IN THE SUPREME COURT OF GEORGIA

CITY OF ATLANTA, et al.,

Defendants-Appellants,

vs.

THE ESTATE OF MACK PITTS, by its Administrator, ANN J. HERRERA, et al.,

Plaintiffs-Appellees.

SUPREME COURT CASE NOS. S12C0517, S12C0526, SC12C0527

BRIEF OF *AMICI CURIAE,* CONSTRUCTION INDUSTRY ASSOCIATIONS, IN SUPPORT OF DEFENDANTS-APPELLANTS

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*, CONSTRUCTION INDUSTRY ASSOCIATIONS

This *amicus* brief is submitted jointly on behalf the following construction industry associations: The Associated General Contractors of Georgia, Inc.; The Associated General Contractors of America, Inc. ("AGC of America"); Associated Builders & Contractors of Georgia, Incorporated; Associated Builders and Contractors, Inc. ("ABC National"); American Subcontractors Association, Georgia Chapter, Inc.; American Subcontractors Association, Inc. ("ASA National"); Georgia Utility Contractors Association, Inc.; The Georgia Highway Contractors Association, Inc.; Atlanta Electrical Contractors Association, Atlanta Chapter NECA, Inc.; Independent Electrical Contractors, Georgia Chapter, Inc.; Independent Electrical Contractors, Atlanta Chapter, Inc.; Mechanical Contractors Association of Georgia, Inc.; National Association of Minority Contractors – Greater Atlanta, Inc.; Georgia Black Constructors Association, Inc.; Plumbing & Mechanical Contractors Association of Georgia, Inc.; Roofing & Sheet Metal Contractors Association of Georgia, Inc.; the Georgia Wall & Ceiling Industries Association, Inc.; and the Home Builders Association of Georgia (collectively referred to herein as the "Construction Industry Associations").

The Construction Industry Associations represent the entire spectrum of construction industry trades. They are comprised, collectively, of more than 6,000 member firms in the State of Georgia - that, in turn, employ untold numbers of

Georgia citizens - and more than 55,000 members nationwide. The members consist of general contractors, trade and specialty subcontractors, material and equipment suppliers, and construction industry service providers located throughout the State of Georgia, as well as companies of all sizes, employing both union and non-union workers, including minority and disadvantaged businesses. Collectively, the members of these diverse organizations are involved in virtually all segments of the Georgia construction industry, including commercial, industrial, institutional, educational, infrastructure, transportation, health care, hospitality, and residential construction, in both the public and private sectors.

These Construction Industry Associations, although diverse in many respects, are firmly united in the conviction that the Georgia Court of Appeals' decision in this case, if allowed to stand as the law of this state, will detrimentally impact the Georgia construction industry, and the state as a whole. Moreover, AGC of America, ABC National, and ASA National, as national associations, have joined as *amici curiae* out of a concern and conviction that, if the new and novel principles of law enunciated in the Court of Appeals' decision are allowed to stand by this Supreme Court, their adverse impact could spread far beyond the borders of Georgia.

Accordingly, the Construction Industry Associations *amici curiae* unite to urge this honorable Court to reverse the Court of Appeals' decision in this case, as it presents issues of great concern, gravity, and importance to the public, and, if

allowed to stand, could have a devastating effect on the construction industry, as well as the public in general. *See* Ga. Const. Art. 6, §6, ¶5.

II. NATURE OF THE CASE AND STATEMENT OF FACTS

The Construction Industry Associations file this *amicus* brief in support of the Defendants-Appellants ("Appellants") and adopt and incorporate by reference the descriptions of the nature of the case and statements of facts contained in the Appellants' principal and reply briefs.

III. QUESTION PRESENTED

> Did the Court of Appeals err in reversing the trial court's grant of summary judgment to the defendants? *See* O.C.G.A. §34-9-11(a); *Crisp Regional Hosp. v. Oliver*, 275 Ga. App. 579-583, 621 S.E.2d 554 (2005).

IV. ENUMERATION OF ERRORS

The Court of Appeals erred in reversing the trial court's grant of summary judgment to the Appellants. The Construction Industry Associations adopt and incorporate by reference the Appellants' arguments and citations of authority on the issues of whether the Georgia Court of Appeals' decision: i) conflicts with the exclusive remedy provision of Georgia's Workers' Compensation Act (O.C.G.A. §34-9-11(a)); and ii) erroneously granted third-party beneficiary status to the decedent, Mr. Pitts; as well as the Appellants' argument that the Court of Appeals erred in its conclusions regarding the underlying issue of whether Appellants

breached any contractual obligations to one another or to the Plaintiffs-Appellees ("Appellees"), as discussed more fully below.

The Construction Industry Associations submit that the Court of Appeals also failed to consider various public policy considerations, resulting in some very significant and adverse, albeit apparently unintended, consequences, if the Court of Appeals' decision is allowed to stand. These include the following:

(1) *Disruption of long-standing and well-established practices regarding risk allocation, risk management, safety, and insurance requirements in the construction industry*. The decision adversely affects the ability of contracting parties to allocate and insure against construction project risks, since the newly-created breach of contract exposure falls outside the scope of commercially-available insurance products. Insurance is a key tool in construction risk management, but most liability insurance policies specifically exclude contractual liability (as opposed to negligence claims). Thus, if this decision stands, owners and contractors will not be able to effectively insure against their vicarious contractual liability arising from negligent acts of their lower tier subcontractors which this decision creates, and will not have any effective and reliable tool to ensure that the lower tier subcontractors have actually procured liability insurance to cover their own direct tort exposure.

(2) Alteration of contracting practices relative to safety and insurance requirements in the construction industry. Moreover, the Court of Appeals' decision will likely lead to the removal of safety and insurance requirements from construction contracts since this decision interprets the inclusion of such requirements as conferring rights and benefits on third parties and subjecting the party who imposed those requirements to liability (i.e., no good deed goes unpunished).

