

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

████████████████████
Plaintiff

v.

████████████████████, and STAPLES, INC.,

Defendants.

Civil Action No.: ██████████

**PLAINTIFF’S RESPONSE TO DEFENDANT ACE AMERICAN INS. CO.’S
MOTION TO DISMISS**

Defendant ACE American Insurance Company’s (“ACE’s”) motion is meritless under the plain text of Georgia’s Code. Further, although ACE does not mention it, ACE made these same arguments while this case pended in the State Court of Fulton County, and that court rejected them.

I. PLAIN TEXT OF GEORGIA’S CODE

Because Defendant Staples, Inc. (“Staples”) operated commercial motor vehicles, it was a motor carrier. Because Staples was a motor carrier, Staples and its insurer, ACE, may be joined in a direct action.

This issue is controlled by Title 40, Chapter 2 of the Official Code of Georgia. Under that chapter, “[a]ny 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.”

O.C.G.A. § 40-2-140(d)(1)(4) (emphasis added). Staples is a “motor carrier.” That is because as used in Title 40, Chapter 2, the phrase “motor carrier” includes “[a]ny 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)(B). Importantly, this cited code section—§ 40-2-140—is the applicable definitions section. That is because like the direct action statute cited above, § 40-2-1 is codified within Title 40, Chapter 2. As the first five words of § 40-2-1 establish, the definitions of § 40-2-1 govern the words and phrases “[a]s used in this chapter [i.e., Title 40, Chapter 2].” § 40-2-1. In other words, the definitions section that applies to the above-cited direct action statute is § 40-2-1. The different definitions statute that ACE erroneously cites (O.C.G.A. § 40-1-100) applies to a *different chapter*. The governing definitions statute is § 40-2-1, not § 40-1-100 as ACE suggests.

Under this governing definition, an entity that owns or operates “commercial motor vehicles” is a “motor carrier” and is therefore subject to a direct action. The Staples truck that Staples owned and operated in this case was a “commercial motor vehicle[.]” Staples admitted as much through its Rule 30(b)(6) designee:

3	Q.	Now, you know, don't you, and Staples knows
4		that the vehicle -- the Staples truck involved in this
5		wreck was a commercial vehicle; right?
6	A.	I believe so.

See Staples Dep. 33:03-19 (Ex. A). Staples’s driver, Sanders Baugh, and his supervisor, Antwon Swain, also testified that the subject truck was a commercial motor vehicle. *See* Baugh Dep. 9:25-10:02 (Ex. B); Swain Dep. 47:24-48:02 (Ex. C).

Staples’s internal documents further prove that the subject truck was a “commercial motor vehicle.” The Staples Driver Manual instructs all of its drivers that “the truck you drive every day is considered a commercial motor vehicle under the Federal Motor Carrier Safety Regulations,” and the forms that Staples instructed its drivers to fill out identify Staples as a “motor carrier.” (The screenshots below contain the relevant excerpts.)

The truck you drive every day is considered a commercial motor vehicle under the Federal Motor Carrier Safety Regulations. As a result, there are certain DOT rules and regulations that we must follow and others we use as guidelines for maintaining compliance.

Drivers Manual at 3 (Ex. D).

STAPLES
that was easy™

Driver Certification for Other Compensated Work

Driver Name SANDERS BAUGH Location Name/Cost Center NOR CROSS/6117

INSTRUCTIONS: **When employed by a motor carrier,** a driver must report to the carrier all on-duty time working for other employers. The definition of on-duty time found in Section 395.2 paragraphs (8) and (9) of the Federal Motor Carrier Safety Regulations includes time performing any other work in the capacity of or in the employment or service of, a common, contract or private motor carrier also performing any compensated work for any non-motor carrier entity.

04/29/09 Driver Certification for Sanders Baugh (Ex. E).

As a textual matter, Georgia’s definition of “motor carrier” at § 40-2-1(6)(B) incorporates the federal regulatory definition of “commercial motor vehicle” at 49 U.S.C. § 390.5.¹ That

¹ Available at https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&ty=HTML&h=L&mc=true&=PART&n=pt49.5.390#se49.5.390_15.

federal regulatory definition establishes that any truck with a GVWR over 10,000 pounds constitutes a “commercial motor vehicle.” When this case pended in Fulton County, Staples admitted that the subject truck’s GVWR was at or above 10,001 pounds. *See* Staples Resp. to RFA 20 (Set 1) (Ex. F). That was obviously true—the driver of the truck admitted that the subject truck’s GVWR was actually 19,500 pounds. *See* Baugh Dep. 18:04-10.

