

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

██████████
Plaintiff,

v.

J. DAVIS TRANSPORTATION LLC,
JOHNNIE DAVIS, ALLSTATE
INSURANCE COMPANY, and
JOHN DOES 1-3,

Defendants.

Civil Action File No.: 16A60243

**PLAINTIFF’S SUR-REPLY REGARDING DEFENDANTS’
NOTICE OF APPORTIONMENT OF NONPARTY FAULT**

Defendants’ notice of nonparty fault fails because it attempts to apportion liability to a person for whom Defendants are vicariously liable. *See P.N. Express, Inc. v. Zegel*, 304 Ga. App. 672, 679-80 (2010). Defendants are vicariously liable for Dameion Jones’s misconduct for two independently-sufficient reasons: both the Federal Motor Carrier Safety Regulations (“FMCSR”) and longstanding Georgia law impose vicarious liability.

FEDERAL MOTOR CARRIER SAFETY REGULATIONS

The FMCSR are clear.¹ The FMCSR’s definition of “employee” expressly “includes a driver of a commercial motor vehicle (including an independent contractor while in the course of

¹ Available at <https://www.fmcsa.dot.gov/regulations/title49/b/5/3>.

operating a commercial motor vehicle).” FMCSR § 390.5 ² (parenthetical in original). The FMCSR define “driver” to include “any person who operates any commercial motor vehicle.”

Id.

Jones was a “driver,” and therefore an “employee,” under the FMCSR. There is no dispute that Jones was “operat[ing]” the truck. *See* Davis Dep. 19:10-12 (Jones was driving) (Ex. A). There can be no dispute that the truck was a “commercial motor vehicle,” first because Defendant Johnnie Davis, the owner of Defendant J. Davis Transportation (“JDT”), admitted it; and second because Defendants have admitted that the subject truck’s GVWR was 10,001 pounds or more. *Id.* at 25:16-17, 27:04-11 (admitting that the subject truck was a commercial motor vehicle); Def.’s Resp. to RFA 32 (admitting GVWR) (Ex. B); FMCSR § 390.5 (defining “commercial motor vehicle” to include vehicles with a GVWR of 10,001 pounds or more). Therefore, Jones was a “driver” under the FMCSR. Because he was a “driver,” he was an “employee.” Therefore, Defendants are vicariously liable for his misconduct.

The FMCSR apply to JDT despite Defendants’ suggestion to the contrary. That is because the FMCSR apply to all “employers.” *See* FMCSR § 390.3T(a)(1). “Employer,” as defined by the FMCSR, includes any business that “owns or leases a commercial motor vehicle in connection with that business.” FMCSR § 390.5. As Defendants have conceded, “JDT owned the subject straight truck.” *Opp.* at 3. JDT obviously used the subject truck “in connection with” JDT’s business, as the truck was making deliveries for JDT that day. *See* Davis Dep. at 31:14-32:19 (describing activities of truck). Because JDT owned a commercial vehicle and used it for its business, JDT was an “employer.” Neither Defendants’ citation to the

² The formal citation is 49 C.F.R. § 390.5. Throughout this brief, Plaintiff uses the citation format “FMCSR § __,” although in all cases the formal citation is “49 C.F.R. § __.”

Texas Court of Appeals nor the fact that JDT owned the subject truck alters this straightforward application of federal law. Because JDT was an “employer,” it was subject to the FMCSR, which impose vicarious liability.³

STATE LAW

The FMCSR alone establish vicarious liability. For present purposes, the analysis could end there. However, Defendants are also vicariously liable for Jones’s misconduct under state law.

Under Georgia law, the question is whether Jones was driving the JDT truck in “furtherance of the master’s business” and “in the scope of his master’s business,” *or* was driving the truck “for reasons unrelated to that employment.” *Broadnax v. Daniel Custom Const., LLC*, 315 Ga. App. 291, 296 (2012). The evidence shows that Jones was driving the JDT truck in the course and scope of “the master’s business.” *See id.* According to Defendants, Jones was taking the truck back to Sears at the time of the collision, which is where the truck would remain overnight until deliveries resumed the next day. Davis Dep. 36:08-18 (Jones was supposed to “bring the truck in”), 34:07-17 (the truck was to be parked at Sears). According to what Plaintiff overheard a JDT employee say at the scene of the collision, Jones was “running [a] load” in the JDT truck. ██████████ Dep. 35:08-36:04 (Ex. C). *Either way, the result is the same:* whether he was

