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Commercial Transportation

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I. INTRODUCTION

Commercial transportation involves all the significant forms of passenger and freight transportation across the United States. This Article surveys significant judicial, regulatory, and legislative developments in Georgia commercial transportation law from June 1, 2020, through May 31, 2021.¹

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1. For an analysis of commercial transportation law during the prior Survey period, see Madeline E. McNeeley, Yvonne S. Godfrey, Elizabeth M. Brooks, Joshua H. Dorminy, & Stephen G. Lowry, *Commercial Transportation*, 72 MERCER L. REV. 45 (2020).

II. TRUCKING AND OTHER COMMERCIAL MOTOR VEHICLES

In *Stubbs Oil Company, Inc. v. Price*, the Georgia Court of Appeals answered several questions pertaining to liability in a wrongful death action involving a commercial motor vehicle.² Specifically, the question before the Georgia Court of Appeals in *Stubbs* was whether an oil company, as well as its insurer, that hired a motor carrier to transport its oil could be held vicariously liable as defendants.³

Three people were killed when Christopher Hinson, who was operating an oil tanker truck at seventy-nine miles per hour, collided with a compact vehicle.⁴ Hinson was employed by Southern Oil Refinery, LLC (Southern Oil) and was on his way to obtain oil for delivery at the time of the crash. Stubbs Oil Company, Inc. (Stubbs Oil), a business involved in purchasing fuel products from large oil companies and reselling the fuel to retail gas station franchises and agricultural and government entities, occasionally hired Southern Oil to transport fuel to its retail service stations. On June 19, 2015, Hinson retrieved the fuel tanker from Southern Oil's facility and, while on his way to pick up the fuel, rear-ended a vehicle driven by Beverly Baird. Baird and the two passengers in her vehicle, Nicholas Price and Ricardo Dewberry, all died as a result of the collision.⁵ The representatives of their estates filed suit, specifically alleging that "Hinson's negligent operation of the fuel tanker truck resulted in a motor-vehicle collision that killed three people, and Southern Oil was vicariously liable as Hinson's employer."⁶ The plaintiffs also argued that Stubbs Oil was vicariously liable because it "acted as Hinson and Southern Oil's statutory employer under the FMCSRs [Federal Motor Carrier Safety Regulations]" and that Federated Service Insurance Company (Federated), Stubbs Oil's insurer, was liable under the direct action statute permitting actions against the insurer of a motor carrier for hire.⁷

Stubbs Oil and Federated filed separate motions for summary judgment at the trial court level.⁸ Stubbs Oil contended that it could not be vicariously liable to the plaintiffs because, "(1) [I]t was a shipper, rather than a motor carrier for hire, and was not a statutory employer under the FMCSRs; (2) Hinson and Southern Oil were independent contractors under Georgia law; and (3) it owed no duty to ensure

2. 357 Ga. App. 606, 848 S.E.2d 739 (2020).

3. *Id.* at 606, 848 S.E.2d at 741.

4. *Id.*

5. *Id.*

6. *Id.* at 609, 848 S.E.2d at 743.

7. *Id.*

8. *Id.*

Southern Oil's carrier status."⁹ Federated argued that it could not be held vicariously liable to the plaintiffs and was not subject to a direct action under Title 40, Chapter 1, Section 112 of the Official Code of Georgia Annotated.¹⁰ The Gordon Superior Court denied both motions for summary judgment, summarily finding that Southern Oil "could only operate as a private motor carrier, and therefore, Stubbs Oil was—seemingly by implication—Hinson and Southern Oil's statutory employer."¹¹ Stubbs Oil and Federated received permission for interlocutory appeals.¹²

