NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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COUNTY OF FAIRFAX CITY OF FAIRFAX

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July 5, 2023

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*Counsel for Defendants*

Re: *Sung-Chul Jung v. Red Top Cab, LLC, et al.*
Case No. CL-2020-13314

*Brian M. O'Connor, Administrator for Estate of Hyo Jung Kim v. Red Top Cab, LLC, et al.*
Case No. CL-2020-13315

Dear Counsel:

The Court has before it two distinct but related motions addressing the Plaintiffs' theories of liability against Fairfax Taxi, Inc. First is the Partial Demurrer to the Second Amended Complaint filed by Defendants Red Top Cab, LLC and Fairfax Taxi, Inc. and

**OPINION LETTER**

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Evelyn Kenin, the Administrator for the Estate of Amoah Gyimah. The other is Plaintiffs' Motion in Limine And/Or in the Alternative For Partial Summary Judgment. At the conclusion of argument on these motions, the Court took the matter under advisement. The Court is now prepared to rule.

*Background*

For purposes of the demurrer, the Court considers only those facts stated in the Amended Complaint, granting the Plaintiffs all reasonable inferences arising from the facts pled. The Court also considers the Taxicab Operator Agreement for which the Motion Craving Oyer is granted. Those facts are as follows.

On April 29, 2019, Plaintiffs Sung-Chul Jung and Hyo Jung Kim were passengers in a Red Top taxicab driven by Amoah Gyimah. Fairfax Taxi, Inc. ("Fairfax Taxi") is authorized to engage in the taxicab business in accordance with the laws of the Commonwealth of Virginia and the ordinances of Fairfax County and does business as Red Top Cab. Mr. Gyimah held a hacker's license authorizing him to drive a taxicab.

Around 4:00 p.m. on April 29, 2019, the taxicab driven by Mr. Gyimah in which the Plaintiffs were passengers was traveling northbound on the George Washington Parkway in the area between Morningside Lane and Tulane Drive. The taxicab collided head-on with a vehicle traveling southbound. Mr. Gyimah and Ms. Kim died as a result of injuries sustained in the collision. Dr. Jung was injured. The Amended Complaint alleges that Mr. Gyimah was negligent in his operation of the cab by speeding, failing to pay full time and attention to driving, being distracted by an electronic device, failing to keep the vehicle under control and to keep a proper lookout, and other acts and omissions.

Plaintiffs seek judgment against Fairfax Taxi for the negligence of Mr. Gyimah on a several theories, including that Gyimah and Fairfax Taxi were "engaged in a joint enterprise, and/or joint venture inasmuch as they combined in a joint business for their mutual benefit, and financial gain." Amended Complaint at ¶ 5. Defendants' Partial Demurrer asserts that the allegations in Paragraph 5 are wholly conclusory and fail to plead facts sufficient to show a joint enterprise or joint venture between Gyimah and Fairfax Taxi.

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*Analysis*

*1. Defendants' demurrer*

A demurrer tests whether a complaint states a cause of action or alleges sufficient facts upon which the relief demanded can be granted. Code § 8.01-273. When considering a demurrer, the Court must accept as true all facts properly pled and grant the plaintiff all reasonable inferences arising from those facts. *Glazebrook v. Bd. of Sup'rs of Spotsylvania Cnty.*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003). The Court is not required to accept conclusory allegation without factual support. *Bowman v. State Bank of Keysville*, 229 Va. 534, 541, 331 S.E.2d 797, 802 (1985).

The general rule is that an employer of an independent contractor is not liable for injuries to third persons caused by the negligence of the independent contractor. *Sanchez v. Medicorp Health Sys.*, 270 Va. 299, 304, 618 S.E.2d 331, 334 (2005); *Smith v. Grenadier*, 203 Va. 740, 747, 127 S.E.2d 107, 112 (1962). One exception to this general rule is when the parties are involved in a joint enterprise or a joint venture.

"A joint adventure exists when two or more persons combine in a joint business enterprise for their mutual benefit, with an express or implied understanding or agreement that they are to share in the profits or losses of the enterprise, and that each is to have a voice in its control and management." *Smith* at 744, 127 S.E.2d at 110. *See also* Va. M.J.I. (Civil) Instr. No. 8.120 ("When two or more persons join in a business enterprise for their mutual benefit with an understanding that they are to share in the profits or losses and that each is to have a right to control or manage, then each one is liable for any negligence of the other[s] that is committed within the scope of the enterprise."). "A joint venture is established by contract, express or implied ..." *Ortiz v. Barrett*, 222 Va. 118, 131 (1981).

