IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JONAH DELDRAGE AS SURVIVING SPOUSE OF MERLIN HUMBERTO ACOSTA BONILLA, DECEASED, *Plaintiff,* v. ROYAL FOOD SERVICE CO., INC., ZURICH AMERICAN INSURANCE COMPANY, AND MARCUS JONES, *Defendants.*	Civil Action No.: 21EV000532

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

Plaintiff, by and through counsel, responds and objects as follows to Defendant Zurich American Insurance Company's Motion to Dismiss and Brief in Support:

I. OVERVIEW

Defendant Jones killed Merlin Bonilla when he crashed a commercial food delivery truck into a car carrying Bonilla. Defendant Zurich American Insurance Company ("Zurich") insured Defendant Jones and the commercial food delivery truck he was driving at the time of the wreck. Plaintiff Deldrage, Merlin Bonilla's surviving spouse, joined Zurich as a defendant to this action pursuant to O.C.G.A. § 40-2-140(d)(4). Zurich moved to dismiss the "direct action" claim arguing that the direct action only applies to motor carriers "for hire." Zurich's motion is misplaced for a number of reasons. As a threshold matter, Zurich's motion attempts to expand the notice pleading standard by raising a factual dispute. As such, the motion to dismiss is improper.

Even if a motion to dismiss was an appropriate venue to resolve a factual issue (it is not), Zurich argues the wrong law. Zurich relies on a definition of "motor carrier" in the Motor Carrier Act, but Plaintiff asserted a direct action under Section 40-2-140(d)(4) ("Unified Carrier Registration Act"), an entirely different section of the code with an entirely different definition of "motor carrier." The Unified Carrier Registration Act defines "motor carrier", among other things, as an entity that operates "commercial vehicles." Defendant's own motion concedes that the food delivery truck was a commercial vehicle. As such, even if the Court reached the factual issue of whether Defendant Royal Food Service was a "motor carrier", the statute is clear that the allegations in the Complaint satisfy the definition.

Zurich's motion should be denied.

II. MOTION TO DISMISS STANDARD

"A motion to dismiss pursuant to O.C.G.A. § 9-11-12(b)(6) will not be sustained unless (1) the allegations in the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought." *State v. Singh*, 291 Ga. 525, 529 (2012). Zurich's motion fails on both grounds. In deciding a motion to dismiss for failure to state a claim, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor. *Quarters Decatur, LLC v. City of Decatur*, 347 Ga. App. 723 (2018). It is not necessary for a complaint to set forth all of the elements of a cause of action in order to survive a motion to dismiss for failure to state a claim. *Roberts v. JP Morgan Chase Bank, N.A.*, 342 Ga. App. 73 (2017). Dismissal for failure to state a claim is

improper where there conceivably could be evidence to support a plaintiff's claim. *Hughes v. Cornerstone Inspection Group, Inc.*, 336 Ga. App. 283 (2016).

III. ARGUMENT

A. Plaintiff's complaint pleads a sufficient factual basis to support a direct action.

Zurich presents a summary judgment motion masquerading as a motion to dismiss. Minimum pleading requirements are found in O.C.G.A. § 9-11-8 (a)(2)(A), which merely require that the complaint contain "[a] short and plain statement of the claims showing that the pleader is entitled to relief." The Georgia Supreme Court has held that the touchstone of a sufficient complaint is fair notice: "this short and plain statement must include enough detail to afford the defendant fair notice of the nature of the claim and a fair opportunity to frame a responsive pleading." That is exactly what Plaintiff has done. As to Zurich, the Complaint alleges that Zurich insured Defendant Royal Food Service, its trucks, and its drivers. Complaint, ¶36. It also alleges that the insurance policy on the food delivery truck was in force and effective at the time of the accident. *Id*. Finally, the Complaint cites to the specific statute that expressly permits joining a "motor carrier" and its insurance carrier to an action such as this one. *Id*. at ¶37. Taken together, those allegations put Zurich on notice of the claims against it. Nothing more is required.

But Zurich argues more is required. It claims that Plaintiff should have included specific factual allegations establishing that Defendant Royal Food Service Co. met the definition of "motor carrier." Georgia law is otherwise. In fact, for more than thirty years, Georgia courts have affirmed that a complaint can state either conclusions or facts as a basis for claims, so long as it gives *notice* of the claim:

> Under this "notice" theory of pleading, it is immaterial whether a pleading states "conclusions" or "facts".... There are no prohibitions in the rules against pleading conclusions and, if pleaded, they may be considered in determining whether a

> complaint sufficiently states a claim for relief. It is immaterial whether an allegation is one of fact or conclusion if the complaint effectively states a claim for relief.

Ledford v. Meyer, 249 Ga. 407, 408-409 (1982).

That is exactly what Plaintiff's complaint has done. Specifically, the Complaint states that "Defendant Zurich is subject to a direct action pursuant to O.C.G.A. § 40-2-140(d)(4)." Complaint, ¶37. This allegation incorporates the applicable definition of "motor carrier" that Defendant claims are missing. Whether through conclusions or factual allegations, Plaintiff's complaint has satisfied the notice pleading standard as to its direct action claim against Zurich under Section 40-2-140(d)(4).

