

Affirmed and Memorandum Opinion filed May 28, 2020.



In The

Fourteenth Court of Appeals

NO. 14-18-01040-CV

ERICA STEELE, Appellant

V.

**GREATER HOUSTON TRANSPORTATION COMPANY, INDIVIDUALLY
AND D/B/A YELLOW CAB, YELLOW CAB COMPANY, CHECKER CAB,
CHECKER CAB COMPANY, GREATER HOUSTON AIRPORT CAB, AND
GREATER HOUSTON AIRPORT TAXI F/K/A GDK, INC., Appellee**

**On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 2015-54117**

M E M O R A N D U M O P I N I O N

Appellant Erica Steele appeals a summary judgment dismissing her tort claims against appellee Greater Houston Transportation Company (“GHTC”). A taxicab in which Steele was a passenger collided with another vehicle. Steele asserted numerous negligence-based claims against GHTC, the taxicab driver (Seifu Ayano), and others. GHTC moved for traditional summary judgment on

several grounds, including that it is not vicariously liable for Ayano's negligence because he is an independent contractor, not an employee. The trial court granted GHTC's motion. The sole dispositive issue before us is the nature of the relationship between GHTC and Ayano. All other claims and parties have been resolved, abandoned, or dismissed.

Viewing the evidence in the light most favorable to Steele, we conclude that GHTC established as a matter of law that Ayano is an independent contractor, and Steele did not present more than a scintilla of evidence that GHTC had the right to control or exercised control over the manner, methods, and details of Ayano's work. Thus, GHTC is not liable to Steele under a respondeat superior theory. The trial court did not err in granting summary judgment in GHTC's favor, and we affirm.

Background

Ayano was driving a taxicab when he collided with another vehicle. Steele, a passenger in the back seat, allegedly sustained personal injuries. Steele sued Ayano and GHTC. Steele alleged that Ayano negligently failed to exercise proper lookout, failed to yield, and failed to control the speed of the vehicle. As relevant here, Steele alleged that GHTC was liable for Ayano's negligence under a theory of respondeat superior.

GHTC filed a traditional motion for summary judgment. GHTC argued that it is not vicariously liable as a matter of law for Ayano's negligence under respondeat superior because Ayano was GHTC's independent contractor. More specifically, GHTC maintained that a contract between it and Ayano established an independent-contractor relationship, and that GHTC lacked the right to control the details of Ayano's work.

GHTC's summary judgment evidence included its contract with Ayano, entitled "Independent Contractor License and Vehicle Lease Purchase Option Agreement" (the "Contract"); Ayano's taxicab license issued by the City of Houston; Ayano's driving records; and the affidavit of Ed Kargbo, GHTC's director of driver services and marketing.

According to the Contract, GHTC owns the taxicab and Ayano leases it. The Contract grants Ayano a license to operate the taxicab and obligates Ayano to pay a weekly lease fee for the taxicab and specialized equipment installed in it. In several sections, the Contract states the parties' agreement that Ayano is an independent contractor, not an employee. For example, section 12 provides:

12. Independent Contractor Relationship.

a. Licensee is an Independent Contractor. IT IS THE INTENTION OF THE PARTIES THAT THIS AGREEMENT ESTABLISHES LICENSEE AS AN *INDEPENDENT CONTRACTOR* OF THE COMPANY. LICENSEE ACKNOWLEDGES THAT THE *INDEPENDENT CONTRACTOR* RELATIONSHIP IS ONLY WITH THE COMPANY AND NOT WITH *AFFILIATED COMPANY*. THIS AGREEMENT DOES NOT ESTABLISH LICENSEE AS AN EMPLOYEE, AGENT, LEGAL REPRESENTATIVE, JOINT VENTURER OR PARTNER OF THE COMPANY OR *AFFILIATED COMPANY* FOR ANY PURPOSE WHATSOEVER. LICENSEE AGREES AND ACKNOWLEDGES THAT LICENSEE SHALL NOT WARRANT OR REPRESENT TO ANYONE THAT LICENSEE IS AN EMPLOYEE, AGENT, LEGAL REPRESENTATIVE, JOINT VENTURER OR PARTNER OF THE COMPANY OR *AFFILIATED COMPANY*. LICENSEE IS NOT AUTHORIZED TO MAKE ANY CONTRACT, AGREEMENT, WARRANTY, REPRESENTATION, OR TO CREATE ANY OBLIGATION, EXPRESSED OR IMPLIED, ON BEHALF OF THE COMPANY OR *AFFILIATED COMPANY*.