As to Stubbs Oil's appeal, the Georgia Court of Appeals analyzed the language in the FMCSRs and reversed the trial court's finding that Stubbs Oil was a motor carrier, determining that Stubbs Oil was a shipper rather than a motor carrier under the FMCSR definitions.¹³ The plaintiffs argued that, even if Stubbs Oil was a shipper pursuant to the FMCSRs, it could still be held liable as a statutory employer, but the court rejected this argument.¹⁴ The court stated initially that the FMCSRs apply only to motor carriers, not to shippers who engage carriers to transport their goods.¹⁵ The court also noted that Georgia precedent makes "the existence of a lease between the defendant and the owner of the vehicle . . . the defining element in creating a statutory employment relationship under the FMCSRs[.]" and it reasoned that because there was "[no] evidence of either a written or oral lease between Hinson or Southern Oil and Stubbs Oil," Stubbs Oil could not be held liable as a statutory employer.¹⁶ The court of appeals further noted that "the tanker truck involved in the accident bore the logo and [Department of Transportation (DOT)] number of Southern Oil, not Stubbs Oil," and Stubbs Oil exercised no control over how Hinson or Southern Oil carried out the delivery, further supporting the conclusion that Stubbs Oil was not operating as a motor carrier at the time of the collision.¹⁷

Similarly, the court of appeals concluded that Stubbs Oil could not be held vicariously liable under a respondeat superior theory because Southern Oil was acting as its independent contractor.¹⁸ The court of

9. *Id.*

10. *Id.* at 615, 848 S.E.2d at 747.

11. *Id.* at 609, 848 S.E.2d at 743.

12. *Id.* (consolidating and addressing in a single opinion).

13. *Id.* at 610, 848 S.E.2d at 744.

14. *Id.* at 611, 848 S.E.2d at 744–45.

15. *Id.* at 610, 848 S.E.2d at 744.

16. *Id.* at 611, 848 S.E.2d at 745.

17. *Id.* at 612, 848 S.E.2d at 745.

18. *Id.* at 613, 848 S.E.2d at 746.

appeals analyzed the facts under O.C.G.A. § 9-2-4, the employer-liability statute, and held that Stubbs Oil “merely hired Southern Oil to transport its fuel products to a retail service station, but had no input as to the driver or the vehicle Southern Oil would use to complete the task.”¹⁹ The court concluded that Southern Oil retained the right to perform delivery of the fuel “by their own means, method, and manner,” foreclosing any possibility that Southern Oil could be considered anything other than an independent contractor.²⁰

Stubbs Oil’s last contention on appeal was that it did not owe a duty to ensure Southern Oil’s carrier status.²¹ The court of appeals acknowledged the trial court’s order was “not entirely clear” as to the basis for the denial of summary judgment, but “seem[ed] to imply” a document regarding Southern Oil’s alleged lack of operating authority nine months after the incident, which created a genuine issue as to whether Stubbs Oil had breached a duty to ensure its carrier status before the incident.²² The court was “unpersuaded” that this document created an issue for trial, and it noted the plaintiffs had not cited any Georgia authority for their other proposition that “Stubbs Oil should be liable for negligently hiring Southern Oil because the act of driving a tractor-trailer is inherently dangerous[.]”²³ Stubbs Oil did not owe a duty to the plaintiffs to ensure Southern Oil’s carrier status and, thus, could not be held liable under this theory.²⁴

Finally, as to Federated’s appeal of the direct-action question, the court held that because Stubbs Oil could not be held vicariously liable, its insurer also could not be held liable.²⁵ Because Stubbs Oil was acting as a shipper, not a motor carrier, at the time of the crash, Stubbs Oil’s insurer could not be held liable to the plaintiffs under O.C.G.A. § 40-1-112.²⁶

In reversing the trial court on every issue that was appealed, the court of appeals made clear that the ultimate purpose of permitting joinder of an insurance company in a negligence action involving a motor carrier is in furtherance of the public policy behind the Motor Carrier Act, which is to protect the public against injuries caused by a motor carrier’s negligence and to allow the insurer to stand in the shoes of the motor

19. *Id.* at 614, 848 S.E.2d at 746.

20. *Id.*

21. *Id.* at 614, 848 S.E.2d at 747.

22. *Id.*

23. *Id.* at 614–15, 848 S.E.2d at 747.

24. *Id.*

25. *Id.* at 615, 848 S.E.2d at 747.

