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Court of Appeals of Georgia.
The ESTATE OF Mack PITTS et al.
v.
CITY OF ATLANTA et al.

No. A11A1487.
Oct. 5, 2011.

Background: Estate of subcontractor's employee, who was fatally struck by truck that was driven by sub-subcontractor's worker during construction project at city airport, brought action against city and general contractor for breach of contract and against city for breach of separate ministerial duty, alleging that defendants failed to require subcontractor to maintain amount of automobile insurance coverage set forth in construction contract. The trial court granted defendants' motions for summary judgment and denied estate's summary-judgment motion. Estate appealed.

Holdings: The Court of Appeals, McFadden, J., held that:
(1) employee was third-party beneficiary of main contract and subcontract;
(2) Workers' Compensation Act's exclusive-remedy provision did not bar breach-of-contract claim;
(3) for purposes of main contract and subcontract, sub-subcontractor was subcontractor, not supplier;
(4) estate suffered damages as result of breach of contract; but
(5) city had no duty independent of contracts to ensure that all contractors and subcontractors maintained amounts of automobile insurance required by owner's controlled insurance program.

Affirmed in part and reversed in part.

West Headnotes

[1] Contracts 95 326

95 Contracts
95VI Actions for Breach
95k326 k. Grounds of Action. Most Cited Cases

The elements for a breach-of-contract claim are the (1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken.

[2] Contracts 95 187(1)

95 Contracts
95II Construction and Operation
95II(B) Parties
95k185 Rights Acquired by Third Persons
95k187 Agreement for Benefit of Third Person
95k187(1) k. In General. Most Cited Cases

Insurance 217 1702

217 Insurance
217XII Procurement of Insurance by Persons Other Than Agents
217k1702 k. Contracts. Most Cited Cases

Subcontractor's employee was third-party beneficiary of main contract and subcontract regarding construction project at city airport, and thus employee's estate had standing to bring breach-of-contract action against city and general contractor regarding failure of sub-subcontractor to comply with contracts' provision governing minimum automobile insurance coverage, although employee was not specifically named as beneficiary, and although main contract's section governing owner's controlled insurance program included provision for workers' compensation insurance; section governing insurance program unambiguously stated intent to benefit all participants in project. West's Ga.Code Ann. § 9–2–20(b).

[3] Contracts 95 187(1)

95 Contracts

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95II Construction and Operation
95II(B) Parties
95k185 Rights Acquired by Third Persons
95k187 Agreement for Benefit of Third Person
95k187(1) k. In General. Most Cited Cases

For a third party to have standing to enforce a contract, it must clearly appear from the contract that it was intended for the third party's benefit. West's Ga.Code Ann. § 9–2–20(b).

[4] Contracts 95 187(1)

95 Contracts
95II Construction and Operation
95II(B) Parties
95k185 Rights Acquired by Third Persons
95k187 Agreement for Benefit of Third Person
95k187(1) k. In General. Most Cited Cases

A contract is intended to benefit a third party when the promisor engages to the promisee to render some performance to a third person. West's Ga.Code Ann. § 9–2–20(b).

[5] Contracts 95 187(1)

95 Contracts
95II Construction and Operation
95II(B) Parties
95k185 Rights Acquired by Third Persons
95k187 Agreement for Benefit of Third Person
95k187(1) k. In General. Most Cited Cases

When a third-party beneficiary is not specifically named in a contract, the question is whether the parties' intention to benefit the third party is shown on the face of the contract. West's Ga.Code Ann. § 9–2–20(b).

[6] Contracts 95 147(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(2) k. Language of Contract. Most Cited Cases

Where the terms of a written contract are clear and unambiguous, the court will look to the contract alone to find the intention of the parties. West's Ga.Code Ann. § 13–2–3.

[7] Contracts 95 176(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k176 Questions for Jury
95k176(2) k. Ambiguity in General. Most Cited Cases

The existence or nonexistence of ambiguity in a contract is a question of law for the court.

