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

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| **JONAH DELDRAGE, as Surviving Spouse of MERLIN HUMBERTO ACOSTA BONILLA, Deceased,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**ROYAL FOOD SERVICE CO., INC., ZURICH AMERICAN INSURANCE COMPANY, and MARCUS JONES,**<br><br>**Defendants.** | **CIVIL ACTION NUMBER:**<br><br>**21EV000532** |

**DEFENDANT ZURICH AMERICAN INSURANCE COMPANY'S MOTION TO DISMISS AND BRIEF IN SUPPORT**

COMES NOW, **ZURICH AMERICAN INSURANCE COMPANY** (hereinafter "Defendant Zurich"), by and through its attorneys of record, and hereby files this Motion to Dismiss and Brief in Support, showing the Court as follows:

## AUTOMATIC STAY OF DISCOVERY

Subject to O.C.G.A. § 9-11-12(j), discovery is automatically stayed for ninety (90) days or until Defendant Zurich's Motion to Dismiss is ruled on.

## PRELIMINARY STATEMENT

This case arises out of an unfortunate automobile accident in which Defendant Marcus Jones (hereinafter "Defendant Jones") collided with the vehicle Plaintiff's decedent was a passenger in on Interstate 85 in Suwannee, Gwinnett County, Georgia. At the time of the accident, Defendant Jones was operating his vehicle under the employment of Defendant Royal Food Co., Inc. (hereinafter "Defendant Royal Food"). Defendant Royal Food is in the business of supplying

and transporting produce and other food to restaurants and other locations in the metropolitan Atlanta area. Plaintiff has also named Defendant Zurich American Insurance Company as a Defendant under Georgia's direct action statute.

At the time of this accident, Defendant Jones was transporting food which was owned and loaded by Defendant Royal Food. Defendant Jones was not transporting goods owned by anyone other than Defendant Royal Food. This is important because Georgia law only allows for a direct action against an insurer if the defendant trucking company is transporting goods owned by another person or entity, otherwise known as "for hire." That is not the case here as Defendant Jones was transporting goods owned by Defendant Royal Food. Therefore, Defendant Royal Food was not operating as a motor carrier for hire at the time of the accident. For these reasons, Defendant Zurich is not subject to a direct action and should be dismissed as a matter of law.

## STATEMENT OF FACTS AND ALLEGATIONS OF THE COMPLAINT

On October 30, 2020, Plaintiff's decedent was the back seat passenger in a vehicle traveling north on Interstate 85. (Pl.'s Compl. ¶¶ 17-18). The vehicle slowed to a stop when Defendant Jones collided with the rear of the vehicle, resulting in the death of Plaintiff's decedent. (Id. at ¶¶ 20-24). Defendant Jones was charged with second degree vehicular manslaughter in relation to the accident. At the time of the accident, Defendant Jones was an employee of Defendant Royal Food and driving a commercial vehicle on its behalf. (Id. at ¶¶ 28-32). Plaintiff has brought claims against Defendant Jones for negligence and negligence *per se*. (Id. at ¶¶ 25-27). Plaintiff further alleges Defendant Royal Food was negligent under the doctrine of *respondeat superior* and for negligently hiring, entrusting, and training Defendant Jones. (Id. at ¶¶ 33-35).

The subject of this Motion to Dismiss, however, is the claim brought against Defendant Zurich. Defendant Zurich issued a liability insurance policy to Defendant Royal Food which was

in effect at the time of this accident. (Id. at ¶¶ 12, 36). Therefore, Plaintiff has brought a claim against Defendant Zurich pursuant to Georgia's direct action statute, O.C.G.A. § 40-2-140(d)(4), as Defendant Royal Food's insurer. (Id. at ¶ 37). Plaintiff's Complaint makes no mention of Defendant Royal Food acting as a motor carrier, for hire or otherwise. (*See generally* Pl.'s Compl.). As discussed below, a direct action claim may only be brought against an insurer where that insurer issues a liability insurance policy to a motor carrier for hire. On the day of the accident, Defendant Royal Food was not operating as a motor carrier for hire because Defendant Jones was carrying food owned by Defendant Royal Food to its destination. Because Defendant Royal Food is not considered a motor carrier for hire in this context, Defendant Zurich, as its insurer, cannot be liable under any set of facts alleged in the Complaint. Therefore, Defendant Zurich's Motion to Dismiss should be granted.

## ARGUMENT AND CITATION OF AUTHORITY

### A. Plaintiff Has Not Sufficiently Pled Allegations Against Defendant Zurich.

Plaintiff has not sufficiently pled allegations against Defendant Zurich as a purported insurer of a motor carrier. Pursuant to O.C.G.A. § 9-11-12(b)(6), "[a] trial court should grant a motion to dismiss only when, assuming the allegations in the complaint are true, the plaintiff would not be entitled to any relief under the facts as stated and the defendant demonstrates that the plaintiff could not introduce evidence that would justify granting the relief sought." *Mowell v. Marks*, 269 Ga.App. 147, 603 S.E.2d 702 (2004). "A motion to dismiss should be granted when the complaint shows with certainty that the plaintiff would not be entitled to relief under any state of facts that could be proven in support of his claim." *RLI Ins. Co. v. Duncan*, 345 Ga.App. 876, 815 S.E.2d 558 (2018).

