



# FOR *the* DEFENSE

December 2019

"Do not withhold good from those to whom it is due, when it is in your power to act."

Proverbs 3:27

## Greetings from Craig Reese

It is amazing that another year is rapidly coming to a close. Not sure that the old adage that time flies when you are having fun applies to the handling of insurance claims, but time does fly.



We are sure that most of you, like us, are scrambling to get everything done for the holidays. Tough when Thanksgiving is so late and there are fewer days to get ready for Christmas. Parties, gifts, relatives, travel - the list never seems to end. But, as you are going crazy trying to get it all accomplished, we hope that you take the opportunity to remember how blessed each of us are. We have jobs that allow us to buy gifts for our families. We have good friends to spend time with. We have homes to decorate. Don't let the craziness of the season take away your joy. Take the opportunity to share your blessings with those around you.

We are certainly thankful for all of you. In the course of representing your companies and your insureds, we have had the opportunity to develop great friendships. Our firm certainly appreciates all of the cases you send us each year. We are blessed by our relationship with each of you.

As 2019 comes to a close and we look forward to 2020 and all that it may bring to each of us, we just wanted to take this opportunity to wish you a very Merry Christmas and Happy Holidays. Enjoy your time with your families and hopefully a few days off to get ready for the coming year.

## Course and Scope and Direct Negligence Claims

### David Colley

We often defend personal injury lawsuits arising from motor vehicle accidents in which the plaintiff/motorist alleges she was injured when a negligent employee/driver operating a company-owned vehicle in the course and scope of his employment collided with the plaintiff's vehicle. In these lawsuits, the plaintiff generally sues the employee/driver for negligence and the company/employer for vicarious liability under the doctrine of *respondeat superior*. The plaintiff may also allege direct negligence claims against the



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Welcome to the latest edition of Fletcher Farley's Newsletter.

If you have any comments, questions or would like more information from us, please contact Doug or Joanna.

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Happy Holidays and a Joyful New Year



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company/employer, such as negligent hiring or supervision and negligent entrustment.

Facts establishing that the employee/driver was **not** acting in the course and scope of his employment at the time of the accident (e.g., personal errand or DWI) typically will defeat a plaintiff's claim against the employer for negligence/vicarious liability under the theory of *respondeat superior*; however, the issue of course and scope is irrelevant to the plaintiff's claims against the employer for negligent hiring or supervision and negligent entrustment. See *Green v. Ransor, Inc.*, 175 S.W.3d 513, 517 (Tex. App.-Fort Worth 2005, no pet.) ("evidence showing [employee] was not acting in the course and scope of his employment does not defeat [plaintiff's] negligent entrustment or negligent supervision claims as a matter of law."). Additionally, whether the employee deviated from the scope of the employer's permission to use the vehicle is irrelevant to a plaintiff's negligent entrustment claim. *Id.* at 519.

Negligent hiring, training, and supervision claims are all simple negligence causes of action based on the employer's *direct* negligence rather than on vicarious liability. *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 49 (Tex. App.-Fort Worth 2002, no pet.). Negligent entrustment also is a *direct* claim against the employer that focuses on the employer's own negligence in creating an unreasonable risk of harm to others, not the negligence of the employee. *Sanchez v. Swift Transp. Co.*, 2016 WL 10587127, at \*4 (W.D. Tex. 2016); *Ravani v. Vaught*, 231 S.W.3d 568, 571 (Tex. App.-Dallas 2007, no pet.) ("[w]hether [employee] was acting in the course and scope of his employment is not relevant to plaintiff's negligent entrustment claim.").

In other words, liability for negligent hiring, training, and supervision-as well as negligent entrustment-**is not** dependent upon a finding that the employee was acting in the course and scope of his employment when the tortious act occurred. *Green*, 175 S.W.3d at 517; *Morris*, 78 S.W.3d at 49; *Ogg v. Dillard's, Inc.*, 239 S.W.3d 409, 421 (Tex. App.-Dallas see also 2007, pet. denied). Instead, the employer is liable if its negligence in hiring, training, supervising, or retaining an alleged unfit employee was a proximate cause of the plaintiff's injuries. *Morris*, 78 S.W.3d at 49; *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 796 (Tex. 2006) ("Negligence in hiring requires that the employer's failure to investigate, screen, or supervise its [hires] proximately caused the injuries the plaintiffs allege.").

Importantly, an employer is **not** negligent when there is nothing in the employee's background that would cause a reasonable employer not to hire or retain the employee. *Fifth Club, Inc.*, 196 S.W.3d at 796; *but see Morris*, 78 S.W.3d at 51-52 (concluding trial court erred in granting summary judgment for employer on negligent hiring and retention claims where employee's three prior drug or alcohol offenses and falsification of employment application raised a fact issue on whether the employer was exercising reasonable care in qualifying him as a truck driver).

Thus, while the issue of course and scope is not relevant to a plaintiff's direct negligence claims against the employer for negligent hiring/supervision or negligent entrustment, the plaintiff still has the burden of establishing that the employer's alleged negligence in hiring the employee or entrusting a company vehicle to him proximately caused the plaintiff's alleged injuries and damages.

## Conflicts Resolved

### Fletcher Farley Obtains Dismissal in Anti-SLAPP Suit

[Fred Arias](#) and [Lorin Subar](#) obtained a dismissal with prejudice for a youth sports club sued by the disgruntled parent of one of its

above to view our Holiday Greeting.

## Senior Source Christmas Party

We have adopted the residents of a nursing & rehab facility in Dallas County through the Senior Source for the last few years as our annual Christmas charity. We are excited to see them again this year! Santa and his elves are headed there with us next week to provide gifts, delicious treats and carols for them. Stay tuned for pictures and stories in next month's newsletter!

## Date Ball Recipe



### Ingredients

- \* 1 cup sugar
- \* 1 box chopped dates (8oz.)
- \* 2 sticks of butter
- \* 1 cup of chopped pecans
- \* 3 cups of Rice Krispies

### Directions

- 1) Melt 2 sticks of butter in sauce pan with dates. When butter is melted, add sugar & cook 5 minutes.
- 2) Add Rice Krispies and pecans.
- 3) Roll into small balls, then let cool.
- 4) Roll in powdered sugar!

Enjoy!!!

## Firm Fun at Thanksgiving

minor athletes. The suit alleged that after the sports club had accepted the minor athlete on its team, club representatives or parents suggested that the Plaintiff had prepared an unflattering video of several teammates; a claim denied by the Plaintiff. The Plaintiff filed suit in Tarrant County seeking damages for both breach of contract (for recovery of membership costs) and defamation. On behalf of the Defendant sports club, our firm filed a Motion to Dismiss under the Texas Citizens Participation Act (TCPA), arguing that both the actions of the Defendant and its representatives, as well as any communications made within the bounds of the club, were protected under the First Amendment's guarantees of free speech and assembly. Therefore, the Plaintiff's attempt, through the filing of the lawsuit, to adversely affect either of those rights was an attempt to affect the Defendant's First Amendment rights and under the TCPA must be dismissed. After extensive briefing on the issue, and after arguments, the Tarrant County District court ruled in favor of Fletcher Farley's client and dismissed the lawsuit with prejudice.



L-R: Zoe Christopherson,  
Sophia Lopez and Bria  
Patel.

We had a great time celebrating Thanksgiving at our firm luncheon.



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