[2] Despite their efforts, the two were unable to restart the tractor, fix the problem, secure a mobile mechanic, or locate a wrecker service to tow the truck. (V4-1014:19-1015:7; V4-1017:11-15; V4-1028:12-1030:19; V4-1052:21-1055:10.) Johnson believed the fuel filter needed replacing and identified the part at a nearby Love's service center, but the parts shop was closed for the evening. (V4-1054:10-25.) Johnson eventually drove home, planning to return to Love's when the parts shop opened the next morning to try again to fix the tractor. (V4-1054:23-1055:4.) With that plan in place, Colbert retired to the sleeper cab for the night.

Nearly nine hours passed after Colbert's truck came to rest on the side of the road without incident. Every vehicle that passed by on the Interstate during that time succeeded in avoiding a collision with Colbert's truck. The record contains no evidence that anyone expressed

[2] Johnson was the sole member of Lizard Licc, LLC, which held title to the tractor Colbert was driving . (V4-1197:5-12; V4-1191:13-1192:5.)

any concern about Colbert's vehicle being in the emergency lane; no law enforcement officer stopped to inquire, assist, or instruct Colbert to move the truck, and no other driver called 9-1-1 to complain.

Mr. Scott was the only exception. Driving eastbound on Interstate 16, he approached Colbert's truck a few minutes before 5:00 a.m. the next morning. (V13 (Dashcam video).) Unlike every other driver who passed, Mr. Scott ran into the left rear corner of Colbert's trailer. (V4-1447.) His truck caught fire, and he died on the scene. (V4-1476-78.)

Ms. Scott admitted below that (1) Colbert's truck was visible, (2) there is no evidence that Mr. Scott applied his brakes or decreased his speed before the collision, (3) there is no evidence that Mr. Scott attempted to steer his truck to the left to avoid Colbert's trailer, and (4) Mr. Scott's tractor was up to eight inches over the fog line when the crash occurred. (V12-44:18-47:20.[3])

Video evidence from a dashcam in Mr. Scott's truck confirms those facts. It shows that Colbert's emergency flashers were visible for up to

[3] Citations to Volume 12 refer to the page number of the transcript.

14 seconds before the collision. (V13-4:56:17-4:56-31.[4]) The video's speedometer reveals that Mr. Scott was traveling between 67 and 76 mph in the minutes leading up to the crash, and 70 mph at the time of impact. (V13-4:54:44-4:56-31.) It also exposes that Mr. Scott drifted to the right toward Colbert's truck moments before hitting it. (V13-4:56:23-4:56-31.)

The video adds more. It shows Mr. Scott's truck drifting back and forth multiple times as he neared Colbert. (V13-4:54:44-4:56-31.) It provides no evidence that anything prevented Mr. Scott from steering to the left to avoid the collision. (*Id.*) In fact, it reveals that he merely needed to stay in his lane.

Investigators reached the same conclusion. Trooper Michael Talbott, the Georgia State Patrol's lead investigator, found that Mr. Scott violated Georgia law by failing to maintain his lane. (V4-1477; V4-1540:14-19; V4-1541:24-1542:3.) His report placed no fault on Colbert. (V4-1475-78.)

[4] Citations to the dashcam video refer to the timestamp near the bottom of the screen.

Even Ms. Scott's own experts believe that Mr. Scott could have avoided the collision. Thomas Langley testified that Mr. Scott could have moved his vehicle to the left and avoided colliding with Mr. Colbert's trailer—without leaving the right-hand lane—*even if the trailer was two feet into Scott's lane of travel.* (V4:1647:6-12.) Roger Allen agreed. He stated that Mr. Scott could have avoided the accident by maintaining his lane of travel. (V4-2402:7-18; V4-2421:2-8.)

Langley added that Colbert's vehicle would have been visible to Mr. Scott "for a good ways" and "was not something, you know, he just drove up on in the dark." (V4-1665:7-14.) Tommy Sturdivan likewise opined that the three emergency triangles and Colbert's emergency flashers would have been visible to Mr. Scott. (V4-1932:14-1934:18.) Dennis Seal opined that the triangles would have been visible 912 feet from Colbert's trailer even if they were incorrectly placed. (V9-5587:12-17.) As a result, her own expert affirmed that *Mr. Scott had the opportunity to perceive and react to Colbert's vehicle.* (V4-1748:2-7.)

II. Evans hired Colbert after conducting the required background check and confirming the DOT inspection.[5]

Colbert bought the tractor through an auction in Louisiana in October 2021. (V4-1032:25; V4-1167.) He had the vehicle undergo extensive service before putting it on the road. (V4-1169-70.) Lizard Licc then hired Love's Truck and Tire Care to perform a federally mandated inspection (the "DOT inspection"). (V4-1297-99.) The tractor, including its fuel system, passed the DOT inspection on July 18, 2022, which Love's certified was conducted in accordance with 49 C.F.R. § 396.[6] (*Id.*) Even still, Lizard Licc had additional service performed. (V4-1033:21-1034:4.).

With the servicing and inspection completed, Mr. Colbert applied to drive for Evans in early August 2022. (V4-1301-21.) Evans conducted a background check on Mr. Colbert, consistent with its standard

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[5] The following facts, though irrelevant to the avoidance of consequences issue, are provided to address the Ms. Scott's argument that the defendants acted wantonly.

