

No. 07-0085

In the Supreme Court of Texas

BROOKSHIRE GROCERY COMPANY,
Petitioner,

v.

BARBARA GOSS,
Respondent.

On Appeal from the Sixth Court of Appeals
Texarkana, Texas
Cause No. 06-05-0036-CV

**BRIEF OF AMICI CURIAE KROGER TEXAS L.P.,
FIESTA MART, INC., AND GROCERS SUPPLY CO.
IN SUPPORT OF BROOKSHIRE'S PETITION FOR REVIEW**

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I.
STATEMENT OF THE CASE

Amici Curiae adopt the Statement of the Case set forth by Brookshire Grocery Co., Inc.

II.
STATEMENT OF INTEREST

Amici curiae Kroger Texas L.P., Fiesta Mart, Inc. and Grocers Supply Co.—all nonsubscribing employers in Texas—file this brief in support of Issue Number Two in Brookshire’s Petition for Review. In Issue Number Two, Brookshire asserts that the Texarkana court of appeals erred by excusing an employee/invitee injured by a condition of the premises from proving the *Corbin* elements of a premises-liability claim.¹

Correcting the *Goss* court’s error is vitally important to Texas jurisprudence because the *Goss* decision conflicts with three Texas Supreme Court cases and has inappropriately expanded the potential liability of the approximately 107,300 Texas employers (which is 40% of all employers) that do not subscribe to the Texas Worker’s Compensation Act.² Accordingly, Amici Curiae respectfully request that the Court grant Brookshire’s Petition for Review.

¹ Issue Number Two asks, in part, “Did the court of appeals err in holding that Mrs. Goss had the right to choose between a general negligence theory and a premises liability theory because she pleaded both theories, even though she failed to prove that her accident was due to any contemporaneous activity by Brookshire or its employee?”

² TEXAS DEPT. OF INSURANCE, WORKERS’ COMPENSATION BIENNIAL REPORT, THE EFFECTS OF THE 2005 LEGISLATIVE REFORMS ON THE AFFORDABILITY AND AVAILABILITY OF WORKERS’ COMPENSATION INSURANCE FOR TEXAS EMPLOYERS at p. iv (Dec. 2006).

Uloth & Peavler, LLP, counsel for amici curiae, is filing this brief *pro bono* and is not receiving compensation of any kind.

III. ISSUE PRESENTED

Three Texas Supreme Court opinions establish the law applicable to this case: (1) *Motel 6 G.P., Inc. v. Lopez*, 929 S.W.2d 1 (Tex. 1996), in which this Court held that negligence is a single cause of action, even if the plaintiff pleads different theories of breach; (2) *Keetch v. Kroger*, 845 S.W.2d 262 (Tex. 1992), in which this Court held that an invitee who is injured by a condition of the defendant's premises—as opposed to a contemporaneous activity of the defendant—must submit her single negligence cause of action as a premises-liability claim; and (3) *Armstrong Co. v. Adair*, 112 Tex. 439, 247 S.W. 848 (Tex. Comm. App. 1923), in which this Court held employees are simply invitees and that a premises owner owes both “the same duty.”

Did the Texarkana Court of Appeals err by ignoring the *Lopez*, *Keetch*, and *Adair* opinions and by allowing Ms. Goss—an invitee who was injured by a condition of the defendant's premises—to dissect her single negligence claim into two distinct causes of action (unsafe workplace and premises liability), even though the duty an employer and landowner owe an invitee is the same duty?

IV.
SUMMARY OF THE ARGUMENT

1. **A plaintiff injured by a condition of the premises has only one cause of action for negligence, regardless of whether the plaintiff is also an employee of the landowner.**

Negligence is a single cause of action, even if the plaintiff pleads different theories of breach. While an unsafe-workplace claim involves a distinct theory of breach, it is merely a claim for negligence. Likewise, premises liability is not a cause of action separate from negligence; it merely establishes the particular standard of care to which an owner of land must adhere when the alleged negligence involves a condition of the premises.

When an invitee is injured by a condition of the defendant's premises, *Keetch v. Kroger* mandates that the plaintiff's negligence cause of action be evaluated under the premises-liability standard of care, regardless of how many different theories of breach the plaintiff asserts.³ Because an employee invitee and non-employee invitee are owed the same duty, the *Keetch* case requires all cases in which an invitee is injured by a condition of the premises to be tried as premises-liability claims. Consequently, the Texarkana Court of Appeals erred when it ignored *Keetch* and permitted Ms. Goss to pursue two theories of breach—premises liability and unsafe workplace—as distinct causes of action.

³ *Keetch v. Kroger Co.*, 845 S.W.2d 262 (Tex. 1992).

2. The only difference between an employee's premises-liability claim and a non-employee's premises-liability claim is the availability of certain defenses.