Additionally, Ayano is not required to perform any services for GHTC. Should he choose to perform services, the Contract states that GHTC "does not

have the right to control the details of how [Ayano] will acquire and transport Passengers under this Agreement, and that [GHTC] gives no instructions as to how, when, where, or even if [Ayano] utilizes the Goods and Services or operates the Taxicab.”¹ GHTC’s lack of contractual right of control over Ayano’s work is emphasized throughout the Contract.² Ayano chooses, at his sole discretion, where to operate, the days and hours of operation, routes (subject to City of Houston ordinances), and the methods by which he would obtain passengers. Ayano retains all profit or incurs all loss based on revenue received from the passengers.

Pursuant to the Contract, GHTC provided Ayano with specified amounts of indemnification liability coverage, and GHTC recommended Ayano obtain additional insurance coverage above the statutory limits from an insurance carrier or purchase additional indemnification coverage from GHTC. GHTC was not obligated to provide driver training, but GHTC encouraged Ayano to complete (and Ayano in fact completed) a “Business Orientation Program.” Ayano also granted GHTC the right to sell advertising on and in the taxicab and the right to collect all revenue from such advertisements; in exchange, Ayano received a weekly lease rebate.

The Contract contains a merger clause stating that it is the entire agreement between the parties, that no other representation induced Ayano to execute the

¹ The Contract defines “Goods and Services” as: “information, advice, equipment, signs, decals, or services purchased, provided to, furnished to, utilized by Licensee or available to be offered to Licensee’s fares by Licensee, pursuant to the Section 5(a) of this Agreement.”

² For example, paragraph 12.b.(12) provides, in bold font: “Notwithstanding any other provision to the contrary, the Company and Licensee agree that the Company has no right to control Licensee in any manner; the Company only retains the right to cancel this Agreement pursuant to Section 22. Licensee agrees and warrants that if Company, or any employee or agent of the Company, requests that Licensee perform any task outside of this Agreement or otherwise attempts to exercise any control over Licensee, that the Licensee will immediately provide written notification to the President of the Company.”

Contract, and that the obligations imposed and rights granted by the Contract cannot be modified except by written agreement.

In his affidavit supporting the summary judgment motion, Kargbo stated that: Ayano applied for and obtained from the City of Houston a taxicab license; Ayano is an independent contractor; GHTC does not have the right to control the details of Ayano's work or the right to control Ayano in any manner; GHTC did not exercise control over Ayano's work as a taxicab driver; GHTC provides a computerized dispatch system, but Ayano is not required to use it; and if Ayano chose to use it, he was not required to accept the fare. Kargbo averred that the City of Houston passed ordinances that controlled Ayano's performance of his duties as a taxicab operator, and GHTC did not control Ayano's work beyond what city ordinances required.

Steele filed a response to GHTC's motion. Steele argued that a genuine issue of material fact existed on her respondeat superior theory against GHTC because the relationship between Ayano and GHTC extended "far beyond an independent contractor relationship." As support, Steele attached, among other items: (1) a copy of the Contract; (2) Ayano's deposition testimony; (3) Kargbo's deposition testimony; (4) the deposition of another GHTC representative, Veda, Cuffee-Fall; and (5) various discovery responses from GHTC.³

Ayano testified that he responded to a newspaper advertisement soliciting taxicab driver applicants. He attended a five-day course during which GHTC provided training on how to operate a taxi, as well as a defensive driving course also provided by GHTC. As part of the Contract, Ayano paid a flat weekly fee to lease the taxicab, and he had an option to purchase the vehicle. The taxicab was outfitted with specialized equipment, including a credit-card swiper, taxi meter,

³ On appeal, Steele relies exclusively on Ayano's deposition excerpts and the Contract.

stool light, and dispatch system. GHTC owned, maintained, and repaired the equipment; while Ayano was responsible for maintaining and repairing the vehicle, as well as for tolls, tickets, and parking. GHTC provided the color scheme and lettering on the outside of the taxicab.