[6] Ms. Scott labels the DOT inspection Love's performed as "superficial." (Appellant's Br. at 4.) Yet her experts admitted that Love's is one of the industry leaders in performing those inspections. (V4-2387:17-25.) Ms. Scott points to no evidence showing that the inspection failed to satisfy federal regulations.

practice. (V4-1331:1-6, 13:5-5.) That process included running a PSP report, which provides a driver's 5-year crash and 3-year roadside impact history. (*Id.*) The report revealed that Colbert was involved in an accident while driving for Dart Transit Company on October 23, 2020. (V4-1450.) The report stated that the "FMCSA reviewed this crash and determined that it was not preventable." (*Id.*) A preventable accident is one "that could have been averted but for an act, or failure to act, by the motor carrier or the driver." 49 C.F.R. § 385.3. Evans hired Colbert after verifying that his prior accident was deemed "not preventable." (V4-1339:16-23.)

III. The trial court held that the avoidable consequences defense bars Ms. Scott's claims.

Appellees moved for summary judgment, asserting that the avoidable consequences defense bars each of Ms. Scott's claims. The trial court granted their motion. (V10-6416-36.)

The court accepted Ms. Scott's allegations of negligence as true for the purposes of the motion. (V10-6422; V10-6431.) It found that Colbert's trailer protruded two feet into the right lane of travel and that Colbert failed to place his emergency triangles in the right place. (*Id.*)

Yet, focusing on Mr. Scott's conduct as the avoidable consequences doctrine requires, it found that the video establishes that Colbert's trailer was visible for more than 10 seconds before the collision, and Mr. Scott did nothing to avoid it. (V10-6426.) Nothing obstructed Mr. Scott's view of Colbert's emergency flashers and triangles, which "served as a warning" to him. (V10-6431.) Nor was there any evidence that traffic prevented him from changing lanes or moving to the left. (V10-6432.) The court relied on testimony from Ms. Scott's experts confirming that Colbert's truck was visible and Mr. Scott could have avoided it. (V10-6427; V10-6432.)

Mr. Scott was required to use ordinary care to avoid Colbert's truck; he was "not 'entitled to drive blindly or recklessly . . . without regard to the conditions and consequences.'" (V10-6431) (quoting *Duckwitz v. Manor*, 238 Ga. App. 545, 546 (1999). Even if Appellees were negligent, their "failures did not absolve Alex Scott from his obligations to exert care to avoid the collision." (V10-6433.) His failure to do so barred his wife's claims. (*Id.*)

Finally, the court rejected Ms. Scott's argument that the willful and wanton conduct exception applied. (V10-6433-34.) It recognized her

failure to provide any authority holding that her allegations, even if true, show that Appellees' conduct "was so reckless or so charged with indifference to the consequences as to be the equivalent in spirit to actual intent." (V10-6433) (quoting *Weston v. Dun Transp.*, 304 Ga. App. 84, 89 (2010)).

ARGUMENT

I. The summary judgment record mandated judgment as a matter of law on Appellees' avoidable consequences defense.

A. Mr. Scott could have avoided the collision by using ordinary care.

Georgia law has long required a plaintiff to exercise ordinary care for his own safety. *See Georgia Power Co. v. Maxwell*, 52, Ga. App. 430 (1936); *accord Weston*, 304 Ga. App. at 87. "He must make use of all his senses in a reasonable measure amounting to ordinary care in discovering and avoiding those things that might cause hurt to him." *Lowery's Tavern, Inc. v. Dudukovich*, 234 Ga. App. 687, 690 (1998). The avoidable consequence defense stems from these requirements. *See Weston*, 304 Ga. App. at 87. It provides an absolute defense that bars a plaintiff's recovery if he could have avoided the consequences of any negligence on the defendants' part by exercising ordinary care. *Id.* The

defense applies not only when the plaintiff subjectively knew of the danger, but also when "in the exercise of ordinary care he should have learned of it." *Lowery's Tavern, Inc.*, 234 Ga. App. at 690. Although usually reserved for the jury, a court may adjudicate the avoidable consequences defense on summary judgment when the defendants satisfy their burden of showing that the plaintiff's "knowledge of the risk is clear and palpable," and "that by ordinary care [he] could have avoided the consequences to himself [ ] caused by the defendant's negligence." *Weston*, 304 Ga. App. at 87-88.

Closely related is the rule that "[a]ll drivers have a duty to exercise ordinary care with regard to other drivers on or users of the roadway." *Jones v. Holland*, 333 Ga. App. 507, 509 (2015). That duty includes the specific obligation to keep a proper and diligent lookout for potential hazards. *Id.*; *Brown v. Shiver*, 183 Ga. App. 207, 208 (1987); *Findlay v. Griffin*, 225 Ga. App. 475, 476 (1997). "A driver has no right to assume that the road ahead of him is clear of traffic" or obstructions. *Jones*, 333 Ga. App. at 509-10; *Rogers v. Johnson*, 94 Ga. App. 666, 679 (1956); *Findlay*, 225 Ga. App. at 476. Even if an obstruction is unlawful, an oncoming driver "must employ the care of an ordinarily prudent

person exercised under similar circumstances" to discover and avoid colliding with it. *Rogers*, 94 Ga. App. at 679; *see also Brown*, 183 Ga. App. at 208 (affirming summary judgment for defendant where plaintiff rear-ended defendant's car that stalled in the middle of the roadway only ten to fourteen minutes earlier, even though the parties disputed whether defendant turned on his emergency flashers); *Wallace v. Yarbrough*, 155 Ga. App. 184, 185 (1980) (physical precedent only) (reversing denial of plaintiff's motion for judgment notwithstanding the verdict against defendant who rear-ended her car); *Drake v. Page*, 195 Ga. App. 226, 227-28 (1990) (same).

Mr. Scott failed to fulfill these duties.