26. *Id.* at 615–16, 848 S.E.2d at 747.

carrier.²⁷ The key is that such liability can only be extended to the insurer of the motor carrier itself, not the insurer of the shipper.²⁸

III. AVIATION

Commercial aviation is largely controlled by federal authority, but there are many areas where it is within state jurisdiction. Multiple state organizations are involved in aviation regulation, as it has environmental, public safety, and economic impacts. Due to the significant role that aviation plays in this state, the Georgia Aviation Authority exists to assist “state aircraft and aviation operations, ensuring the safety of people traveling by air and aviation property.”²⁹ While there were no judicial developments during this Survey period, state legislative and regulatory agencies continued to address aviation issues, despite the ongoing Coronavirus (COVID-19) pandemic.

Noting that “the current and future economic health of Georgia relies on thriving airports and an efficient air travel industry,” the state legislature enacted a resolution creating the Joint Study Committee on Airport Infrastructure and Improvements.³⁰ The committee will perform a study on funding and policy development relating to airports, emphasizing efficiency, and coordination within the aviation industry.³¹ By year’s end, the committee must file a report and any proposed legislation it deems necessary based on the study’s results.³² Thus, there is potential aviation legislation on the horizon to protect and advance Georgia’s role as a national “leader in the movement of goods and persons[.]”³³

The legislature also passed a bill governing the licensing of airports.³⁴ Operating airports without regulation of minimum and uniform safety requirements endangers lives and property.³⁵ To establish and improve a safer system of airports and operating conditions within them, the state provides for the licensing of airports based on certain rules and regulations.³⁶ One such rule is that an airport operator must first obtain,

27. *Id.* at 616, 848 S.E.2d at 747.

28. *Id.* at 616, 848 S.E.2d at 748.

29. *Georgia Aviation Authority*, GEORGIA.GOV, <https://georgia.gov/organization/georgia-aviation-authority> (last visited Jul. 8, 2021).

30. Ga. S. Res. 84 (2021).

31. *Id.*

32. *Id.*

33. *Id.*

34. Ga. H.R. Bill 577, Reg. Sess. (2021).

35. O.C.G.A. § 32-9-8(b) (2021).

36. O.C.G.A. § 32-9-8(b)–(d).

and thereafter maintain, a valid license.³⁷ This statutory amendment lays out the procedure and remedies for an airport operator's failure to comply with the state's licensing requirements.³⁸

On the regulatory front, the Environmental Protection Division of the Department of Natural Resources adopted air quality rules relevant to aviation.³⁹ The Georgia Air Quality Act serves to:

[P]reserve, protect, and improve air quality and to control emissions to prevent the significant deterioration of air quality and to attain and maintain ambient air quality standards so as to safeguard the public health, safety, and welfare consistent with providing for maximum employment and full industrial development of the state.⁴⁰

Air quality control includes regulating the volatile organic compound (VOC) emissions from aerospace vehicles and their components.⁴¹ Under the Air Quality Act, general aviation is now defined as "that segment of civil aviation that encompasses all facets of aviation except air carriers, commuters, and military. General aviation includes charter and corporate-executive transportation, instruction, rental, aerial application, aerial observation, business, pleasure, and other special uses."⁴² While this is specific to environmental regulation, it demonstrates the breadth of issues that fall under the aviation umbrella.

IV. RAILROADS

Regulations governing railroads traditionally stem from federal regulations. Attempts by several states to regulate railroads are often preempted by the applicable federal law. However, on May 5, 2021, the governor of Georgia signed House Bill 588 into law.⁴³ This bill amends several code sections to clarify the definition of a "public benefit" in the context of public-private partnerships for the Georgia Freight Railroad Program.⁴⁴ House Bill 588 also dedicates certain tax revenue to be used for freight and logistics projects in Georgia.⁴⁵

The Georgia Freight Railroad Program enhances Georgia's investment in freight rail projects to benefit the public and supports a safe and

37. O.C.G.A. § 32-9-8(i).

38. *Id.*

39. GA COMP. R. & REGS. § 391-3-1-.03 (2021).

40. O.C.G.A. § 12-9-2 (2021).

41. GA COMP. R. & REGS. § 391-3-1-.02(2)(kkk) (2021).

42. GA COMP. R. & REGS. § 391-3-1-.02(2)(kkk)(17)(xlv) (2021).

43. Ga. H.R. Bill 588, Reg. Sess. (2021).

44. *Id.* at § (1)(f).

