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Lessons learned litigating against Lyft

A LOOK AT THIS TRANSPORTATION COMPANY'S LITIGATION PRACTICES AND CASELAW THAT WILL HELP YOU WITH VICARIOUS LIABILITY FOR A LYFT DRIVER'S NEGLIGENCE

For nearly three years (2019-2022), our law firm vigorously litigated personal-injury and wrongful-death claims against Lyft for its vicarious liability for the negligence of one of its drivers. The case has since resolved. And while some of the information and documents we received in discovery are confidential, many lessons we learned in the process are not. They also can be used in litigation against other large corporations – particularly those like Lyft that profit off "gig" economies.

The collision and its aftermath

Bryan Panzanaro was married to his childhood sweetheart and together they had four daughters. They all lived in New York. On the morning of July 25, 2019, Bryan was in Seattle on business with some of his colleagues. He got into a Marriott shuttle bus to take him to SeaTac International Airport for meetings. With him on the shuttle bus that morning were seven other passengers, including three of his co-workers and a flight attendant. Just minutes into the drive, a BMW coming from the opposite direction in the far-left lane turned suddenly, jumped the barrier dividing the north- and southbound lanes, and struck the left side of the shuttle bus at about 45 mph.

Why had the driver done that? A Lyft driver in a Toyota Prius carrying a passenger to the airport, who had been driving just ahead of the BMW, drifted left into the BMW's lane. The driver of the BMW jerked her steering wheel to the left to avoid hitting the Prius, but she overcorrected, which led to the crash. The Lyft driver did not stop. He was found only after several months of excellent detective work by King County Sheriff Detective Jeanne Walford and her team, which included collecting nearby surveillance videos showing the Toyota Prius, and sending subpoenas to both Lyft and Uber for any drivers whose app navigation data showed they were driving in the vicinity at the time of the crash.

The force of the crash was so violent that the much larger and much heavier shuttle bus was spun and ultimately tipped over onto its side. The results of the crash were devastating. Luggage and passengers were thrown around. Bryan Panzanaro was thrown through a window before the bus fell on top of him, crushing him to death. Bryan's co-workers and the flight attendant suffered serious physical injuries, but worst of all were the mental and emotional health problems they suffered including depression, PTSD, and survivor's guilt.

Lesson #1: Lyft will delay. Keep pushing.

On behalf of the Panzanaro family and the three co-workers ("Panzanaro group"), we filed suit in King County Superior Court against the driver of the BMW, the Lyft driver, and Lyft for vicarious liability of the Lyft driver's negligence. From the beginning, Lyft slow-walked its discovery responses while also seeking to add other parties to the litigation, which greatly slowed things down.

Lyft asserted fault of the driver of the shuttle, the owner of the shuttle, and the manufacturer of the shuttle, as well as the comparative fault of the various injured/killed passengers. Many months into litigation, the owner of the shuttle and the manufacturer of the shuttle were brought in as third- and fourth-party defendants. Lyft also successfully moved to consolidate the cases of the other injured parties with the Panzanaro group's lawsuit.

Lyft used the addition of the new parties and claims to successfully argue for multiple trial continuances, as well as for the appointment of a Special Discovery Judge to handle discovery disputes – which probably ultimately backfired for Lyft, but did succeed in imposing the additional costs on plaintiffs of having to share in the Special Discovery Judge's fees.

Discovery was no different. From the beginning, Lyft fought against providing information and documents during discovery related to the agency of its drivers.

Among other things, plaintiffs asked for information and documents on the topics of Lyft requirements to be a driver, restrictions Lyft puts on its drivers, Lyft supervision and evaluation of drivers including driver ratings and other metrics used by Lyft to evaluate drivers, safety monitoring, Lyft driver pay and financial incentives, safety and other ride policies, driver discipline and consequences imposed by Lyft for violating Lyft requirements and policies, and marketing and advertising campaigns.

Lyft delayed production as much as possible. Lyft asserted non-specific boilerplate objections. It provided no document logs for documents it withheld. It claimed simple words were vague,

ambiguous, or undefined, such as "performance" or "relationship." It took hyper-technical and overly narrow views of the requests and their terms such that – under Lyft's interpretation – they had no records to produce. And with the exception of documents related to the incident itself, Lyft's initial document productions consisted almost exclusively of publicly available records – materials any person could have viewed at Lyft's website.

Multiple, long, meet and confers were held, to little avail. Lyft was never going to produce internal documents relevant to the issues of agency and vicarious liability without a court order.

