Affirmed and Opinion filed February 28, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01498-CV

JOHN ROBERTS II, Appellant

V.

PETCO ANIMAL SUPPLIES, INC., Appellee

On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Cause No. 6240*JG98-2

O P I N I O N

In this wrongful death suit, appellant John Roberts II appeals a take-nothing summary judgment in favor of appellee Petco Animal Supplies, Inc. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Roberts' minor son was riding in the sleep compartment of a converted cargo trailer when he died from carbon monoxide fumes from a gasoline generator attached to the trailer. At the time, Roberts' son and two other minors were accompanying Freddie McGee on a trip

McGee was making for Rainbow Acquatics, a partnership in which McGee owned 70 percent interest. The purpose of the trip was to deliver frozen fish food to Petco.

Roberts sued McGee, Rainbow, Petco, and various other defendants. Roberts alleged Petco was liable because (1) Petco was McGee's employer at the time of the minor's death, and he was acting within the course and scope of his employment when the injury occurred; "and/or in the alternative" (2) Petco had the right to control McGee's activities by virtue of their contract. Petco responded, alleging in part that the death was caused by a third party over whom Petco had no control and that McGee was an independent contractor.

Petco filed a traditional and a no-evidence summary judgment motion. In the traditional portion of the motion, Petco alleged it was not McGee's employer as a matter of law and did not have the right to control McGee's activities. In support, Petco attached excerpts from the depositions of McGee and Jeff Fox (30 percent partner in Rainbow at the time of the incident and president of the successor corporation) and the affidavit of Nettie Pedro (regional live animal coordinator for Petco). In the no-evidence portion, Petco alleged in part:

> Adequate time for discovery has passed to determine that Freddie McGee was not [sic] employed by PETCO, and, for the reasons outlined above [in the traditional portion], the Plaintiff can offer no evidence that Freddie McGee was an employee of PETCO . . . . To the contrary, summary judgement evidence has been presented that proves Freddie McGee was not an employee, nor under the control, of PETCO on the day of the accident made the basis of this suit.

In his response, Roberts requested the trial court to "take judicial notice of the file and the documents that have been filed" including McGee's and Fox's depositions of February 1, 2000. At the same time, Roberts "object[ed] to that part of the motion for summary judgment and the depositions relied on by Petco as the questions were leading, not supported by any evidence, hearsay, conclusory statements." Roberts objected to the affidavit of Nettie Pedro on the ground it was "not based on personal knowledge . . . .

contain[ed] hearsay, [was] conclusory in its statements and insufficient to support a summary judgment." Roberts argued (1) a material fact issue existed regarding the amount of control Petco had over McGee, (2) Petco was the common-law employer of McGee, and (3) McGee was an agent-driver as identified in Texas Labor Code chapter 201.042. To his response, Roberts attached only a list of twenty common-law factors indicating whether workers are employees.

The trial court rendered summary judgment in favor of Petco, stating only that the pleadings showed an absence of a genuine issue of material fact. The same day, the trial court severed Roberts' action against Petco from his remaining claims.

DISCUSSION

A. Issues presented and Standards of Review

Roberts presents the following two issues for review: (1) whether the trial court erred in granting Petco's motion for summary judgment, and (2) whether the trial court erred in finding McGee was an independent contractor of Petco as a matter of law. He also complains about Petco's summary judgment proof.

The purpose of summary judgment is to eliminate patently unmeritorious claims or untenable defenses; it is not intended to deprive litigants of their right to a full hearing on the merits of any real issue of fact. *Gulbenkian v. Penn*, 151 Tex. 412, 416, 252 S.W.2d 929, 931 (1952). The movant for summary judgment has the burden to show there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). When deciding whether there is a disputed material fact issue precluding summary judgment, the appellate court must take as true all evidence favorable to the non-movant. *Id.* at 548-49. The reviewing court must indulge every reasonable inference in favor of the non-movant and resolve any doubts in its favor. *Id.* at 549.

