

**IN THE STATE COURT OF GWINNETT COUNTY
STATE OF GEORGIA**

ERIN ALTMAN,)
)
 Plaintiff,)
)
 v.) Civil Action No.: 21-C-02854-S1
)
 ARCH INSURANCE COMPANY,)
 VETERANS EMPOWERMENT)
 ORGANIZATION OF GEORGIA, INC.)
 and EDWARD DAVIS)
)
 Defendants.)

**DEFENDANT ARCH INSURANCE COMPANY'S MOTION TO DISMISS
AND INCORPORATED MEMORANDUM OF LAW**

Defendant Arch Insurance Company (“Arch”) respectfully moves the Court, pursuant to O.C.G.A. §§ 9-11-12(b)(1) and 9-11-12-(b)(6), to dismiss the Complaint against it as no privity of contract exists between Arch and Plaintiff and neither O.C.G.A. § 40-1-112(c) nor O.C.G.A. § 40-2-140(d)(4) authorize the Court to entertain a direct action by Plaintiff against Arch because its insured, Veterans Empowerment Organization of Georgia, Inc. (“VEO”) is not a motor carrier for hire engaged in either interstate or intrastate commerce.

MEMORANDUM OF LAW

In order for the Court to have subject matter jurisdiction and for Plaintiff Erin Altman to maintain an action against Arch, Ms. Altman must either be in privity of contract with Arch or she must be authorized to bring a direct action against Arch under O.C.G.A. § 40-1-112(c) or O.C.G.A. § 40-2-140(d)(4). As will be shown below, Ms. Altman is not in privity of contract as Arch issued its commercial auto liability policy to VEO. Ms. Altman's attempts to sidestep this obstacle to her suit by claiming that she is authorized by O.C.G.A. § 40-1-112(c) or O.C.G.A. § 40-2-140(d)(4) to bring a direct action. However, those statutes authorize a direct action against an insurer of a

motor carrier only if the motor carrier is a motor carrier for hire that is engaged in intrastate or interstate commerce.

VEO is a not for profit organization. At the time of the accident, VEO owned the truck being operated by its employee. VEO does not operate as a motor carrier for hire and is not engaged in interstate or intrastate motor carrier commerce.

I. Background Information

Ms. Altman's claims arise out of an automobile accident that she was involved in on January 5, 2021. Ms. Altman alleges that a truck owned by VEO and being driven by VEO's employee collided with the vehicle that she was driving.

Arch issued Policy Number AAAUT0046602 with a Policy Period of July 1, 2020 through July 1, 2021 to the Named Insured "Veterans Empowerment Organization of Georgia, Inc.," which provides commercial automobile coverage (the "Arch Policy").

Ms. Altman does not assert that she has a right of action against Arch because she is an insured under the terms and conditions of the Arch Policy or that she is an intended third party beneficiary. Rather, she alleges that she is authorized to bring a direct action against Arch pursuant to O.C.G.A. § 40-1-112(c) or O.C.G.A. § 40-2-140(d)(4). In support of her claim, she alleges the following:

- "Arch provided applicable liability insurance to VEO." (Complaint, ¶ 28)
- "VEO is a 'motor carrier' under O.C.G.A. § 40-2-1(6)(B) because it 'operates or controls commercial motor vehicles as defined in 49 C.F.R. Section 390.5 or this chapter whether operated in interstate or intrastate commerce, or both.'" (*Id.* at ¶ 29)

- "VEO is a 'motor carrier' under O.C.G.A. § 40-1-100(12)(A) because it 'own[s], control[s], operat[es], or manag[es] . . . motor vehicle[s] . . . used in the business of transporting for hire . . . household goods . . . or property . . .' and because the subject truck had a GVWR greater than 10,000lbs." (*Id.* at ¶ 30)
- "Because VEO was a motor carrier, Arch is subject to this direct action." (*Id.* at ¶ 31)
- "Plaintiff names Arch as a party defendant and brings this case against Arch as a direct action as authorized by O.C.G.A. § 40-2-140(d)(4), O.C.G.A. § 40-1-112(c), and other applicable law." (*Id.* at 32)

II. Argument and Citations to Authority

Ms. Altman lacks standing to bring a direct action against Arch because she is not in privity of contract with Arch and VEO is not a "motor carrier for hire."