Ayano determined his own work schedule, subject to city ordinances. GHTC did not limit the days or hours Ayano could work, but it monitored when he started and stopped by requiring him to log in and out on the computer terminal in the taxicab. Ayano could utilize GHTC's dispatch system to obtain information about potential fares based on the driver's proximity to the passenger pick-up location. Ayano was free to accept or reject any potential fares generated through the GHTC dispatch system, but if Ayano did not accept a trip, dispatch would "alert" him. Also, if multiple taxicabs were accepting fares within a particular "zone," priority was based on which drivers entered the zone first. For example, if four taxicabs were present in a zone when Ayano entered the zone, Ayano would have to wait for each of those drivers to take a trip before he could accept a fare.

After the accident, GHTC suspended Ayano for two weeks. Consistent with the Contract, Ayano was responsible for the cost to repair his taxicab, but GHTC paid for the damage to the other driver's car.

The trial court granted GHTC's motion for summary judgment and dismissed the claims against it. After Steele and Ayano settled all remaining claims, the court signed a final judgment. Steele timely appealed the judgment in GHTC's favor.

Standard of Review

We review de novo a trial court's order granting a traditional summary judgment. *Mayer v. Willowbrook Plaza Ltd. P'ship*, 278 S.W.3d 901, 908 (Tex.

App.—Houston [14th Dist.] 2009, no pet.). We take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant’s favor. *Id.*

To be entitled to a traditional summary judgment, the movant must show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). If the movant does so, the burden shifts to the nonmovant to produce evidence raising a fact issue. *Lyda Swinerton Builders, Inc. v. Cathay Bank*, 409 S.W.3d 221, 229 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

Analysis

Under the doctrine of respondeat superior, an employer is vicariously liable for the negligence of its employee acting within the scope of his or her employment, although the employer has not personally committed a wrong. *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 541-42 (Tex. 2002); *Wilson v. Davis*, 305 S.W.3d 57, 66-67 (Tex. App.—Houston [1st Dist.] 2009, no pet.). An entity that hires an independent contractor, however, is generally not vicariously liable for the independent contractor’s negligence. *Baptist Mem’l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 (Tex. 1998). The long-accepted reasoning for this distinction lies in the difference in control that a person or entity retains over an employee versus that retained over an independent contractor. *See id.*; *Newspapers, Inc. v. Love*, 380 S.W.2d 582, 589 (Tex. 1964). Generally, a principal or employer possesses the right to control not merely the end result but also the means and methods of an agent’s or employee’s work. *Wolff*, 94 S.W.3d at 542 (quoting *Sampson*, 969 S.W.2d at 947). An independent contractor, in contrast, solely controls the details, means, and methods of the work to be accomplished. *Id.*; *Olivares v. Brown & Gay Eng’g, Inc.*, 401 S.W.3d 363, 368 (Tex. App.—Houston [14th Dist.] 2013),

aff'd, 461 S.W.3d 117 (Tex. 2015). Accordingly, the test for distinguishing between an employee and an independent contractor focuses on whether the hiring person or entity has the right to control the progress, details, and methods of the work. *Thompson v. Travelers Indem. Co. of R.I.*, 789 S.W.2d 277, 278 (Tex. 1990). If the right of control is present, an employment relationship is established and vicarious liability applies. *See id.*