First, the undisputed evidence shows that he would have realized any danger presented had he used ordinary care. Ms. Scott admitted that Colbert's truck was visible. She also conceded that his emergency flashers were on and could be seen. And while she quibbles with their placement, she acknowledges that Colbert's emergency triangles were placed behind his trailer, and her expert admitted that they would have been visible from 912 feet from his trailer. (V9-5587:12-17.)

The video confirms those facts. It reveals that Colbert's flashers could be seen for up to 14 seconds before the collision. (V13-4:56:17-4:56:31.) It also shows that the road approaching Colbert's truck was straight and that nothing obstructed Mr. Scott's view during those 14 seconds. (*Id.*) These facts forced Ms. Scott's experts to agree that Colbert's truck was visible; it could be seen "for a good ways," allowing Mr. Scott to perceive and react to it. (V4-1665:7-13; V4: 1748:2-9.)

Second, despite those undisputed facts, the record shows that Mr. Scott did *nothing* to avoid hitting Colbert's trailer. Again, Ms. Scott's admissions are critical. She conceded that the record contains no evidence that Mr. Scott applied his brakes, decelerated, or attempted to steer away from Colbert's truck, even though nothing shows he was prevented from doing so. In fact, based on Langley's testimony, she admitted Mr. Scott's truck veered up to eight inches over the fog line. (V4-1649:5-14) ("So I think [right front corner is] about eight inches to the right of the white.") That means that Mr. Scott steered *into* Colbert's trailer. His dashcam video shows that to be true. (V13-4:56:17-4:56:31.)

The avoidable consequences defense presents one fundamental question: Could Mr. Scott have avoided colliding with Colbert's truck by exercising ordinary care? The undisputed evidence says "yes." As proof, every other driver on Interstate 16 who approached Colbert's truck for nearly nine hours was able to avoid it. Nothing distinguishes Colbert from any of them; they confronted the same truck, stopped in the same place (trailer protruding into the lane or not), with the same emergency triangles placed in the same location, and the same emergency flashers. There is no reason why they were able to avoid the truck, but Mr. Scott was not.

Here, Appellees made a prima facie showing that Mr. Scott could have avoided the collision by using ordinary care for his own safety. *See Weston*, 304 Ga. App. at 84 (noting that a defendant may prevail on summary judgment by establishing "a prima facie affirmative defense."). Ms. Scott does not contend otherwise. So the issue becomes whether she satisfied her burden in response. She did not.

B. Ms. Scott presented no evidence that created a genuine issue of fact about whether Mr. Scott could have avoided the collision through the exercise of reasonable care.

Arguing that an issue should be decided by a jury, without more, is not enough to overcome summary judgment. *See City of Brunswick v. Smith*, 350 Ga. App. 501, 502 (2019). Neither is evidence "based on speculation or conjecture." *Cowart v. Widener*, 287 Ga. 622, 633 (2010). Instead, the law requires "concrete evidence from which a reasonable juror could return a verdict in [her] favor." *City of Brunswick*, 350 Ga. App. at 502. In response to Appellees' avoidable consequences defense, Ms. Scott's evidence must create a genuine issue of material fact as to an element of that defense. *Weston*, 304 Ga. App. at 85. And the evidence must be admissible. *Barich v. Cracker Barrel Old Country Store, Inc.*, 244 Ga. App. 550, 551 (2000). Her failure to meet that burden warranted summary judgment for Appellees. *See Weston*, 304 Ga. App. at 85.

1. Ms. Scott failed to satisfy her burden in the trial court.

Ms. Scott neglected to present the concrete, admissible evidence needed to overcome summary judgment on the avoidable consequences defense. Her response reveals that shortcoming.

Ms. Scott did not file any statement of material facts she contended were in dispute as required by Uniform Superior Court Rule 6.5. The statement of facts in her response brief focused on Appellees' conduct. (V10-5829-43.) The only exceptions were her citations to her experts' opinions that Colbert's placement of the emergency triangles did not strictly comply with federal regulations, that the location of the truck "deprived" Mr. Scott of the benefit of the rumble strips,[7] and that Colbert's emergency flashers were not synchronized. (V10-5842-43.)

Ms. Scott failed again in the argument section of her response. She disputed Appellees' argument that the fact that every other driver avoided hitting Colbert's truck for nearly nine hours supports the notion that he too could have done so. (V10-5844-45.) She also repeated her

[7] Mr. Scott would only have driven over the rumble strips if he was over the fog line. (V8-4253:3-5; V8-4253:21-24.)

assertions that the emergency triangles were misplaced and the emergency flashers were not working properly. (V10-5846) Ms. Scott added a vague argument that the dash cam video required "contextual interpretation" but offered no evidence in support. (*Id.*) She presented no additional evidence at the hearing. (V12-38-61.)

And Ms. Scott admitted at the hearing that Coblert's truck was visible even if those critiques about the triangles and emergency lights were true. (V12-44:18-47:20.) And to the extent her complaints constituted a factual dispute, the trial court accepted her version and gave it the inference the law requires. (V10-6422, 6431). So at the end of the day, the record reveals that Ms. Scott failed to identify any evidence in the trial court that precluded summary judgment on Mr. Scott's ability to perceive and avoid Colbert's truck. As a result, "summary judgment was proper in this case because the plaintiff failed to meet his burden of putting forth any evidence to show that there remained a genuine issue of material fact." *Hill v. MM Gas & Food Mart, Inc.*, 351 Ga. App. 708, 712-13 (2019).

2. She fails again on appeal.

The crux of her argument is that a jury must determine whether Mr. Scott could have avoided the collision and sort out the parties' relative fault. But that is not evidence, and it is not enough to defeat summary judgment. *See City of Brunswick*, 350 Ga. App. at 502 (highlighting that a plaintiff may not "defeat a defendant's properly supported motion for summary judgment without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of wrongdoing.") (quoting *City of Macon v. Brown*, 343 Ga. App. 262, 263 (2017)).