A defendant moving for traditional summary judgment assumes the burden of showing as a matter of law the plaintiff has no cause of action against him. *Levesque v. Wilkens*, 57 S.W.3d 499, 503 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Traditional summary judgment for a defendant is proper only when the defendant negates at least one element of each of the plaintiff's theories of recovery, or pleads and conclusively establishes each element of an affirmative defense. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

Additionally, after sufficient time for discovery has passed, a party may file a "no evidence" motion for summary judgment if there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i). As with the traditional summary judgment, in reviewing a "no evidence" summary judgment, we review the evidence in the light most favorable to the nonmovant and disregard all evidence and inferences to the contrary. *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282, 284 (Tex. App.—Houston [14th Dist.] 2000, no pet.). We sustain a no evidence summary judgment if (1) there is a complete absence of proof of a vital fact; (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. *Id.* Less than a scintilla of evidence exists when the evidence offered to prove a vital fact is so weak it does no more than create a mere surmise or suspicion of its existence, and in legal effect is no evidence. *Id.* at 284-85. More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions as to the existence of the vital fact. *Id.* at 285.

Because the propriety of summary judgment is a question of law, we review the trial court's decision de novo. *See Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699 (Tex. 1994). If, as here, the trial court grants a motion for summary judgment without stating the grounds

on which it relied, we must affirm the summary judgment if any ground argued in the motion was sufficient. *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995); *Blan v. Ali*, 7 S.W.3d 741, 747-48 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

B. The Summary Judgment Motion and Proof

Roberts based his suit against Petco on the alternative theories Petco was either McGee's employer or, if McGee was an independent contractor, Petco had the right to control his activities. In the traditional part of its motion for summary judgment, Petco alleged (1) as a matter of law, Petco was not McGee's employer, and (2) as a matter of law, Petco did not have the right to control McGee's activities on the occasion in question.[1]

On appeal, Roberts discusses the right to control only in the context of arguing McGee was Petco's employee. Roberts does not argue sufficient control absent an employer-employee relationship.[2] We conclude, as a matter of law, McGee was not Petco's employee.

In order to hold an employer liable for injuries caused a third party by an employee, the plaintiff must establish an employer-employee relationship. *Brentwood Financial Corp. v. Lamprecht*, 736 S.W.2d 836, 845 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.); *see*

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[1] In a single sentence, Roberts argues appellant's motion for summary judgment insufficiently stated the grounds for the motion. *See* TEX. R. CIV. P. 166a(c) (requiring motion for summary judgment to state specific grounds therefor). The purpose of the requirement that the motion for summary judgment must state specific grounds is to provide the opposing party with adequate information for opposing the motion, and to define the issues for the purpose of summary judgment. *Westchester Fire Ins. Co. v. Alvarez*, 576 S.W.2d 771, 772 (Tex. 1978). In *Garcia v. South Texas Security and Alarm Co.*, the Corpus Christi Court of Appeals held a motion for summary judgment in which the closing paragraph stated (1) the plaintiffs had shown no legal duty owed them by the defendants, and (2) there was no causal connection between the defendants' conduct and the damages suffered by the plaintiffs, sufficiently complied with Texas Rule of Civil Procedure 166a(i)). 911 S.W.2d 483 (Tex. App.—Corpus Christi 1995, no writ). The statement of grounds in the present case compares favorably with that held sufficient in *Garcia*.

[2] This case therefore, does not present a question of whether Petco exercised control over the independent contractor's activity that caused the injury. *Cf. Arlen v. Hearst Corp.*, 4 S.W.3d 326, 327 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (stating for party to be liable for negligence of independent contractor's employee, party's control must relate to condition or activity that caused the injury).

Newspapers, Inc. v. Love, 380 S.W.2d 582, 589 (Tex. 1964). To determine whether such a relationship exists, the plaintiff must prove the employer had the right to control the details of the employee's work. *See id.* Every person found performing the work of another is presumed to be in the employment of the person whose work is being done. *Taylor, B. & H. Ry. Co. v. Warner*, 88 Tex. 642, 32 S.W. 868, 870 (1895); *Hoechst Celanese Corp. v. Compton*, 899 S.W.2d 215, 219 (Tex. App.—Houston [14th Dist.] 1994, writ denied). Once the presumption is raised, the burden of proof shifts and the defendant has the burden to escape liability by establishing that the worker was an independent contractor. *Hoechst Celanese*, 899 S.W.2d at 219. The fact that one employer pays the salary of the worker does not establish that the worker is not an employee of another. *Kachmar v. Stewart Title Co.*, 477 S.W.2d 306, 310 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ).