(3) *Likely increase in litigation*. In creating entirely new and broad contractual liability to virtually all persons involved in a construction project, by virtue of its expansive and unprecedented application of the third-party beneficiary concept and circumvention of the workers' compensation exclusive remedy defense, the Court of Appeals' decision will likely invite multiple waves of litigation. The opportunity for those injured in construction site accidents for yet a third "bite at the apple" (after workers' compensation remedies and tort claims against the wrongdoer are exhausted) against "deep pocket" owners and contractors will prove irresistible.

(4) *Unwarranted skepticism regarding use of consolidated "Controlled Insurance Programs" (such as "OCIP" and "CCIP")*. Since the Court of Appeals' ruling is based upon contractual language relating to the project's OCIP, the ruling could have a chilling effect on the use of consolidated or controlled

insurance programs on large construction projects [commonly referred to as Owner Controlled Insurance Programs ("OCIPs") and Contractor Controlled Insurance Programs ("CCIPs")].

(5) *Complicating and Discouraging the Participation of Small, Disadvantaged and Minority Businesses in Large Public Construction Projects.* Finally, the Court of Appeals' apparent disregard of the City of Atlanta's established practice of imposing lower insurance requirements for contractors working in less sensitive areas, combined with the chilling effect the decision may have on the use of OCIPS, will create new barriers to the participation of smaller firms who cannot obtain high levels of insurance coverage, thus making it harder for small, disadvantaged, and minority businesses to participate in public works projects and other contracting opportunities.

ARGUMENT AND CITATION OF AUTHORITY

A. WHERE'S THE BREACH?

The Construction Industry Associations submit that perhaps the most troubling aspect of the Court of Appeals' decision is the critical question which was not addressed: ***What contractual obligation did each of the Appellants breach*?** It appears that the Court of Appeals imposed liability on all of the Appellants in this case, as a matter of law and without a trial, without even considering this fundamental question. For contractual liability to exist (on a third-

party beneficiary basis or otherwise), there must first exist both a contractual duty and a breach of that duty. *See Graham Bros. Constr. Co., Inc. v. C.W. Matthews Contr'g Co., Inc.,* 159 Ga. App. 546, 549 (5) (1981). Both are lacking here.

1. No Independent Duty Owed to Third-Party Beneficiaries.

In classifying a construction worker as an intended third-party beneficiary of all of the project's various construction contracts, the Court of Appeals bestowed rights on a class of individuals without a sound contractual basis, and contrary to well-established legal precedents and public policy. Under Georgia law, there must be a clear intent reflected in the contract to make someone a third-party beneficiary of a contract. *O.C.G.A. §* 9-2-20(b). *See Northen v. Tobin*, 262 Ga. App. 339, 344 (2003). Here, the Court of Appeals disregarded Georgia law by granting this status to a vast multitude of unnamed and (at the time of contracting) mostly unknown individuals.

Moreover, even assuming, for the sake of argument, that Mr. Pitts was an intended third-party beneficiary of the prime contract, as well as the first-tier subcontract, all that status would entitle him to would be to enforce those contracts against the promisor(s). *See O.C.G.A §* 9-2-20(b). A third-party beneficiary stands in the shoes of a party to the contract and can only enforce any rights a party to the contract would have. If a defendant breached no contractual obligation, it

necessarily follows that that defendant can have no contractual liability to the third-party beneficiary.

So, what contractual duties were breached by any of the Appellants in this case? According to the Court of Appeals, every party upstream of the party that failed to procure sufficient insurance ultimately owed a contractual duty to the other contracting party ***and*** to approximately 10,000 unnamed, unknown, and undefined project workers to ensure that a lower-tier trucking company carried sufficient automobile liability insurance. Even assuming that the lower-tier trucking company here, A&G Trucking ("A&G"), breached its contractual obligations by failing to carry more insurance, the breaching party, A&G, is not a party to the lawsuit giving rise to this appeal.

Thus, the Georgia Court of Appeals' decision creates vicarious liability, and perhaps even strict liability, for the *non-breaching* party to the second-tier subcontract, as well as all of the upstream Project participants who were not even in privity with the breaching party, by holding all of them accountable for the trucking company's alleged failure to carry adequate insurance. Effectively, the Georgia Court of Appeals has fashioned a new rule of law holding that, if a plaintiff is a third-party beneficiary, rather than a party to the contract, the plaintiff can assert an independent cause of action in contract without any requirement that the contract be breached by the defendant, and without a requirement that the

defendant even be a party to the contract that was breached. The absurdity and profound potential impact of such a rule of law is obvious once this subtle, but profound, effect of the decision is recognized.

2. No Breach as a Matter of Law.

The trial court entered summary judgment in favor of the Appellants based upon its conclusion that, as a matter of law, the Appellees were not third-party beneficiaries of any contractual insurance obligations. In so ruling, the trial court never reached the question of whether any duty the Appellants may have owed to Mr. Pitts was breached. Moreover, the trial court did not determine whether any such breach of contract claim was barred by workers' compensation exclusivity rule. This did not stop the Court of Appeals. Instead, it found that: (1) Mr. Pitts was an intended third-party beneficiary of the upstream contracts, ***and*** (2) the Appellants each owed a duty to Mr. Pitts (among others), ***and*** (3) the Appellants breached their respective duties to Mr. Pitts (presumably a duty to ensure that A&G carried sufficient automobile liability insurance), ***and*** (4) the workers' compensation exclusivity rule did not bar these contract claims. It is hard to understand how the Court of Appeals apparently resolved the subsequent issues of duty, breach, and workers' compensation immunity based upon the record in this case when the trial court never even reached these issues and there was no trial. At the very least, genuine issues of material fact exist as to each of these issues.