The Amended Complaint does not include any facts to support the conclusory allegation in Paragraph 5 that Gyimah and Fairfax Taxi were engaged in a joint enterprise or joint venture. There are no facts alleged that there existed between these Defendants an express or implied agreement that they would share in the profits or losses of providing taxicab services in Fairfax County and that Gyimah had a voice in the control or management of how that enterprise would be run. The allegation that a joint venture or joint enterprise existed between Gyimah and the corporate defendants is wholly conclusory and is therefore insufficient to support a claim that Fairfax Taxi is liable for Gyimah's negligent operation of the taxicab.

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The Taxicab Operator Agreement ("TOA") does not establish a joint venture or joint enterprise between Fairfax Taxi. and Gyimah. In fact, it expressly excludes such a relationship. Section 2 of the TOA states that "The parties intend to create by the Agreement the relationship of an independent contractor and not an employer-employee relationship. Any doubt as to the construction of this Agreement shall be resolved to maintain the Operator's status as an independent contractor.... Nothing contained in this Agreement shall create an agency, joint venture, partnership, franchise or any other legal relationship except that of principal and independent contractor." Nothing in the TOA suggests that Gyimah has a role in controlling or managing the taxicab business in which Fairfax Taxi is engaged. The financial arrangement between Gyimah and Fairfax Taxi is one in which Gyimah must pay the agreed upon weekly fee regardless of how many hours he drives or how much money he makes. Nothing in the agreement suggests that Gyimah is entitled to share in profits made by Fairfax Taxi, Inc. or that Gyimah could share his losses with Fairfax Taxi, or that Fairfax Taxi could share its losses with Gyimah.

Consequently, the Court sustains the Defendants' Partial Demurrer without leave to amend.[1] The portion of the Plaintiffs' claims seeking to impose liability upon Fairfax Taxi based upon the existence of a joint venture or joint enterprise is dismissed with prejudice.

*2. Plaintiffs' Motion in Limine And/Or in the Alternative For Partial Summary Judgment.*

Plaintiffs seek a pretrial ruling from the Court declaring that, as a matter of law, Fairfax Taxi has a non-delegable duty and is therefore liable for Gyimah's negligence. Plaintiffs also seek to exclude any evidence in support of a claim that that Fairfax Taxi is not liable for Gyimah's negligence. Plaintiffs further request partial summary judgment that Fairfax Taxi is liable (whether directly or vicariously) for the Gyimah's negligence.

Plaintiffs rely upon The Restatement of Torts, 2d Section 428, which states:

> An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability

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[1] Had the Motion Craving Oyer not been granted, the Court would have, nevertheless, sustained the demurrer. Consideration of the TOA leads the Court merely to deny leave to amend the complaint a second time to allege specific facts showing the existence of a joint venture or joint enterprise. Under the express terms of the TOA, no such thing ever existed.

> for physical harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity.

The Virginia Supreme Court has not considered this section of the Restatement.

Assuming without deciding that Fairfax Taxi is operating its taxicab service pursuant to a publicly granted authority, the issue becomes whether a taxicab service involving ordinary passenger cars "involves an unreasonable risk of harm to others." The Court finds that it does not. Driving a car on a busy highway presents ordinary risks of harm encountered by millions of people each day. There is nothing unreasonable about the risk involved. Plaintiffs' argument that driving a passenger car presents an unreasonable risk of harm is unpersuasive.

Plaintiffs attempt to eliminate the unreasonable risk requirement of the Restatement by holding any person or entity who operates *any business* under an exclusive government franchise liable for the negligent acts of independent contractors. "[I]f one accepts the rights and privileges of an exclusive government franchise, the liability associated with such economic activity becomes nondelegable." Plaintiffs' Brief at 4. This is not the principle stated in the Restatement, nor has this principle been applied in Virginia. Plaintiffs cite to numerous cases involving the trucking industry, which are legally and factually inapposite. The trucking industry operates under complex federal and state laws and regulations fixing the obligations of the actors involved. Driving trucks is a completely different activity that brings larger risks than operating a passenger vehicle. The Court finds the trucking cases to be unpersuasive.

Plaintiffs lastly rely upon the case of *Belcher v. Dandridge*, 61 Va. Cir. 684 (Norfolk Circuit Court 2002), which held a taxicab company was vicariously liable for its driver's negligence. The Court finds that this case is distinguishable on its facts and by more recent holdings by the Virginia Supreme Court.

The facts of *Belcher* differ significantly from those present before this Court. In *Belcher*, the taxicab company owned the taxicab involved in the accident. The driver merely leased the vehicle from the taxicab company. *Belcher* found it significant that the Norfolk Code of Ordinances required the owner of a public vehicle to provide proof of insurance on the taxicab for any damages or injuries in which the cab is involved. In the case now before this Court, Fairfax Taxi is not the owner of the vehicle. Gyimah is the owner. Additionally, the applicable Fairfax County ordinance provides that

> In the case where the certificate holder [i.e. the taxicab company] is not the vehicle owner, the certificate holder is fully responsible for providing evidence of insurance for all authorized taxicabs under his or her company, *and for ensuring that all owner-operators maintain adequate insurance according to this Chapter*. [. . .] In the event an owner-operator's insurance has lapsed, and the owner-operator incurs a liability from an accident or other circumstance, the certificate holder's insurance must be so written that it will cover such liability up to the coverage levels prescribed in this Chapter.