[8] Contracts 95 152

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k152 k. In General. Most Cited Cases

Unambiguous language in a contract must be afforded its literal meaning and plain ordinary words given their usual significance.

[9] Insurance 217 3436

217 Insurance
217XXIX Persons Entitled to Proceeds
217XXIX(A) In General
217k3434 Status of Claimant in General
217k3436 k. Third-Party Beneficiary. Most Cited Cases

Insurance 217 3457

217 Insurance
217XXIX Persons Entitled to Proceeds
217XXIX(C) Liability Insurance

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217k3456 Rights of Injured Person Against Insurer
217k3457 k. In General. Most Cited Cases

Liability claimants generally are not regarded as third-party beneficiaries of insurance policies.

[10] Workers' Compensation 413 2090

413 Workers' Compensation
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(A) Between Employer and Employee
413XX(A)1 Exclusiveness of Remedies Afforded by Acts
413k2090 k. Injuries Not Within Acts. Most Cited Cases

Workers' Compensation Act does not exclude redress in cases to which it is not applicable, and thus the right to bring an ordinary action for damages is not excluded by the Act as to injuries which do not fall within its terms. West's Ga.Code Ann. § 34–9–11(a).

[11] Workers' Compensation 413 2166

413 Workers' Compensation
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(C) Action Against Third Persons in General for Employee's Injury or Death
413XX(C)1 Right of Action of Employee or Representative Generally
413k2160 What Persons Liable as Third Persons
413k2166 k. Subcontractor Contracting with Employer of Injured Person. Most Cited Cases

Workers' Compensation Act's exclusive-remedy provision did not bar estate of subcontractor's employee from recovering judgment against sub-subcontractor in wrongful-death action arising from construction accident in which employee was fatally stuck by vehicle that was being driven by sub-subcontractor's worker; sub-subcontractor was not employee of subcontractor, sub-subcontractor was not statutory employer of employee, and sub-subcontractor was not party to any contract under which it provided workers' compensation benefits to employee. West's Ga.Code Ann. §§ 34–9–8, 34–9–11(a), 34–9–11.1(a).

[12] Workers' Compensation 413 2165

413 Workers' Compensation
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(C) Action Against Third Persons in General for Employee's Injury or Death
413XX(C)1 Right of Action of Employee or Representative Generally
413k2160 What Persons Liable as Third Persons
413k2165 k. General, Principal, or Original Contractor Contracting with Employer of Injured Person. Most Cited Cases

Workers' Compensation Act's exclusive-remedy provision did not bar breach-of-contract action that estate of subcontractor's employee brought against city and general contractor regarding failure to ensure that sub-subcontractor complied with main construction contract's provision requiring minimum amount of automobile insurance coverage when working on construction project at city airport; action did not seek recovery for personal injuries, and Workers' Compensation Act provided no specific remedy for damages sought by estate. West's Ga.Code Ann. §§ 34–9–11(a), 34–9–11.1(a).

[13] Insurance 217 1702

217 Insurance
217XII Procurement of Insurance by Persons Other Than Agents
217k1702 k. Contracts. Most Cited Cases

For purposes of main contract, which required general contractor for construction project at city airport to obtain minimum amount of automobile liability insurance coverage, and subcontract, which required subcontractors to carry same amount of automobile liability coverage, sub-subcontractor that performed trucking work was “subcontractor,”

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not "supplier"; sub-subcontractor agreed to furnish all labor, equipment, supervision, and administration necessary to properly complete trucking and hauling.

[14] Insurance 217 ⚿1702

217 Insurance
217XII Procurement of Insurance by Persons Other Than Agents
217k1702 k. Contracts. Most Cited Cases

Estate of subcontractor's employee suffered damages as result of breach of contract by city and general contractor, as element of breach-of-contract claim arising from failure to require that sub-subcontractor comply with contractual requirement to obtain at least $10 million in automobile liability insurance coverage before working on construction project at city airport; had sub-subcontractor obtained required minimum amount of coverage, there would have been enough coverage to satisfy money judgment from estate's wrongful-death action. West's Ga.Code Ann. § 13–6–2.

