Opinion filed March 10, 2016

In The

Eleventh Court of Appeals

No. 11-13-00354-CV

ERIC MANCIL AND DEBORAH MANCIL, INDIVIDUALLY AND AS NEXT FRIENDS OF DELANEY RHEA MANCIL, AND ALICE CZERNIAK AND CHARLES ROGERS, INDIVIDUALLY AND AS NEXT FRIENDS OF SAMANTHA JILL ROGERS, Appellants

V.

JOHN STROUD; SUSAN STROUD; SSJC HOLDINGS, LTD.; AND SSJC, LLC, Appellees

On Appeal from the 16th District Court

Denton County, Texas

Trial Court Cause No. 2013-10779-16

M E M O R A N D U M O P I N I O N

This appeal involves a fatal, four-car collision. It is an appeal from two take-nothing summary judgments that the trial court entered in favor of Appellees: John

Stroud; Susan Stroud; SSJC Holdings, Ltd.; and SSJC, LLC. In their motions for summary judgment, Appellees asserted that there were no genuine issues of material fact on the issues of course and scope of employment, vicarious liability, and joint enterprise. We affirm in part and reverse and remand in part.[1]

Appellees are owners of a farm located off Highway 380 near Newcastle. Daniel Gerald Studdard, a defendant below but not a party to this appeal, worked at the farm at Appellees' request. Studdard, among other tasks, bulldozed trees, cleared land, and hauled feed. Prior to the date of the collision made the basis of this lawsuit, Studdard had spent approximately two weeks at the farm, during which he performed several tasks around the farm. On the day of the wreck, Studdard completed his work around the farm and headed "[b]ack to Denton."

Studdard lived in Little Elm at the time of the collision. Little Elm is east of Denton and about two and one-half hours from the farm. On the date of the collision, Studdard left the farm and drove east on Highway 380. Near Denton, Studdard crossed into the westbound lane and collided with a truck. The truck then lost control and collided with two vehicles behind Studdard. The truck ended up on top of the vehicle driven by Samantha Jill Rogers. Tragically, Samantha Jill Rogers and Delaney Rhea Mancil, a passenger in Rogers's vehicle, died as a result of injuries suffered in the wreck.

Appellants filed suit against Appellees. In their third amended petition against Appellees, Appellants alleged causes of action for (1) negligence, (2) negligence per se, and (3) vicarious liability. Appellants' negligence claim included allegations that Appellees negligently hired Studdard. Appellants' vicarious liability claim also

[1]Under a docket equalization order, the Texas Supreme Court transferred this appeal from the Second Court of Appeals to the Eleventh Court of Appeals. As required under Rule 41.3 of the Texas Rules of Appellate Procedure, we will decide this case in accordance with the precedent of the Second Court of Appeals.

included allegations of joint enterprise and control. John Stroud filed a traditional motion for summary judgment and, subsequently, filed an amended motion. Later, Susan Stroud filed a traditional motion for summary judgment on behalf of herself; SSJC Holdings, Ltd.; and SSJC, LLC. The trial court granted both motions for summary judgment.

Appellants bring one issue (with eight sub-issues) on appeal. Appellants' overarching issue is that the trial court erred when it granted summary judgment in favor of Appellees. We note that, in their motions for summary judgment, Appellees did not address whether Studdard was an employee or an independent contractor. Further, neither Appellants nor Appellees argue that Studdard was not negligent at the time of the collision. Consequently, we address neither Studdard's negligence nor his status as an employee or as an independent contractor. Finally, although Appellees discuss special employment liability in their motions for summary judgment, Appellants and Appellees agree that this doctrine is inapplicable.

We review a trial court's grant of summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). When reviewing a summary judgment, the appellate court takes as true evidence favorable to the nonmovant. *Id.* A trial court must grant a traditional motion for summary judgment if the moving party establishes that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). The nonmovant is not required to file a response to defeat a traditional motion for summary judgment; however, once the movant establishes a right to judgment as a matter of law, the nonmovant must come forward with evidence or law that precludes summary judgment. *Clear Creek*, 589 S.W.2d at 678–79.