Ms. Scott also argues that the trial court improperly found that Mr. Scott should have discovered the presence of Colbert's truck. (Appellant's Br. at 30-38.) Her argument ignores her admission that the truck was visible. It also disregards her experts' testimony that Mr. Scott had the opportunity to perceive and react to Colbert's truck, which was "visible for a good ways" and "not something . . . he just drove up on in the dark." (V4:1748:2-9; V4-1665:7-14.) Lest there be any doubt, the

video confirms that Colbert's truck was visible for up to 14 seconds. (V13-4:56:17-4:56-31.)

Boxed in by that evidence, Ms. Scott attempts to distinguish the unquestioned visibility of Colbert's truck from Mr. Scott's ability to appreciate the specific potential danger it presented. That too falls short.

Colbert's truck was visible because its emergency flashers were blinking. Emergency flashers signal to other drivers that something unusual may be happening. They warn of potential danger and communicate to other drivers the need to be alert. (V9-5605:2-10; V4-4284:7-19.) They may indicate that the vehicle is traveling slowly, has come to a complete stop, is in the travel lane, out of the travel lane, or somewhere in between. Either way, they signal the potential need to stop, slow down, or change course. There is no dispute that Mr. Scott did not do any of those things. In any event, the emergency flashers that made Colbert's truck visible also provided Mr. Scott a warning of potential danger that he should have appreciated and reacted to. *See First Tennessee Bank, N.A. v. Wilson Freight Lines*, Inc., 907 F.2d 1122, 1125 (11th Cir. 1990) (recognizing that emergency flashers "enable[ ]

approaching motorists not merely to *view* the stalled truck, but to appreciate the abnormality of its position.") (emphasis in original). That fact renders the distinction Ms. Scott urges a red herring.

Under Ms. Scott's theory, summary judgment would be unavailable absent some specific warning that would cause Mr. Scott to know that Colbert's truck was stopped and might have been protruding into the lane.[8] The law does not require that level of specificity. Nor does it limit a driver's obligation to be alert to situations in which they subjectively know the exact nature of the danger they are confronting.

Simply put, no reasonable juror could view the video, Ms. Scott's admissions, her expert's concessions, and the other undisputed facts, and conclude that Mr. Scott could not have appreciated a potential

[8] If driving 70 mph, Mr. Scott would have traveled approximately 1,473 feet (479 yards) during those 14 seconds. That is nearly five times the 100 yards at which the truck in *Pittman v. Staples*, 95 Ga. App. 187 (1957) first became visible to the decedent driver. Colbert's unquestioned use of his emergency flashers and triangles also distinguishes this case from *First Tennessee Bank, N.A.*, 907 F.2d at 1122. The truck driver there failed to use his emergency triangles while his vehicle was stopped in the emergency lane. *Id.* at 1124. And because the fact was disputed, the court assumed, for the purposes of summary judgment, that he did not turn on his emergency flashers. *Id.* The opposite facts are undisputed here.

danger that required his attention. Nothing she presented in the trial court or her appellate brief changes that outcome.

3. Ms. Scott makes no effort to show that Mr. Scott could not have avoided the collision.

The avoidable consequences defense contains two components: (1) the plaintiff knew of the danger or should have discovered it by exercising ordinary care, and (2) he failed to use ordinary care to avoid harming himself. *See Lowery's Tavern, Inc.*, 234 Ga. App. at 690. Ms. Scott focuses entirely on the first. She cites no evidence that could allow a jury to find that he exercised ordinary care to avoid the collision. None exists.

C. Ms. Scott misapplies O.C.G.A. § 51-11-7.

Ms. Scott miscasts this case as being about comparative fault only. She reasons that the evidence construed in her favor could allow a jury to find Colbert or Evans partially responsible even if Mr. Scott bears some blame. Carried to its logical conclusion, her position essentially eliminates any defendant's ability to obtain summary judgment on the avoidable consequences defense.

That is because the avoidable consequences defense assumes some negligence on the defendant's part. The statute's first sentence shows

that: "If the plaintiff by ordinary care could have avoided the consequences to himself *caused by the defendant's negligence*, he is not entitled to recover." O.C.G.A. § 51-11-7 (emphasis added). So *every* plaintiff facing the defense can point to allegations of the defendant's negligence.

The avoidable consequences defense focuses on the *plaintiff's* conduct, not the defendant's; even if the defendant's negligence created the danger, the plaintiff cannot recover if he could have avoided that danger by exercising reasonable care. Stated differently, the defendant's alleged negligence does not automatically convert the case into one about comparative fault if the plaintiff could have avoided the harm. Comparative fault applies only when the evidence falls short of that showing. *See* O.C.G.A. § 51-1-7 ("*In other cases* the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained.") (emphasis added). So the defendant's conduct is not relevant unless the plaintiff first clears the hurdle of showing they could not have avoided the danger.

Ms. Scott takes the opposite approach. She brushes aside the undisputed evidence showing that Mr. Scott could have seen Colbert's

truck and avoided it by using ordinary care. She never confronts her admissions that Colbert's truck was visible, that Mr. Scott did not apply his brakes or decelerate, that he did not steer away from Colbert's trailer even though nothing suggests he could not, and that his truck was up to eight inches over the fog line at impact. She also ignores her experts' conclusions that Mr. Scott could have seen Colbert's truck "for a good ways," and could have avoided it even if the trailer was two feet into the lane of travel.