The Georgia Court of Appeals has allowed other direct action cases to proceed under most attenuated pleadings. For example, in *Daily Underwriters of America v. Williams*, 354 Ga. App. 551 (2020), the Plaintiffs failed to cite to the correct direct action statute for interstate motor carriers. They cited to Section 40-1-112(c) in their Complaint, which only governs intrastate motor carriers, not Section 40-2-140(d)(4), which covers both intrastate and interstate motor carriers. *Williams* at 552. The Court found that even though it was the wrong direct action statute, the carrier was still put on notice by the pleading. *Daily Underwriters of America v. Williams*, 354 Ga. App. 551 (2020) (Daily Underwriters argues that we should not consider whether the direct actions are authorized by O.C.G.A. § 40-2-140(d)(4) because in their complaints, the Williamses cited only O.C.G.A. § 40-1-112. This, the appellant argues, prohibits consideration of O.C.G.A. § 40-2-140(d)(4) because it would exceed the scope of notice pleading. We disagree."). Here, Plaintiffs have cited the correct direct action statute, which is sufficient to put Zurich on notice of the claim.

It is for this reason that Zurich's motion contains no citation to any authority to support its novel expansion of the notice pleading standard. The only case cited by Zurich that involved at a motion to dismiss, *RLI Ins. Co. v. Duncan*, 345 Ga. App. 876 (2018), does not apply here because

it involved dismissal of an excess carrier. Zurich is not an excess carrier. In fact, that case was decided expressly because the insurance company in Duncan was an excess carrier. It did not reach the issue of whether a factual basis for "motor carrier" was pled in the Complaint. All other cases cited by Zurich involved resolution at the summary judgment stage and had nothing to do with the sufficiency of pleading a direct action against a motor carrier's insurance carrier.

Zurich's motion should be denied for this reason alone.

B. Zurich argues the wrong definition of "motor carrier".

The entire premise of Zurich's motion – that "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*** – is inaccurate. There are two direct action statutes in Georgia: (1) O.C.G.A. § 40-1-112; and (2) O.C.G.A. § 40-2-140(d)(4). Zurich conflates them, but they are distinct. *Daily Underwriters of America v. Williams*, 354 Ga. App. 551 (2020). "O.C.G.A. § 40-2-140 is not even part of the Georgia Motor Carrier Act…[rather] it is a distinct part of the Code concerning administration of the federal Unified Carrier Registration Act.". *Id*. at 558. And the distinction matters to this motion because they define "motor carrier" differently.

Section 40-2-140(d)(4) permits a Plaintiff to join a "motor carrier and its insurance carrier" to a tort action: "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."

"Motor Carrier" is defined under that chapter as: "(A) Any entity subject to the terms of the Unified Carrier Registration Agreement pursuant to 49 U.S.C. Section 14504a whether engaged in interstate or intrastate commerce, or both; or (B) Any entity defined by the commissioner or commissioner of public safety who 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." O.C.G.A. § 40-2-1(6).

In other words, a "motor carrier" is an entity that operates commercial vehicles such as food delivery trucks. Zurich concedes that Plaintiff has alleged just that: "At the time of the accident, Defendant Jones was an employee of Defendant Royal Food and ***driving a commercial vehicle*** on its behalf." Motion, p.2 (emphasis added).

Putting aside the fact that Zurich ignores the applicable definition of "motor carrier" and focuses, instead, on the definition of "motor carrier" in the Motor Carrier Act, Zurich's argument requires this Court to resolve a factual dispute. According to Zurich, Royal Food Service is only considered a "motor carrier" if it is in the business of transporting persons or property for hire over the public highways. Motion, p.4. Thus, for this Court to grant Zurich's motion would require the Court to (1) apply the wrong definition for "motor carrier"; and (2) resolve a factual issue of whether Defendant Jones was transporting goods for hire when he crashed the food delivery truck. That is a determination to be considered on a motion for summary judgment after discovery has been conducted, not at the motion to dismiss stage. See e.g., *Hughes v. Cornerstone Inspection Group, Inc.*, 336 Ga. App. 283, 286 (2016) ("Relevant factual evidence which may or may not be developed during discovery can be considered on a subsequent motion for summary judgment.'").

As such, even if the Court reaches the factual dispute raised in Zurich's motion, it must be resolved in favor of Plaintiff, and Zurich's motion should be denied.

IV. CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Court DENY Defendant's motion to dismiss and grant any such further relief as the Court deems appropriate.

Respectfully submitted this 24th day of March, 2021.

TOBIN INJURY LAW

BY: */s/ Darren M. Tobin*
DARREN M. TOBIN
Georgia Bar No. 200383
DAESIK SHIN
Georgia Bar No. 989885

267 W. Wieuca Rd. NE
Suite 204
Atlanta, Georgia 30342
darren@tobininjurylaw.com
daesik@tobininjurylaw.com
(t) 404 587 8423
(f) 404 581 5877

ATTORNEYS FOR PLAINTIFF

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on all parties via statutory electronic service addressed to the following attorneys of record:

Scott H. Moulton
Daniell R. Fink
Hall Booth Smith, P.C.
smoulton@hallboothsmith.com
dfink@hallboothsmith.com

Respectfully submitted this 24th day of March, 2021.

TOBIN INJURY LAW

BY: */s/ Darren M. Tobin*
DARREN M. TOBIN
Georgia Bar No. 200383
DAESIK SHIN
Georgia Bar No. 989885

267 W. Wieuca Rd. NE
Suite 204
Atlanta, Georgia 30342
darren@tobininjurylaw.com
daesik@tobininjurylaw.com
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(f) 404 581 5877

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