

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 FILE
NO. 21EV000532

JUDGE BESSEN

**ORDER ON DEFENDANTS' MOTION TO STAY AND ZURICH AMERICAN
INSURANCE COMPANY'S MOTION TO DISMISS**

Merlin Bonilla died when a truck driving by Defendant Marcus Jones collided with it on Interstate 85 in Suwanee, Gwinnett County, Georgia. Jonah Deldrage, Bonilla's spouse, Jones, Jones' employer Royal Food Service Co., Inc. ("Royal Food"), and Royal Foods' insurer, Zurich American Insurance Company ("Zurich"). Zurich has moved to dismiss the direct action against it, and to stay the case entirely until the criminal charges against Jones are resolved. Upon consideration, the Court DENIES both motions.

Motion to Dismiss

As noted above, Zurich was sued directly. In doing so, Plaintiff relied on OCGA § 40-2-140(d)(4), which permits "[a]ny person having a cause of action, whether arising in tort or contract [to] join in the same cause of action the motor carrier and its insurance carrier." Motor carrier is defined 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.

OCGA § 40-2-1(6).

Zurich argues for dismissal under a different statute, OCGA § 40-1-112, which is part of the Georgia Motor Carrier Act, OCGA § 40-1-50 *et seq.* Zurich explains in brief – but without supporting facts – that Royal Food does not act as a motor carrier under this statute. However, Zurich does not argue that it is an improper party under the statute relied upon by Plaintiff.

In ruling on this motion, the Court relies on the well-established rule in Georgia.

The Defendant has filed a Motion to Dismiss for failure to state a claim. A motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of 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.... In deciding a motion to dismiss, 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.

Balmer v. Elan Corp., 278 Ga. 227, 227 (2004). To that end, the Court is unable to find that Zurich is not a motor carrier under the statute relied upon by Zurich, because to do so would require the Court to consider facts. Instead, the Court must read the complaint in the light most favorable to Plaintiff, who cites to a statute that may – or may not – permit a direct action against Zurich.

Additionally, Zurich has made no argument that the statute relied upon by Plaintiff is inapposite in this case. For both of these reasons, the motion to dismiss is DENIED.

Motion to Stay

All Defendants move to stay this case pending disposition of the criminal charges against Jones,¹ on the basis that Jones' Fifth Amendment right against self-incrimination is paramount. Plaintiff responds that Jones may always assert his Fifth Amendment right, but that other discovery should be permitted to proceed both against him and his co-Defendants. The Court agrees with Plaintiff, and DENIES the motion to stay.

That said, the Court ORDERS the parties to comply with the Court's Standing Case Management Order, filed concurrently herewith. In considering discovery deadlines, the parties should take the pending criminal charges into account.

This 13th day of April, 2021.



Judge Diane E. Bessen
State Court of Fulton County

cc:
Served electronically

¹ Jones is currently charged with following too closely and two counts of second degree vehicular manslaughter.