45. *Id.*

balanced transportation system for the state.⁴⁶ The program empowers the DOT Commissioner to utilize public funds for rail enhancement projects to acquire, lease, or improve railways or railroad equipment, including rail crossings, rolling stock, rights of way, or rail facilities; rail preservation projects to improve short line railways, and rail industrial projects to improve industrial access to railroad tracks and related facilities.⁴⁷ House Bill 588 amended the Georgia Freight Railroad Program to require the DOT Commissioner to make certain determinations prior to the expenditure of state funds dealing with railways in Georgia.⁴⁸ Under the new law, the Commissioner must demonstrate “a benefit accrued to the public in the form of enhanced public safety, enhanced mobility of goods, congestion mitigation, enhanced trade and economic development, improved air quality or land use, [or] reduction of public expenditures due to improved transportation efficiency or infrastructure preservation.”⁴⁹

House Bill 588 further added a new code section which provides for appropriation of certain taxes to be used exclusively for freight and logistics projects in Georgia.⁵⁰ Official Code of Georgia Annotated § 48-8-78 provides that any funds collected through taxes on retail purchase, retail sale, rental, storage use, or consumption of fuel used exclusively in the operation of locomotives “shall be appropriated to the Department of Transportation for use exclusively on freight and logistics projects located on or connected to publicly owned roads.”⁵¹ The new code section empowers the Commissioner of the DOT to allocate the funds based on a formula that includes considerations of total track miles operated within the state by a common carrier and any other factors that the Commissioner may deem appropriate.⁵²

V. TRANSPORTATION FOR HIRE: LIVERY AND RIDESHARE SERVICES

Federal courts in the Eleventh Circuit have had several opportunities in recent years to address the arbitrability of labor disputes and other claims involving rideshare apps, but Georgia’s state courts had not yet squarely considered these issues.⁵³ In 2020, the Georgia Court of Appeals

46. O.C.G.A. § 32-2-41.3 (2021).

47. *Id.*

48. Ga. H.R. Bill 588, Reg. Sess. § (1)(f).

49. *Id.*

50. *Id.*

51. O.C.G.A. § 48-8-78(b) (2021).

52. *Id.* at § 48-8-78.

53. See, e.g., Madeline E. McNeeley et al., *Commercial Transportation, 2019 Eleventh Circuit Survey*, 71 MERCER L. REV. 951, 964–65 (2020).

finally addressed as a matter of first impression whether the “browsewrap”⁵⁴ arbitration agreement in the Uber ride-request app is binding on its customers.⁵⁵

Ryan Thornton was murdered by his rideshare driver in 2018.⁵⁶ His mother brought a wrongful-death action against the rideshare company, Uber Technologies, Inc. (Uber), which moved to compel arbitration pursuant to an arbitration agreement in the terms and conditions of use of its customer app. The DeKalb State Court granted the motion, but Thornton’s mother filed an interlocutory appeal, and the Court of Appeals of Georgia reversed and remanded.⁵⁷

The court of appeals described the relevant screen of the app as follows:

The version of the Uber app at issue in this case prompted a user to either enter his credit card information or link his PayPal account. The top portion of the payment screen contains fields for the user to input his credit card information. The middle portion of the screen contains a button labeled “Register” and a button to link a PayPal account. Underneath the two buttons, near the bottom of the screen, small, dark gray text reads “BY CREATING AN UBER ACCOUNT, YOU AGREE TO OUR TERMS & CONDITIONS AND PRIVACY POLICY.” The words “TERMS & CONDITIONS AND PRIVACY POLICY” are presented as a hyperlink in blue, underlined text. If clicked on, a user would be directed to a document containing Uber’s terms and conditions for users of its services. The terms and conditions explain that a user is entering into a contract with Uber and is bound by the terms and conditions through the user’s access and use of Uber’s services. Uber’s terms and conditions contain an arbitration clause, under which the user agrees to settle any disputes arising out of the use of Uber’s services.⁵⁸

Appellant presented evidence that a user on a smartphone with an Android operating system experienced an on-screen keyboard appearing at the bottom of the screen when they clicked on the

54. “On the internet, the primary means of forming a contract are the so-called ‘click-wrap’ (or ‘click-through’) agreements, in which website users typically click an ‘I agree’ box after being presented with a list of terms and conditions of use, and the ‘browsewrap’ agreements, where website terms and conditions of use are posted on the website typically as a hyperlink at the bottom of the screen.” *Thornton v. Uber Techs., Inc.*, 858 S.E.2d 255, 259 n.1 (2021), *petition for cert. filed*, (Ga. June 28, 2021) (quoting *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009)).

