No. 20-13538

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PATRICIA HOLLAND, et al.,
Plaintiffs-Appellees,
v.
CYPRESS INSURANCE COMPANY, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

TRUCKING INDUSTRY DEFENSE ASSOCIATION'S PROPOSED BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT AND IN FAVOR OF REVERSAL AND REMAND

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1-1, the following trial judges, attorneys, persons, associations of persons, firms, partnerships, and corporations are known to have an interest in the outcome of this case or appeal:

- Arndt, Patrick N., (Counsel for Amicus)
- Bell, Kari, as Administrator of the Estate of James Wendell Harper (Defendant-Appellant)
- Carroll Law Firm LLC (Counsel for Plaintiffs-Appellees)
- Carroll, Stacey A. (Counsel for Plaintiffs-Appellees)
- Cypress Insurance Company, a wholly-owned indirect subsidiary of Berkshire Hathaway Inc. (stock "ticker" symbol: BRK.A) (Defendant-Appellant)
- Daniel, Laurie Webb (Counsel for the Defendant Estate)
- Dennis Corry Smith & Dixon, LLP (Trial counsel for Defendants)
- Estes, Brent M. (Trial counsel for Defendants)
- Holland & Knight LLP (Counsel for the Defendant Estate)
- Holland, Patricia (Plaintiff-Appellee)
- Holland, Wayne (Plaintiff-Appellee)
- Hostetter, Michael D., (Counsel for Amicus)

- Kerzner, Elliot (Counsel for Cypress Insurance Company)
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- Pate, William B. (Trial counsel for Defendants)
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- Spital, Jonathan (Counsel for the Defendant Estate)
- Story, Richard W. (Judge, U.S. District Court, N.D. Ga.)
- Trucking Industry Defense Association, (Amicus)

CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* make the following disclosures:

- For non-governmental corporate parties please list all parent corporations: None.
- For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Respectfully submitted April 16, 2021

s/Patrick N Arndt
Patrick N. Arndt

Counsel for amicus curiae

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FRAP 29 CERTIFICATION

Undersigned counsel certifies that no party, party's counsel, or other person contributed money intended to fund the preparation or submission of this brief. This brief was drafted by undersigned counsel; counsel for Defendant Estate provided edits and suggestions.

s/Patrick N Arndt
Patrick N. Arndt

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STATEMENT OF ISSUES

1. Whether a direct action may be brought against an insurer pursuant to O.C.G.A. § 40-2-140(d)(2) when there is no allegation that a motor carrier failed to register, failed to pay necessary fees, or failed to maintain the proper insurance.

2. Whether the trial court erred in requiring the insurer appear as a named defendant at trial when all issues relating to the existence or applicability of the insurance policy were stipulated to.

INTEREST OF AMICUS CURIAE

TIDA is a national 501(c)(3) entity founded in 1993 devoted to protecting the interests of the trucking industry. It is the association of choice for over 1,600 motor carriers, trucking insurers, defense attorneys, and claims servicing companies. Amicus seeks to assist the Court in considering the issues arising from the application of the direct action statutes in this matter.

The impact of trucking on the Georgia economy is difficult to overstate. There are over 32,000 trucking companies located in Georgia. Over 75% of Georgia communities rely exclusively on trucks to move their goods. There are over 265,000 trucking industry jobs in Georgia; in other words, 1 in 14 jobs in Georgia are in the trucking industry.[1]

TIDA's interest is in protecting this vital industry. The meteoric rise in extreme jury verdicts over the last decade imperils the trucking industry. The number of trucking cases with verdicts over $1,000,000 increased dramatically over the last 15 years. In cases in which a jury awarded at least $1,000,000 the average verdict increased nearly 1,000%, moving from $2.3 million to $22.3 million.[2] These verdicts have caused a concomitant rise in liability insurance premiums. Some carriers are

[1] *See* "Georgia Trucking Fast Facts," a fact sheet published by the American Transportation Research Institute and the Georgia Motor Trucking Association. Available at https://www.trucking.org/sites/default/files/2020-11/Georgia%20Fast%20Facts%202020.pdf

[2] https://www.cnbc.com/2021/03/24/rise-in-nuclear-verdicts-in-lawsuits-threatens-trucking-industry.html

experiencing annual premium increases of 35-40%.[3] Yearly increases at that level are unsustainable for the industry. Forcing an insurer to appear as a party defendant at a motor carrier accident trial will result in higher verdicts, higher insurance premiums, and higher risk that Georgia trucking companies will be put out of business.