A motion pursuant to OCGA § 9-11-12 (b) (1) asserts the defense of "lack of jurisdiction over the subject matter..." "When a defendant challenges a plaintiff's standing by bringing a ... 12 (b) (1) motion, the plaintiff bears the burden to establish that jurisdiction exists." *McCabe v. Daimler Ag*, No. 1:12-CV-2494-MHC, 2015 WL 11199196, 2015 U.S. Dist. LEXIS 182877 (II), *6 (N.D. Ga. 2015). "A motion to dismiss for lack of subject matter jurisdiction under OCGA § 9-11-12 (b) (1) can allege either a facial challenge, in which the court accepts as true the allegations on the face of the complaint ... or a factual challenge, which requires consideration of evidence beyond the face of the complaint..." (Citations and punctuation omitted.) *Bobick v. Community & Southern Bank*, 321 Ga.App. 855, 860 (3), n. 4, 743 S.E.2d 518 (2013).

Douglas County v. Hamilton State Bank, 340 Ga.App. 801, 798 S.E.2d 509 (2017). Ms. Altman's Complaint fails to establish that she has standing to bring a direct action against Arch, and she cannot establish that she has standing to bring the direct action against Arch.

Generally, a party not in privity of contract may not bring a direct action suit against the liability insurer of the party alleged to have caused damage absent an unsatisfied judgment against the insured, legislative mandate, or as permitted by a provision in the insurance policy in issue. *Richards v. State Farm Mut. Automobile Ins. Co.*, 252 Ga. App. 45, 555 S.E.2d 506 (2001); *see Hartford Ins. Co. v. Henderson & Son*, 258 Ga. 493, 494, 371 S.E.2d 401 (1988) (citing *Seaboard Coast Line R. Co. v. Freight Delivery Svc.*, 133 Ga. App. 92, 95–96 (3), 210 S.E.2d 42 (1974) (“An insurer may not be joined as a party defendant with the insured and sued directly, unless a judgment has previously been obtained against the insured which is unsatisfied or liability has been otherwise fixed, or unless a provision in the policy permits it, or unless specifically permitted by statute[.]”)).

Ms. Altman is not a party to the Arch Policy. She is not an insured or additional insured under the terms and conditions of the Arch Policy. She does not allege that she is in privity of contract with Arch. Thus, absent some statutory authority, Ms. Altman does not have a right to bring a direct action against Arch.

The statutory exceptions to the general prohibitions on direct actions against liability insurers are found in O.C.G.A. § 40-1-112 and O.C.G.A. § 40-2-140, which permit, under certain circumstances and strict construction, an insurer of a motor carrier to be named as a defendant in a lawsuit by an injured party. Because the direct action statutes are in derogation of the common law rule prohibiting direct actions by injured parties against insurers, the statutes must be strictly construed. *Glenn McClendon Trucking Co. v. Williams*, 183 Ga.App. 508, 509, 359 S.E.2d 351 (1987).

A. O.C.G.A. § 40-1-112 does not authorize Ms. Altman to bring a direct action against Arch.

O.C.G.A. § 40-1-112(c) states, "It shall be permissible under this part for any person having a cause of action arising under this part to join in the same action the motor carrier and the insurance carrier, whether arising in tort or contract." As used in O.C.G.A. § 40-1-112(c), "motor carrier" is defined as follows:

Every person owning, controlling, operating, or managing any motor vehicle, including the lessees, receivers, or trustees of such persons or receivers appointed by any court, used in the business of transporting for hire persons, household goods, or property or engaged in the activity of nonconsensual towing pursuant to Code Section 44-1-13 for hire over any public highway in this state.

O.C.G.A. § 40-1-100(12)(A) (emphasis added). Under the plain language of the statute, for an insurer to be subject to a direct action, the entity that it insures must be in the business of transporting people or things "for hire." If an entity is not transporting goods or passengers for compensation, then it is not a carrier under O.C.G.A. § 40-1-112(c), and its insurer is not subject to a direct action. *See Nat'l Union Fire Ins. Co. v. Sorrow*, 202 Ga.App. 517, 414 S.E.2d 731 (1992) (holding that a vehicle that was not held out for hire to the public and was not used or hired by the public for the transportation of goods or people was not a motor common carrier or motor contract carrier as defined by the version of the direct action statute in effect at the time of the accident; therefore, there could be no direct action against the insurer of the vehicle).

VEO does not use its truck "in the business of transporting for hire persons, household goods, or property." VEO is a non-profit that provides assistance to veterans. (Ex. A, Affidavit of Don Gibson.) VEO is not a motor carrier for hire by others, nor was VEO hired, at the time of this accident, by any third party to transport for compensation people or goods. (*Id.*) Because VEO is not a "motor carrier" as defined by O.C.G.A. § 40-1-100(12)(A), O.C.G.A. § 40-1-112(c) does not authorize Ms. Altman to bring a direct action against its automobile liability insurer, Arch.

