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DAILY REPORT

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City may have to pay in death suit

FAILURE TO force subcontractor to obtain adequate insurance could put Atlanta, contractors on hook for $4.47 million

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THE STATE COURT OF APPEALS has ruled that the city of Atlanta and a group of construction companies may be on the hook for $4.47 million in a wrongful death case—simply based on their failure to force another company found liable at trial to procure adequate insurance coverage.

The Oct. 5 decision was the result of a creative attempt by plaintiffs' lawyers to collect on a $5.47 million verdict awarded by a DeKalb County jury in 2009. That suit was won for the children of Mack Pitts, who died from injuries he suffered working on a construction project at Atlanta's airport.

The DeKalb verdict was entered against A&G Trucking and its driver, Sarah Okoro, who accidentally backed a truck into Pitts at the work site. But, according to Matthew E. Cook, one of the Pitts family's lawyers, A&G had only $1 million of insurance.

The family's attempt to recover the remainder of the verdict from the city and its other contractors is premised on those defendants' contractual duty to require A&G to carry a minimum of $10 million in automobile liability coverage to work on the project. Fulton County Superior Court Judge Constance C. Russell said Pitts wasn't meant to benefit from that part of the construction contracts, but last week's Court of Appeals ruling says otherwise.

"I thought it was a pretty novel theory," said Cook, who added the Court of Appeals decision wouldn't open the floodgates to similar litigation because it has to be clear the contract in question was meant to benefit a non-party in order for that person to recover. But, he said, "it's important because I think anytime you have a case where the main tort defendant has a relationship with other parties who may require insurance minimums—it's pretty common in the trucking scenario, very common in construction cases—the plaintiffs' lawyers need to consider any contractual agreements between their tort defendants and any employer and affiliated companies."

FILE PHOTO

Matthew Cook, with Alan Hamilton, left, and Patrick Sneed, right, co-trial counsel: Plaintiffs' lawyers must consider contractual agreements between tort defendants and their affiliates.

Pitts was a 26-year-old resident of East Point when he was injured in June 2007 on the construction site of the international terminal of Hartsfield-Jackson Atlanta International Airport. He was working as a flagman for the terminal's general contractor, Archer Western Contractors. Pitts' job was to signal directions to dump trucks on where and when to unload their loads of fill dirt.

At trial, the plaintiffs were represented by Cook and Alan J. Hamilton—who both were with Butler, Wooten & Fryhofer at the time but since have left—and Atlanta lawyer J. Patrick Michael Sneed. A&G and Okoro were represented by Joseph C. Parker of Marietta, who couldn't be reached for this story.

On the day of the accident, Okoro broke out of a line of trucks on the site, according to the plaintiffs' complaint. She initially stopped on Pitts' directions, the plaintiffs' lawyers have said, but then put her truck into reverse and ran over Pitts. He died about two hours later.

According to the plaintiffs' lawyers, the defense argued at trial that Pitts had violated workplace rules by turning his back on Okoro's truck and walking behind it, although Cook has

said there was conflicting testimony on whether that actually happened. According to a Court of Appeals opinion from last year, Okoro testified that she didn't see Pitts signal for her to stop and did not know Pitts was behind her when she put her truck into reverse. Okoro did not contest in her trial testimony that she violated safety rules herself, according to that court opinion, but she testified her actions on the day of the accident were consistent with the actions of other drivers on the site.

Last year, A&G and Okoro lost their appeal of the $5.47 million verdict at the Court of Appeals, and they didn't appeal further. Cook wouldn't say exactly what A&G has paid the plaintiffs, citing confidentiality.

Meanwhile, Pitts' estate had filed the action in Fulton Superior Court against the city of Atlanta and other contractors, claiming they were responsible for the $4.47 million not covered by insurance. The estate sued the city, its general contractor on the project (a joint venture composed of Holder Construction Co. and other entities) and the subcontractor (a joint venture composed of Archer Western and another entity). The Archer Western venture had hired A&G for work on the project.

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>
> —Plaintiffs' attorney Matthew Cook

The contract between the general contractor and the city required the contractor, all subcontractors and all sub-subcontractors to maintain at least $10 million in insurance. According to an appellate brief filed by the plaintiffs, the contracts on the project required the city, contractor and subcontractors to ensure that those working under them complied with this requirement.

Christopher McFadden, writing for the court, tossed a separate noncontractual claim against city.

Russell granted summary judgment to the defendants, finding that Pitts' estate didn't have standing to claim breach of the insurance requirements because he wasn't an intended third-party beneficiary of the contracts. The contract between the city and the general contractor stated the purpose of the insurance program was "to provide one master insurance program that provides broad coverages with high limits that will benefit all participants involved in the project."

Russell concluded the estate hadn't presented any evidence that the parties understood the term "participants" to include specific workers on the site.

But the Court of Appeals in large part reversed in an opinion written by Judge Christopher J. McFadden and joined by Presiding Judge J.D. Smith and Judge Charles B. Mikell. The court tossed a separate noncontractual claim against the city but allowed the contractual claims against all defendants to go forward.

"By working on the construction project as an employee of the Subcontractor," wrote McFadden, "Pitts took part in the project and was a 'participant' under the usual significance of that word."

The defendants pointed to a separate provision that said the insurance program was "for the benefit of the [City] and Contractors and Subcontractors of all tiers" as evidence they were the only intended beneficiaries of the insurance provisions. But McFadden said the language included no such express restriction, adding that to conclude otherwise would render meaningless the other provision extending the benefit to all "participants."

McFadden also rejected the defendants' argument that a provision for workers' compensation insurance meant individual workers could not have been intended beneficiaries of the liability insurance program. The defendants pointed to language in the contract between the general contractors and the subcontractors to the effect that nothing contained in that agreement was intended to make any of the subcontractors' lower tier sub-subcontractors or vendors third-party beneficiaries, but McFadden wrote that this language didn't affect Pitts because he was an employee, not a sub-subcontrator or vendor.

Joel O. Wooten Jr. of Butler Wooten, whose colleague Kate S. Cook (Matt Cook's wife) did much of the briefing on the appeal in the Fulton case, said the issue was a straightforward one. "The city had contractually said that every contractor and subcontractor will have a certificate for $10 million worth of coverage to protect participants, and Mack Pitts was a participant," said Wooten. When the city allowed a subcontractor on the job that didn't comply with the $10 million insurance requirement, he added, that was a breach of contract.

James H. Fisher II of Hall Booth Smith & Slover, who represents the general contractor joint venture, said his clients are considering an appeal. He said Russell was correct in her analysis but added, "I think this is a fairly unique situation."

R. Patrick White of Casey Gilson, who represents Pitts' employer Archer Western, referred questions to the city's lawyer, Stephen M. Schatz of Swift, Currie, McGhee & Hiers, who couldn't be reached for comment.

The case is *Estate of Mack Pitts v. City of Atlanta*, No. A11A1487. DR