[15] Insurance 217 ⚿1702

217 Insurance
217XII Procurement of Insurance by Persons Other Than Agents
217k1702 k. Contracts. Most Cited Cases

City had no duty, independent of construction contracts, to ensure that all contractors and subcontractors maintained amounts of automobile insurance required by owner's controlled insurance program, which was created in main contract governing construction project at city airport, and thus estate of subcontractor's employee, who was fatally struck by sub-subcontractor's vehicle, could not prevail on claim for breach of that alleged duty. West's Ga.Code Ann. § 51–1–8.

[16] Torts 379 ⚿112

379 Torts
379I In General
379k110 Contracts in Relation to Torts
379k112 k. Breach of Contract in General. Most Cited Cases

Not all breaches of contract are also independent torts.

[17] Torts 379 ⚿114

379 Torts
379I In General
379k110 Contracts in Relation to Torts
379k114 k. Duty, Breach, or Wrong Independent of Contract. Most Cited Cases

Under statute providing that private duties may arise from relations created by contract, express or implied, a private duty arising from a contractual relationship must exist independent of the contract. West's Ga.Code Ann. § 51–11–8.

[18] Torts 379 ⚿114

379 Torts
379I In General
379k110 Contracts in Relation to Torts
379k114 k. Duty, Breach, or Wrong Independent of Contract. Most Cited Cases

Absent a legal duty beyond the contract, no action in tort may lie upon an alleged breach of a contractual duty.

James E. Butler Jr., Joel O. Wooten Jr., Columbus, Matthew Evan Cook, Alan John Hamilton, James Patrick M. Sneed, Atlanta, for The Estate of Mack Pitts et al.

Stephen Michael Schatz, Steven J. Defrank, James H. Fisher II, Denise Weiner Spitalnick, Robert P. White, Kawania Brown James, Atlanta, for City of Atlanta et al.

McFADDEN, Judge.

***1** On June 14, 2007, Mack Pitts was killed while working on a construction project at the Atlanta Hartsfield–Jackson International Airport, when he was struck by a vehicle driven by an employee of A & G Trucking, Inc. In an action separate from the present case, Pitts's estate through its

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administratrix and his minor children through their mothers (collectively, "the Estate") obtained a wrongful death judgment against A & G Trucking and its driver. That judgment exceeded the limits of A & G Trucking's automobile liability insurance coverage.

The Estate brought the present, separate action against the City of Atlanta ("the City") and various construction companies associated with the construction project. In the present action the Estate asserts that all of the defendants breached a contractual duty to require that A & G Trucking carry a minimum of $10 million in automobile liability insurance to work on the project. As to the City, the Estate also alleges breach of a ministerial duty to require A & G Trucking to carry insurance in that amount.

The parties filed cross motions for summary judgment. The trial court denied summary judgment to the Estate and granted summary judgment to the City and the various construction company defendants on the ground that the Estate lacked standing to enforce the contractual minimum insurance requirement because Pitts had not been a third-party beneficiary to the contracts setting forth that requirement. (The court also ruled on motions for summary judgment related to claims between certain of the construction company defendants; those rulings are not at issue in this appeal.)

As detailed below, we find that the trial court erred in granting summary judgment to the defendants and denying summary judgment to the Estate on the breach of contract claim. First, we find that the Estate had standing to enforce the contracts' minimum insurance provision because Pitts was a third party beneficiary to the contracts; and we find that, since the Workers' Compensation Act did not apply to the injury for which damages were sought in this action, the exclusive remedy provision did not bar it. Second, we find that under the unambiguous language of the contracts, A & G Trucking was a "subcontractor" required to have a minimum amount of insurance before working on the construction project, and that the undisputed evidence shows that the defendants breached their duty under the contracts by allowing A & G Trucking to work on the project without that minimum coverage. Finally, we find that the undisputed evidence shows that the Estate was harmed by the breach of contract, because A & G Trucking would have had enough insurance coverage to satisfy the Estate's judgment if the contract had been performed.