Instead, Ms. Scott seeks to make the issue here about Appellees' conduct. That's not how the avoidable consequences doctrine works. Appellees' conduct has no bearing on Mr. Scott's failure to avoid this tragic accident.

Finally, precedent dispels any notion that the avoidable consequences defense cannot be decided on summary judgment when warranted. *Weston*, 304 Ga. App. 84; *Lowery's Tavern, Inc.*, 234 Ga. App. 687; *Ball v. CSX Intermodal Terminals, Inc.*, -- S.E.2d --, 2025 WL 3000965 (Oct. 27, 2025); *Holcomb v. Norfolk Southern Ry. Co.*, 295 Ga. App. 821 (2009); *Ohl v. CSX Transp., Inc.*, 625 F. Supp. 3d 1319, 1334 (N.D. Ga. 2022).

Weston provides an example. There, an eastbound driver stopped at an intersection and attempted a left-hand turn. *Weston*, 304 Ga. App. at 85. A stalled front-end loader was sitting in the westbound lane, blocking the driver's view of approaching southbound traffic, which had the right of way. *Id.* Even so, the driver entered the intersection, where she was struck by a southbound tractor-trailer, killing her instantly. *Id.*

This Court affirmed summary judgment for the defendants under the avoidance of consequences doctrine. *Id.* at 87-89. It found that the driver knew the danger because, in part, she could see the stalled front-end loader, and she knew it blocked her view of southbound traffic. *Id.* at 88. She entered the intersection despite knowing the risk and "suffered the tragic consequences of her misjudgment." *Id.* So "the evidence established as a matter of law that the decedent in the exercise of ordinary care could have avoided the consequences to herself" caused by any of the defendants' negligence. *Id.*

Reed v. Carolina Cas. Ins. Co., 327 Ga. App. 130 (2014) does not mandate a different result here. There, a tractor-trailer driver voluntarily parked his vehicle in the emergency lane along Interstate 285 just west of the Interstate 75 entrance ramp. *Id.* at 130. An hour

later, a drunk driver attempted to negotiate the curve of the ramp from I-75 onto I-285 at a speed too fast for the rainy conditions. *Id.* at 130-31. The driver lost control of his vehicle and collided with the rear of the tractor-trailer. *Id.* at 130-31. The trial court entered summary judgment for the defendant, but this Court reversed. *Id.* at 130. The deciding factor was the absence of evidence that the drunk driver was or should have been aware of the truck's presence on the side of the road. *Id.* at 136.

The dashcam video, Ms. Scott's admissions, and her experts' testimony provide the piece missing in *Reed*. In that way, *Reed* supports the trial court's holding that Appellees were entitled to judgment as a matter of law.

D. The trial court gave due weight to the dashcam video.

1. Ms. Scott waived her new attacks on the video.

Ms. Scott mostly ignored the dashcam video in her response to Appellees' motion for summary judgment. She cited it several times when it supported her allegations (V10-5827, 5842-43, 5846), but otherwise failed to confront the many ways it revealed that Mr. Scott could have avoided the collision by exercising ordinary care for his own safety. She did not argue that the video's quality or positioning

rendered it unreliable, that it was inadmissible, or that the trial court should have refused to consider it. She never contested Appellees' position that the court should rely on the video under *Scott v. Harris*, 550 U.S. 372, 380 (2007), and the line of Georgia cases adopting *Scott's* rule. Most importantly, she did not challenge what the video does or does not show regarding Mr. Scott's ability to perceive and avoid the danger. Her attempts to cure those omissions on appeal come too late.

Ms. Scott contends for the first time in her appellate brief that the video is "difficult to discern," and speculates that it "is largely grainy and somewhat disjointed, likely the product of the camera being dislodged by the impact and ultimately discovered in the debris field." (Appellant's Br. at 10, 24.) She also implies that the video is unreliable because no one knows where the camera was mounted or the angle at which it was positioned. (*Id.* at 10.) Ms. Scott needed to raise her objections below to preserve them for this Court's consideration. *See Luckie v. State*, 310 Ga. App. 859, 861 (2011); *Birch Prop. Partners, LLC v. Simpson*, 364 Ga. App. 315, 325-26 (2022).

In a similar vein, Ms. Scott now argues that the trial court's reliance on the video violates *Scott* and its progeny because it does not

"blatantly contradict" other evidence. (Appellant's Br. at 24-30.) She waived that argument by not raising it in the trial court. *See Cordial Endeavor Concessions of Atlanta, LLC v. Gebo L. LLC*, 370 Ga. App. 528, 530-31 (2024).

Appellees made the video the centerpiece of their motion for summary judgment on avoidable consequences. The time for Ms. Scott to contest its reliability or the weight the trial court should have given it was in her response brief or at the hearing. She had ample opportunity to do both, but did neither. She may not do so now.

2. Her efforts to avoid the video fail on their merits.

Even if Ms. Scott preserved her attacks on the video, she offers no reason why the trial court erred in relying upon it.

First, the video *does* "blatantly contradict" any notion that Mr. Scott could not have seen and avoided Colbert's truck. Ms. Scott contends that he was somehow unable to perceive and appreciate the potential danger. The video erases any doubt. It shows Colbert's emergency flashers visible for up to 14 seconds. It shows the absence of anything obstructing Mr. Scott's view during that time. It shows the emergency triangles. It shows Mr. Scott's failure to brake or slow down

at all. It shows that he made no effort to steer around Colbert's truck, nor any reason why he could not have done so. It even shows that Mr. Scott veered to the right into Colbert's truck. A piece of evidence that more "blatantly contradicts" Ms. Scott's contentions is difficult to imagine. At the end of the day, the video leaves room for only one conclusion—Mr. Scott had ample opportunity to perceive and avoid Colbert's truck, and he failed to do so.