³ Defendants have not made this argument, but sometimes smaller companies like JDT make arguments over the FMCSR’s internal references to “interstate commerce.” The FMCSR apply to JDT despite those references, even if JDT operated only within the state of Georgia. That is because the regulations promulgated by Georgia’s Department of Public Safety make the FMCSR applicable. Specifically, the Georgia regulations specify that where the FMCSR refer to “interstate” commerce, that phrase should be read to include “*intrastate*” commerce. DPS 1-1(d) (emphasis added). (The DPS regulations are available online at <https://dps.georgia.gov/georgia-department-public-safety-transportation-rulebook>. If the Court goes to that page and clicks “Chapter One – Motor Carrier Safety Regulations,” a Word document containing the regulations will be downloaded to the Court’s computer.) Therefore, the FMCSR apply to JDT even if JDT operated only “intrastate,” within the state of Georgia.

returning JDT's truck to Sears or "running [a] load," Jones was driving the truck in furtherance of JDT's business, not "for purely personal reasons disconnected from the authorized business of the master." *Broadnax*, 315 Ga. App. at 296. Therefore, Jones was acting in the course and scope of Defendants' business.

Importantly, it *does not matter* whether Johnnie Davis gave permission for Jones to drive the truck *or whether Davis specifically prohibited him from driving*. Georgia law is clear:

whether a specific act was authorized has never been the test of liability. In fact, **it makes no difference that the master did not authorize a particular act, or even know of the servant's act or neglect, or even if he disapproved or forbade it**, he is equally liable, if the act be done in the course of his servant's employment.

Id. This rule makes sense. If the fact that an act was 'forbidden' allowed an employer to evade vicarious liability, then virtually every truck company could evade liability for its drivers' misconduct. A truck company would write "never speed or drive negligently!" in its policy manuals, then assert that if a driver drove over the speed limit or committed a negligent act, that act removed the driver from the course and scope of his employment, thereby absolving the company of vicarious liability. That is not the law.

Further, *Jones was doing what he was asked to do*. Johnnie Davis has admitted that Shannon Ollie, a JDT employee, *asked* Jones to "take the truck back" to Sears. Davis Dep. 36:08-18. At the time of the collision, Jones was doing what he was told. Although Defendants now attempt to evade that fact by asserting (without citation) that "Ollie was not an employee," the evidence shows that he was. *See* Opp. at 4, n.2 (quoted language). The evidence unequivocally establishes that Ollie—who told Jones to take the truck—was "an employee driver." Davis Dep. 7:14-16. The evidence further shows that *this was not the first time Jones*

had driven the truck at Ollie's behest. Davis Dep. 42:18-21. Because Jones was doing what he had been asked to do, the cases that Defendants cite—arising mainly from people in the restaurant industry who got into fights—are inapposite.

CONCLUSION

Because Defendants are vicariously liable for Jones's misconduct under the FMCSR *or* Georgia law, Defendants may not apportion liability to Jones. *PN Exp.*, 304 Ga. App. at 679-80.

This 4th day of August, 2017.

Respectfully submitted,

BUTLER TOBIN LLC

BY: /s/ James E. Butler III
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Georgia Bar No. 116955
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ATTORNEYS FOR PLAINTIFF

STATE COURT OF
DEKALB COUNTY, GA.
8/4/2017 10:47:31 AM
E-FILED
BY: Jewel Hendrix

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

██████████
Plaintiff,

v.

J. DAVIS TRANSPORTATION LLC,
JOHNNIE DAVIS, ALLSTATE
INSURANCE COMPANY, and
JOHN DOES 1-3,

Defendants.

Civil Action File No.: 16A60243

CERTIFICATE OF SERVICE

I hereby certify the **PLAINTIFF'S SUR-REPLY REGARDING DEFENDANTS' NOTICE OF APPORTIONMENT OF NONPARTY FAULT** was served upon all parties by e-filing same using the Odyssey eFileGA System which will automatically send email notification of said filing to the following attorneys of record:

Thomas E. Brennan, Esq.
W. Jason Pettus, Esq.
Fain, Major & Brennan, P.C.
100 Glenridge Point, Suite 500
Atlanta, GA 30342-1445

This 4th day of August, 2017.