But we find that the trial court did not err in granting summary judgment to the City on the Estate's claim for breach of a separate ministerial duty. The Estate has pointed to no evidence that would give rise to a private duty, independent of the contracts, under OCGA § 51–1–8.

***2** Accordingly, we reverse the trial court's grant of summary judgment to the defendants and its denial of the Estate's motion for summary judgment on the claim for breach of contract, and we affirm the trial court's grant of summary judgment to the City on the claim for breach of a separate ministerial duty.

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Hutto v. CACV of Colo.*, 308 Ga.App. 469, 707 S.E.2d 872 (2011). We review the grant or denial of summary judgment de novo, construing the evidence in favor of the nonmovant. Id.

So viewed, the evidence showed that the City entered into a contract ("the Main Contract") with a joint venture comprised of defendants Holder Construction Company, Manhattan Construction Company, C.D. Moody Construction Company, Inc., and Hunt Construction Group, Inc. ("the General Contractor") regarding the construction project. The General Contractor entered into a contract ("the Subcontract") with a joint venture comprised of defendants Archer Western Contractors, Ltd. and Capital Contracting, Inc. ("the Subcontractor") to perform work on the project. Pitts was employed by the Subcontractor to work on the project. The Sub-

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contractor contracted with A & G Trucking for trucking and hauling work on the project.

Pursuant to the Main Contract, the General Contractor would serve as construction manager for the construction of the Atlanta airport's Maynard Holbrook Jackson, Jr., International Terminal, identified in the Main Contract as the "project." The Main Contract authorized the General Contractor to enter into subcontracts with other entities. The General Contractor was obligated to require any subcontractors to be bound to it by the terms of the Main Contract and to assume to it all obligations and responsibilities which it assumed to the City under the Main Contract. The Main Contract also provided that, "[w]here appropriate, [the General Contractor] shall require each Subcontractor to enter into similar agreements with its Sub–Subcontractor."

The Main Contract specified that the General Contractor, its subcontractors, and its sub-subcontractors were named insureds under the City's "Owner's Controlled Insurance Program," which was made a part of the Main Contract. The stated purpose of the Owner's Controlled Insurance Program was "to provide one master insurance program that provides broad coverage with high limits that will benefit all participants involved in the project." The Main Contract required that the named insureds comply with all requirements of the Owner's Controlled Insurance Program, which pertinently provided:

> Contractor shall, at its own expense, purchase and maintain ... such insurance as will protect Contractor, Owner, Construction Manager, Design Consultant, and their Trustees, Directors, Officers, Partners, Agents, Representatives, and Employees from claims of the type set forth below: ... Automobile, Bodily Injury and Property Damage Liability Insurance covering all automobiles, whether owned, non-owned, leased or hired, with not less than the following limits: ... Bodily Injury-*$10,000,000* per person and occurrence[.]
>
> ***3** (Emphasis in original.)

Pursuant to the Subcontract, the Subcontractor agreed to be bound by the terms of the Main Contract, to assume toward the General Contractor all duties and obligations that the General Contractor owed the City under the Main Contract, and to bind all lower tier subcontractors to the obligations set forth in the Main Contract and the Subcontract. The Subcontract expressly required the Subcontractor to maintain automobile liability insurance coverage for "[o]wned, hired and non-owned vehicles with a $10,000,000 combined single limit for bodily injury and property damage."

1. The Estate contends that the trial court erred in granting summary judgment to the defendants and in denying the Estate's motion for summary judgment on its breach of contract claims. We agree, and accordingly we reverse the trial court's decision on the breach of contract claims.