Courts measure the right to control by considering factors such as: (1) the independent nature of the worker's business; (2) the worker's obligation to furnish necessary tools, supplies, and materials to perform the job; (3) the worker's right to control the progress of the work except as to final results; (4) the time for which the worker is employed; and (5) the method of payment, whether by unit of time or by the job. *Tex. A&M Univ. v. Bishop*, 156 S.W.3d 580, 584-85 (Tex. 2005); *Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002); *Raynor v. Moores Mach. Shop, LLC*, 359 S.W.3d 905, 908 (Tex. App.—Houston [14th Dist.] 2012, no pet.). All five factors need not be present to support a finding of control. *Thompson*, 789 S.W.2d at 278. “[T]he type of control normally exercised by an employer include[s] when and where to begin and stop work, the regularity of hours, the amount of time spent on particular aspects of the work, the tools and appliances used to perform the work, and the physical method or manner of accomplishing the end result.” *Id.* at 278-79. Additionally, that a “person is normally an independent contractor does not preclude a finding of agency as to the particular transaction at issue.” *Weidner v. Sanchez*, 14 S.W.3d 353, 373-74 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Determining employee status is a fact question for the jury unless “the material underlying facts are not in dispute and can give rise to only one reasonable conclusion,” in which case the question is one of law. *See Bishop*, 156 S.W.3d at 585.

A written contract expressly providing for an independent-contractor relationship is determinative of the parties' relationship in the absence of extrinsic evidence indicating the contract was subterfuge, the hiring party exercised actual control in a manner inconsistent with the contract, or if the written contract has been modified by a subsequent agreement. *Olivares*, 401 S.W.3d at 369; *Weidner*, 14 S.W.3d at 373; *see also Love*, 380 S.W.2d at 588-89; *Farrell v. Greater Houston Transp. Co.*, 908 S.W.2d 1, 3 (Tex. App.—Houston [1st Dist.] 1995, writ denied). Extrinsic evidence of control must demonstrate more than “[s]poradic action directing the details of the work” or an “occasional assertion of control,” neither of which is sufficient to override the contract. *Farrell*, 908 S.W.2d at 3. The exercise of control must be “so persistent and the acquiescence therein so pronounced as to raise an inference that at the time of the act or omission giving rise to liability, the parties by implied consent and acquiescence had agreed that the principal might have the right to control the details of the work.” *Love*, 380 S.W.2d at 592.

In its motion for traditional summary judgment, GHTC argued that Ayano was not its employee—and GHTC was not vicariously liable for Ayano's alleged negligence—because the Contract established an independent-contractor relationship and GHTC lacked the right to control the details of Ayano's work. The Contract supports this argument, and thus GHTC conclusively negated at least one element of Steele's respondeat superior theory. *See Love*, 380 S.W.2d at 592; *Weidner*, 14 S.W.3d at 373. The burden shifted to Steele to present evidence raising a fact question as to whether Ayano was, in fact, GHTC's employee and not an independent contractor. *See Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997) (a defendant moving for traditional summary judgment has burden to establish that, as a matter of law, the plaintiff has no cause of action against the

defendant, by conclusively negating one of the elements of plaintiff's cause of action or by establishing all elements of an affirmative defense to each claim).

1. *Independent nature of Ayano's business and GHTC's right to control Ayano's progress*

We address the first and third factors together, because they both concern who has the right to control the details and methods of Ayano's work. *See Perez v. Greater Houston Transp. Co.*, No. 01-17-00689-CV, 2019 WL 3819517, at *5 (Tex. App.—Houston [1st Dist.] Aug. 15, 2019, pet. filed) (mem. op.). Ayano testified that he generally controlled the days and hours he worked and that he was free to accept or reject fares. There is no evidence that GHTC dictated Ayano's routes or required that Ayano accept any fares. One constraint was that if Ayano entered a zone where other taxicab drivers were awaiting potential fares, Ayano had to wait for those drivers to accept a trip before Ayano could accept one in that zone. However, Ayano testified that he was free to move to a different zone if he wanted. Ayano acknowledged that he kept all profit or incurred all loss from his fares. There is no evidence that GHTC withheld income taxes on Ayano's behalf, and Steele does not dispute GHTC's assertion that Ayano's earnings are subject to self-employment tax under the Internal Revenue Code.⁴ *See* IRS Rev. Rul. 71-572, 1971-2 C.B. 347. The evidence in the record pertaining to these factors shows the independent nature of Ayano's business and that GHTC lacks the right to control the details of Ayano's work. This evidence is consistent with the Contract and to the extent it shows that GHTC exercises any degree of control over details, it is no more than "sporadic." *Farrell*, 908 S.W.2d at 3. The deposition testimony on which Steele relies does not indicate that GHTC controlled the progress of Ayano's work.