Fairfax County Ordinance § 84.1-2-11(c) (Emphasis added). Here, the obligation to have insurance rested upon Gyimah as the owner of the vehicle. Fairfax Taxi was required to make sure that its driver had insurance. Fairfax Taxi's insurance would not be implicated until 1) its driver's insurance lapsed and 2) the driver incurs liability. The ordinance does not make the certificate holder liable for any accident involving its driver. This Court concludes that the Fairfax ordinance does not impose a non-delegable duty that makes Fairfax Taxi liable for the negligence of its driver.

The decision in *Belcher* also relies upon a theory of public perception regarding financial responsibility for accidents, stating that "the average person, who gets in an accident with a Yellow Cab taxi logically and reasonably assumes that Yellow Cab owns and operates that taxi." This is a separate and distinct theory for an exception to the general rule barring liability of an employer for the negligence of an independent contractor, known as apparent or ostensible agency described in The Restatement of Torts (Second), § 429:

> One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

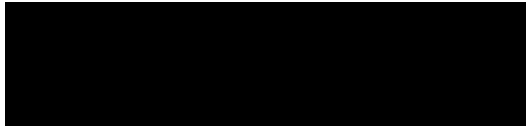
Three years after *Belcher* was decided, the Virginia Supreme Court expressly rejected this theory of liability in *Sanchez v. Medicorp Health Sys.*, 270 Va. 299, 305–08, 618 S.E.2d 331, 334–36 (2005). The Supreme Court held that "[t]he theory of apparent or ostensible agency, or agency by estoppel, has never been used in Virginia to impose vicarious liability on an employer for the negligent acts of an independent contractor." *Id.* at 308, 618 S.E.2d at 336. The Supreme Court saw no reason to begin doing so in that

case. The same reasoning applies here. Because *Belcher* is both factually different and one theory of liability on which that decision is based was subsequently rejected by the Virginia Supreme Court, the Court rejects Plaintiffs' argument. The Motion in Limine And / Or in the Alternative For Partial Summary Judgment is denied.

*Conclusion*

The Defendants' Partial Demurrer to the Amended Complaint is sustained without leave to amend, and the portion of Plaintiffs' claim based upon the existence of a joint venture or joint enterprise is dismissed with prejudice. The Plaintiff's Motion in Limine is denied as is the request to enter a partial summary judgment on the issue of Fairfax Taxi's liability for any negligence committed by Gyimah. An Order to this effect is enclosed. Counsel shall have 7 days to submit objections to the Order.

Sincerely yours,



Michael F. Devine
Circuit Court Judge

**OPINION LETTER**

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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| SUNG-CHUL JUNG, | ) | |
| | ) | |
| Plaintiff, | ) | |
| v. | ) | CL-2020-13314 |
| | ) | |
| RED TOP CAB, LLC, *et al.* | ) | |
| | ) | |
| Defendants. | ) | |

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| BRIAN M. O'CONNOR, Administrator, | ) | |
| | ) | |
| | ) | |
| Plaintiff, | ) | |
| v. | ) | CL-2020-13315 |
| | ) | |
| RED TOP CAB, LLC, et al. | ) | |
| | ) | |
| Defendants. | ) | |

**ORDER SUSTAINING PARTIAL DEMURRER**
**AND**
**DENYING PLAINTIFFS' MOTION IN LIMINE**
**AND FOR SUMMARY JUDGMENT**

For the reasons stated in the Letter Opinion issued today in these cases, which is hereby incorporated by reference, it is hereby

ORDERED that the Defendants' Partial Demurrer is SUSTAINED WITHOUT LEAVE TO AMEND and that the Plaintiffs' claims against Fairfax Taxi predicated upon the existence of a joint venture or joint enterprise are DISMISSED WITH PREJUDICE.

It is further

ORDERED that the Plaintiffs' Motion in Limine And/Or in the Alternative for Partial Summary Judgment is DENIED.

Entered: 07/05/2023

Michael F. Devine
Circuit Court Judge

**ENDORSEMENT OF THIS ORDER BY COUNSEL IS WAIVED PURSUANT TO RULE 1:13 OF THE RULES OF THE SUPREME COURT OF VIRGINIA. COUNSEL SHALL HAVE 7 DAYS TO SUBMIT OBJECTIONS TO THIS ORDER TO THE CLERK OF COURT.**