BUTLER TOBIN LLC

BY: /s/ James E. Butler III
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ATTORNEYS FOR THE PLAINTIFF

Exhibit A

IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

CARLAS SMITH,

Plaintiff,

v.

CIVIL ACTION FILE
NO. 16A60243

J. DAVIS TRANSPORTATION LLC,
JOHNNIE DAVIS, ALLSTATE
INSURANCE COMPANY, and
JOHN DOES 1-3,

Defendants.

VIDEO DEPOSITION OF JOHNNIE DAVIS

February 3, 2017

1:41 p.m.

Fain Major & Brennan

100 Glenridge Point Parkway NE

Suite 500

Atlanta, Georgia

By Jennifer A. Davis, RMR, CRR, CCR-2496

1 was supposed to do what he was told. Is that right?

2 A. Yes.

3 Q. All right. You said that -- we talked
4 about driving. Was Jones supposed to drive the
5 truck?

6 A. No.

7 Q. All right. In fact, he didn't have a
8 driver's license, as I understand it.

9 A. No, he didn't.

10 Q. He was driving at the time of the wreck.
11 Do you agree with that?

12 A. Yes.

13 Q. And then the officer wrote Jones either a
14 ticket or a couple of tickets for improper lane
15 change and I think also driving without a license.
16 Is that right?

17 A. I'm not 100 percent sure.

18 Q. Okay. What do you understand --

19 A. I thought he was arrested. That's what I
20 know.

21 Q. Okay. Do you know what he was charged
22 with?

23 A. Driving without a license. That's the
24 only ticket I'm aware of.

25 Q. Okay. Did Jones pass away?

Exhibit B

IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

CARLAS SMITH ,

Plaintiff,

v.

J. DAVIS TRANSPORTATION LLC,
ALLSTATE INSURANCE COMPANY, and
JOHN DOES 1-3,

Defendants.

Civil Action No. 16A60243

PLAINTIFF'S FIRST REQUESTS FOR ADMISSIONS
TO J. DAVIS TRANSPORTATION LLC

Plaintiff serves these Requests for Admission upon the above-named Defendants, and requests that they be fully admitted in writing under oath within the time provided by law. These Requests for Admission are served pursuant to the Georgia Civil Practice Act, including O.C.G.A. §§ 9-11-26 and 9-11-36.

Note that a request for admission is *not* objectionable on the grounds that it calls for a legal conclusion or contains a mixed question of law and fact. To the contrary, "requests for admission under OCGA § 9-11-36(a) are not objectionable even if they require opinions or conclusions of law, as long as the legal conclusions relate to the facts of the case." *G.H. Bass & Co. v. Fulton Cnty. Bd. of Tax Assessors*, 268 Ga. 327, 329 (1997).

Each matter of which an admission is required shall be deemed admitted unless, within the time allowed by law after service of these requests, you serve Plaintiff with a written answer or objection to such matter.

If you fail to admit the genuineness of any document or the truth of any matter addressed

28.

J. Davis Transportation LLC taught its drivers that they were responsible for following the Federal Motor Carrier Safety Regulations (“FMCSR”).

29.

J. Davis Transportation LLC did not teach its drivers that they were responsible for following the Federal Motor Carrier Safety Regulations (“FMCSR”).

30.

J. Davis Transportation LLC taught Dameion Jones that he was responsible for following the Federal Motor Carrier Safety Regulations (“FMCSR”).

31.

J. Davis Transportation LLC did not teach Dameion Jones that he was responsible for following the Federal Motor Carrier Safety Regulations (“FMCSR”).

32.

The gross vehicle weight rating (“GVWR”) of the subject truck was 10,001 pounds or more.

33.

The gross vehicle weight rating (“GVWR”) of the subject truck was 26,001 pounds or more.

34.

To lawfully drive the subject truck at the time of the wreck, the driver of the truck needed to have a commercial driver’s license (“CDL”).

The Collision

35.

**IN THE STATE COURT OF DEKALB COUNTY
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**CARLAS SMITH,
Plaintiff,**

vs.