Ms. Scott's unilateral declaration that the video is inconclusive does not make it so. Without question, it shows with clarity the facts dispositive of the avoidable consequences defense—the visibility of Colbert's truck, the ample opportunity Mr. Scott had to avoid it, and his failure to make any attempt to do so. The video's clear depiction of those key facts distinguishes it from those at issue in some of the cases Ms. Scott cites. *See, e.g.*, *Giddens v. Metropower, Inc.*, 366 Ga. App. 15, 19 (2022) (finding that video evidence did not clearly demonstrate plaintiff voluntarily jumping for a truck, such that his contributory negligence could not be decided as a matter of law); *Albright v. Terminal Investment Corp.*, 373 Ga. App. 798, 803-04 (2024) (affirming trial

court's finding the video did not clearly show the fact critical to the proximate cause element of plaintiff's claim).

Second, Ms. Scott takes inconsistent positions. She cited the video when it supported her allegations that the emergency triangles were not placed in the correct location, the emergency flashers were not synchronized, and the trailer extended into the lane of travel. ((V10-5827, 5842-43, 5846.) She also provided the video to her experts, who relied upon it in reaching some of their opinions. (*See, e.g.*, V10-5842.) It was not too "grainy," "disjointed," or otherwise unreliable for those purposes. Yet she posits that it suddenly became so when the trial court used it to make undisputable factual findings related to the avoidable consequences issue. She cannot have it both ways.

Third, Ms. Scott paints an incomplete picture regarding the trial court's use of the video, asserting that the court improperly gave it "conclusive weight." (Appellant's Br. at 24.) She seizes upon one sentence from the court's order: "Even accepting Scott's arguments that the triangles were improperly placed, the video establishes conclusively that the parked trailer was visible more than 10 seconds before the

collision and that Alex Scott did nothing to avoid this stationary vehicle." (*Id.*); (V10-6426.)

To begin with, the video does conclusively establish those facts. But the trial court relied on additional evidence. It cited testimony from Ms. Scott's experts, Langly, Sturdivan, Allen, and Seal. (V10-6422-23; V10-6426-28; V10-6431-32.) It also had the benefit of her admissions that Colbert's truck was visible, Mr. Scott did not brake, slow down, or try to steer around the truck, and that Mr. Scott veered up to eight inches over the fog line. The video confirms those admissions and supports the trial court's findings, even if it could be found that the court gave it undue weight.[9]

Fourth, Ms. Scott's screenshot-by-screenshot critique is misleading. Ms. Scott uses a select set of screenshots to create the impression that the video is confusing or unclear. (Appellant's Br. at 11-17.) She refers to a purported "halo" effect of Colbert's emergency

[9] Ms. Scott's admissions and her experts' concessions allow this Court to affirm under the "right for any reason" rule even if it finds that the trial court over-relied on the video. *See City Of Gainesville v. Dodd*, 275 Ga. 834, 835 (2002).

flashers combining with the taillights of the vehicle in front of Mr. Scott. (*Id.* at 14.) She also contends that one screenshot shows "two separate sets of taillights flashing at different intervals. (*Id.* at 15.) She even suggests that one picture shows what is "perhaps a right-hand turn signal at an exit ramp." (*Id.* at 16.) And she uses another to seemingly imply that Colbert's emergency flashers were not visible 14 seconds before the collision, as Appellees contended. (*Id.* at 28.)

Of course, a screenshot captures only one moment in time. It does not fully or accurately depict the event as a whole. For that reason, extracting a screenshot from the context of the entire video can be problematic. Ms. Scott's use of one such image to apparently suggest that Colbert's emergency flashers were not visible 14 seconds before the accident illustrates the point. The picture she uses does not appear to show the flashers illuminated. (Appellant's Br. at 28.) The explanation is obvious—emergency flashers blink on and off. One can capture a picture of them during the time the lights are not visible, even though they are "on." A split second later, the video shows the flashers' lights.

The lesson is that the video needs to be viewed as a whole, not as a series of carefully curated screenshots. The trial court used

screenshots in its order, but it recognized their limitations. It stated that it "did its best to capture images from the video," while emphasizing that it viewed the video in real-time. (V10-6427 n.5.) That is the correct approach. And when used, it eliminates any confusion or doubt that Mr. Scott could have seen and avoided Colbert's truck.

II. The record shows that no reasonable jury could conclude that Appellees' actions rise to the level equivalent of the "spirit of actual intent" required to prove wantonness.

Georgia law imposes a high bar on a plaintiff seeking to escape the effect of an injured party's failure to use ordinary care to avoid the harm that he suffered. She may only do so by proving that the defendants' conduct reached the high level of willfulness or wantonness. *Weston*, 304 Ga. App. at 88-89. The trial court correctly held that the evidence here fails to clear that high bar.

To begin with, evidence that could allow a jury to find Appellees liable is not sufficient to prove wanton conduct.[10] Were it otherwise,

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[10] Ms. Scott makes passing reference to Appellees' conduct being willful, but she focuses her arguments on the wantonness standard, acknowledging that is the "more salient[ ]" issue here. (Appellant's Br. at 39.) In any event, she did not argue willfulness in responding to Appellees' motion for summary judgment. (V10-5844-50.) And she points to no evidence that Appellees actually intended to harm Mr. Scott.

"then practically every case of negligent injury can be made the vehicle of submitting to the jury the question of wilfulness and wantonness by merely using objectives in describing the character of the negligence." *Herring v. R. L. Mathis Certified Dairy Co.*, 121 Ga. App. 373, 381 (1970).