An employee is merely a species of invitee, and the duty a landowner owes to all invitees—whether employee or not—is the same. The only difference in litigation involving an invitee who is also an employee of a nonsubscribing employer is the defenses that are available to the landowner.

The Texas Supreme Court attempted to explain this distinction in *Sears, Roebuck & Co. v. Robinson* decision. In *Robinson*, the Court held that certain *defenses* available in premises-liability cases involving a non-employee are not available in premises-liability cases involving an employee because the Texas Legislature has prohibited nonsubscribing employers from asserting certain common-law defenses. Unfortunately, the *Goss* court misinterpreted the *Robinson* decision as creating different duties for landowners and employers (as opposed to different defenses) when the decision itself did no such thing. *Robinson* does not—as the *Goss* court suggests—support abolishing the distinction between premises liability and negligent activities when the plaintiff-invitee also happens to be the landowner's employee.

V.
ARGUMENT

POINT ONE: A PLAINTIFF INJURED BY A CONDITION OF THE PREMISES HAS ONLY ONE CAUSE OF ACTION FOR NEGLIGENCE, REGARDLESS OF WHETHER THE PLAINTIFF IS ALSO AN EMPLOYEE OF THE LANDOWNER.

A. Although a Plaintiff May Argue Different Theories of Breach, There is But One Cause of Action for Negligence.

A plaintiff asserting negligence has only one cause of action for negligence, regardless of the number of negligence theories she may advance. For example, although a slip-and-fall plaintiff may argue that the defendant breached its duty by failing to warn, failing to maintain the floors, and failing to use adequate safety precautions, those theories are all part of a single negligence claim.

This Court explained this concept in its 1996 decision in *Motel 6 G.P., Inc. v. Lopez*, 929 S.W.2d 1 (Tex. 1996). In that case, a motel guest sued the motel for negligence after she fell in the shower of her motel room. She asserted various ways in which the motel was negligent, including allowing a dangerous condition to exist; failure to provide adequate slip resistant mats or appliqués; failure to install adequate hand railings and/or grips; and failure to warn that the shower floor was slippery.⁴ The motel moved for and won summary judgment on the “unreasonably dangerous” and “notice” elements of a premises-liability claim, and the plaintiff appealed, arguing that summary judgment was improper because the motel only challenged one of her allegations—that the motel negligently maintained a shower stall with a slippery floor—and ignored the

⁴ *Id.*

other allegations regarding safety mats, hand rails, and failure to warn. The court of appeals affirmed summary judgment on the claim that the motel negligently maintained the floor because the motel had no actual or constructive knowledge of any defect. But the court of appeals reversed on the remaining allegations and held that the plaintiff had asserted independent theories of liability that the motel had failed to address.

The Texas Supreme Court reversed and rendered judgment in favor of the motel, holding that “the court of appeals erred in confusing the duty and breach elements of a premises liability claim.”⁵ Because plaintiff did not dispute that the motel had no knowledge of the alleged defect, the plaintiff “failed to meet her threshold burden” of proof on the “knowledge” element of her premises-liability claim. As a result, *all of her negligence theories failed*. And since “the court of appeals cannot separate each of Lopez’s suggested safety precautions into a distinct cause of action,” this Court held that “[t]here is no need to consider the various ways that Lopez suggests Motel 6 breached its duty because Motel 6 had no actual or constructive knowledge of the risk alleged in the case.”⁶ This Court then explained why multiple allegations of negligence do not create distinct causes of action:

Lopez’s claim that Motel 6 was negligent for failing to install safety devices is, at best, an allegation of the *breach element* of the premises claim. Motel 6 cannot breach a duty that it does not owe, and it does not owe a duty to correct a defect of which it is not, and should not, be aware.⁷

⁵ *Id.* at 2.

⁶ *Id.* at 3.

⁷ *Id.* at 4 (emphasis in original).

Under the teachings of *Lopez*, although Goss alleged various *breaches* of her employer/landowner's duty, she alleged but one cause of action for negligence. Accordingly, the Texarkana Court of Appeals erred in allowing different theories of breach to be treated as distinct causes of action and has set a dangerous precedent for future nonsubscriber cases.

B. *Keetch* requires that a Negligence Claim Based on a Condition of the Premises Be Submitted as a Premises-Liability Claim.

This Court followed the same reasoning in *Keetch v. Kroger* as it did in *Lopez*, when it held in *Keetch* that a plaintiff injured by the condition of the premises has only one negligence cause of action, and that cause of action is determined under a premises-liability standard.