B. O.C.G.A. § 40-2-140 does not authorize Ms. Altman to bring a direct action against Arch.

O.C.G.A. § 40-2-140(d) states as follows:

- (1) Any intrastate motor carrier, leasing company leasing to a motor carrier, broker, or freight forwarder that engages in intrastate commerce and operates a motor vehicle on or over any public highway of this state shall register with the commissioner and pay a fee determined by the commissioner.
- (2) No for-hire intrastate motor carrier shall be issued a registration unless there is filed with the commissioner a certificate of insurance for such applicant or holder, on forms prescribed by the commissioner, evidencing a policy of indemnity insurance by an insurance company licensed to do business in this state. Such policy shall provide for the protection of passengers in passenger vehicles and the protection of the public against the negligence of such for-hire intrastate motor carrier, and its servants or agents, when it is determined to be the proximate cause of any injury. The commissioner shall determine and fix the amounts of such indemnity insurance and shall prescribe the provisions and limitations thereof. The insurer shall file such certificate. Failure to file any form required by the commissioner shall not diminish the rights of any person to pursue an action directly against a for-hire intrastate motor carrier's insurer. The insurer may file its certificate of insurance electronically with the commissioner.
- (3) The commissioner shall have the power to permit self-insurance in lieu of a policy of indemnity insurance whenever in his or her opinion the financial ability of the motor carrier so warrants.
- (4) Any person having a cause of action, whether arising in tort or contract, under this Code section may join in the same cause of action the motor carrier and its insurance carrier.

There are few Georgia appellate decisions addressing O.C.G.A. § 40-2-140. Under Georgia rules of statutory construction, “a statute must be construed in relation to other statutes of which it is a part, and all statutes relating to the same subject-matter, briefly called statutes ‘*in pari materia*,’ are construed together, and harmonized wherever possible so as to ascertain the legislative intent and give effect thereto. [cit.]” *Monticello, Ltd. v. City of Atlanta*, 231 Ga. App. 382,

383, 499 S.E.2d 157 (1998). Georgia rules of statutory construction further dictate that statutes must be read as a whole and that the express mention of one thing in a statute implies the exclusion of other things. *See Rodgers v. Gen. Motors Corp.*, 277 Ga. App. 547, 550, 627 S.E.2d 151, 154 (2006) (applying the rule of “*inclusion unius, exclusion alterius*.”); *see also Walker Cnty. v. Tri-State Crematory*, 292 Ga. App. 411, 415, 664 S.E.2d 788 (2008) (holding that “in construing language in any one part of a statute, a court consider the entire scheme of the statute and attempt to gather the legislative intent from the statute as a whole”).

As under its counterpart, O.C.G.A. § 40-1-112, for an insurer to be subject to a direct action under O.C.G.A. § 40-2-140, the entity that it insures must be a motor carrier for hire. This is evident when the statute is read as a whole. Subpart (d)(1) requires all intrastate motor carriers that engage in interstate commerce to register with the commissioner and pay a fee. It does not address any insurance requirements. It is Subpart (d)(2) that requires "for hire" motor carriers to provide evidence of insurance at limits fixed by the commissioner for the "protection of the public against the negligence of *such for-hire* intrastate motor carrier" (emphasis added). It further states, "Failure to file any form required by the commissioner shall not diminish the rights of any person to pursue an action directly against *a for-hire* intrastate motor carrier's insurer" (emphasis added). No such protection is afforded for persons injured by motor carriers that are not for hire.

Limiting the insurance requirements to "for hire" motor carriers and providing protection to the public for injuries caused by the negligence of "for hire" motor carriers expressly demonstrates the intent that only insurers of "for hire" motor carriers are subject to a direct action authorized by subpart (d)(4), which again references "for hire" intrastate motor carriers. To conclude otherwise would be illogical and would require disregarding the express wording of the

statute. Furthermore, this interpretation is consistent with the direct action authorized by O.C.G.A. § 40-1-112.

As discussed above, VEO is not a "for hire" motor carrier. VEO is a non-profit that provides assistance to veterans. (Exhibit A, Affidavit of Don Gibson) Third parties do not hire it to transport people or goods. (*Id.*) VEO is not required to register with the Department of Public Safety or provide proof of insurance under O.C.G.A. 40-2-140(d)(2). (*Id.*) Because VEO is not a "for hire" motor carrier and was not carrying for hire passengers or goods at the time of the subject accident, O.C.G.A. § 40-2-140(d)(4) does not afford Ms. Altman a statutory right of direct action against Arch as the automobile liability insurer of VEO.

III. Conclusion

No privity of contract exists between Arch and Ms. Altman. Therefore, for Ms. Altman to be entitled to bring a direct action against Arch, that right of action must be authorized by O.C.G.A. § 40-1-112 or O.C.G.A. § 40-2-140. Arch's insured, VEO, is not a "for hire" motor carrier generally or at the time of the subject action. Thus, neither O.C.G.A. § 40-1-112 nor O.C.G.A. § 40-2-140 authorize Ms. Altman to bring a direct action against Arch. Arch respectfully requests that the Court grant its Motion to Dismiss and dismiss Arch with prejudice.