[1] "The elements for a breach of contract claim in Georgia are the (1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken." (Citation omitted.) *Kuritzky v. Emory Univ.*, 294 Ga.App. 370, 371(1), 669 S.E.2d 179 (2008). The trial court found that the Estate could not show this third element of a breach of contract claim, on the ground that Pitts was not a third-party beneficiary to the contracts and thus the Estate lacked standing. We find, however, that the Estate's decedent, Pitts, was a third-party beneficiary of the contracts, thereby giving the Estate standing. Alternatively, the defendants contend that the Estate did not have the right to complain about a breach of contract because the exclusive remedy provision of the Workers' Compensation Act barred the claim, but we find that the exclusive remedy provision does not apply to the type of injury for which the Estate seeks damages in this case. As to the element of breach, the defendants contend that no breach occurred because A & G Trucking was a "supplier" under the contracts exempt from the minimum insurance coverage requirement, rather than a "subcontractor,"

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but we find that the unambiguous contract language shows otherwise. As to the element of damages resulting from the breach, the defendants present no argument; and we find that there is undisputed evidence of damages.

(a) *The Estate's Right to Complain.*

[2] (i) *Standing.* The defendants argue, and the trial court determined, that the Estate lacked standing to enforce the minimum insurance provision because, as a matter of law, Pitts had not been a third-party beneficiary of the Main Contract or the Subcontract. We disagree.

[3][4] "The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on the contract." OCGA § 9–2–20(b). "For a third party ... to have standing to enforce a contract, it must clearly appear from the contract that it was intended for the third party's benefit." (Citation and punctuation omitted.) *U.S. Foodservice v. Bartow County Bank,* 300 Ga.App. 519, 521(1), 685 S.E.2d 777 (2009). "A contract is intended to benefit a third party when the promisor engages to the promisee to render some performance to a third person." (Citation omitted.) *Scott v. Mamari Corp.,* 242 Ga.App. 455, 457(1), 530 S.E.2d 208 (2000).

***4** [5] Pitts was not specifically named as a beneficiary in either the Main Contract or the Subcontract, but that fact is not dispositive. *Marvel Enters. v. World Wrestling Federation Entertainment,* 271 Ga.App. 607, 615(5), 610 S.E.2d 583 (2005). When a "third-party beneficiary [is not] specifically named, the question is whether the parties' intention to benefit the third party is shown on the face of the contract." (Citation and punctuation omitted.) Id.

[6][7] The cardinal rule of contract construction is to ascertain the intention of the parties. OCGA § 13–2–3. "Where the terms of a written contract are clear and unambiguous, the court will look to the contract alone to find the intention of the parties.... The existence or nonexistence of ambiguity in a contract is a question of law for the court." (Citation omitted.) *Duke Galish, LLC v. Manton,* 308 Ga.App. 316, 318–319(1), 707 S.E.2d 555 (2011).

[8] The Owner's Controlled Insurance Program—a part of the Main Contract, which was in turn incorporated into the Subcontract—stated that its purpose was "to provide one master insurance program that provides broad coverages with high limits *that will benefit all participants involved in the project.* " (Emphasis supplied.) Thus, on its face the Owner's Controlled Insurance Program unambiguously stated the intent to benefit all *participants* in the construction project. None of the contracts define the term "participant," and the trial court held that the Estate had "presented no evidence that the [parties] understood the word 'participant' to include specific workers on the site." But where the language of the contract is unambiguous, the contract provides the only evidence of the parties' intent. See id. at 318(1), 707 S.E.2d 555. "Unambiguous language must be afforded its literal meaning and plain ordinary words given their usual significance." (Citation and punctuation omitted.) *Perkins v. M & M Office Holdings,* 303 Ga.App. 770, 773, 695 S.E.2d 82 (2010). The word "participant" means "one that participates," and "to participate" means "to take part" or "to have a part or share in something." Webster's New Collegiate Dictionary, p. 829 (1981). By working on the construction project as an employee of the Subcontractor, Pitts took part in the project and was a "participant" under the usual significance of that word.

