FROLICKING AWAY

Texas courts shield employers from respondeat superior claims.

BY GARRETH A. DEVOE

As a consultant for Druid Drilling Solutions, Daniel Delos often travels hundreds of miles away from his home in Houston to operators' oil and gas well sites in West Texas. During one of these multi-day assignments, while driving from his hotel to the operator's site, Delos' vehicle collides with another vehicle, instantly killing the other driver. After the deceased driver's spouse files a negligence claim against Delos and a vicarious liability negligence claim against Druid Drilling, his employer's counsel begins reviewing the company's employment policy manual and its contract with the operator client.

"Respondeat superior," translated as "let the superior make answer[,]" is a legal doctrine holding an employer liable for an employee's wrongful acts committed within the scope of employment.[1] Generally, a person has no duty to control the conduct of another.[2] Further, Texas courts generally absolve an entity of negligence when its employee embarks on a frolic of his or her own.[3] However, under respondeat superior, an employer may be vicariously liable for the negligent acts of its employee if the employee's actions are within the course and scope of employment.[4]

One of the earliest applications of this doctrine by a Texas court occurred in *McNeal v. Home Ins. Co.* In that case, an insurance company's agent used his company vehicle to drive his friend to a liquor store, followed by four separate bars.[5] After leaving the fourth bar, the agent's friend began driving the agent back to his hotel when their vehicle collided head-on with another vehicle being driven by the plaintiff's husband, resulting in the deaths of the insurance agent and the plaintiff's husband.[6] In absolving the insurer of liability, the court found that "at the time of the accident, [the insurance agent and his friend] were on a pleasure trip and frolic purely personal to themselves[.]"[7] In finding that the insurance agent lacked authority to use the vehicle "in jaunts and frolics of his own[,]" the court held that the insurance agent was not acting in furtherance of the employer's business at the time the tort arose, and was thus not acting within the course and scope of employment.[8]

Texas courts have held that the less extreme cases of running personal errands and eating lunch constitute instances of frolicking not within the course and scope of employment. For example, in *Molina v. City of Pasadena*, the 14th Court of Appeals in Houston held that a city engineering inspector who was involved in a vehicle accident while driving his city-owned vehicle from lunch at a restaurant to his next inspection site was not acting within the course and scope of his employment because he was returning from the personal errand of lunch and had not yet reached his next zone of employment.[9] Significantly, the court found that he had not yet resumed his job duties and was not acting in furtherance of the city's interests at the time of the accident.[10]

The Texas Supreme Court recently issued a seminal opinion on this issue in *Painter v. American Drilling I, Ltd.* wherein it held that an employer's bonus payment to its employee to drive several co-workers between the employer's work site and employer-provided housing constituted evidence that the employee was acting within the course and scope of his employment when he was involved in a motor vehicle accident while driving to the housing.[11] In that case, an oil and gas exploration and production company hired a drilling company to drill wells in the Permian Basin in West Texas.[12] The drilling company provided a bunkhouse for its crew approximately 30 miles from the well site.[13] Although the drilling company paid its driller employee $50 per day to drive other crew members from the bunkhouse to the well site, as required by the contract between the exploration company and drilling company, the drilling company did not require any of its employees to stay at the bunkhouse or to ride with the driller.[14] Further, the drilling company did not dictate the specific route the driller had to take when transporting the other members of the crew.[15]

In order to prevail on a respondeat superior claim against an employer, an injured plaintiff must show that, at the time of the negligent conduct, the employer's worker (1) falls within the legal definition of "employee" and (2) was acting in the course and scope of his or her employment.[16] A worker is an employee when his or her employer has "the overall right to control the progress, details, and methods of operations of the work."[17] An employee acts within the course and scope of his or her employment when performing tasks generally assigned to him or her in furtherance of the employer's business (a) with the employer's authority and (b) for the employer' benefit.[18] However, under the coming-and-going rule, an employer is not vicariously liable for torts committed by its employee while the employee is traveling to or from work, unless the travel involves the performance of specifically assigned duties for the benefit of the employer.[19]