We will begin our summary judgment analysis with Appellants' fifth and eighth sub-issues. In Appellants' fifth sub-issue, they claim that Studdard's deposition testimony is not competent summary judgment evidence because he is an interested witness and because his testimony was not clear, free from contradiction, and uncontroverted. Non-substantive defects in summary judgment evidence must be objected to at the trial court to preserve the argument for appeal. TEX. R. CIV. P. 166a(f); *e.g.*, *Rockwall Commons Assocs., v. MRC Mortg. Grantor Trust I*, 331 S.W.3d 500, 507 (Tex. App.—El Paso 2010, no pet.); *Wrenn v. G.A.T.X. Logistics, Inc.*, 73 S.W.3d 489, 498 (Tex. App.—Fort Worth 2002, no pet.); *Patterson v. Mobiloil Fed. Credit Union*, 890 S.W.2d 551, 554 (Tex. App.—Beaumont 1994, no writ). Legal and factual conclusions contained in an affidavit constitute substantive defects. *Rockwall Commons Assocs.*, 331 S.W.3d at 507. Whether an affidavit is clear, positive, free from contradiction, or uncontroverted is a question of form, not substance. *Id.* Appellants did not object to this summary judgment evidence in the trial court. Consequently, Appellants have not preserved this argument for review on appeal. *See id.*

In their eighth sub-issue, Appellants argue that John's affidavit that is attached to his summary judgment response is not competent summary judgment evidence because it contains legal conclusions. In the affidavit, John uses the words "direct," "control," and "require." The statements made by John are factual and account for his actions as they pertained to Studdard. John does not conclusively state that Studdard was not in the course and scope of his employment; that would constitute a legal conclusion. *See, e.g.*, *La China v. Woodlands Operating Co.*, 417 S.W.3d 516, 520 (Tex. App.—Houston [14th Dist.] 2013, no pet.). Instead, John merely provides the following factual information:

> 3. On November 11, 2010, I did not *exercise any control* over how Daniel Studdard drove home from the Farm. I did not *require* that

> Daniel Studdard use any particular vehicle or any other means of travel in driving home from the Farm. In addition, I did not *direct or require* Daniel Studdard to use any particular route in driving home from the Farm.
>
> 4. Guests of the farm were requested to take their personal trash with them when they left. When Daniel Studdard left the Farm, he was free to throw his trash away where ever [sic] he wanted. Studdard was not *required* to take his trash back to his home.
>
> 5. Daniel Studdard would use my set of keys when he went to the Farm to perform work. When he would return home from the Farm, he would eventually return my keys to me. He was not *required* to bring the keys directly to me when he returned from the Farm. Instead, I would typically get the keys from him three to four days later. There were other sets of keys to the Farm.

(emphasis added). Appellants claim that these statements, specifically the italicized portions, constitute improper legal conclusions. However, these statements are like the statements in *La China* where the affiant stated that certain individuals were not "the owners, lessors, lessees, or managers" of a business. *La China*, 417 S.W.3d at 520. The statements were factually based and not legal conclusions. In *La China*, although the affiant used words that may signify a legal classification, the court found them to be factual in nature. *Id.* at 520–21. Similarly, here, John's use of "direct," "require," and "control" factually describe his relationship with Studdard. Because John's statements were not legal conclusions, the statements are competent summary judgment evidence. We overrule Appellants' fifth and eighth sub-issues.

Next, we will address Appellants' third sub-issue. Appellants claim that the trial court erred when it granted Appellees' motions for summary judgment because Appellants raised genuine issues of material fact as to whether Studdard was in the course and scope of his employment.

An employer is liable for the tort of its employee "only when the tortious act falls within the scope of the employee's general authority in furtherance of the employer's business and for the accomplishment of the object for which the employee was hired." *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 757 (Tex. 2007) (quoting *Minyard Food Stores, Inc. v. Goodman*, 80 S.W.3d 573, 577 (Tex. 2002)) (internal quotation mark omitted). The specific elements require that an employee's act must be (1) committed within the scope of the general authority of the employee, (2) in furtherance of the employer's business, and (3) for the accomplishment of the object or purpose for which the employee was hired. *Bell v. VPSI, Inc.*, 205 S.W.3d 706, 715 (Tex. App.—Fort Worth 2006, no pet.) (citing *Leadon v. Kimbrough Bros. Lumber Co.*, 484 S.W.2d 567, 569 (Tex. 1972); *Robertson Tank Lines, Inc. v. Van Cleave*, 468 S.W.2d 354, 357 (Tex. 1971)).