Interestingly, the contract language the Court of Appeals relied upon related to an OCIP that expressly ***excluded*** "automobile liability" insurance coverage – the type of insurance coverage involved in this case.[1] The City did not provide automobile liability insurance in the consolidated policies under the OCIP; instead, contractors and subcontractors, whether enrolled in the OCIP or not, were required to furnish this coverage on their own.[2] Thus, the OCIP manual descriptions and purposes statements relative to "participants" in the OCIP program do not even apply.

Moreover, A&G was not even enrolled as a participant in the OCIP. The City did not extend OCIP enrollment to companies that only performed trucking or hauling operations, such as A&G.[3] In fact, under the applicable Contract Documents, the City reserved the authority and power to exclude from the overall coverage otherwise provided under the Project OCIP certain subcontractors "as determined by the Owner."[4] Pursuant to this reserved authority, the City's established practice, policy, and published guidelines - then and now - excluded hauling and trucking subcontractors from OCIP participation and a "trucking

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[1] *See Prime Contract*, Appendix, Exhibit "A," Part 3(B), at p. 126 (V9: R. at pp. 1511-2012); see also discussion in Subpart V (B) (5), below.
[2] *See* Affidavit of Neill Davis (the "*Davis Affidavit*") ¶¶ 5 (B) and 16, and Exhibit 3, thereto, (V11: R. 1781-1782, 1785, and 1837-1839).
[3] *See* Davis Affidavit, ¶¶ 7-8, 10, 13 (V11: R. 1781-2, 1784).
[4] *See* Note 1, *supra*, Part 3(B), at p. 126 (V9: R. 1511-2012).

company" could not be an "enrolled contractor" under the OCIP.[5] For subcontractors not eligible to enroll as participants in the OCIP, the City would approve their operations at the project based upon the sufficiency of their own separate insurance coverage.[6]

Here, A&G was a second tier subcontractor engaged to transport materials from off-site to the Project site, dumping those materials at the Project site, and occasionally to transport materials from the Project site to off-site locations.[7] The record establishes that the hauling services performed by A&G excluded any work inside the Airport's more restricted and higher risk Aviation Operations Area ("AOA").[8] So, A&G was not required to be "enrolled" as a participant in the OCIP.[9] Moreover, A&G, in point of fact, was not "enrolled" in the OCIP.[10]

The Appellees attempt to support their argument by continually referring to a provision in the Project's OCIP Manual regarding "contractor's insurance to be provided" relative to "Automobile, Bodily Injury and Property Damage liability

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[5] *See* Deposition of Tamika Puckett (June 8, 2009) ("Puckett Deposition") (at p. 11, ll. 14-24 (V18: R. 3002); p. 15, ll. 3-15; p. 16 , l. 3; p. 17, l. 10 (V18: R. 3006-3009); p. 29, ll. 1-23 (V18; R. 3020); p. 45, l. 18; p. 46, l. 4 (V18: R. 3036-37); and p. 47, ll. 8-14 (V18: R. 3038)).

[6] *See* Davis Affidavit, ¶ 7 (V11: R. at p. 1782).

[7] *See* Puckett Deposition, *id*. Note 5; Davis Affidavit ¶ 12 (V11: R. 1782).

[8] *See* Davis Affidavit, ¶¶ 12, 16 (V11: R. 1781, 1784-5); *See* Affidavit Kenneth W. Goggins, (March 9, 2010) ("Goggins Affidavit"), ¶¶ 4 (V11: R. 1927).

[9] *See* Davis Affidavit ¶¶ 10 – 13 (R. at pp. 1781 – 1784).

[10] *See* Davis Affidavit ¶¶ 8-9, 14 -15 (V11: R. 1781, 1783 – 85); *See* Puckett Deposition at pp. 24, ll. 12-15, (V18: R. 3015).

insurance coverage" and specifying a $10,000,000 coverage limit for bodily injury.[11] However, this requirement only applied to contractors performing work ***inside the*** Airport's more restricted and higher risk ***AOA areas***. The accident which caused the injuries suffered by Mr. Pitts occurred outside the AOA.[12]

The City required contractors and subcontractors working outside the AOA, such as A&G, to procure and maintain only $2,000,000 of automobile liability insurance. This is reflected in an e-mail communication from the OCIP Manager for the City, dated June 9, 2006, to the project management for the Prime Contractor Joint Venture on the Project regarding insurance requirements for "OCIP and Non-OCIP contractors" on the Project.[13] That email attached a Summary/Outline stating the minimum required limits and coverage (noted specifically to be "at the discretion of the City on a case by case basis") and showing that the minimum automobile liability insurance coverage for work performed outside the AOA area (for both those contractors "enrolled" and those not "enrolled" in the Project OCIP) was "$2,000,000 (Non AOA Airside)" and that

[11] *See* Note 1, *supra*, Part 5, (A) (1) at p. 132 (R. at pp. 1518).
[12] *See* Goggins Affidavit, ¶¶ 4, 7 (V11: R. 1927-1929).
[13] *See* Davis Affidavit, ¶¶ 16 (V11: R. at p. 1784-5; 1837-39; 1840-41 and 1846); *see also* (V12: R1928-29, 1932-34).

such coverage limits could be satisfied by "a combination of Primary & Excess or Umbrella Policy Limits." (See copy attached as **Exhibit "A"**)[14]

Thus, the City had in place on this Project, and afterwards, policies and guidelines establishing lower insurance requirements for contractors working exclusively outside the higher risk AOA areas of the Project.[15] The City also retained discretion as to how and to whom such requirements were to be applied. The City likely had sound reasons for imposing less stringent requirements for contractors working in lower risk areas, such as the goal of creating opportunities for participation by small, disadvantaged businesses.