The defendants argue that a later provision in the Owner's Controlled Insurance Program, which stated that "[t]he [Owner's Controlled Insurance Program] will be for the benefit of the [City] and Contractors and Subcontractors of all tiers," (emphasis omitted), restricted the intended beneficiaries to only those entities. But this language did not contain any express restriction, and to construe the contracts in a manner limiting the intended beneficiaries to only *some* participants in the con-

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struction project would render meaningless the earlier provision that the Owner's Controlled Insurance Program was to benefit *all* participants in the project. See *Kreimer v. Kreimer*, 274 Ga. 359, 361(1), 552 S.E.2d 826 (2001) (courts should avoid whenever possible construction of contract that renders any portion of it meaningless).

***5** The defendants also point to a provision for workers' compensation insurance in the Owner's Controlled Insurance Program as support for their assertion that individual workers could not have been intended third-party beneficiaries to the contracts. As the statement of intent reflects, however, the "purpose of the [Owner's Controlled Insurance Program] is to provide one master insurance program ... that will benefit all participants involved in the project." Contrary to the defendants' contention, the inclusion of workers' compensation insurance in this master insurance program does not conflict with an intent that individual workers be third-party beneficiaries of it.

The defendants argue, and the trial court found, that the contracts did not demonstrate an intent to benefit third parties because they did not require any specific undertaking on the third parties' behalf. See *Gay v. Ga. Dept. of Corrections*, 270 Ga.App. 17, 23–24(2), 606 S.E.2d 53 (2004) (involving contract containing party's "general promise to abide by state law in providing a safe workplace"). We disagree. The Main Contract set forth the responsibilities of the City and the General Contractor regarding establishing and maintaining the Owner's Controlled Insurance Program, and the Subcontract contained provisions imposing those responsibilities upon the Subcontractor. These responsibilities included the duty to ensure that subcontractors of any tier complied with the minimum insurance requirements of the Owner's Controlled Insurance Program before working on the construction project. And as discussed above, the Owner's Controlled Insurance Program—which was expressly made a part of the Main Contract and consequently also incorporated into the Subcontract—provided that its purpose was to provide one master insurance program that provided coverage that benefitted all participants in the project. Thus, through the Main Contract and Subcontract the defendants promised to provide a specific benefit (ensuring the availability of minimum insurance coverage through the Owner's Controlled Insurance Program) to a limited group of intended beneficiaries ("all participants involved in the project"). We find this case analogous to *Plantation Pipe Line Co. v. 3–D Excavators*, 160 Ga.App. 756, 758–759, 287 S.E.2d 102 (1981), in which we held that a contract that afforded a benefit to a relatively small group of persons rendered those persons third-party beneficiaries.

The defendants argue that the parties nevertheless did not intend the contracts to benefit third parties, based on the following language in the Subcontract: "*No Third Party Beneficiaries.* Nothing contained in this Subcontract is intended, nor shall be construed, to make any of SUBCONTRACTOR's lower tier sub-subcontractors or vendors third[-]party beneficiaries of this Subcontract." This language has no application to Pitts's status as a third-party beneficiary because Pitts was not a sub-subcontractor or vendor of the Subcontractor; rather, he was the Subcontractor's employee.

***6** [9] Finally, the defendants point to the general rule in Georgia that liability claimants are not regarded as third-party beneficiaries of insurance policies. See *Crisp Regional Hosp. v. Oliver*, 275 Ga.App. 578, 583(4), 621 S.E.2d 554 (2005). But they have cited no authority for the proposition that this general rule applies where, as here, the contract contains specific language to the contrary. See generally *City of Atlanta v. Atlantic Realty Co.*, 205 Ga.App. 1, 6–7(3), 421 S.E.2d 113 (1992) (plaintiff was a third-party beneficiary entitled to judgment as a matter of law on its claim that parties had breached a contract by failing to acquire and maintain insurance, where the contract specified that the insurance was to benefit the plaintiff).