Even after the Superior Court compelled production of documents, Lyft continued to slow-walk its production. It failed to meet the court-imposed deadline. When it finally produced documents, it did so in classic "document dump" fashion without any identification or labeling of which documents were responsive to which discovery request. And still there were gaping holes in its production of documents. At one point in the process, Lyft had produced over 23,000 pages of documents – nearly 19,000 of which consisted of current or archived versions of their publicly available website, and very few of which evidenced the inner workings of how Lyft dealt with its drivers.

Lyft's behavior forced us to file a motion for sanctions, which was heard by the (at the time) newly appointed Special Discovery Judge. Lyft's response was a series of deflections: Plaintiffs' motion is premature; Lyft was willing to meet and confer further with Plaintiffs to resolve the issues; Lyft did not "document dump"; Lyft has already produced the "best source of information" for what Plaintiffs were seeking.

The Special Discovery Judge disagreed. She not only ordered further production by Lyft, she also awarded $12,996.58 in sanctions. She wrote: "Lyft's discovery responses, particularly the 19,000 pages of undifferentiated responses, is not within the spirit of our discovery rules."

In short, Lyft did not want to provide internal documents. The only reason we were able to get the discovery we did was by a significant investment of lawyer time into numerous meet and confers, numerous letters detailing deficiencies, and numerous motions to the court and Special Discovery Judge. And ultimately it worked.

Lesson #2: Don't agree to a blanket protective order.

The protective order originally proposed by Lyft was incredibly onerous, permitted them to designate just about anything as confidential, and would limit the review of some documents to attorney eyes only. It was like the type of protective order one would expect in commercial litigation or where intellectual property is at issue – not a fairly straightforward personal injury/wrongful death lawsuit involving lay people. After some back and forth, we reached an agreement. But here you should learn from our mistake.

The protective order did not require the designating party to establish with specificity why documents were deserving of their confidential designation. This slowed *plaintiffs* down in filing their sanctions motion – because we needed to file confidential documents and information in support of our motion, and to do so we needed to justify to the court why Lyft's documents needed to be sealed. And when we requested that Lyft provide us that justification for its documents, they initially refused – claiming it was *our* burden because it was *our* motion.

The protective order also contained a provision that plaintiffs had to destroy all confidential documents – which in the era of electronic documents, backups, and cloud storage, is almost entirely impossible to do.

In short, don't cave to onerous protective-order provisions in your eagerness to see the "confidential" documents. Hold your ground.

Lesson #3: Look to public sources for information.

You shouldn't start from scratch when suing a company like Lyft or Uber. There's lot of public information out there, primarily because of other litigation across the country against Uber, Lyft, Grubhub, Postmates, etc. Most of that significant litigation has occurred in California because that is where most of the companies are headquartered. Look through the record of those cases and you'll find helpful court opinions, motions, and supporting documents.

For example, we took prior court opinions and used the factors focused on in the opinions to help draft discovery, including our 30(b)(6) notice. Also, if they are publicly traded, the companies have public regulatory filings and reports to investors that you can use.

But also, don't think you can go without discovery of Lyft's current internal documents. You'll find that Lyft likes to revise its procedures in response to lawsuits and court rulings, to avoid any future finding of vicarious liability.

Lesson #4: Understand the defendant's motivation and use it as leverage.

Based on our experience, Lyft wanted to avoid two things that were not compatible with taking the case to trial: (1) disclosure of internal information and documents, and (2) any official finding of vicarious liability that could then be used by others in similar cases. Because of the strong public policy of open courts in Washington, any documents used as evidence in trial would almost certainly be publicly available. Civil trials are rarely, if ever, closed to the public. We used that tension to drive our strategy.

Besides holding Lyft's feet to the fire during discovery, we also used motions practice to show Lyft it was vulnerable. We noted a motion for summary judgment on Lyft's vicarious liability for the Prius driver's negligence to be heard a couple of months after mediation.

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While the briefing had not yet been filed by the time of settlement, we made our vicarious liability arguments a centerpiece of our mediation materials. And although for confidentiality reasons we cannot share many of the facts we discovered in the litigation process, below is some of what we can share.

Under Washington law, vicarious liability can arise where the hiring party "retains the right to control the manner and means of work" of the contractor. (*DeWater v. State*, (1996) 130 Wash.2d 128, 137.) Control does not mean "actual interference with the work of the independent contractor, but the *right* to exercise such control." (*Kennedy v. Sea-Land Serv.*, (1996) 62 Wash.App. 839, 851 (emphasis added).)