Respectfully submitted, this 14th day of May, 2021.

HALL BOOTH SMITH, P.C.

/s/ C. Michael Johnson

C. Michael Johnson, Georgia Bar No. 392550

mjohnson@hallboothsmith.com

Thomas K. Wingfield, Georgia Bar No. 770653

twingfield@hallboothsmith.com

*Counsel for Arch Defendant, Arch Insurance
Company*

191 Peachtree Street NE, Suite 2900
Atlanta, GA 30303-1775
Phone: (404) 954-5000
Fax: (404) 954-5020

CERTIFICATE OF SERVICE

I hereby certify that I have on this day, filed electronically via CM/ECF a true copy of the within and foregoing **DEFENDANT ARCH INSURANCE COMPANY'S MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW** in the appropriate court of jurisdiction, with notice of same being electronically served by the Court, addressed to the following:

James E. Butler III, Esq. [116955]
Matthew R. Kahn, Esq. [833443]
BUTLER LAW FIRM
10 Lenox Pointe
Atlanta, GA 30324
jeb@butlerfirm.com
matt@butlerfirm.com

Counsel for Plaintiff, Erin Altman

Payton D. Bramlett, Esq.
C. Kimberly Liverpool-Settle, Esq.
QUINTAIRO, PRIETO, WOOD & BOYER, P.A.
365 Northridge Road, Suite 230
Atlanta, GA 30350
payton.bramlett@qpwblaw.com
kimberly.settle@qpwblaw.com

*Counsel for Defendant, Veterans
Empowerment Organization of Georgia,
Inc. and Edward Davis*

Savannah L. Bray, Esq.
WORSHAM, CORSI, DOBUR & BERS
Post Office Box 674027
Marietta, GA 30006
GAEfile@progressive.com
sbray1@progressive.com

*Counsel for Progressive Premier Insurance
Company of IL*

This 14th day of May, 2021.

HALL BOOTH SMITH, P.C.

/s/ C. Michael Johnson
C. Michael Johnson
Georgia Bar No. 392550

Counsel for Defendant, Arch Insurance Company

EXHIBIT “A”

TO

***DEFENDANT ARCH INSURANCE
COMPANY’S MOTION TO DISMISS
AND INCORPORATED
MEMORANDUM OF LAW***

**IN THE STATE COURT OF GWINNETT COUNTY
STATE OF GEORGIA**

ERIN ALTMAN,)

Plaintiff,)

v.)

Civil Action No.: 21-C-02854-S1

ARCH INSURANCE COMPANY,)
VETERANS EMPOWERMENT)
ORGANIZATION OF GEORGIA, INC.)
and EDWARD DAVIS)

Defendants.)

STATE OF GEORGIA)

COUNTY OF FULTON)

AFFIDAVIT OF DON GIBSON

COMES NOW, Don Gibson, who personally appears before the undersigned officer duly authorized to administer oaths, and after being duly sworn deposes and states as follows:

1. I, Don Gibson, am over the age of 21 and am competent to give this Affidavit. The statements contained herein are based upon my personal information, knowledge, and belief.
2. I am the Chief Financial Officer and Vice President of Human Resources of Veterans Empowerment Organization of Georgia, Inc. ("VEO").
3. VEO is a 501(c)(3) non-profit organization that assists veterans by providing them resources to help restore them to a life of self-sufficiency.
4. VEO owns the truck that was being driven by its employee, Edward Davis, which was involved in the accident with Erin Altman on January 5, 2021 (the "Vehicle").
5. The Vehicle is used by VEO to pick up in kind gifts, mostly furnishings and supplies, that are donated by individuals and organizations and to transport those donated items

to VEO's campus, which provides, among other things, housing to veterans.

6. On January 5, 2021, the Vehicle was being used to pick up and deliver donations to VEO.
7. At the time of the accident on January 5, 2021, VEO had not been hired by any third party to transport for compensation people or goods.
8. VEO is not hired by third-parties to transport household goods or property or passengers using the Vehicle.
9. VEO is not registered with the Georgia Department of Public Safety as a motor carrier of household goods or property or passengers.
10. VEO does not file a certificate of insurance to the Georgia Department of Public Safety in order to obtain a motor carrier certificate.

FURTHER, AFFIANT SAYETH NOT.

This 13th day of May, 2021.



Don Gibson

Sworn to and subscribed before me on this
13th day of May, 2021.

Notary Public

[Notary Seal]
My commission expires: 2/23/25