"[A] mutual departure from the terms of an agreement results in a quasi-new agreement suspending the original terms of the agreement until one party has given the other reasonable notice of its intent to rely on the original terms." *Vakilzadeh Enterprises, Inc. v. The Housing Authority of County of DeKalb*, 281 Ga. App. 203, 206 (2006); *see* O.C.G.A. § 13–4–4. But, "whether the parties' mutual conduct caused a waiver and effected a quasi-new agreement ordinarily is a question for the jury." *Id.; Westmoreland v. JW, LLC*, 313 Ga. App. 486, 489 (2012). Here, the record reflects that the City and the upper tier contractors agreed on this project to impose lower automobile liability insurance requirements on

[14] *Id*.
[15] *See* Note 14, *supra*.

lower tier contractors not working inside the AOA, such as A&G. Appellants conducted the work on the Project based upon this mutual agreement and no one objected. Any party claiming to have been a third-party beneficiary of such insurance requirements, even if such a claim was otherwise valid, can have no greater rights than the actual parties to the contract.

Because it operated as a hauling subcontractor, operating exclusively outside the AOA, and was not enrolled in the OCIP, and consistent with the Prime Contract and the City's established practice, A&G only had to carry automobile liability coverage with the lower limit of $2,000,000.[16] The existence of such automobile liability coverage was evidenced by the Certificate of Insurance dated February 28, 2007, submitted by A&G, through the subcontractor and prime contractor, to the City.[17] (See copy attached as **Exhibit "B"**). On its face, this Certificate of Insurance showed that A&G Trucking, in fact, exceeded the City's automobile insurance requirements for non-AOA contractors, whether actually enrolled in the OCIP or not, in that it indicated A&G had a $1,000,000 automobile liability policy and a $2,000,000 excess liability policy in place, from the effective date of February 22, 2007 through the policy expiration date of February 22, 2008,

[16] *See* Davis Affidavit, ¶¶ 5 (B) and 16, and Exhibit 3, thereto, (V11: R. 1781-1782, 1785, and 1837-1839.)

[17] *See* Davis Affidavit, ¶¶ 7 and 14 and Exhibit 1, thereto (V11: R. 1781, 1783, 1785 and 1787, 1837-39); Puckett Deposition at pp. 19, ll. 7-19, (V18: R. at pp. 3010), p. 20, ll., 15-20 (V18: R. at 3011).

which encompassed the date on which the accident occurred. Information of this type was reviewed by the City, and the registering company was either: i) enrolled in the OCIP; or, ii) if it the company, like A&G, was merely a hauler of materials, then it was approved to operate solely outside the AOA, subject to the applicable, lower automobile liability insurance limits.[18]

The City relied upon the Certificate of Insurance submitted on behalf of A&G in concluding that A&G carried sufficient insurance for its participation in the Project, outside the AOA, as a nonparticipant in the OCIP.[19] A&G was properly permitted to perform its subcontract responsibilities in the non-AOA areas of the project. Both the City and the Defendant contractors were adhering to the rules then administered by the City of Atlanta.[20]

Accordingly, even if Mr. Pitts is considered a third-party beneficiary entitled to enforce all of the insurance requirements imposed upon the Appellants, the higher $10,000,000 insurance coverage obligation did not apply to A&G.

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[18] *Id.*

[19] *Id.*

[20] Of course, the impossibility or impracticability of effectively monitoring the insurance coverages of subcontractors generally, as discussed below, is amply illustrated by the fact that, here, A&G Trucking submitted the insurance certificate showing $1 million automobile liability coverages and $2 million excess liability coverage as being in place for a one year policy period which encompassed the date of the accident in question. Apparently, within the policy year when the accident happened, the $2 million excess coverage became unavailable to satisfy the plaintiff's judgment against A&G for reasons not disclosed by the record.

Therefore, none of these Appellants can now be held contractually responsible as a result of A&G's failure to have coverage it was not contractually required to have.

The deposition testimony which is relied upon heavily by the Appellees on this issue must be viewed in its proper context. These depositions were conducted in the original tort action brought by the Plaintiffs against only A&G and its employee. At the time these depositions were taken on June 8, 2009, none of the Appellants in the later separate action now before this Court had been named as parties in that earlier action, and none had been sued in any other action relative to this accident on any claims arising out of it. The depositions were all taken the day before the instant civil action was filed by the Plaintiff on June 9, 2009, naming these previously deposed companies as parties to a lawsuit arising out of this accident for the first time.

The Appellees argue that isolated portions of this deposition testimony should trump and effectively negate other testimony, as well as the content of the several later affidavits presented by the City in this case in connection with the motions for summary judgment. Appellees cite the Court of Appeals, asserting that "where the deponent is a party, his self-contradictory testimony must be construed against him and cannot create an issue of fact for the purpose of summary judgment unless the contradiction is adequately explained." This excerpt is drawn from *J.H. Harvey Co. v. Reddick*, 240 Ga. App. 466, 474 (1999), citing

this Court's earlier decision in *Prophecy Corp. v. Charles Rossignol, Inc.*, 256 Ga. 27, 28-29 (1986)). That citation is inapposite, however, because, in both of the cited cases, the deposition testimony in question was deposition testimony given by "a party" to the civil action in which it was sought to be used. Here, the depositions in question were taken at a time when none of the deponents were parties to any action, and no claims had been asserted against them. By contrast, the subsequent affidavit testimony was given in this action, in which specific claims had been asserted against the Appellants.

Moreover, much of the deposition questioning improperly called for legal conclusions or opinions by these fact witnesses regarding the legal consequences, import, or interpretation of the contract language. This questioning also sought to elicit parol evidence regarding the intentions and understandings of the parties in drafting the contract language, without any showing that the language is ambiguous and subject to modification or clarification by parol evidence.

For all of these reasons, and others, this deposition testimony should not be considered binding, let alone preemptive or dispositive, on the issue of the automobile insurance coverage to be furnished by A&G, especially in light of the clear evidence that A&G satisfied the applicable insurance requirements for this Project and was properly permitted to perform work in the non-AOA portions of the Project site.