To decide whether one is an employee or independent contractor, Washington uses the 10 factors in the Restatement (Second) of Agency, § 220(2):

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

(*Hollingbery v. Dunn*, (1966) 68 Wash.2d 75, 80-81.)

As demonstrated by the decisions in other cases across the country, many of the above factors do not weigh in favor of independent contractor status for drivers.

Control

No one factor is conclusive, and not all elements need to be present, except the first element – control. (*Id.* at 81.) The principal does not need to control or have the right to control every aspect of the agent's operation to be subject to vicarious liability. (*Kroshus v. Koury*, (1981) 30 Wash. App. 258, 264.) The key is the principal's right to control the agent's specific activity that caused injury. (*Id.* at 265.)

Other courts around the country have analyzed the issue of control of Uber and Lyft over its drivers. For example, the Supreme Court of Pennsylvania determined that an Uber driver was *not* self-employed for purposes of that state's unemployment compensation. (*Lowman v. Unemployment Comp. Bd. Of Review* (Pa. 2020) 235 A.3d 278.) The court concluded Uber had the requisite control over its drivers because of the following factors:

- The required application process;
- Uber's required criteria that vehicles had to meet;
- The required use of Uber's driver app as the only means of receiving work and communicating with Uber and passengers;
- Uber's complete control of the passenger fare and driver pay structure;
- The driver's inability to use a substitute to provide services;
- Uber's extensive monitoring and supervision of the driver's work, including Uber's benchmarks for ratings and Uber's ability to deactivate drivers based on the failure to meet those benchmarks;
- Uber's right to deactivate drivers who did not qualify to provide driving services under applicable law or under Uber's standards of policies; and
- Uber's extensive use of emails and text messages to drivers advising how to maximize rides and earnings.

(*Id.* at 303-306.)

Similarly, New York's highest court decided a Postmates driver was an employee, not an independent contractor, for purposes of the state's unemployment insurance fund. (*Matter of Vega*, (2020) 35 N.Y.3d 131, 134.) The court ultimately concluded that Postmates drivers were low-paid workers performing unskilled labor who possess limited discretion over how to do their jobs. It pointed to the following factors:

- Postmates requires use of its digital platform;
- Postmates controlled the assignment of deliveries;
- Postmates informed the drivers where the requested good were to be delivered only after the driver had accepted the job;
- Customers could not request a specific driver;
- Postmates finds a replacement if a driver cannot perform the job;
- Postmates tracks the drivers' location with its app;
- Postmates unilaterally fixes driver compensation;
- Postmates pays the drivers, not the customers;
- Postmates unilaterally sets the delivery fees; and
- Postmates handles all customers complaints, not the drivers.

(*Id*. at 137-38.)

In a case involving Lyft specifically, the U.S. District Court for the Northern District of California denied the defendant's motion for summary judgment on the issue of whether Lyft drivers were independent contractors. (*Cotter v. Lyft, Inc.*, (N.D.Cal. 2015) 60 F. Supp.3d 1067, 1075.) The court pointed to several factors supporting its decision:

- Lyft retained the right to terminate drivers at will, without cause;
- Lyft was much more than just a platform. It marketed itself to customers as an on-demand ride service and Lyft told the drivers they were driving for Lyft;
- Lyft retains control over how rides proceed, including instructing drivers not to talk on the phone with a passenger present, not to have anyone else in the car, not to pick up non-Lyft passengers, and not to ask for a passenger's contact information;

- Lyft tells drivers it will deactivate or terminate their account if their passenger ratings fall below a certain threshold;
- The work performed by the drivers is wholly integrated into Lyft's business because Lyft could not exist without its riders;
- The riders are Lyft's customers, not the drivers;
- Driving for Lyft requires no special skill;
- Drivers are paid by the ride, but they have no ability to negotiate the rates or Lyft's fees charged to drivers.

(*Id*. at 1078-81.)

Finally, in a case against Uber, the U.S. District Court for the Northern District of California found that Uber exercised "extensive control of drivers and the transportation system it operates" and denied Uber's motion for summary judgment. (*Crawford v. Uber Techs., Inc.* (N.D.Cal. Aug. 26, 2021, No. 17-cv-02664-RS) 2021 U.S. Dist. LEXIS 161969, at *18 [2021 WL 3810259].) There, the court noted that Uber:

- Requires drivers to comply with state and local laws;
- Maintains expectations and enforces community standards against drivers;
- Selects the cities in which it operates and which products it will provide;
- Connects potential drivers to rental car agencies;
- Oversees personnel deployed to airports and other large events to help riders; and
- Sets the price of rides without input from drivers.(*Ibid*.)

