

# FOR THE DEFENSE

November 2017

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

Proverbs 2:27

## Greetings from Paul Bennett



Halloween is past, Thanksgiving is around the corner and a chill is finally in the air. Can you believe it's already November? It's been a busy year through the fall, with multiple trials and defense verdicts, summary judgments and wins on appeal. We also enjoyed seeing many of you in Chicago last month for our annual Texas Law Update seminar. Fall is also one of the nicest seasons in Texas and a good time to reflect on our many blessings. As many of you know, we have been celebrating the 25<sup>th</sup> year of our practice with acts of kindness for others who are less fortunate. We are proud as a firm to have supported causes ranging from juvenile diabetes research to food for the homeless. We can only do this because of the trust and support of our valued clients, and we are thankful for you. We hope that each of you have a blessed and happy Thanksgiving!

## Breaking a Habit

### Joshua Abrams



As we approach the holiday season, people will be travelling throughout the state. Police will be scanning the roads for drivers who are texting while driving as an amendment to the Texas Transportation Code prohibiting texting while driving became effective on September 1, 2017. Plaintiff's attorneys will seek to show, in cases where negligence in an automobile collision case has been alleged, that a driver with a cell phone is in violation of the law in order to bolster their claims and show a conscious disregard for the rules of the road.

Since texting while driving is now punishable by fine - \$99 fine for a first time offense and \$200 fine for repeat offenders - and as a Class A misdemeanor offense when involving death or serious bodily injury, Plaintiff's attorneys will attempt to show that a Defendant driver's actions are more than distracted driving, but are negligence per se, that is, that the Defendant driver broke a law which caused the Plaintiff's injuries. Plaintiff's attorneys will also seek to introduce into evidence citations of texting while driving in order to bolster a negligence cause of action.

However, the new law provides a range of defenses for driver's over age 18. The activity prohibited by the new law is texting while the automobile is moving - not stopped - and drivers are permitted to make and receive calls, search on

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Welcome to the latest edition of Fletcher Farley's Newsletter, which we hope you find interesting and helpful.

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

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### Lorin Subar Interviewed by NPR's Morning Edition



[Lorin Subar](#) was interviewed on NPR's Morning Edition on October 30th by Tovia Smith regarding confidentiality clauses.

To read the transcript, please [click here](#).

internet browsers, and perform other functions as long as not specifically prohibited by local ordinance.

The typical testimony in the issuing of a citation under the new law is that a Defendant driver had their head down, was not moving when the stoplight turned green, or made more than 10 taps on their cell phone. Effective cross-examination in a negligence action where it has been alleged that the driver was texting at the time of impact is achieved when that cross-examination focuses on the accuracy of the perception of the witness to the alleged texting. For example, questioning the witness on the distance he or she was from the Defendant driver, the height difference from which the witness observed the texting, and any obstructions and distractions between the witness and Defendant driver. Additionally, the witness would also need to establish that the vehicle was moving and that he or she was able to peer into the Defendant driver's vehicle and determine that the Defendant was actually texting.

If you have any questions about these or any other new laws in Texas and their civil liability implications please do not hesitate to give us a call.

## Conflicts Resolved

### Fletcher Farley Granted a Summary Judgment

On October 31, 2017, U.S. Federal Judge John McBryde (Northern District of Texas) granted a summary judgment in a premises liability lawsuit filed against the firm's client, a national restaurant. The Motion for Summary Judgment garnering the dismissal was briefed by [Michael Shipman](#) and [Lorin Subar](#). The Plaintiff had alleged that she slipped in a bathroom stall in a puddle of water that had accumulated due to a plumbing leak. She further contended that the store knew of the leak because there was a "Wet Floor" warning cone that had been placed in the stall. She alleged that as a result of the accident, she suffered a significant back/neck injury, and submitted medical bills for \$175,000 which she related to the incident. She also sought recovery for future medical care as well as past and future pain and suffering and disability. Plaintiff claimed that although the restaurant knew the premises were kept in an unsafe condition, the establishment neither adequately maintained the restaurant, nor warned customers of known risks. On behalf of its client, the firm argued there was no knowledge of the water issue (there had never been any plumbing issues) and the presence of the warning cone was sufficient to give warning. Judge McBryde granted the Summary Judgment, finding Plaintiff had failed to provide sufficient information as to whether the restaurant had notice of any water on the floor, or the existence of plumbing problems. Therefore, the Judge ruled there was insufficient evidence to establish that the store had actual or constructive notice of the alleged condition. As the Judge could find no notice of the condition, the Court ruled for the firm's client without considering whether there had been an adequate warning. The Court's decision, located at *Moore v. Golden Corral Corp.*, 4:17-CV-256-A, 2017 WL 5028335 (N.D. Tex. Oct. 31, 2017), formally disposed of all claims against the firm's client.

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## Honoring 25 Years with 25 Acts of Kindness

### JDRF One Walk Dallas



Our Team Walkers  
Sean Douglas, Dwanna Gassaway, Molly Higgins, Fred Arias, Yolanda Rodriguez, La'Teria Robinson and Teri Lews. (L-R, Top- Bottom)

We got together to donate and walk at the JDRF One Walk in Dallas on October 21st to support JDRF and their goal of creating a world without Type 1 Diabetes. To learn more, [click here](#).

### TCS New York Marathon Congrats Melissa Smith!



Go Melissa!

We are proud of Melissa Smith (wife of Jeff Smith) who ran the TCS New York City Marathon on November 5th. She ran with the American Heart Association's team, Team Heart & Stroke, in memory of her father-in-law. To read more, please [click here](#).

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