⁴ In his deposition, Ayano agreed that he did not "pay any kind of business taxes, [he] just [paid] income tax on the monies [he] receive[d] through a 1099."

2. *Ayano's obligation to furnish necessary tools, supplies, and materials to perform the job*

The summary judgment evidence established that GHTC owned the taxicab, including all of the specialized equipment installed in it, and Ayano paid a fixed fee to lease the car and the equipment. GHTC also owned the city-required operating permit and provided certain indemnification insurance. There is no evidence that GHTC controlled whether or when Ayano used the leased equipment or the vehicle itself. But, Ayano did not furnish the equipment in the sense that he acquired it on his own independently of GHTC and decided what type of taxicab equipment was best-suited for the work of being a taxicab driver. He agreed to lease equipment GHTC provided and installed in the vehicle. We presume GHTC “furnishes” most of the equipment necessary for Ayano to perform his work even though Ayano is leasing it from GHTC. Further, as discussed, GHTC instructed Ayano how to operate its equipment, and Ayano was required to operate it within certain parameters if he chose to use it. For instance, if Ayano chose to accept fares through GHTC’s dispatch equipment, he had to honor fare priority relative to other drivers in the same zone. The only necessary material Ayano provided was gas. This proof indicates that GHTC furnished some materials necessary to perform Ayano’s work as a taxicab driver, but it is not alone sufficient evidence of GHTC’s control and it is not inconsistent with the Contract’s terms. *Accord, e.g., Tirres v. El Paso Sand Prods., Inc.*, 808 S.W.2d 672, 674, 676 (Tex. App.—El Paso 1991, writ denied) (“Requiring the trucker to use an employer-leased trailer and to obtain certain liability insurance are conditions of employment, not evidence of rights to control.”).

3. *Time of employment*

This factor takes into consideration the time for which Ayano was working. The Contract term is designated as the number of weeks in the lease period, which is 209 weeks, or until Ayano exercised his option to purchase the vehicle, or until the Contract is cancelled pursuant to its terms. Ayano has the right to terminate the Contract at any time upon written notice to GHTC. At the time of the accident, Ayano had been driving for GHTC for approximately one and one-half years. Steele does not argue that the length of Ayano's relationship indicates an employment relationship with GHTC, nor do we see any support in case law for such a proposition.

4. *Method of payment*

There is scant evidence regarding method of payment, other than that Ayano was paid by the job. There is no evidence he received a salary or an hourly wage. Steele does not direct us to any evidence showing a factual conflict in how and when Ayano was paid. Steele asserts "Ayano was paid by GHTC for fares, less expenses," but provides no record support for this assertion. Ayano testified that he received fares through GHTC's dispatch system, through taxi lines, and through personal calls.

Considering the above factors and viewing the evidence in the light most favorable to Steele, we conclude that she failed to raise a genuine issue of material fact on her respondeat superior theory. The summary judgment evidence indicates that Ayano determined his own hours and was not required to take any fares or particular routes. *See Farrell*, 908 S.W.2d at 4 (one-year contract did not preclude independent-contractor status when taxicab driver had ability to control when, where, and if he worked). Ayano received fares both from GHTC's dispatch system and from sources external to GHTC (taxi lines and personal calls).

Although GHTC provided training and insurance and owned the specialized equipment in Ayano's taxicab, this is insufficient to show a persistent and pronounced assumption of control over the means, methods, and details of Ayano's work despite the Contract's terms. *See Love*, 380 S.W.2d at 592; *Tirres*, 808 S.W.2d at 676.