B. THE COURT OF APPEALS' DECISION ADVERSELY AFFECTS CONTRACTING PARTIES' ABILITY TO INSURE AGAINST CONSTRUCTION PROJECT RISKS.

Construction projects, and the parties involved in those projects, face many risks affecting project cost, safety, and performance. The success of a project and the welfare and safety of the people involved require effective management of these risks. Effective risk management begins with contractually allocating known risks to the contracting parties who are in the best position to manage those risks. Where a risk cannot be fully controlled or avoided, one effective management tool available to mitigate the exposure is the purchasing of insurance. The Court of Appeals' decision, however, adversely impacts the ability of contractors to manage and quantify their risks through insurance in many ways. Several of these are discussed below.

1. The Creation of Uninsurable Risks

Before the Court of Appeals' decision, exposure to liability for construction site accidents was limited to the workers' compensation process and/or the tort liability of the party causing the accident. Both of these types of liability exposure were readily insurable through conventionally and commercially available insurance coverage addressing those specific forms of liability exposure. In fact, that is what occurred here, as the casualty was covered and compensated under the workers' compensation insurance procured

by the first tier subcontractor that employed Mr. Pitts, and an additional recovery was also obtained from A&G, the company whose employee caused the accident, and its automobile liability insurance carrier.

However, in this case the Appellees pursued a third source of recovery based upon an innovative and novel third-party beneficiary contractual liability argument, and the Court of Appeals obliged by creating an entirely new cause of action. This new cause of action creates an unprecedented risk of exposure for owners and contractors to claims by persons unknown and unknowable until the claim is asserted. Moreover, insurance coverage is not conventionally or commercially available for the risk posed by this new contractual liability exposure. Conventional liability insurance policies contain an explicit "contractual liability" exclusion that eliminates coverage for contractually-created liability such as that created by the Court of Appeals in this case.

2. Unreasonable Risk Allocation and Unmanageable Risk

It is unreasonable and impracticable to impose contractual liability on all upper-tier contractors and the owner, for potential claims by an undefined, indeterminate, and unidentifiable category of persons, with whom they have no direct employment relationship or contractual privity; and any such risk is impossible to manage. To consider such persons as third-party beneficiaries of liability insurance requirements could extend the resulting liability exposure of

the owner and upper-tier contractors to thousands of individual persons who, on any given day, may be involved on a construction project site, making the risk unquantifiable and unmanageable.

3. Unmanageable Risk and Vicarious Contract Liability Compounded By the Certificate of Insurance Quandary.

The Court of Appeals' decision, in effect, creates vicarious, and perhaps even strict, liability for innocent upstream parties in the event the culpable party does not have adequate insurance. Under this decision, a party contractually requiring another contracting party (or other parties) to carry insurance will effectively become the project insurer or guarantor itself, if the downstream party fails to carry the sufficient insurance. Not only does this contradict the basic concepts of risk allocation and management, it also punishes contracting parties for including insurance requirements in their contracts in the first place. Had the Appellants simply omitted any insurance requirements from their contracts, they would have no liability now to the Plaintiffs-Appellees even under the Court of Appeals' analysis.

Moreover, in Georgia, once insurance requirements are imposed, a contracting party has no effective means of ensuring that the other parties have satisfied their insurance obligations. Under Georgia law, obtaining a certificate of insurance from the other parties provides no assurance that that party has, in fact, procured, and is maintaining, the required insurance. To the contrary, by statute,

certificates of insurance in Georgia cannot be relied upon by certificate holders, as they have no binding effect on the insurer. O.C.G.A. §§33-24-19.1(d) and (j). Insurance certificates do not expand or affect insurance coverage, nor do they confer any additional rights on the parties. *See Investor's Nat. Life Ins. Co. v. Norsworthy,* 160 Ga. App. 340 (1981); *Morrison Assur. Co., Inc. v. Armstrong,* 152 Ga. App. 885 (1980); *see also American Interstate Ins. Co v. Smith,* 537 F.Supp.2d 1378 (S.D. Ga. 2008).

Moreover, even if an upstream party can confirm that the requisite insurance coverage is in place at the outset of a project, the coverage can be cancelled or otherwise expire during the course of a project without any notice to the upper-tier contracting parties. In this regard, O.C.G.A. § 33-24-19.1(l)) states that:

> A certificate holder shall have a legal right to notice of cancellation, nonrenewal, or any material change, or any similar notice concerning a policy of insurance ***only if the person is named within the policy or any endorsement and the policy or endorsement requires notice to be provided. The terms and conditions of the notice, including the required timing of the notice, are governed by the policy of insurance and cannot be altered by a certificate of insurance***.

(Emphasis supplied).

Under the Court of Appeals' rationale, these upstream parties would be exposed to breach of contract liability notwithstanding their exercising their best efforts to ensure that the requisite insurance is in place, using the only tool available to them.

4. Incentive to Mitigate Risk by Not Imposing Specific Insurance Requirements and Other Requirements Benefitting Non-parties.

In this case, a party that is not even a defendant in the case allegedly breached an obligation under the construction documents by failing to maintain sufficient automobile liability insurance coverage. Yet, all of the upstream contractors, who did not breach their obligations, were nonetheless deemed contractually responsible for the subject loss. The Court of Appeals' ruling, thus, creates a profound dilemma for contracting parties in Georgia: What, if any, insurance requirements should be spelled out in the parties' contract?

If allowed to stand, this decision will create vicarious contractual liability for parties who place insurance requirements in their contracts, in the event those requirements are not met. Why would an owner or general contractor require downstream contractors to procure insurance, if the owner or general contractor will be ultimately liable for the downstream contractor's failure to furnish such insurance? The logical answer is: they will not. Construction risk management in Georgia will forever change if this decision stands, as it will likely cause contracting parties to avoid including insurance requirements in their contracts.