55. *Id.*

56. *Thornton*, 858 S.E.2d at 257.

57. *Id.* at 257–58.

58. *Id.* at 257.

information field at the top of the payment screen to enter a credit card number. In that circumstance, the on-screen keyboard concealed the text and hyperlink informing the user of Uber's terms and conditions but did not conceal the "Register" button.⁵⁹

The court of appeals concluded that the terms and conditions were not so inconspicuous as to mean that Thornton could not have assented to them as a matter of law.⁶⁰ The dark gray text and blue, underlined hyperlink appeared clearly against the white background of the payment screen, and the blue of the hyperlink further drew attention to the terms and conditions, "such that a reasonable smartphone user would know that more information would be found if he clicked upon the hyperlink."⁶¹ This type of browsewrap agreement, which permits the user to manifest assent to hyperlinked terms and conditions by implication through continued use of the product, was upheld in other jurisdictions where the text was found to be sufficiently conspicuous to a reasonably prudent user, and failure to read a contract does not excuse a party's obligations under the contract.⁶² Therefore, under Georgia's objective standard of assent, Thornton could have been bound by the terms and conditions after he registered his account.⁶³

The clarity of the text, however, did not end the inquiry. As Uber itself acknowledged, Thornton had used a credit card when he registered for the app, and the pop-up keyboard might have covered the text when he was entering his card information.⁶⁴ "Under Georgia's objective theory of intent, Thornton cannot have assented to Uber's terms and conditions if he never had the opportunity to see them."⁶⁵ Because of the keyboard issue, questions of material fact remained as to whether "the terms and conditions were either never displayed or displayed for an unreasonably short amount of time such that Thornton would not have seen them."⁶⁶ Uber also contended that it subsequently sent Thornton an email with a link to updated terms and conditions and that his continued use of the app after that email indicated assent, but the court determined a

59. *Id.*

60. *Id.* at 258.

61. *Id.* at 259.

62. *Id.* at 258–59 n.1.

63. *Id.* at 259.

64. *Id.*

65. *Id.*

66. *Id.*

question of fact existed as to whether Thornton received that email.⁶⁷ For these reasons, the court reversed the order compelling arbitration and remanded for further proceedings to resolve these outstanding questions.⁶⁸

The *Thornton* case demonstrates that while browsewrap agreements may be upheld in Georgia courts, the mere fact of a link to terms and conditions is not sufficient by itself to support a finding of assent by the end user.⁶⁹ The courts should consider the full context of the agreement, including whether the functioning of the website or app in practice interfered with what otherwise might have been a reasonably clear presentation. Practitioners should carefully review not only screenshots or markups of the pages, but the actual experience of proceeding through the site or app on the platform used by the customer to gain a full picture of how clear and conspicuous the terms and conditions might be to a reasonable user.

VI. AUTONOMOUS VEHICLE TECHNOLOGY

Vehicles operating on public roads are subject to dual regulation by the federal government and states in which they are registered and driven. Autonomous vehicles (AV) have opened a new dimension in vehicle regulation. Rule makers must keep up with the innovation in real time in all areas that AV technology reaches, from infrastructure to public safety. While AV regulation is still in relative infancy, it has begun at both the state and federal levels.