Employers generally are not liable for accidents involving their employees while the employees are traveling to and from work. *See Tex. Gen. Indem. Co. v. Bottom*, 365 S.W.2d 350, 354 (Tex. 1963). In a summary judgment case decided by this court, we held that "[p]laintiffs who rely on the doctrine of respondeat superior to hold an employer liable have the burden of proving at trial that the employee was acting within the course and scope of his employment at the time of the accident." *Elmore v. E. Sullivan Advert. & Design, Inc.*, No. 11-07-00118-CV, 2008 WL 4349919, at *2 (Tex. App.—Eastland Sept. 25, 2008, pet. denied) (mem. op.); *Dunlap-Tarrant v. Ass'n Cas. Ins. Co.*, 213 S.W.3d 452 (Tex. App.—Eastland 2006, no pet.); *Soto v. Seven Seventeen HBE Corp.*, 52 S.W.3d 201, 204 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Mata v. Andrews Transp., Inc.*, 900 S.W.2d 363, 366 (Tex. App.—Houston [14th Dist.] 1995, no writ).

First, Appellants focus on Studdard's use of his own vehicle to complete tasks around the farm. Appellants cite *Kennedy v. American National Insurance Co.* to

show that Appellees implicitly authorized the use of Studdard's vehicle for the job and, therefore, are liable for Studdard's negligence. 107 S.W.2d 364, 366 (Tex. 1937). *Kennedy* does hold that, when an employee repeatedly uses his own vehicle while completing business for the employer, "the employer will be held to have impliedly authorized its use and to be liable for negligence in connection therewith." *Id.* at 366. However, this does not mean that the employer is liable when the employee uses his vehicle outside the course and scope of employment. *See id.* at 366–67. (relying on other jurisdictions that require control by the employer at the time of the employee's negligence). Even when utilizing an employer-owned vehicle, an employee is not always in the course and scope of employment. *See, e.g., Goodyear Tire & Rubber Co.*, 236 S.W.3d at 757.

Appellants also claim that, because Studdard was compensated for his fuel costs, he was in the course and scope of his employment at the time of the collision. However, courts have held otherwise. *See, e.g., London v. Tex. Power & Light Co.*, 620 S.W.2d 718, 719–20 (Tex. Civ. App—Dallas 1981, no writ). In *London*, the court held that, despite reimbursement of travel expenses, employee was not acting in the course and scope of employment at the time of the injury. *London*, 620 S.W.2d at 719–20. Consequently, reimbursement for Studdard's fuel costs does not, alone, create a genuine issue of material fact as to whether Studdard was in the course and scope of his employment. *See London*, 620 S.W.2d at 719–20.

Appellants also argue that John had the right to control Studdard's activity at the farm and that, therefore, Studdard was in the course and scope of his employment. Appellants argue that John's directions to Studdard to leave the farm that day before guests arrived, and not to stay the night, show that Studdard was in the course and scope of his employment at the time of the collision. The Fourteenth Court has held that an employee is not within the course and scope of employment

while traveling to work simply because his employer requires him to arrive at work at a specific time. *See Wilie v. Signature Geophysical Servs., Inc.*, 65 S.W.3d 355, 360–61 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). That court reasoned that holding otherwise would place a large number of employees in the course and scope of employment each time they drove to work. *Id.* Similarly, we cannot find that the instructions Studdard received—to leave and not stay the night at the farm—amount to a genuine issue of material fact concerning control at the time of the collision. The key to deciding issues that involve course and scope of employment is to look at the control at the time of the alleged negligence. *Bell*, 205 S.W.3d at 711–12. We find that informing an employee when to leave a worksite does not by itself constitute control at a later time as the employee travels away from the worksite.