Thus, a Court of Appeals decision that is so contrary to established law that it can only be explained as a results-oriented decision designed to benefit Mr. Pitts' heirs, will ultimately cause damage to Georgia construction workers and the public

at large that is far greater than any good it may cause in this case. This is because one ultimate effect of the rule of law established by this case, if the Court of Appeals' decision is affirmed, will be that all construction workers and the public will likely face a far greater risk that workplace injuries will not be insured.

5. The Decision Calls Into Question the Future Use of OCIPs and Other Controlled Insurance Programs on Georgia Construction Projects.

On large projects, OCIPs can significantly reduce project costs, while providing greater and more predictable insurance coverage for the participating companies enrolled in the program and allowing smaller contractors to participate. An OCIP involves the consolidated procurement of certain lines of insurance to cover the interests of certain designated, enrolled participants ("participants" in the OCIP – which may not include all "project participants"). OCIPs typically only cover certain project-specific risks, most often including commercial general liability, workers' compensation, employer's liability, and excess liability. Other types of insurance coverage, such as automobile liability, typically are not provided under the OCIP; instead, these are provided by the contractor's individual insurance programs. *See generally* Kaplan, Bunting, & Iannone, *OCIPs, CCIPs, and Project Policies,* 29-Sum. CONSTR. LAW. 11, 13-15 (2009).

OCIPs also have the benefit of providing separate project-specific policies for the participating contractors, the policy limits of which are not affected by their

work on other projects. Hence, more insurance may be available for a covered loss because the coverage will not have been exhausted by claims on other jobs. On large projects, smaller or disadvantaged contractors that are unable to procure certain types of insurance on their own can be included in the consolidated coverages in the wrap-up policies under the OCIP, allowing them to work on the project. Because of these benefits and advantages, OCIPs have become popular in the construction industry. But, the Court of Appeals' decision raises new questions and concerns about unintended consequences that may arise from OCIP usage, which may discourage the future use of such consolidated wrap-up programs, to the detriment of all.

The Court of Appeals' decision rests on a weak foundation of questionable interpretation and application of language contained in the Project OCIP Manual. First, the court applied the OCIP language to a type of insurance coverage that was not even included in the OCIP, stating that the Appellants failed to make sure that A&G "satisfied OCIP minimum requirements." *See* Plaintiffs-Appellees Response to Defendants' Appellate Briefs at 11. It is undisputed, however, that automobile liability insurance was expressly excluded from the Project OCIP, which is typical for OCIPs. Kaplan, *supra,* 29-Sum. CONSTR. LAW. at 15. Further, A&G was not even an OCIP participant.

Additionally, the Court of Appeals' ruling expands the generally accepted and industry-recognized definition of "participants" in the context of the application of an OCIP: namely, only those contractors which are enrolled in the OCIP. The OCIP is summarized in the OCIP Manual of the Prime Contract as being provided for the explicit purpose "to provide one master insurance program that provides broad coverages with high limits that will benefit all participants involved in the project", listing the six specific types of such "coverage" involved in the "program".[21] To be entitled to participate in the coverage afforded under the consolidated insurance policies comprising the OCIP package for this Project, a contractor had to apply for and be affirmatively approved and enrolled under the Program.[22] If a subcontractor was not enrolled as a participant in the OCIP, no "credit" was taken from that subcontract agreement and no coverage was afforded, leaving the subcontractor to provide all of its insurance on its own.

Thus, the term "participants" is logically and necessarily related to only the contractors and subcontractors insured under the OCIP, and does not include non-enrolled contractors or the individuals who may assert claims against such insured parties. Remarkably, the Court of Appeals applied its unique and expanded view of "participant" even when: (1) the culpable party, A&G, was not even enrolled in

[21] *See* Note 1, *supra.*
[22] *See* Davis Affidavit ¶¶ 7 and 8 (R. at pp. 1781 – 1783).

the OCIP and (2) the coverage involved relates to automobile liability, which was expressly excluded from the Project OCIP. Obviously, Mr. Pitts, like A&G, also was not an enrolled "participant" in the OCIP, and Mr. Pitts was not required to furnish any insurance coverage for the project himself. By expanding the definition of "participant" to include entities and persons who are not enrolled in the OCIP, the Court of Appeals renders OCIPs unpredictable, and therefore, unmanageable.

Effective risk management is accomplished through making informed decisions. If courts do not properly interpret insurance products such as OCIPs and CCIPs, the construction industry cannot effectively price and manage the corresponding risks. If this Court accepts the flawed reasoning of the Court of Appeals, as urged by the Appellees, Georgia will see owners and contractors abandoning OCIPs, CCIPs, and other comprehensive insurance products, and returning to traditional insurance programs. If OCIPs and similar products are abandoned in Georgia due to uncertainty from this decision, the various positive effects of such products will be lost.

C. EXPECT MULTIPLE WAVES OF CONTRACT-BASED CLAIMS FROM INJURED WORKERS.

The Court of Appeals' decision in this case, if affirmed, would leave all Georgia contractors – and, in fact, all contracting parties in Georgia - with potential unknown, undefined, and unlimited liability to an amorphous group of third-party

beneficiaries. In effectively affording persons injured on construction sites, such as the decedent here, "three bites at the apple" (namely workers' compensation, then tort claims against the culpable party, and now a third-party breach of contract claim against upper tier "deep pocket" contracting parties not even directly involved in the actual accident), the Court of Appeals' approach will now introduce a new source of unquantifiable and uncontrollable risk into the construction contracting process.

If it stands, the Court of Appeals' decision will likely lead to successive waves of litigation seeking recovery from deep pockets in the construction process irrespective of fault or causation, as injured parties seek to capitalize upon the expanded application of the "third party beneficiary" theory and the Court's gutting of the workers' compensation exclusive remedy defense. Then, if that action is successful, the cascade of litigation and liability reallocation will continue, as the upstream parties pursue subrogation and/or indemnification claims back down the contractual chain, including claims against the injured workers' employer which provided the workers' compensation coverage (the very party the workers' compensation exclusive remedy defense was designed to protect).