The court concluded that Uber was "primarily engaged in the business of transporting people." (*Id*. at *19 (internal citation and quotations omitted).)

Other factors

Driving for Lyft does not require any special skill, is not a distinct occupation, and does not require any specialization. Anyone with a license can perform the tasks of a Lyft driver. As the U.S. Court of Appeals for the Third Circuit recognized in a case involving UberBLACK drivers, "[i]t is generally accepted that 'driving' is not itself a 'special skill.'" (*Razak v. Uber Techs., Inc.* (2020) 951 F.3d 137, 147.) The court in *Cotter* similarly ruled "driving for Lyft requires no special skill – something we often expect independent contractors to have." (*Cotter*, *supra*, 60 F.Supp.3d at 1080.) The comments to the Restatement (Second), Agency section 220 note that "unskilled labor is usually performed by those customarily regarded as servants," even where he contracts "to do a specified job for a specified price." (Restat. (2d), Agency § 220, cmt i.)

Similarly, drivers for Lyft require no special instrumentalities to perform their jobs. As the court in *Cotter* recognized, unlike a commercial truck/vehicle, "providing a car often does not require a significant investment." (*Cotter*, *supra*, 60 F.Supp.3d at 1080.) Nor are vehicles considered special equipment. As the Washington Court of Appeals recognized in a different context involving couriers and workers' compensation, the vehicles the couriers were required to provide are not "special equipment"; rather the court considered the vehicles "ordinary equipment." (*Henry Indus., Inc. v. Dep't of Labor & Indus. of Wash.* (2016) 195 Wash. App. 593, 608.

Lyft claims it is simply a "transportation network company," i.e., a software company. However, courts regularly reject this claim for both Lyft and Uber. In a case involving Uber, the U.S. District Court for the Northern District of California noted that "Uber simply would not be a viable business entity without its drivers." (*O'Connor v. Uber Techs., Inc.* (N.D.Cal. 2015) 82 F. Supp.3d 1133, 1142.) Further, "Uber's revenues do not depend on the distribution of its software, but on the generation of rides by its drivers." (*Ibid.*) In short, "Uber only makes money if its drivers actually transport passengers." (*Ibid.*)

Likewise, in *Cotter*, the court recognized that the job performed by Lyft drivers "is wholly integrated into Lyft's business – after all, Lyft could not exist without its drivers – and the riders are Lyft's customers, not the drivers' customers." (*Cotter*, *supra*, 60 F.Supp.3d at 1079 (internal quotations and alterations omitted).)

The U.S. District Court for the District of Massachusetts also did not buy Lyft's claim that it was only in the business of providing software that connects drivers and riders:

> The "realities" of Lyft's business are no more merely "connecting" riders and drivers than a grocery store's business is merely connecting shoppers and food producers, or a car repair shop's business is merely connecting car owners and mechanics. Instead, focusing on the reality of what the business offers its customers, the business of a grocery stores is selling groceries, the business of a car repair shop is repairing cars, and Lyft's business – from which it derives its revenue – is transporting riders.

(*Cunningham v. Lyft, Inc*. (D.Mass. May 22, 2020, No. 1:19-cv-11974-IT) 2020 US Dist. LEXIS 90333, at *28.)

More recently, the court in *Crawford* noted, "it is undeniable that 'Uber does not simply sell software; it sells rides.'" (*Crawford*, *supra*, 2021 U.S. Dist. LEXIS 161969, at *13 (internal citations omitted).)

Finally, as made clear by the Restatement, the parties' subjective belief about the nature of their relationship is not dispositive. (Restat. (2d), Agency § 220, cmt m.) Other courts choose to look at the actual conduct of the parties, instead of their stated beliefs: "The parties' label is not dispositive and will be ignored if their actual conduct establishes a different relationship." (*Doe v. Uber Techs., Inc.* (N.D.Cal. 2016) 184 F.Supp.3d 774, 782.)

Conclusion

Litigating against large corporations like Lyft is never easy. But understanding what drives it (pun intended) can help you get the upper hand. While the legal landscape in California is somewhat up in the air right now pending the outcome of the Proposition 22 litigation, we hope these tips nevertheless will be useful.

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