Further, Appellants argue that Studdard was in the course and scope of his employment because he carried items from the farm to deliver them elsewhere in furtherance of his employment. Appellants make this claim as to debris, sheet metal, keys, and trash. During Studdard's deposition, he was asked whether he hauled anything away from the farm on the date of the collision. He testified that he did not recall doing so, but was not sure. Studdard was then questioned about the items that he had in his vehicle at the time of the collision, which included personal trash, Clorox, Raid, and wood. Studdard explained that all of those items were his, including the wood, and were not items that he was delivering elsewhere for Appellees. The presence of those items does not create a genuine issue of material fact as to whether Studdard was within the course and scope of his employment at the time of the collision. *See, e.g.*, *Bogue v. Newman*, No. 11-12-00098-CV, 2014 WL 4347812, at *6 (Tex. App.—Eastland Aug. 29, 2014, no pet.) (mem. op.)

(holding that an employee is only in the course and scope of employment when the employee is acting in furtherance of the employer's business).

On the day of the collision, Studdard had picked up some sheet metal that was lying around the farm. Studdard testified that the sheet metal was lying around because of damage from storms that had hit the farm. In text messages to John the day before the collision, Studdard asked whether John knew the location of a scrapyard near the farm; John answered that he did not. Appellants ask this court to take this evidence and make an inference that Studdard loaded the sheet metal that belonged to Appellees into his personal vehicle and was in the process of taking it to a scrapyard at the time of the collision. There is no summary judgment evidence that Studdard was hauling any sheet metal at the time of the wreck.

At the time of the collision, Studdard also had John's keys to the farm. Appellants ask this court to find that this fact leads to a reasonable inference that Studdard was on his way to return the keys to John at the time of the collision and, therefore, was in the course and scope of his employment.

The Supreme Court of Texas has held that "[w]hen the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)) (internal quotation marks omitted). Further, stacking inference upon inference does not create a genuine issue of material fact. *See, e.g.*, *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 858 (Tex. 1968); *Zavala v. Burlington N. Santa Fe Corp.*, 355 S.W.3d 359, 372–73 (Tex. App.—El Paso 2011, not pet.); *Poteet v. Kaiser*, No. 2-06-397-CV, 2007 WL 4371359, at *5 (Tex. App.—Fort Worth Dec. 13, 2007, pet. denied) (mem. op.).

The summary judgment evidence does not show that Studdard hauled or was instructed to haul the sheet metal away. The summary judgment evidence does not show that Studdard had any sheet metal in his vehicle when he left the farm or at the time of the collision. Instead, Appellants ask this court to infer that (1) Studdard found a scrapyard to take the sheet metal to; (2) he loaded the sheet metal into his vehicle; and (3) he was on the way to a scrapyard to drop the sheet metal off for Appellees at the time of collision. Stacking each of these inferences on one another may create a mere surmise or suspicion that Studdard acted in the course and scope of employment at the time of the collision, but it does not create a genuine issue of material fact so as to preclude summary judgment. *See Ridgway*, 135 S.W.3d at 601; *Schlumberger Well Surveying Corp.*, 435 S.W.2d at 858; *Zavala*, 355 S.W.3d at 372–73; *Poteet*, 2007 WL 4371359, at *5.

Appellants rely upon summary judgment evidence that Studdard had John's only set of keys to the farm and that Studdard often would return the keys or leave the keys at John's home several days after he left the farm. However, there is no summary judgment evidence to show that John requested that Studdard return the keys on the date of the collision or that Studdard intended to return the keys that day. Appellants ask this court to infer that Studdard and John intended to meet to return the keys at the time of the collision based solely on Studdard's possession of the keys. The evidence that surrounds Studdard's possession of the keys may create a mere surmise or suspicion that Studdard intended to return the keys to John at the time of the collision, but it does not create a genuine issue of material fact as to whether Studdard was in the course and scope of his employment at that time. *See Ridgway*, 135 S.W.3d at 601; *see also Schlumberger Well Surveying Corp.*, 435 S.W.2d at 858; *Zavala*, 355 S.W.3d at 373; *Poteet*, 2007 WL 4371359, at *5.

Additionally, Appellants argue that, because Studdard transported his personal trash from the farm, he was in the course and scope of his employment. Although Studdard's deposition testimony showed that Studdard carried his own personal trash from the farm on the date of the collision, we find that this evidence does not raise a genuine issue of material fact as to whether Studdard was in the course and scope of his employment at the time of the collision. For reasons similar to the reasoning in *Wilie*, we find that an employee carrying his personal trash from a jobsite, without more, does not raise a genuine issue of material fact as to whether the employee is in the course and scope of his employment. *See Wilie*, 65 S.W.3d at 359 (reasoning that an employee is not in the course and scope of employment while traveling to work at a time required by the employer because holding otherwise would drastically increase the number of employees within the course and scope of employment each time they drove to work).