**J. DAVIS TRANSPORTATION, LLC.,
JOHNNIE DAVIS, ALLSTATE
INSURANCE COMPANY, and
JOHN DOES 1-3,
Defendants.**

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Civil Action No. 16A60243

**J. DAVIS TRANSPORTATION, LLC'S RESPONSE TO
PLAINTIFF'S FIRST REQUESTS FOR ADMISSIONS**

COMES NOW J. DAVIS TRANSPORTATION, LLC and responds to Plaintiff's First Request for Admissions as follows:

1.

Defendant admits Paragraph 1 of Plaintiff's Requests for Admissions.

2.

Defendant admits Paragraph 2 of Plaintiff's Requests for Admissions.

3.

Defendant admits Paragraph 3 of Plaintiff's Requests for Admissions.

4.

Defendant admits Paragraph 4 of Plaintiff's Requests for Admissions.

5.

Defendant admits Paragraph 5 of Plaintiff's Requests for Admissions.

6.

Defendant admits Paragraph 6 of Plaintiff's Requests for Admissions.

28.

Defendant admits Request to Admit No. 28.

29.

Defendant denies Request to Admit No. 29.

30.

Defendant denies Request to Admit No. 30.

31.

Defendant admits Request to Admit No. 31.

32.

Defendant admits Request to Admit No. 32.

33.

Defendant denies Request to Admit No. 33

34.

Defendant denies Request to Admit No. 34.

35.

Defendant admits Request to Admit No. 35.

36.

Defendant denies Request to Admit No. 36.

37.

Defendant admits Request to Admit No. 37.

38.

Defendant admits Request to Admit No. 38.

39.

Defendant admits Request to Admit No. 39.

Exhibit C

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IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

CARLAS SMITH,

Plaintiff,

CIVIL ACTION FILE NO.

16A60243

vs.

J. DAVIS TRANSPORTATION LLC

JOHNNIE DAVIS, ALLSTATE

INSURANCE COMPANY, and

JOHN DOES 1-3

Defendants.

DEPOSITION OF

CARLAS SMITH

December 20, 2016

1:03 p.m.

1932 North Druid Hill Road

Atlanta, GA

Diondre' Thomas, RPR, CCR-B-2433

1 Q. Any other conversation you recall them
2 having?

3 A. No, because they were walking away. I
4 didn't hear anything else until the owner guy came.

5 Q. How do you know it was the owner guy?

6 A. Because they said it.

7 Q. Okay. Tell me what happened there.

8 A. When the owner guy came out he was cursing
9 and fussing. He got out with another guy and he was
10 fussing and cursing them, and he was asking, "Why the
11 F did you let him drive?" He was like, "That was
12 your load." And the guy who came to take the charge,
13 he said, "I had something to do and he was just
14 running an errand for me and he was just running the
15 load." It was y'all MF'ing load and they just kept
16 fussing. I don't know.

17 Q. Anything else that you can remember?

18 A. No, not that I recall.

19 Q. The owner guy said to the other gentleman
20 who came to take the charge, "Why did you let
21 Mr. Jones drive that was your load?"

22 A. Well, I don't know if he said Mr. Jones, but
23 he was talking to him. He was like, "Why did you let
24 him take your load?"

25 Q. He was referring to why did you let

1 Mr. Jones?

2 A. Yeah. Why did you let him take your load?
3 And the other guy was like he had something to do, so
4 he was doing him a favor.

5 Q. Do you recall any other conversations that
6 the owner guy had that you overheard?

7 A. No. He just kept cursing them saying they
8 F'd up.

9 Q. Did you ever hear any other conversations
10 between the owner guy and anybody else?

11 A. No. But the lady and her four kids or three
12 kids came up. She was like, "Don't call the police,
13 that's my old man. If you call the police he's going
14 to go to jail."

15 The guy, the one who came to take the
16 charge, he was like just take him with you, and they
17 were trying to leave. The guy in the white shirt --
18 I remember he had a white shirt. The guy in the
19 white shirt told the guy that hit me, "Y'all go ahead
20 and leave I'm gone take the charge." He was telling
21 him to leave. The lady was like we are going to fix
22 your car, don't worry about it.

23 So they were all pleading with me the whole
24 time I was on the phone calling the police telling
25 them to please come because they're trying to leave