While it was an atypical year due to COVID-19, the Georgia legislature enacted a rule regarding AVs during this survey period. Effective June 30, 2020, operators of AVs are included in the statute defining persons exempt from having a Georgia driver's license while operating a vehicle in the state.⁷⁰ The statute lists categories of persons exempt from having licenses, like employees of the federal government driving work vehicles, nonresidents who possess licenses from other states, and military servicemembers with foreign-issued licenses.⁷¹ The final exempt "person" listed in the statute is "[a] fully autonomous vehicle with the automated driving system engaged or the operator of a fully autonomous vehicle

67. *Id.* The court did not consider whether O.C.G.A. § 10-12-15(b), regarding when an electronic record is deemed received, had any bearing on this matter because the parties had not argued the statute in the trial court. *Id.* at 260 n.3.

68. *Id.* at 260.

69. *Id.*

70. O.C.G.A. § 40-5-21 (2020).

71. O.C.G.A. § 40-5-21(a).

with the automated driving system engaged.”⁷² While the wording is awkward, this statute highlights a prevalent topic in AV regulation: exemption from rules applicable to traditional motor vehicles and their drivers.

In February 2021, bills were introduced in both the House and the Senate seeking to exempt fully autonomous vehicles from certain vehicle equipment requirements.⁷³ Amendments to several statutes were proposed, like exempting AVs from the rule requiring motor vehicles to be equipped with a working speedometer, including AVs with motorcycles in rules pertaining to multiple-beam road lighting equipment, allowing the use of electric motor to apply parking brakes, and exemption from mirror and windshield rules affecting a driver’s visibility.⁷⁴ The bills also sought to amend the operational rules for AVs and state consumer laws.⁷⁵ The proposals essentially tried to work AVs into Chapter 8, Title 40 of the Official Code of Georgia Annotated, relating to equipment and inspection of motor vehicles, but it was not a good fit.

The House bill died in committee while the Senate bill continued. Working through the bill seemingly highlighted the vast differences between vehicles operated by human drivers and AVs, and the confusion that would arise by trying to regulate them jointly. The language that ultimately passed in May 2021 was succinct. Rather than carve out exceptions to the existing rules for AVs, O.C.G.A. § 40-8-1(b) now states,

Unless otherwise required by federal law, rule or regulation, a fully autonomous vehicle that is designed to be operated exclusively by the automated driving system for all trips shall not be subject to any provisions of this article that relate to or support motor vehicle operation by a human driver and are not relevant to the operation of an automated driving system.⁷⁶

While statutes specifically for AVs are slowly emerging, it seems clear that this is the direction in which the legislature is going.

VII. SHAREABLE DOCKLESS MOBILITY DEVICE RENTALS

Regulation of electric scooters and bicycles is handled primarily at the municipal level in Georgia. Readers of last year’s Survey will recall that the Georgia Senate attempted to update the Rules of the Road to address

72. *Id.* at § 40-5-21(a)(13).

73. Ga. H.R. Bill 249, Reg. Sess. (2021); Ga. S. Bill 165, Reg. Sess. (2021).

74. O.C.G.A. §§ 40-8-8, 40-8-30, 40-8-52, 40-8-72, 40-8-73.

75. O.C.G.A. § 40-8-11.

76. O.C.G.A. § 40-8-1(b).

safety issues with electric scooters by passing Senate Bill 159 during the first part of the 2020 legislative session.⁷⁷ The Georgia House of Representatives failed to vote on Senate Bill 159 when the session reconvened in June 2020, however,⁷⁸ and the General Assembly did not renew its efforts during the 2021 legislative session. As a result, electric scooters remain notably absent from state safety regulations of motorized vehicles and transportation devices.⁷⁹

VIII. CONCLUSION

As in so many other areas of American life, the COVID-19 pandemic continued to affect the commercial transportation world during 2020 and 2021 through court closures and the truncation of the 2020 legislative session. While the law of commercial transportation remained relatively stable during this survey period, practitioners should be prepared for backlogged legislation and judicial opinions to emerge as the legislature and the judicial system return to their normal activities.

77. McNeeley, et al., *supra* note 1, at 56.

78. Ga. S. Bill 159, Reg. Sess. (2020).

79. A member of the Georgia House of Representatives introduced a separate bill in February 2021 that would have prevented users of personal assistive mobility devices from engaging in certain conduct, such as clinging to vehicles or carrying passengers, but the bill did not receive a vote before the end of the session. Ga. H.R. Bill 564, Reg. Sess. (2021).