[3] https://www.freightwaves.com/news/atri-study-reveals-nuclear-verdicts-on-the-rise

SUMMARY OF ARGUMENT

This appeal involves the application of the direct action statutes. The clear wording of O.C.G.A. § 40-2-140 does not permit a direct action against a motor carrier insurer when there is no allegation that the motor carrier failed to register, failed to pay necessary fees, or failed to maintain the proper insurance

Further, the purpose of these statutes is to ensure that a party injured by a motor carrier can recover from the motor carrier's insurer without having to resort to filing a separate lawsuit. Direct action statutes do not create a separate cause of action and they are not intended to increase the value of the injured party's case. Requiring a liability insurer to attend trial as a named party defendant results in extreme prejudice to the driver, the motor carrier, and the insurer.

ARGUMENT

A. History and Purpose of Direct Action Statutes

Generally, "a party not in privity of contract may not bring a direct action suit against the liability insurer of the party alleged to have caused damage absent an unsatisfied judgment against the insured, legislative mandate, or as permitted by a provision in the insurance policy in issue." *Richards v. State Farm Mut. Auto. Ins. Co.*, 252 Ga. App. 45, 45, 555 S.E.2d 506, 507 (2001).

Georgia's direct action statutes (O.C.G.A. §§ 40-1-112(c) and 40-2-140(d)(4)) are exceptions to the general rule. Pursuant to these statutes, the liability

of an insurer is derivative of the liability of the motor carrier and its driver. The direct action against a motor carrier's insurer is not based on any negligent act or omission by the insurer. Indeed, a commentator notes that prejudgment actions against a motor carrier's insurer "are not actions in tort but actions in contract and are based upon the carrier's statutory obligations to maintain either indemnity insurance or self-insurance that are an integral part of each insurance agreement."[4] Georgia Courts have held that proper venue for an insurer is subject to an independent determination from the other defendants, since the action is based in contract, not tort. *Jackson v. Sluder*, 256 Ga. App. 812, 817, 569 S.E.2d 893, 897 (2002).

The direct action statutes are in derogation of common law. As such, they must be strictly construed. The direct action provision of O.C.G.A. § 40-1-112 applies to intrastate travel; as such, it does not apply to the accident giving rise to this suit.

Georgia enacted the other direct action statute, O.C.G.A. § 40-2-140, "as a part of its effort to comply with the implementation of the federal Unified [Carrier] Registration Act of 2005." *Direct action against liability insurer*, Ga. Automobile Insurance Law § 46:1 (2020-2021 ed.) The statute obligates certain interstate motor carriers to register "with a base state" and pay fees required by the Unified Carrier

[4] "Direct Action in Contract Against Insurer," Mary Ellen West. 15 Ga. Jur. § 30:32. *See also, Thomas v. Bobby Stevens Hauling Contractors, Inc.*, 165 Ga. App. 710, 714, 302 S.E.2d 585, 589 (1983).

Registration Act. The statute states that "[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)(2). However, the Plaintiff here did not have a cause of action against the Defendants for anything related to the Unified Carrier Registration Act. There was no allegation that the motor carrier failed to register, failed to pay necessary fees, or failed to maintain the proper insurance. As such, this statute, strictly construed, does not authorize a direct action against a motor carrier's insurer. Amicus is aware that there is Georgia case law to the contrary on this point; however, the explicit wording of the statute and the fact that the statute must be strictly construed compels the requested result. Amicus joins Appellant's request to certify this issue for resolution by the Georgia Supreme Court pursuant to its Rule 46.