The test to determine whether a worker is an employee or an independent contractor is whether the employer has the right to control the progress, details, and methods of operations of the employee's work. *Thompson v. Travelers Indem. Co.*, 789 S.W.2d 277, 278 (Tex. 1990); *Newspapers, Inc.*, 380 S.W.2d at 585-90. This same test applies regardless of whether the claim arises at common law or under workers' compensation. *Thompson*, 789 S.W.2d at 278; *Elder v. Aetna Casualty & Sur. Co.*, 149 Tex. 620, 623, 236 S.W.2d 611, 613 (1951). The employer must control not merely the end sought to be accomplished, but also the means and details of its accomplishment as well. *Thompson*, 789 S.W.2d at 278. When there is no dispute about the controlling facts, and there is only one reasonable conclusion that can be inferred from such facts, the question whether a person is an employee or an independent contractor is one of law, not of fact. *See Indus. Indem. Exch. v. Southard*, 138 Tex. 531, 534, 160 S.W.2d 905, 906 (Tex. 1942) (stating rule in context of worker's compensation case).

Courts generally analyze five factors in determining the amount of control retained by the employer: (1) the independent nature of the worker's business; (2) the obligation to furnish the necessary tools, supplies, and materials to perform the job; (3) the right to control

the progress of the work except as to final results; (4) the time for which the worker is employed; and (5) whether the worker is paid by the time or by the job. *Hoechst Celanese*, 899 S.W.2d at 220 (citing *Pitchfork Land & Cattle Co. v. King*, 162 Tex. 331, 346 S.W.2d 598, 603 (1961)). Examples of the type of control normally exercised by an employer include 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. *Thompson*, 789 S.W.2d at 278-79. Petco presented summary judgment proof on four of the five factors showing Petco did not retain sufficient control to be considered McGee's employer.[3]

Independent nature of worker's business. At the time of the accident, Rainbow was a partnership in which Fox and McGee, together owned 100 percent of the partnership interest. Petco had no ownership interest in Rainbow. Rainbow was in the business of buying, selling, and delivering fish and frozen fish products to Petco retail stores. Fox considered Petco to be Rainbow's customer.

Obligation to furnish necessary tools, etc. McGee testified Petco did not furnish any equipment with which Rainbow did its work. Pedro testified Petco did not furnish any tools, equipment, or material for McGee's use. McGee owned the truck and paid for the

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[3] Specifically, Petco presented Fox's and McGee's depositions and Pedro's affidavit. On appeal, Roberts renews his objections to this evidence. The record does not show the trial court ruled on the objections or that Roberts objected to the lack of a ruling. To the extent the objections were addressed to defects of form, Roberts has waived them. *See Brown v. Blum*, 9 S.W.3d 840, 849 (Tex. App.—Houston [14th Dist.] 1999, pet. dism'd w.o.j.) (holding party waived hearsay and lack of proper predicate objections to summary judgment evidence when record did not contain evidence of ruling, or objection to lack of ruling on objection).

Roberts, however, did not have to obtain a ruling on the ground the proof was conclusory. *See Green v. Indus. Specialty Contractors, Inc.*, 1 S.W.3d 126, 130 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (stating objection affidavit contains conclusory statements is objection to substance and may be raised for first time on appeal). Roberts' objection to the depositions and affidavit on this ground is waived, however, because he does not specify the particular parts of the documents to which he objects. *See Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc.*, 779 S.W.2d 474, 477 (Tex. App.—El Paso 1989, writ denied) (applying to summary judgment deposition testimony the rule that general objection to unit of evidence as whole, which does not point out specifically portion objected to, is insufficient).

insurance on it; Rainbow owned the trailer involved in the boy's death and used to haul the products.

Lack of right to control details. Both Fox and Pedro testified Petco did not have the right to control the details of how McGee did his job, including the route McGee took, the speed at which he drove, or the manner in which he packed his trailer. McGee testified Petco did not have the right to tell him how to do the details of his job, such as routes and speed. Fox testified although they kept Pedro abreast of what they were doing, Pedro did not tell them when to deliver product to the various locations. Rainbow did accommodate Petco's request that deliveries be made before 3:00 p.m. in order to avoid the after-school rush. Fox testified the latest they ever delivered to a Petco store was probably 8:00 or 9:00 at night, and, in such situations, they would call so Petco would have the proper personnel to take care of the product.