"The general rule in Georgia is that 'a party may not bring a direct action against the liability insurer of the party who allegedly caused the damage unless there is an unsatisfied judgment against the insured or it is specifically permitted either by statute or a provision in the policy.'" *McGill v. Am. Trucking & Transp., Ins. Co.*, 77 F.Supp.3d 1261, 1264–65 (N.D.Ga. Jan. 8, 2015) (quoting *Hartford Ins. Co. v. Henderson & Son, Inc.*, 258 Ga. 493, 371 S.E.2d 401 (1988)). As an exception to that general rule, Georgia has two direct action statutes, O.C.G.A. §§ 40-1-112 and 40-2-140, "which permit an injured plaintiff to join a motor carrier's insurer in an action against the insured motor carrier—[and] were designed 'to protect members of the general public against injuries caused by the negligence of a Georgia motor carrier.'" *Id.* "To establish direct action, (1) the subject carrier must be a 'motor carrier' as defined by the direct action statutes; (2) the plaintiff must have sustained an actionable injury; and (3) the insurer must be an 'insurance carrier.'" *Id.*

Under O.C.G.A. § 40-1-112, a direct action may be brought against the insurance carrier of a "motor carrier of household goods or property…" Likewise, O.C.G.A. § 40-2-140(d)(4) provides that a party "may join in the same cause of action the motor carrier and its insurance carrier." O.C.G.A. § 40-1-100(12) defines a motor carrier as "[e]very person owning, controlling, operating, or managing any motor vehicle… used in the business of transporting for hire persons, household goods, or property…" "The definitions of motor contract carrier and motor common carrier… both pertain to the business of transporting persons or property **for hire** over the public highways of Georgia." *National Union Fire Ins. Co. v. Sorrow*, 202 Ga.App. 517, 518, 414 S.E.2d 731 (1992) (decided under the previous versions of the code sections) (emphasis in original). Where a defendant involved in an accident was transporting its own products, that defendant does

not qualify as a motor carrier under Georgia's direct action statute. *See Cordle v. Koch Foods, LLC*, 2014 WL 12576635, *4 (N.D.Ga. Aug. 7, 2014).

In *Sorrow*, the plaintiff sued Frito Lay and named its insurer, National Union, as a defendant under the direct action statute. *Sorrow*, 202 Ga.App. at 517. The Georgia Court of Appeals found that National Union could not be brought into the case because Frito Lay was "transport[ing] its own products." *Id*. at 518. Additionally, the subject vehicle "was never held out for hire to the public and was not used or hired by the public for the transportation of either goods or people." *Id*. The court, therefore, held that the subject vehicle "was neither a common nor contract carrier" and"[n]o [direct] cause of action existed in the case at bar." *Id*.

Here, Plaintiff alleges Defendant Zurich is subject to a direct action pursuant to O.C.G.A. § 40-2-140(d)(4), which provides a plaintiff "may join in the same cause of action the motor carrier and its insurance carrier." However, there are no allegations in Plaintiff's Complaint which allege that Defendant Zurich's insured, Defendant Royal Food, was transporting goods for hire, as required under the direct action statute. Additionally, Plaintiff never alleges Defendant Royal Food is a "motor carrier" or "common motor carrier" anywhere in the Complaint. (*See generally* Pl.'s Compl.). "Because the direct action statute is in derogation of the common law, [and] the terms of that statute must be strictly construed," Plaintiff's failure to assert allegations that Defendant Royal Food was transporting goods or people **for hire**, shows with certainty Plaintiff would not be entitled to relief from Defendant Zurich under any state of facts that could be proven. *Duncan*, 345 Ga. App. at 878. Therefore, Plaintiff's Complaint against Defendant Zurich should be dismissed, pursuant to O.C.G.A. § 9-11-12(b)(6), for failure to state a claim upon which relief may be granted as a matter of law.

## CONCLUSION

For the reasons set forth herein, Defendant Zurich respectfully requests the Court dismissed Plaintiff's Complaint against it for failure to state of claim pursuant to O.C.G.A. § 9-11-26(b)(6).

Respectfully submitted this 26th day of February, 2021.

**HALL BOOTH SMITH, P.C.**

*/s/ Daniell R. Fink*

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## CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing **DEFENDANT ZURICH AMERICAN INSURANCE COMPANY'S MOTION TO DISMISS AND BRIEF IN SUPPORT** upon the following through the Odyssey eFileGa electronic filing system, an electronic notification will be sent automatically, addressed as follows:

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This 26th day of February, 2021.

[SIGNATURE PAGE FOLLOWS]

**HALL BOOTH SMITH, P.C.**

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