Wantonness requires proof of "highly culpable conduct" that exceeds negligence, gross negligence, and even recklessness. *Ford Motor Co. v. Cosper*, 317 Ga. 356, 366 (2023); *Culpepper v. Thompson*, 254 Ga. App. 569, 570 (2002). It does not require the actual intent to harm needed to show willfulness, but intent is not irrelevant. *Martin v. Gaither*, 219 Ga. App. 646, 652 (1995) ("There is an element of intent, actual or imputed, in 'wilful and wanton conduct' which removes such conduct from the range of conduct which may be termed negligent.") Wanton conduct is "so reckless or so charged with indifference to the consequences as to be *the equivalent in spirit to actual intent*." *Weston,* 304 Ga. App. at 89 (emphasis added). "Conscious indifference to consequences involves an *intentional* disregard of the rights of another, knowingly *or wilfully* disregarding such rights." *Atl. Star Foods, LLC v. Burwell*, 368 Ga. App. 79, 85 (2023) (emphases added). So proving

wanton conduct requires something close to, but not quite, actual intent.

The standard for reckless conduct, which falls short of wantonness, provides a helpful reference point. The Supreme Court of Georgia addressed the meaning of "reckless" within O.C.G.A. § 51-1-11(c)'s exception to the statute of repose in product liability cases for claims "arising out of conduct which manifests a willful, reckless, or wanton disregard for life or property." *Cosper*, 317 Ga. at 356 (quoting O.C.G.A. § 51-1-11(c)). Adopting a modified version of the Restatement's definition of "reckless disregard for safety," the court set the following high bar for conduct that rises to the level of "reckless disregard for life or property":

> [I]f the actor intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable person to realize that the actor's conduct not only creates an unreasonable risk of harm to another's life or property but also involves a high degree of probability that substantial harm will result to the other's life or property.

Id. at 370.

The Eleventh Circuit Court of Appeals' recent decision in *Leslie v. Daimler Trucks North America, LLC*, 2025 WL 1937361 (11th Cir., July

15, 2025) (per curiam), illustrates *Cosper's* demanding standard for recklessness. The court held that O.C.G.A. § 51-1-11's ten-year statute of repose barred a negligent design claim against an auto manufacturer and that the exception for reckless conduct did not apply. *Id.* at *1, 6-9. It found plaintiff's evidence that it knew of the general danger (crash-induced fires) and failed to adopt theoretical safety measures that would reduce the risk insufficient to constitute recklessness. *Id.* at *9. ("[U]nder Georgia law, such theoretical evidence falls short of what is necessary for a reasonable jury to conclude that Daimler had the requisite knowledge that its failure to act would result in a high probability of injury to life."). The court concluded that, at most, a jury could conclude that the manufacturer was negligent, which falls short of "reckless disregard." *Id.*

The same principles apply here. Ms. Scott contends that Evans failed to screen, hire, or train Colbert properly. She also blames Colbert for failing to adequately maintain the truck, not stopping it somewhere else, and not placing the emergency triangles in the exact right place. Even if true, her theoretical evidence merely shows in retrospect that they could have done better. The record contains no evidence that

Evans or Colbert knew of facts that would cause a reasonable person to realize they were creating an unreasonable risk of harm to others. *Id.* ("[T]estimony regarding the theoretical possibility of an increase in safety cannot lead a reasonable jury to conclude that ignoring that possibility demonstrated [defendant] 'knew facts' that would cause a reasonable person to realize there was a high probability that harm would occur if they failed to act.") The record evidence also falls short of allowing a reasonable jury to conclude that their conduct involved a "a high degree of probability that substantial harm will result to the other's life or property." *Cosper*, 317 Ga. at 370; *Leslie*, 2025 WL 1937361 at *9 ("Such speculative theories can only show that [defendant] was aware of the possibility that harm might be reduced, not knowledge that failing to adopt the theories *would* result in a high probability of injury to life.") (emphasis in original). *Leslie* shows that the evidence here would only allow a reasonable jury to find negligence, at most. See *Leslie*, 2025 WL 1937361 at *9. But even if that evidence could reach the standard for recklessness, it is not sufficient to establish wantonness. *See Cosper*, 317 Ga. at 367.

The gross negligence standard is another useful reference. Gross negligence is "the failure to exercise that degree of care that every man of common sense, however inattentive he may be, exercises under the same or similar circumstances." *Kennestone Hosp., Inc. v. Turner*, 374 Ga. App. 887, 890 (2025). It is "equivalent to the failure to exercise even a slight degree of care or lack of the diligence that even careless men are accustomed to exercise." *Id.* Like recklessness, gross negligence is a lower level of culpability than wantonness. *See Culpepper*, 254 Ga. App. at 570 ("Wilful and wanton conduct does not encompass negligence, because wanton and wilful conduct differs from gross negligence.") (cleaned up); *see also Seaboard Coast Line R. Co. v. Clark*, 122 Ga. App. 237, 241 (1970). Georgia law holds that gross negligence is not enough to support an award of punitive damages. *See Bailey v. Make a Difference Ministries, Inc.*, 372 Ga. App. 442, 449 (2024). And the standard for punitive damages includes wantonness. O.C.G.A. § 51-12-5.1(b). So evidence that a defendant exercised even a slight degree of care defeats a claim of gross negligence, and by extension, wantonness.

Colbert attempted to remove the truck from the roadway to prevent creating a danger to other drivers. He turned on his emergency

flashers and placed three emergency triangles behind the trailer to warn oncoming drivers of the truck's presence. He called Johnson, who drove to the scene and tried to fix the truck so it could be moved. Those actions show at least a slight degree of care and diligence. They do not, nor does any other evidence Ms. Scott cites, show that Colbert knew or should have realized to "a high degree of probability that substantial harm" would result. *See Cosper*, 317 Ga. at 370. So the evidence does not rise to the level of either gross negligence or recklessness, let alone the even higher bar of wantonness.