Method of payment. McGee received a monthly salary from Rainbow. If Petco wanted to order a product from Rainbow, it submitted a facsimile notifying Rainbow of the product Petco wanted to purchase. Rainbow then ordered the requested products from suppliers and paid the suppliers for the products. Finally, Rainbow delivered the products to Petco, and Petco paid Rainbow for the merchandise. When Petco paid Rainbow, Petco did not withhold any amount for taxes from the check nor did Petco pay McGee's health insurance.

Rather than pointing to specific summary judgment proof to show Petco exercised sufficient control over McGee to be held liable for his negligence, Roberts lists 11 factors he believes indicate McGee was Petco's employee. These factors appear to be derived from guidelines established by the Internal Revenue Service for determining when a worker is an employee for federal employment tax purposes. *See* Paul Kellogg, Note, *Independent Contractor or Employee: Vizcano v. Microsoft Corp.*, 35 HOUS. L. REV. 1775, 1797-98 n.

166 (1999) (citing Rev. Rul. 87-47, 1987-1 C.B. 296, 298-99).[4] Other than citing summary judgment proof that Petco was Rainbow's sole customer, Roberts does not tie his 11 factors to specific summary judgment proof except by a list of record citations after the list. Having reviewed the cited pages, we find only proof (in addition to that set forth above) that (1) on the night of the accident, McGee was making a delivery to Petco; (2) Rainbow's business in June 1997 was to deliver goldfish and frozen fish foods to Petco; (3) Rainbow delivered product to Petco every week on Tuesdays and Wednesdays; (4) someone at Petco (possibly the district manager) asked Rainbow to finish delivering by 3:00 p.m. to avoid the after-school rush; (5) although McGee initially testified Petco had the right to hire or fire him from Rainbow, he then clarified Petco could not terminate his relationship with Rainbow, and what he meant by the "right to hire and fire" was that Petco could cease buying product from Rainbow; and (6) Rainbow delivered to the Petco stores in the same order every time Rainbow made a delivery.

In *Limestone Products Distribution, Inc., v. McNamara*, the supreme court recently held similar evidence conclusively showed a driver was an independent contractor:

> When we apply the right-to-control test to the summary-judgment evidence here, we hold that it conclusively shows that Mathis [the driver] was an independent contractor when the accident occurred. Although Limestone told Mathis where to pick up and drop off loads, and Mathis had to turn in his load tickets to get paid, he had broad discretion in how to do everything else. Mathis was free to drive any route he wished when delivering for Limestone as long as he timely delivered the load. Mathis did not work regular hours and did not have to visit the office on a regular basis. Moreover, Limestone supplied no tools or equipment to Mathis. Instead, Mathis owned and used his own truck for deliveries, and he paid for his truck's gasoline, repairs, and insurance. Limestone paid Mathis by the load he delivered, and he received no pay if there was no work. Limestone reported Mathis's income on a 1099 form, not a W-2 form. Also, Limestone did not pay Mathis for vacation, sick

[4] Roberts' 11 factors do not exactly track the 20 IRS guidelines. Furthermore, Roberts provides no Texas authority that these factors are to be used in lieu of, or as a gloss on, the five factors set forth in *Pitchfork Land & Cattle Co. v. King*, 162 Tex. 331, 338, 346 S.W.2d 598, 603 (1961). We have found no such authority.

> leave, or holidays. And Mathis paid his own social security and federal income taxes.

45 Sup. Ct. J. ___, 2002 WL 220574 at *4 (Feb. 14, 2002) (per curiam).

The control exercised by Petco over McGee here is no greater than that in *Limestone Products*. Furthermore, unlike the driver in *Limestone Products*, McGee's company had purchased the product it was hauling and then sold the product to Petco. Consistent with *Limestone Products*, and indulging every reasonable inference in favor of Roberts and resolving any doubts in his favor, we conclude, as a matter of law, McGee was not Petco's employee, and the summary judgment proof does not raise a fact question regarding whether Petco exercised sufficient control over McGee to be liable under the doctrine of respondeat superior.

We overrule appellant's issues one and two, and affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed February 28, 2002.

Panel consists of Justices Brister, Anderson, and Frost.

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