[10] (ii) *Exclusive remedy provision.* The de-

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fendants argue that the exclusive remedy provision of the Workers' Compensation Act bars the Estate from seeking damages for breach of the contracts. Under that provision, "[t]he rights and the remedies granted to an employee by [the Act] shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, at common law or otherwise, on account of such injury, loss of service, or death." OCGA § 34–9–11(a). But the Act "does not exclude redress in cases to which it is not applicable." (Citation and punctuation omitted.) *Doss v. Food Lion,* 267 Ga. 312, 313(3), 477 S.E.2d 577 (1996). Thus, "the right to bring an ordinary action for damages is not excluded by the statute as to injuries which do not fall within its terms." (Citations and punctuation omitted.) *Bright v. Nimmo,* 253 Ga. 378, 379–380, 320 S.E.2d 365 (1984).

[11] The Act's exclusive remedy provision did not prevent the Estate from securing a judgment in its separate, underlying action against A & G Trucking. That provision generally does not exclude claims against third parties. "[N]o employee shall be deprived of any right to bring an action against any third-party tort-feasor, other than an employee of the same employer or any person who, pursuant to a contract or agreement with an employer, provides workers' compensation benefits to an injured employee." OCGA § 34–9–11(a). A & G Trucking was not an employee of Pitts's employer (the Subcontractor), nor was A & G Trucking a party to a contract under which it provided workers' compensation benefits to Pitts. Moreover, the Act expressly preserves certain remedies

> [w]hen the injury or death for which compensation is payable under [the Act] is caused under circumstances creating a legal liability against some person other than the employer, the injured employee or those to whom such employee's right of action survives at law may pursue the remedy by proper action in a court of competent jurisdiction against such other persons, except as precluded by Code Section 34–9–11 or otherwise.

OCGA § 34–9–11.1(a). A & G Trucking was not an "employer" of Pitts as that term is defined at OCGA § 34–9–8, which sets out the duties of statutory employers under the Act. Consequently, the Estate's claim against A & G Trucking is not among the rights and remedies excluded by OCGA § 34–9–11.

***7** [12] The injury for which the Estate seeks damages in this case is not a physical injury but instead is the loss of access to insurance coverage occasioned by the defendants' alleged breach of contract. The Estate has already obtained a judgment from A & G Trucking in their separate action against it for damages based on Pitts's death from the physical injuries he sustained. The defendants have pointed to no authority holding the Workers' Compensation Act to apply in an action for the type of injury at issue here, and we have found none. Moreover, in *Superb Carpet Mills v. Thomason,* 183 Ga.App. 554, 359 S.E.2d 370 (1987), we held that the definition of "injury" under the Workers' Compensation Act was synonymous with "personal injury," and that in cases where the Act was held to bar claims not based upon physical injury, it was because the Act provided a specific remedy for the damages sought. Id. at 555, 359 S.E.2d 370. Cf. *Crisp Regional Hosp.,* supra at 579–583(1), (2), (3), (4), 621 S.E.2d 554 (court did not consider whether Workers' Compensation Act barred employee's contract claim against employer hospital which had failed to purchase insurance for physician alleged to have negligently treated employee's on-the-job injury; in contrast, court *did* hold that Act barred employee's tort claims against employer).

The Estate's claim in this case seeks damages for breach of contract, not personal injury, and the Workers' Compensation Act provides no specific remedy for the damages sought by the Estate. See generally OCGA § 34–9–11.1. Accordingly, the Act is not applicable to the Estate's breach of contract action, and we find no merit in the defendants' contention that the Act's exclusive remedy provision bars the action.

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[13] (b) *Breach.* The Main Contract obligated the City to "maintain the required and necessary [Owner's Controlled Insurance Program] policies" and to "procure, pay for and administer the [Owner's Controlled Insurance Program]." It obligated the General Contractor and any subcontractors or sub-subcontractors to "comply with all requirements of the [Owner's Controlled Insurance Program]," and the General Contractor was prohibited under the Main Contract from commencing any work on the construction project or allowing any subcontractor or sub-subcontractor to commence work on the project until the requirements were met and approved by the City. The Subcontract obligated the Subcontractor to bind all lower-tier subcontractors to the obligations set forth in the Main Contract.