Alternatively, Appellants argue that Studdard was in the course and scope of his employment because he was on a special mission for Appellees. The "special mission" doctrine is an exception to the general rule that an employee is not within the course and scope of his employment when driving his own or another vehicle to and from his place of employment. *E.g.*, *id.*; *Upton v. Gensco, Inc.*, 962 S.W.2d 620, 621–22 (Tex. App.—Fort Worth 1997, pet. denied). To be on a special mission, an employee must be completing a task at his employer's direction or "performing a service in furtherance of the employer's business." *Upton*, 962 S.W.2d at 621. Furthermore, before it can be said that an employee is on a special mission, the employer must require that the employee use a specific mode of travel or take a specific route on the mission. *Id.* at 621–22. Without evidence that John specified a mode of travel or a specific route to take, Appellants have not provided evidence to create a genuine issue of material fact as to whether Studdard was on a special

mission. Because Appellants failed to provide evidence that raised a genuine issue of material fact as to whether Studdard was in the course and scope of his employment at the time of the collision, we overrule Appellants' third sub-issue.

Next, we address Appellants fourth sub-issue. Appellants claim that Appellees and Studdard were engaged in a joint enterprise. The elements of joint enterprise are (1) an express or implied agreement among the members, (2) a common purpose, (3) community of pecuniary interest in the purpose, and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control. *Motloch v. Albuquerque Tortilla Co.*, 454 S.W.3d 30, 35 (Tex. App.—Eastland 2014, no pet.).

In Appellees' traditional motions for summary judgment, they merely stated that there was no evidence that a joint enterprise existed, and they did not produce evidence or arguments to conclusively disprove any or all elements of the existence of a joint enterprise.

Even if we were to hold that Appellees failed to carry their summary judgment burden on the *existence* of a joint enterprise, that holding would not require a reversal. For the other members of the joint enterprise the be liable, it must be shown that a member of the joint enterprise acted in furtherance of a common undertaking of the joint enterprise at the time of the wrongful act. Appellees' argument on this issue rests on similar grounds as their course and scope argument. Because Studdard was not in the course and scope of his employment at the time of the collision, he was not in furtherance of a joint enterprise, if one existed. Appellants failed to respond to this issue in their response to Appellees' motions for summary judgment. Instead, Appellants' response was directed only at the *existence* of a joint enterprise, not as to whether Studdard was acting in furtherance of a common undertaking of

any joint enterprise at the time of the collision. We overrule Appellants' fourth sub-issue.

In Appellants' first sub-issue, they argue that, at a minimum, the trial court improperly granted summary judgment on Appellants' negligent-hiring claim. Appellants argue that, because Appellees did not expressly address Appellants' negligent-hiring cause of action, the trial court erred when it granted summary judgment as to all of Appellants' causes of action. Although, Appellees' traditional motions for summary judgment contained arguments and evidence that concerned whether Studdard was in the course and scope of his employment and whether Studdard acted in furtherance of a joint enterprise, there were no references to Appellants' negligent-hiring claim.

John based his motion for summary judgment on the argument that "Studdard was not acting in the course and scope of any relationship with John Stroud" at the time of the accident. In the other Appellees' motion for summary judgment, they claimed that the evidence established that Appellees did not owe a duty to Appellants and that, therefore, the trial court properly granted the motion for summary judgment on all of Appellants' causes of action. However, the only arguments and evidence that the movants provided involved whether Studdard was in the course and scope of employment or in furtherance of a joint enterprise. None of the appellees addressed the negligent-hiring claim.

Generally, a trial court may only grant summary judgment on grounds expressly stated within a motion for summary judgment. TEX. R. CIV. P. 166a(c); *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 49 (Tex. App.—Fort Worth 2002, no pet.). In their motions for summary judgment, Appellees only addressed issues regarding whether Studdard was in the course and scope of his employment and in furtherance of a joint venture. Consequently, Appellees failed to move for summary

judgment on Appellants' negligent-hiring claim. *See* TEX. R. CIV. P. 166a(c). However, Appellees argue that some courts have found that if a movant fails to include a certain ground, and if that ground is precluded as a matter of law by other grounds raised, any error that the trial court made when it granted summary judgment as to the ground not included is harmless. *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 296–97 (Tex. 2011).

