IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

[redacted] *Plaintiff,* v. J. DAVIS TRANSPORTATION LLC, JOHNNIE DAVIS, ALLSTATE INSURANCE COMPANY, and JOHN DOES 1-3, *Defendants.*	Civil Action File No.: 16A60243

PLAINTIFF'S OBJECTION TO DEFENDANTS' NOTICE OF APPORTIONMENT OF FAULT TO DAMEION JONES

Plaintiff objects to this "Notice of Apportionment of Fault" because Defendants are attempting to "apportion" liability to a party for whom they are ***vicariously liable***. That does not make sense, and it contravenes Georgia law. *PN Express, Inc. v. Zegel*, 304 Ga. App. 672, 679-80 (2010) (Ex. A). Therefore, Plaintiff respectfully requests that Defendants' "Notice of Apportionment of Fault to Dameion Jones" be stricken, or at least not charged upon. *See id.* (trial court correctly refused to instruct jury regarding apportionment to driver for whom motor carrier was vicariously liable).

FACTS

This is a personal injury case arising out of the misconduct of a motor carrier. On August 23, 2015, a commercial motor vehicle owned and operated by J. Davis Transportation LLC ("JDT") collided with Plaintiff, causing personal injuries to Plaintiff. The JDT truck was driven by Dameion Jones, who worked for JDT at the time of the collision. Jones is now deceased.

ARGUMENT

Defendants cannot "apportion" liability to Jones because Defendants are ***vicariously liable*** for Jones's misconduct. *PN Express*, 304 Ga. App. at 679-80 (defendants may not apportion fault to a party for whom they are vicariously liable). Defendants are viciously liable for Jones's misconduct for two separate, independently-sufficient reasons.

First, Jones was the statutory employee of JDT pursuant to the Federal Motor Carrier Safety Regulations ("FMCSR"). *See id.* at 676 n.15 ("Statutory employment is a theory of vicarious liability created by the Federal Motor Carrier Safety Regulations."). Under the FMCSR, the term "employee" includes "a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle)." 49 C.F.R. § 390.5 (parenthetical in original) (Ex. B). "Driver," in turn, means "any person who operates any commercial motor vehicle." *Id.* There is no dispute that Jones was operating the JDT truck at the time of the collision,[1] and no dispute that the truck constituted a commercial motor vehicle.[2] Because Jones was the "driver" of the at-fault truck, he was a statutory "employee" of JDT pursuant to the FMCSR (even if his employer called him an "independent contractor"). § 390.5. Because Jones was an "employee," Defendants are vicariously liable for Jones's misconduct. In turn, "apportionment" against Jones is inappropriate. *PN Express*, 304 Ga. 679-80.

Defendants' assertion that Jones was not authorized to drive the truck does not change this result. Under the FMCSR, the "driver" of any "commercial motor vehicle" constitutes an

[1] Davis Dep. 19:10-12 (Ex. C).

[2] Davis Dep. 25:16-27:11; *see also* Pl.'s RFA No. 32 and JDT's Resp. to Pl.'s RFA No. 32 (admitting that the GVWR of the subject truck exceeded 10,001 lbs., making it a "commercial motor vehicle" pursuant to 49 C.F.R. § 390.5) (Ex. D).

"employee" of the motor carrier. § 390.5. Whether someone constitutes a "driver" under the FMCSR does not depend on whether that person was *authorized* to drive the truck—instead, it depends on whether that person *actually did* drive the truck. That is because the FMCSR define "driver" as "any person who ***operates*** any commercial motor vehicle." § 390.5 (emphasis added). The definition is ***not*** 'any person *authorized to* operate a commercial motor vehicle,' or 'any person *hired to* operate a commercial vehicle.' The relevant question is whether the person "operate[d]" the truck. *Id.* Here, Jones operated the truck. Therefore, Jones was a "driver" and, in turn, an "employee" for whom Defendants are vicariously liable. *Id.*

Second, and independently, JDT is vicariously liable for Jones's misconduct under state law. Jones was not, in any real sense, an "independent contractor"—he was a low-level agent whom Defendants called a "helper." *See* Defs.' Notice of Apportionment. He was basically there to unload cargo—his job was to "ride along and, like, assist the driver with getting appliances [i.e., the cargo] in the house [i.e., the destination for the cargo]." Davis Dep. 12:18-23. Under Georgia law, an employer is vicariously liable for the misconduct of a so-called "independent contractor" if the employer controlled, or had the right to control, "the time, manner, and method of executing the work as distinguished from the right merely to require certain definite results in conformity to the contract." *Larmon v. CCR Enterprises*, 285 Ga. App. 594, 594-95 (2007).