It is undisputed that A & G Trucking did not have the minimum automobile liability insurance of $10 million when it worked on the construction project. The defendants argue, however, that A & G Trucking was not subject to this minimum insurance requirement because it was not a "subcontractor" but merely a "supplier" under the Main Contract, which excluded suppliers from the Owner's Controlled Insurance Program requirements.

The Main Contract contained definitions of "supplier" and "subcontractor" that were incorporated by the Subcontract and thus were applicable to A & G Trucking. The Main Contract defined "supplier" as a person or organization contracted "to supply materials or equipment needed for the completion of the [construction]," Under the terms of its contract with the Subcontractor, however, A & G Trucking agreed to do more than simply supply materials and equipment to the construction site; it contracted to "provide and furnish *all labor*, materials, tools, supplies, equipment, *services*, facilities, *supervision*, and *administration* necessary or incidental to properly complete performance ... of the following work: Trucking and Aggregate Hauling." (Emphasis supplied.) Rather than a "supplier," A & G Trucking fell within the Main Contract's definition of "subcontractor": a person or organization contracted "to perform any of the [construction] at the site." Although the defendants point to evidence extrinsic to the contracts to argue that the minimum insurance requirements nevertheless did not apply to A & G Trucking, such evidence cannot be used to vary the unambiguous terms of the contracts. *Simpson v. Pendergast,* 290 Ga.App. 293, 296(1), 659 S.E.2d 716 (2008).

***8** Accordingly, the undisputed evidence shows that the defendants breached their contractual duties regarding the Owner's Controlled Insurance Program by allowing A & G Trucking to work on the construction project without the required minimum insurance coverage.

[14] (c) *Resultant Damages.* The defendants do not contest that, had A & G Trucking been required to obtain $10 million in automobile liability insurance coverage before working on the construction project, it would have had enough insurance to satisfy the Estate's judgment against it. The undisputed evidence shows that the Estate was harmed by the defendants' breach of contract. See OCGA § 13–6–2 ("Damages recoverable for a breach of contract are such as arise naturally and according to the usual course of things from such breach and such as the parties contemplated, when the contract was made, as the probable result of the breach."); *Wilks v. Overall Constr.,* 296 Ga.App. 410, 413 n. 7(1), 674 S.E.2d 320 (2009) (measure of damages for breach of contract is amount that will compensate injured person for loss which fulfillment of contract would have prevented, such that injured person is placed, so far as is possible, in position he would have been in had contract been performed).

[15][16][17][18] 2. The Estate asserted a separate claim against the City for breach of a duty to ensure all contractors and subcontractors maintained the amounts of insurance required by the Owner's Controlled Insurance Program. The only source for this duty cited by the Estate in its appellate brief is OCGA § 51–1–8, which pertinently

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provides that "[p]rivate duties may arise from ... relations created by contract, express or implied." But not all breaches of contract are also independent torts. See *Orkin Exterminating Co. v. Stevens*, 130 Ga.App. 363, 365, 203 S.E.2d 587 (1973). A private duty arising from a contractual relationship under OCGA § 51–11–8 must exist independent of the contract. See *Brookview Holdings v. Suarez*, 285 Ga.App. 90, 94(1), 645 S.E.2d 559 (2007). "[A]bsent a legal duty beyond the contract, no action in tort may lie upon an alleged breach of a contractual duty." (Citation, punctuation and footnote omitted.) *Fielbon Devel. Co. v. Colony Bank*, 290 Ga.App. 847, 855(3), 660 S.E.2d 801 (2008). The Estate has pointed to no evidence that the City owed Pitts any duty independent of the contracts. And because there is no evidence that an independent duty existed, we do not reach the Estate's contention that the independent duty was ministerial rather than discretionary in nature.

The trial court did not err in granting summary judgment to the City on this claim.

Judgment affirmed in part and reversed in part.

SMITH, P.J., and MIKELL, J., concur.

Ga.App.,2011.
Estate of Pitts v. City of Atlanta
--- S.E.2d ----, 2011 WL 4581550 (Ga.App.)

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