Even presuming, *arguendo*, that § 40-2-140 allows a plaintiff to bring suit against an insurer, there is no need for the insurer to participate at trial. The Georgia Supreme Court explained that the insurer "**is not, in reality, a separate party for purposes of liability**, but, rather, is equivalent to a provider of a substitute surety bond, creating automatic liability in favor of a third party who may have a claim for damages for the negligence of the motor common carrier…The plaintiff has no separate claim for damages against the motor carrier's insurer" *Andrews v. Yellow Freight Sys., Inc.*, 262 Ga. 476, 476, 421 S.E.2d 712, 713 (1992)(emphasis added).

The purpose of the direct action against motor carrier insurers is "to protect the public against injuries caused by the motor carrier's negligence…[it] **is not intended in any respect, to enhance the value of a third party's claim for damages**." *Id.*(emphasis added).

Here, there was no dispute as to whether the insurance policy applied to the subject accident. The Plaintiff was relieved of his obligation to prove that the insurance contract was genuine and in place at the time of the accident. The Plaintiff did not have to prove that there was coverage for his claimed loss. *See, e.g.*, Doc. 155-1, pp. 2-3. Since these facts were established, there was no need for the insurer to participate in trial as a party defendant. There was no allegation that the insurer had any independent act of negligence. Since the insurer was no more than a mere surety for a judgment awarded against the motor carrier or its driver, the insurer should not have been forced to participate in this trial.

B. Prejudice to Defendants

There can be no question that Defendants were prejudiced by their insurer appearing as a party defendant at the trial of this matter. The insurer was referenced frequently during trial, as well as during the jury instructions. Georgia courts regularly grant motions for mistrials when the barest mention of a defendant's insurance coverage is introduced into evidence. The extreme remedy of a mistrial is based on the recognition that "knowledge of the fact of insurance against liability

will motivate the jury to be reckless in awarding damages to be paid, not by the defendant, but by a supposedly well-pursed and heartless insurance company that has already been paid for taking the risk." *Denton v. Con-Way S. Exp., Inc.*, 261 Ga. 41, 43, 402 S.E.2d 269, 270 (1991), disapproved of on other grounds by *Grissom v. Gleason*, 262 Ga. 374, 418 S.E.2d 27 (1992). Knowledge of insurance "could motivate a jury to award increased damages…the introduction of [this] evidence ... tends to emphasize something that is usually irrelevant and that may have an adverse effect on the quality of the jury's deliberations and conclusions." *Chambers v. Gwinnett Cnty. Hosp., Inc.*, 253 Ga. App. 25, 26, 557 S.E.2d 412, 415 (2001).

In *Andrews,* the Supreme Court held that the purpose of the direct action statutes was <u>not</u> to increase the value of an injured party's claim for damages. Requiring an insurer to participate at trial as a party guarantees that exact result - a claim's value will dramatically increase.

As discussed above, there was no dispute that the insurer was ready to serve in its role as a surety, as it was statutorily required to do. As such, the extreme prejudice to the defendants was not offset by <u>any</u> legitimate need for the plaintiff to have the insurer participate as a party defendant. The only purpose served by the insurer participating in trial is an improper one: To inflame the jury's passions and prejudices with the hopes of obtaining an extreme verdict.

<u>CONCLUSION</u>

The trial court's decision to force the insurer to participate as a party defendant prejudiced the Defendants and was doubtless a factor in the jury's large verdict. The judgment should be vacated and this matter should be remanded for a new trial.

April 16, 2021

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATIONS

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(g)(1) and 27(d)(2)(A) because this brief contains 2058 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f), as counted by Microsoft® Word 2016, the word processing software used to prepare this brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft® Word 2016, Times New Roman, 14 point.

April 16, 2021.

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