That test is met here. Defendants have not even produced a written contract for Jones. *See* Davis Dep. 11:18-12:14 (Ex. C). As Defendants have admitted, Jones "had to do what he was told or was supposed to do what he was told." Davis Dep. 18:21-19:02. Jones "work[ed] at the direction of [JDT] and the person he was riding with." *Id.* at 12:18-13:12. He was not a "decision-maker." *Id.* at 13:13-16. Defendants paid Jones by the day, not by the task. *Id.* at

13:17-18 (Defendants paid Jones $120 per day). Defendants controlled when Jones worked, the manner in which he worked, and the methods he used. *Id.* at 16:10-16 (time); *id.* at 18:07-12, 18:21-19:02 (manner and method). Because Defendants controlled (or had the right to control) the time, manner, and method of Jones's work, Defendants are viciously liable for Jones's misconduct under Georgia law as well as under the FMCSR.

Defendants' assertion that Jones was not authorized to drive the truck does not change this analysis. First, the evidence shows that this was *not* the first time Jones drove the truck—to the contrary, the employee with whom Jones was working, Shannon Ollie, admitted that Jones drove the truck "every once in a while." *Id.* at 42:16-20.[3] Second, the evidence shows that when Jones drove the truck on the day of the wreck, he was operating under the direction of Ollie, who had asked Jones to "run[] the load" for him. [redacted] Dep. 35:08-36:04 (Ex. E).[4] Third (and most importantly) "**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." *Broadnax v. Daniel Custom Const., LLC*, 315 Ga. App. 291, 297 (2012) (emphasis added). There is no reasonable question that Jones was driving the truck within the "course" of JDT's delivery business rather than "for purely personal reasons disconnected from the authorized business of the master"—Jones was "running [a] load"

[3] Ollie was indisputably an "employee" of Defendants. Davis Dep. 7:14-16. Therefore, his statement is admissible as the admission of a party opponent. O.C.G.A. § 24-8-801(d)(2).

[4] This evidence comes from Plaintiff [redacted] who overheard Ollie and Jones talking on the scene of the wreck. Plaintiff did not know Ollie's name, so in the deposition passage cited above, she referred to Ollie as "the guy who came to take the charge." The reason for that is interesting, though not directly relevant to this brief—after the wreck, Ollie and Jones initially lied to the police officer and told the officer that *Ollie* had been driving. That was because Ollie and Jones had arranged between themselves for Ollie to "take the charge." However, after the officer questioned them, Ollie and Jones admitted that it was Jones, not Ollie, who was driving at the time of the collision. Plaintiff therefore referred to Ollie as "the guy who came to take the charge." *See generally* [redacted] Dep. 33:06-37:03 (Ex. E).

in a JDT-owned truck at the direction of Ollie, a JDT agent, not off on some personal errand.[5]

CONCLUSION

Because Jones was a statutory employee under the FMCSR *and* because Defendants controlled the time, manner, and method of Jones's work, Defendants are vicariously liable for Jones's misconduct. Because Defendants are vicariously liable for Jones's misconduct, Defendants cannot "apportion" fault to Jones. *PN Express*, 304 Ga. App. at 679-80.

Plaintiff respectfully requests that the Court strike Defendants' "Notice of Apportionment of Fault to Dameion Jones," or in the alternative, decline to charge the jury regarding apportionment to Jones.

This 16th day of February, 2017.

Respectfully submitted,

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[5] *See Broadnax*, 315 Ga. App. at 296 (quoted legal language); [redacted] Dep. 35:07-16 (Jones was "running the load"); Davis Dep. 8:02-08 (Defendants owned the truck); Davis Dep. at 7:14-16 (Ollie, who told Jones to run the load, was Defendants' employee).

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CERTIFICATE OF SERVICE

I hereby certify the **PLAINTIFF'S OBJECTION TO DEFENDANTS' NOTICE OF APPORTIONMENT OF FAULT TO DAMEION JONES** 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:

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This 16th day of February, 2017.

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