Litigation scenarios such as this will clog court dockets, at enormous costs to the citizens of this state. Further, the upstream parties the Legislature intended to receive the benefit of statutory immunity from suit under the workers'

compensation exclusivity rule will now be liable in contract, both to the injured party and to each other, without any insurance to protect them.

The financial and legal risks and burdens unnecessarily placed on the construction industry in Georgia by such mass litigation will further impact an industry already struggling in the grips of a recession. To address these additional burdens, contracting parties will need to increase pricing for services rendered. Goods and services will cost more, which will likely cause owners to increase their pricing, or simply choose not to undertake capital improvement projects in Georgia in order to avoid the added, uninsurable costs and risks. Ultimately, no one wins in this type of situation.

Further, conferring third-party beneficiary status on unnamed and unknown masses will permit creative non-parties to contracts to assert a wide range of breach of contract actions where none might have otherwise existed. These might include design obligations, safety obligations, payment obligations, or others. Such applications could present unintended, unforeseen, and uncontrollable financial repercussions far beyond the realm of the insurance requirements involved in this case. To avoid such uncertainties, contracting parties may attempt to minimize such third party exposure by removing any contractual obligations on other contracting parties which are designed to benefit, directly or even indirectly, non-parties, in order to avoid being later deemed liable to some amorphous group

of unknown third parties because those obligations were not fulfilled. Any contract provision that could be construed to protect a non-party, including provisions relating to safety and protection of construction workers and members of the public, will likely be eliminated from contracts in Georgia. Ultimately, such conduct will place the public and construction workers in more peril.

D. CHILLING EFFECT ON MINORITY CONTRACTORS, AND SMALL AND DISADVANTAGED BUSINESSES.

As noted above, the Court of Appeals' decision, if affirmed, will very likely cause owners and contractors to move away from wrap programs and return to traditional insurance programs in which each contractor must procure its own insurance. Some small, disadvantaged, and minority firms cannot obtain the insurance coverage necessary to perform work on a large project. Wrap-up programs benefit small, disadvantaged and minority contractors since they allow such companies access to the higher larger levels of coverage that they might be unable to obtain or afford on their own. Small businesses, and/or disadvantaged or minority contractors may be excluded from participation because they may be unable to procure the necessary insurance, effectively reducing competition and limiting the contractors who can participate on public projects.

V. CONCLUSION

The rule of law announced by the Georgia Court of Appeals in this case contravenes existing Georgia law and sound public policy for the reasons

summarized above, among others. The above-named Construction Industry Associations, appearing as friends of the Court on behalf of national and Georgia businesses serving the construction industry, strongly urge the Georgia Supreme Court to reverse the Georgia Court of Appeals' decision and to remand this case to the trial court for entry of summary judgment in favor of the Appellants.

Respectfully submitted this 2nd day of July, 2012.

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COUNSEL FOR *AMICI CURIAE*, CONSTRUCTION INDUSTRY ASSOCIATIONS

IN THE SUPREME COURT OF THE STATE OF GEORGIA

CITY OF ATLANTA, ARCHER WESTERN CONTRACTORS, LTD., CAPITAL CONTRACTING COMPANY, INC., HOLDER CONSTRUCTION COMPANY, MANHATTAN CONSTRUCTION COMPANY, C.D. MOODY CONSTRUCTION COMPANY, and HUNT CONSTRUCTION GROUP, INC.,	)	
Appellants,	)	Case Nos. S12C0517, S12C0526, SC12C0527
v.	)	
THE ESTATE OF MACK PITTS, by its Administrator, Ann J. Herrera; CALVIN E. J. PITTS, JR., MAKALA PITTS and WILLIE G. PITTS, minors, by and through their next friend and natural mother, Lillian Pitts; and AKIM USSERY, a minor by and through his next friend and natural mother, Lakeshi Rena Ussery,	)	
Respondents.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have on this 2nd day of July, 2012 served the within and foregoing **BRIEF OF *AMICI CURIAE*, CONSTRUCTION INDUSTRY ASSOCIATIONS, IN SUPPORT OF DEFENDANTS-APPELLANTS** on all counsel of record by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed, upon:

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s/ G. Scott Walters
G. Scott Walters

EXHIBIT "A"

To

BRIEF OF *AMICI CURIAE,* CONSTRUCTION INDUSTRY ASSOCIATIONS, IN SUPPORT OF DEFENDANTS-APPELLANTS

"Edwards, Kasunie" <kasunie.edwards@atlanta-airport.com>
06/09/2006 10:01 AM

To: <rfischer@hmmhteam.com>
cc: <NPeden@hmmhteam.com>
Subject: OCIP requirements

Per your request, I have attached general requirements for OCIP and Non-OCIP contractors. Let me know if you need anything else.

Regards,

Kasunie F. Edwards
OCIP Manager
City of Atlanta, Risk Management
Phone: (404) 530-5500 ext 1223
Mobile: (404) 725-6115
Fax: (404) 559-2333

requirement forms.dc

EXHIBIT 3

EXHIBIT "A" to
BRIEF OF *AMICI CURIAE,* CONSTRUCTION INDUSTRY ASSOCIATIONS, IN SUPPORT OF DEFENDANTS-APPELLANTS

City of Atlanta / HAIA OCIP

Owner Controlled Insurance Program / Wrap Up

Summary / Outline

(Note: The limits listed here are at the discretion of the City on a case by case basis)

Insurance Requirements for Contractors NOT enrolled in OCIP

- Contractors must maintain Insurance Coverage for the duration of their work on the project.
- A Company licensed to do business in Georgia, with a Best Rating of A- or better.
- Certificate(s) of Insurance as evidence of required limits and coverages
- 30 day cancellation notice to the City

Minimum Required Limits and Coverages:

Workers Compensation	Statutory
Employer's Liability	$ 500,000 each accident
Commercial General Liability (Occurrence Form)	$ 1,000,000 CSL BI / PD
Personal Injury	$ 2,000,000 each occurrence
Products/Completed Operations	$ 2,000,000 annual aggregate
General Annual Aggregate (Other than Products/Completed Operations)	$ 2,000,000
Automobile Liability (Incl. Owned, Hired, Non-Owned)	$ 10,000,000 CSL BI/PD (AOA Airsite) $ 2,000,000 (Non AOA Airsite)

** These limits may be satisfied by a combination of Primary & Excess or Umbrella Policy Limits*

The City of Atlanta shall be named as Additional Insured as respects the work for the City.