The court held that the driller's act of transporting the crew to and from the well site, for which he was paid a specific amount of money over his regular salary, and evidence that

he did so as part of his assigned job duties constituted evidence that the driller was acting in furtherance of the employer's business, within the employer's authority, and for the employer's benefit at the time of the incident.[20] Such evidence created a genuine issue of material fact as to whether the plaintiff was acting within the course and scope of his employment, thus defeating the employer's motion for summary judgment.[21]

Texas courts have distinguished between an employee who is paid a specific amount of money to transport co-workers as a duty in addition to the employee's primary job and an employee who is provided mileage reimbursement. For example, in *Silvas v. Harrie*, the U.S. District Court for the Western District of Texas held that, based on the coming-and-going rule, a traveling consultant, whose employer reimbursed his travel and mileage expenses but did not otherwise control or direct his work-related travel arrangements, was not within the course and scope of his employment when he was involved in a motor vehicle accident while driving between his hotel and temporary work site.[22]

Finally, Texas courts have also shielded small businesses from respondeat superior claims based on financial commingling theories. For example, in *Grogan v. Elite Metal Fabricators, Inc.*, the 2nd Court of Appeals in Fort Worth held that an employee who owned the majority of his employer and who was involved in a motorcycle accident while on an out-of-state vacation was not within the course and scope of his employment at the time of the accident.[23] In that case, the employee used his employer-sponsored cellphone and was on call during his vacation and used his employer-sponsored credit card, including reward points, to pay for a portion of his vacation.[24] However, the court held that the employee was not acting with his employer's authority because there was no evidence that he was performing work for his employer at the time of the accident.[25]

Luckily for Druid Drilling, its employment policy manual contains certain provisions likely to absolve it of liability from the respondeat superior claim. First, the manual provides that Druid Drilling will not provide any company-owned vehicles or credit cards for its traveling consultants. Second, the manual provides that Druid Drilling will reimburse its consultants for travel expenses and mileage in accordance with the Internal Revenue Service's standard mileage rates but will not reimburse its consultants a specific total amount of money for any required travel. Third, the manual provides that the consultants are required to make their own travel plans in connection with all work assignments. Further, the contract between Druid Drilling and its operator client neither requires Delos to transport other co-workers nor dictates specific travel arrangements.

In the recent opinions of *Molina*, *Painter*, *Silvas*, and *Grogan*, Texas appellate courts have greatly clarified the analysis used to determine the vicarious liability of a Texas employer with traveling employees. By ensuring their companies have employment and contractual policies mirroring those of Druid Drilling above, corporate counsel and business leaders will reduce their companies' liability exposure with respect to the acts of their traveling employees. Further, plaintiffs' counsel and defense counsel must remain vigilant of the issues raised in this article because the resolution of a multitude of vicarious liability cases will likely hinge on the holdings of these recent opinions. **TBJ**

Notes

1. Black's Law Dictionary (10th ed.).
2. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 757 (Tex. 2007).
3. *Grogan v. Elite Metal Fabricators, Inc.*, 2018 Tex. App. LEXIS 10089, 15 (Tex. App—Fort Worth 2018).
4. *Painter v. Amerimex Drilling I, Ltd.*, 561 S.W.3d 125, 128-29, 139 (Tex. 2018).
5. *McNeal v. Home Ins. Co.*, 112 S.W.2d 339, 340-41 (Tex. Civ. App.—Galveston 1937).
6. *Id.* at 339, 341.
7. *Id.* at 341.
8. *Id.* at 341-42.
9. *Molina v. City of Pasadena*, No. 14-13-00436-CR, 2018 Tex. App. LEXIS 6579, 12013 (Tex. App.—Houston [14th Dist.] 2018).
10. *Id.* at 12-14.
11. *Painter*, 561 S.W.3d at 128-29, 139.
12. *Id.* at 128.
13. *Id.*
14. *Id.*
15. *Id.* at 128-29.
16. *Id.* at 131.
17. *Id.* at 138.
18. *Id.* at 131, 138-39.
19. *Id.* at 136, 139.
20. *Id.* at 136.
21. *Id.* at 128-29, 137, 139.
22. *Silvas v. Harrie*, 2018 U.S. Dist. LEXIS 203479, 1, 7-9 (W.D.TX 2018).
23. *Grogan*, 2018 Tex. App. LEXIS 10089 at 1, 13-14.
24. *Id.* at 1, 10, 13-14, 25.
25. *Id.* at 15-16.

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