A defendant cannot be found to have acted "in the spirit of actual intent" when he takes steps to keep others safe by warning them of a potential harm. Ms. Scott points to no evidence showing that Colbert intentionally, knowingly, or willfully disregarded the rights of oncoming drivers. *See Atl. Star Foods, LLC*, 368 Ga. App. at 85.

The same is true of Evans. It complied with federal law by screening Colbert before hiring him. It conducted due diligence, confirming his qualifications and ensuring that the tractor had passed a

recent DOT inspection.[11] Its diligence included a PSP screening that revealed Colbert's one prior accident was "not preventable," and thus not disqualifying. Evans then trained Colbert on its policies and procedures. Those policies include instructing drivers not to park on the shoulder of the road voluntarily.[12] (V4-1379:6-18.) Evans also instructed Colbert to call dispatch if his truck broke down while hauling a load and to follow federal regulations on the placement of warning triangles. (V4-1375:12-18; V4-1377:2-20.) Those actions do not equate to the "spirit of actual intent."

Ms. Scott relies on hindsight to critique Appellees' actions. But her arguments amount to nothing more than "they could have done better." This Court rejected that same approach in *Weston*. 304 Ga. App. at 89. ("[A]lthough with the benefit of hindsight one can argue that each of the appellees could have taken some action that would have reduced the

[11] Ms. Scott cites the Equipment Hauling Agreement between Evans and Lizard Licc to criticize Evans for not inspecting the truck itself. But the agreement imposed no such obligation. (V10-5952.) It only required Lizard Licc to provide a DOT inspection. (*Id.*) Lizard Licc, and thus Evans, fulfilled that obligation.

[12] In any event, Colbert did not voluntarily park his truck along I-16; he was forced to stop there when his engine lost power.

likelihood of the accident that ended the decedent's life, we conclude that, as a matter of law, [plaintiff] failed to identify any evidence from which a jury could find that the conduct of any appellee was so reckless or so charged with indifference to the consequences as to be the equivalent in spirit to actual intent."); *see also Flint Explosive Co. v. Edwards*, 84 Ga. App. 376, 387 (1951).

Finally, Ms. Scott emphasizes that whether a defendant's conduct rises to the level of wantonness is usually a jury issue. That may be true, but courts can decide the issue as a matter of law. *See Herring*, 121 Ga. App. at 381. This Court has done so. *See Weston*, 304 Ga. App. at 89 (affirming summary judgment under avoidable consequences defense and holding that plaintiff failed to present evidence amounting to wantonness); *see also*, *Trulove v. Jones,* 271 Ga. App. 681, 682 (2005) (affirming summary judgment on premises liability claim brought by a licensee because the evidence did not show a willful or wanton injury as a matter of law); *Manners v. 5 Star Lodge and Stables, LLC*, 347 Ga. App. 738, 741-42 (2018) (same); *Shedeke v. Garrett*, 373 Ga. App. 881, 885 (2024) (same); *Stanfield v. Kime Plus, Inc.*, 210 Ga.

App. 316, 317 (1993) (same but affirming grant of motion for judgment notwithstanding the verdict).

CONCLUSION

Appellees ask the Court to affirm for the reasons provided above.

This submission does not exceed the word count limit imposed by Rule 24.

FREEMAN MATHIS & GARY, LLP

/s/ P. Michael Freed
P. Michael Freed
Georgia Bar No. 061128
michael.freed@fmglaw.com
Jennifer C. Adair
Georgia Bar No. 001901
jadair@fmglaw.com
Attorneys for Appellees Marvin Colbert and Evans Delivery Company, Inc.

100 Galleria Parkway
Suite 1600
Atlanta, Georgia 30339
(770) 818-0000 (phone)
(833) 330-3669 (facsimile)

CERTIFICATE OF SERVICE

I certify that there is a prior agreement with counsel for Appellants to allow documents in a PDF format sent via email to suffice for service.

I certify that I have this date served the within and foregoing Brief of Appellees via electronic mail to counsel of record:

Mark A. Wade, Jr.
Georgia Auto Law: Auto Accident Attorneys
GEORGIA AUTO LAW: AUTO ACCIDENT ATTORNEYS
120 Ottley Drive NE, Studio B
Atlanta, Georgia 30324
mark@georgiaautolaw.com

Counsel for Appellants

Maxey Scherr
Scherr Law
521 Texas Avenue
El Paso, Texas 79901
mscherr@scherrlawfirm.com

Counsel for Appellants

Robert Collins
Bracken Millar
ROBERT COLLINS LAW
Post Office Box 7726
Houston, Texas 77270
robert@robertcollinslaw.com
bracken@robertcollinslaw.com

Counsel for Appellants

Darren Summerville
Elizabeth Stone
The Summerville Firm, LLC
1226 Ponce de Leon Ave., NE
Atlanta, Georgia 30306
darren@summervillefirm.com
Elizabeth@summervillefirm.com

Counsel for Appellants

Respectfully submitted this 10th day of November, 2025.

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FREEMAN MATHIS & GARY, LLP

100 Galleria Parkway
Suite 1600
Atlanta, Georgia 30339
(770) 818-0000 (phone)
(833) 330-3669 (facsimile)

/s/ P. Michael Freed
P. Michael Freed
Georgia Bar No. 061128

Attorney for Appellees Marvin Colbert and Evans Delivery Company, Inc.