In sum, Staples operated commercial motor vehicles. *See* 49 C.F.R. 390.5; Staples Dep. 33:03-19; Baugh Dep. 9:25-10:02, 18:04-10; Swain Dep. 47:24-48:02; Driver Manual at 3; 04/29/09 Driver Certification. Therefore, Staples was a motor carrier. O.C.G.A. § 40-2-1(6)(B). Therefore, Staples and its insurer, ACE, are subject to a direct action. O.C.G.A. § 40-2-140(d)(1)(4).

II. THE STATE COURT OF FULTON COUNTY HAS ALREADY REJECTED ACE’S ARGUMENTS.

On January 26, 2016, after the undersigned counsel became involved in this case, Plaintiff moved to add ACE as a party defendant in Fulton County. On February 18, 2016, Defendants objected to that motion. On February 19, 2016, Plaintiff replied. On August 4, 2016, the State Court of Fulton County granted Plaintiff’s motion by stamping “GRANTED” across the top of it, as shown in the screenshot below.² In sum, although Staples does not mention it, this issue has already been litigated to resolution in Plaintiff’s favor.

² On January 10, 2017, *after* granting Plaintiff’s Motion, the State Court of Fulton County entered an order purporting to *deny* Plaintiff’s motion to add ACE (on the ground that too much time had passed since the filing of the lawsuit, and ACE would therefore be prejudiced by the passage of time, which is *not* the ground on which ACE opposed the motion). That January 10, 2017 Order did not mention that Plaintiff’s motion had previously been granted. *See* 01/10/17 Order (Ex. G). On January 12, 2017, Plaintiff filed a motion for clarification, stating that there was no prejudice to ACE and noting that the motion had already been granted. *See* Pl.’s Mot. for Clarification (Ex. H). On August 18, 2017, the State Court of Fulton County vacated the denial of Plaintiff’s motion, thereby leaving Plaintiff’s motion to add ACE granted. *See* 08/18/17 Order (Ex. I).

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

[REDACTED]

Plaintiff,

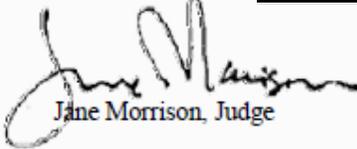
v.

STAPLES, INC., [REDACTED]
and ACE AMERICAN INSURANCE
COMPANY,

Defendants.

GRANTED

Civil Action No.: [REDACTED]


Jane Morrison, Judge

**MOTION TO ADD ACE AMERICAN INSURANCE COMPANY
AS A DEFENDANT**

Plaintiff hereby requests leave of Court to add "ACE American Insurance Company" as a party defendant. ACE American Insurance Company is a proper defendant pursuant to Georgia law authorizing a direct action against the insurer of a motor carrier (such as Defendant Staples).

[signature on next page]

This 19th day of February, 2018.

Respectfully submitted,

BUTLER TOBIN LLC

BY: /s/ J.E. Butler III
JAMES E. BUTLER III
Georgia Bar No. 116955
DARREN M. TOBIN
Georgia Bar No. 200383

1932 N. Druid Hills Rd. NE
Suite 250
Atlanta, Georgia 30319
jeb@butlertobin.com
darren@butlertobin.com
(t) 404 587 8423
(f) 404 581 5877

ATTORNEYS FOR PLAINTIFF

STATE COURT OF
DEKALB COUNTY, GA.
2/19/2018 11:12 AM
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BY: MARIVIC BOVARD

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

CLIFTON [REDACTED]

Plaintiff

v.

[REDACTED], and STAPLES, INC.,

Defendants.

Civil Action No.: [REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the State Court of Fulton County by using the EFileGA system. I certify that the following parties or their counsel of record are registered as EFileGA Filers and that they will be served by the EFileGA system:

J. Scott Bell
Vernis & Bowling of Atlanta, LLC
30 Perimeter Park Drive
Suite 200
Atlanta, GA 30341

This 19th day of February, 2018.

Respectfully submitted,

BUTLER TOBIN LLC

BY: /s/ J.E. Butler III
JAMES E. BUTLER III
Georgia Bar No. 116955
DARREN M. TOBIN

Georgia Bar No. 200383

1932 N. Druid Hills Rd. NE
Suite 250
Atlanta, Georgia 30319
jeb@butlertobin.com
darren@butlertobin.com
(t) 404 587 8423
(f) 404 581 5877

ATTORNEYS FOR PLAINTIFF