In lieu of naming the City as Additional insured under the General Liability Policy, Contractor may provide:

- Owners & Contractors Protective Policy with a $ 2,000,000 CSL BI/PD Each Occurrence and $ 2,000,000 Annual Aggregate

City of Atlanta / HAIA OCIP
Owner Controlled Insurance Program / Wrap Up
Summary / Outline

EXHIBIT "A" to
BRIEF OF *AMICI CURIAE*, CONSTRUCTION INDUSTRY ASSOCIATIONS, IN SUPPORT OF DEFENDANTS-APPELLANTS

Insurance Requirements for Contractors Enrolled in OCIP

Required Limits of Insurance:

Comprehensive General Liability (For all On-Site Activities)	$ 300,000 CSL BI/PD
Automobile	$ 10,000,000 BI / PD (AOA Airsite work) $ 2,000,000 BI/PD (non AOA Airsite)
Workers Compensation	Statutory limits
Employers Liability	$ 500,000 each claim
Aircraft or Watercraft (If used – Owned or Non-owned)	$ 1,000,000 / occurrence

Contractor must deliver, as part of the Enrollment process, and prior to the beginning of their work, a Certificate of insurance, issued on behalf of an Insurer licensed to do business in the State of Georgia, and showing the City of Atlanta and its agents as an Additional Insured as follows, under the listed policies, and referencing the specific project by its designated number and name:

Certificate Holder:

City of Atlanta
City Hall Tower
Suite 9100
68 Mitchell Street
Atlanta, GA 30335

EXHIBIT "A" to
BRIEF OF *AMICI CURIAE*, CONSTRUCTION INDUSTRY ASSOCIATIONS, IN SUPPORT OF DEFENDANTS-APPELLANTS

EXHIBIT "B"

To

BRIEF OF *AMICI CURIAE,* CONSTRUCTION INDUSTRY ASSOCIATIONS, IN SUPPORT OF DEFENDANTS-APPELLANTS

Inc

b 28 07 12:58p P.2

ACORD CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YY) 02/28/07

PRODUCER
Five Star Insurance & Business Svc.
2093 Rock Chapel Road
Lithonia, GA 30058
(678)526-7979

RECEIVED HMMH, JV APR 19 2007

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURERS AFFORDING COVERAGE — NAIC #

INSURED
A&G Trucking INC.
2081 Rock Chapel Rd
Lithonia, GA 30058

WBS. #

INSURER A: Canal
INSURER B: Progressive Express Ins. Comp
INSURER C:
INSURER D: Canal
INSURER E: Zurich
INSURER F:

COVERAGES

THE POLICIES OF INSURANCE LISTED HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	ADD'L INSRD	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS
A	☑	GENERAL LIABILITY ☑ COMMERCIAL GENERAL LIABILITY ☐ CLAIMS MADE ☑ OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: ☐ POLICY ☐ PROJECT ☐ LOC	GL33391	11/01/06	11/01/07	EACH OCCURRENCE 1,000,0 DAMAGE TO RENTED PREMISES (Ea occurrence) 1,000,0 MED EXP (Any one person) 5,0 PERSONAL & ADV INJURY 1,000,0 GENERAL AGGREGATE 1,000,0 PRODUCTS - COMP/OP AGG INCL.D
B	☑	AUTOMOBILE LIABILITY ANY AUTO ALL OWNED AUTOS ☑ SCHEDULED AUTOS HIRED AUTOS NON OWNED AUTOS	05631733-0	02/22/07	02/22/08	COMBINED SINGLE LIMIT (Ea accident) 1,000,000 BODILY INJURY (Per person) BODILY INJURY (Per accident) PROPERTY DAMAGE (Per accident)
	☐	GARAGE LIABILITY ANY AUTO				AUTO ONLY - EA ACCIDENT OTHER THAN AUTO ONLY: EA ACC / AGG
D	☑	EXCESS LIABILITY ☑ OCCUR ☐ CLAIMS MADE ☐ DEDUCTIBLE ☐ RETENTION	953915	02/22/07	02/22/08	EACH OCCURRENCE 2,000,00 AGGREGATE 2,000,00
E		WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR / PARTNER / EXECUTIVE OFFICER / MEMBER EXCLUDED? If yes, describe under SPECIAL PROVISIONS below	5769C124	10/19/06	10/19/07	☑ WC STATU-TORY LIMITS ☐ OTH-ER E.L. EACH ACCIDENT 100,0 E.L. DISEASE - EA EMPLOYEE 500,0 E.L. DISEASE - POLICY LIMIT 100,0
F		OTHER				

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES / EXCLUSIONS ADDED BY ENDORSEMENT / SPECIAL PROVISIONS

CERTIFICATE HOLDER

ARCHER WESTERN CONTRACTORS
3715 NORTHSIDE PARKWAY,NW 550 BUILDING
ATLANTA, GA 30327

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 45 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

AUTHORIZED REPRESENTATIVE
AISHA SMITH-DANZY

ACORD 25 (2001/08)

EXHIBIT 7

EXHIBIT "B"
BRIEF OF *AMICI CURIAE*, CONSTRUCTION INDUSTRY ASSOCIATIONS, IN SUPPORT OF DEFENDANTS-APPELLANTS