Nevertheless, as Appellants point out, whether Studdard was in the course and scope of his employment is not an element of negligent hiring. *See Morris*, 78 S.W.3d at 49; *Wrenn v. G.A.T.X. Logistics, Inc.*, 73 S.W.3d 489, 496 (Tex. App.—Fort Worth 2002, no pet.). Although negligent hiring is a case-specific inquiry, generally an "employer is liable if its negligence in hiring or retaining the unfit employee was a proximate cause of the plaintiff's injuries." *Morris*, 78 S.W.3d at 49. Similarly, even if Appellees conclusively proved that joint enterprise liability did not apply in this case, Appellants' negligent-hiring claim would not be precluded. *See Motloch*, 454 S.W.3d at 35 (listing the elements of joint enterprise); *Morris*, 78 S.W.3d at 49–50 (detailing how an employer is liable under a negligent-hiring cause of action); *Wrenn*, 73 S.W.3d at 496–97 (detailing how an employer is liable under a negligent-hiring cause of action). As a result, Appellants' negligent-hiring claim is not precluded as a matter of law by a finding that Appellants have failed to present a genuine issue of material fact as to whether Studdard was in the course and scope of his employment or acting in furtherance of a joint enterprise. *See G & H Towing*, 347 S.W.3d at 296–97. Consequently, because Rule 166a(c) requires a trial court to rule only on grounds expressly presented in the motion for summary judgment, we find that the trial court erred when it granted summary judgment in favor of Appellees on Appellants' negligent-hiring claim. Appellants' first sub-issue is sustained.

In Appellants' sixth sub-issue, they argue that, because the credibility of interested witnesses will likely be dispositive in this case, the trial court erred in granting summary judgment. Appellants allege that there are inconsistencies in deposition testimony as to the following: (1) what Studdard was hired to do; (2) whether his personal vehicle was required for employment; (3) whether his fuel costs to the farm were paid by Appellees; (4) whether his employment included driving; (5) how Studdard was paid for his work; and (6) where Studdard was going at the time of the collision. However, because any inconsistencies with respect to the first five portions of testimony that Appellants cite do not show control at the time of the collision or an act in furtherance of employment, as evidenced by our analysis in this opinion, such inconsistencies do not create a material fact issue as to the question of course and scope of employment in this case.

In their brief, Appellants claim, for the first time, that there is a disagreement as to where Studdard was going at the time of the collision. Studdard's deposition testimony states that he was going "[b]ack to Denton," and Appellees use this information to state that Studdard was on his way home. Appellants claim that this statement means that he was in the course and scope of his job duties because he was going to Denton to deliver or complete a task for Appellees. Since this argument was not made in the trial court, we do not address its merits, if any. We overrule Appellants' sixth sub-issue.

In their second sub-issue, Appellants seem to argue that the trial court erred when it granted Appellees' traditional motions for summary judgment because, when we apply the standard of review for motions for summary judgment, it is clear that the evidence created a genuine issue of material fact on each cause of action. Appellants, in their seventh sub-issue, argue that whether an employee is in the course and scope of his employment is generally a fact issue and, therefore, that the

trial court improperly granted Appellees' motions for summary judgment. As our analysis shows, we disagree. Appellees presented summary judgment evidence that established that Studdard was not acting in the course and scope of his employment or in furtherance of a joint enterprise at the time of the collision. In response, Appellants did not provide any evidence that raised a genuine issue of material fact as to those elements. Further, although whether an employee is in the course and scope of his employment is generally a fact issue, that generality alone does not preclude summary judgment. Consequently, we overrule Appellants' second and seventh sub-issues.

We affirm the judgment of the trial court as to all causes of action except the negligent-hiring cause of action, and as to that cause of action only, we reverse the trial court's judgment and remand the negligent-hiring cause of action to the trial court.

JIM R. WRIGHT
CHIEF JUSTICE

March 10, 2016

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.