The facts before us are quite similar to the those addressed in *Farrell*, where the evidence established that: GHTC provided a computerized dispatch system, but the driver was not required to use it, or to accept any fares if he did; the driver paid a fee to operate to GHTC to be licensed under its cab operating permit and to use its radio and dispatch system; and the driver's total compensation came from payments by customers; GHTC did not monitor how, where, or when the driver worked, and it did not know where or if he was operating his taxicab; the driver determined the route he took when delivering a customer; the driver was responsible for all maintenance expenses on the cab; and the driver was covered under GHTC's self-insurance certificate. *See Farrell*, 908 S.W.2d at 3-4. In *Farrell*, the court concluded, as we do today, that no fact issue precluded summary judgment in GHTC's favor on respondeat superior. *Id.* at 4.

Our sister court recently reached a contrary decision in a case also involving GHTC. *See Perez*, 2019 WL 3819517, at *6-7. In *Perez*, the court concluded that the plaintiff presented more than a scintilla of evidence that GHTC controlled a drivers' work, such that the driver may have been considered an employee and not an independent contractor. *Id.* However, the facts in *Perez* differ materially from ours. There, the taxicab driver testified that: he obtained all, or 99%, of his fares from GHTC; he was pressured by GHTC to take fares under certain circumstances; GHTC required the driver to take certain routes and the routes were set by a GPS device owned by GHTC and installed in the cab; and GHTC would penalize the

driver for inactivity or rejecting fares. *Id.* at *5. None of these facts is present here.

Steele also cites three cases in which courts found either a fact issue on respondeat superior or sufficient evidence to support a jury finding on the issue. *See Weidner v. Sanchez*, 14 S.W.3d 353 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Shaw v. Greater Houston Transp. Co.*, 791 S.W.2d. 204 (Tex. App.—Corpus Christi 1990, no writ); *McClure v. Greater San Antonio Transp. Co.*, No. SA-08-CA-112-FB, 2009 WL 10670178 (W.D. Tex. Mar. 24, 2009). Each is distinguishable. In *Weidner*, evidence showed that the company directed fares, routes, and pricing; that the driver was prohibited from picking up any other fares during certain times; and that the company could assess a large fine if the driver were to deviate from certain parts of the manifest. *Weidner*, 14 S.W.3d at 375. In *Shaw*, the driver received all of his customers through GHTC and was required to renew his agreement to drive every twenty-four hours. *Shaw*, 791 S.W.2d at 211. Likewise, in *McClure*, the driver relied on the transportation company for all or most of his customers, and the company “monitored” its drivers. *McClure*, 2009 WL 10670178, at *15.

Here, GHTC presented an independent-contractor agreement, which is determinative of the relationship in the absence of evidence showing that GHTC exercised a degree of control over the means, methods, and details of Ayano’s work inconsistent with the contract. *See Love*, 380 S.W.2d at 588-89; *Olivares*, 401 S.W.3d at 369; *Farrell*, 908 S.W.2d at 3. Such evidence is lacking here. Ayano acknowledged that he was not GHTC’s employee, and his testimony, read most favorably to Steele, demonstrates nothing greater than “[s]poradic action directing the details of the work” or an “occasional assertion of control,” which is not sufficient to override the contract. *Farrell*, 908 S.W.2d at 3. On this record,

and in particular the limited excerpts from Ayano's deposition on which Steele relies, we cannot conclude that Steele presented sufficient evidence to raise a fact issue on respondeat superior.⁵ *See id.* at 4.

For these reasons, we hold that the trial court did not err in granting GHTC's traditional motion for summary judgment and dismissing Steele's claim against GHTC. We overrule Steele's issue.

We affirm the trial court's judgment.

/s/ Kevin Jewell
Justice

Panel consists of Justices Wise, Jewell, and Poissant.

⁵ Steele makes a number of unsubstantiated assertions in her brief, such as that GHTC dictated by GPS the routes Ayano was required to take, that GHTC had the right to receive a share of Ayano's profits and losses, and that that GHTC provided restrictions for Ayano's work shifts and levied penalties for failure to adhere to GHTC's policies and procedures. However, Steele either provides no record cites or directs us to pages of the Contract that do not address her points. We consider only the assertions in Steele's briefing that are supported by accurate citations to the record. *See* Tex. R. App. P. 38.1(i).