In *Keetch*, like in *Lopez*, the plaintiff asserted various *theories of breach*, including negligent activity and premises liability.⁸ *Keetch* claimed that Kroger breached its duty of care to invitees "by negligently conducting its plant spraying activity in an area of its store that was open to its customers." Noting that "[a]t some point, almost every artificial condition can be said to have been created by an activity," the *Keetch* Court "decline[d] to eliminate all distinction between premises conditions and negligent activities." Accordingly, *Keetch* directs that a plaintiff injured by a condition of the premises cannot avoid the *Corbin* elements by electing to treat her premises-liability claim as a negligent-

⁸ *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992).

activity claim.⁹ Rather, she has but one cause of action for negligence, and that negligence claim *must be* submitted under a premises-liability theory. After all, “[p]remises liability is not a cause of action separate from negligence; it merely establishes the particular standard of care that an owner of land must adhere to.”¹⁰

The *Goss* decision directly conflicts with *Keetch*. In *Goss*, the plaintiff was injured by a condition of the premises—a lowboy cart left in a cooler.¹¹ Although the *Goss* court recognized “the well-established basic principle that employees are treated as invitees” and agreed that the facts presented a premises-liability claim, the court refused to restrict plaintiff’s recovery under a premises-liability theory as required by *Keetch*.¹² Instead, the court improperly allowed Plaintiff to assert two distinct negligence causes of actions, and then allowed her to elect the theory that would be easiest to prove.¹³

⁹ In *Corbin v. Safeway Stores, Inc.*, this Court defined the elements of a premises-liability claim as: (1) actual or constructive knowledge of some condition on the premises by the owner/operator; (2) that the condition posed an unreasonable risk of harm; (3) that the owner/operator did not exercise reasonable care to reduce or eliminate the risk; and (4) that the owner/operator’s failure to use such care proximately caused the plaintiff’s injuries. 648 S.W.2d 292 (Tex. 1983).

¹⁰ *Villalobos v. Fiesta Mart, Inc.*, No. 01-93-00969-CV, 1994 WL 543311 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (emphasis added); see also *Motel 6 G.P., Inc. v. Lopez*, 929 S.W.2d 1, 3 (Tex. 1996) (where plaintiff’s claim arose from condition of premises, court could not separate each of plaintiff’s suggested safety precautions into distinct causes of action).

¹¹ *Brookshire Groc. Co. v. Goss*, 208 S.W.3d 706, 711 (Tex. App.—Texarkana 2006, pet. filed).

¹² *Id.* at 717-18.

¹³ *Id.* at 718.

To ensure that *Lopez* and *Keetch* are properly followed, this Court should grant review to clarify that regardless of whether the invitee is also an employee of the landowner, a premises-liability plaintiff may not chop a single negligence claim into multiple causes of action to avoid proving the *Corbin* elements of a premises-liability claim.

C. The Duty Owed to Invitees Depends on Legal Status, Not Employment Status.

1. The *Adair* Court Held that Employee Invitees and Non-Employee Invitees are Owed the Same Duty.

Landowners and occupiers of land owe varying duties of care to visitors on their land, depending on the legal status of the visitor.¹⁴ An “invitee” is defined as one who enters the property of another “with the owner’s knowledge and for the mutual benefit of both.”¹⁵ A landowner owes *the same duty* to all invitees: a duty to exercise ordinary care to protect them from not only those risks of which the owner is actually aware, but also those risks of which the owner should be aware after a reasonable inspection.¹⁶ The duty does not change depending upon whether the claimant’s “invitee” status arises from her employment on the defendant’s property or by an express or implied invitation to enter the premises.

The Texas Commission of Appeals pronounced that employee invitees and non-employee invitees are owed the same duty over 75 years ago in *Armstrong Co. v.*

¹⁴ See, e.g., *Motel 6 G.P., Inc. v. Lopez*, 929 S.W.2d 1, 3 (Tex. 1996).

¹⁵ *Rosas v. Buddies Food Store*, 518 S.W.2d 534, 536 (Tex. 1975).

¹⁶ *Lopez*, 929 S.W.2d at 3.

Adair.¹⁷ In that case, plaintiff Adair applied for employment with defendant Armstrong Co.¹⁸ Defendant's foreman instructed plaintiff to return to see him and told him that he would put him to work as soon as he could.¹⁹ When plaintiff returned, defendant's foreman told him he could begin working the following week, and instructed him to "go and familiarize yourself with the work so you will not be a green hand." Plaintiff was injured as he walked around the premises attempting to familiarize himself with the operations, and he sued under a premises-liability theory.

The defendant, a subscriber to workers' compensation, argued that the plaintiff was an employee and therefore must pursue workers' compensation benefits as his exclusive remedy. The plaintiff, on the other hand, argued that he was not an employee but rather that he, "as a member of the general public," entered defendant's premises upon express invitation. In affirming judgment in favor of the plaintiff, the Texas Commission of Appeals noted "it was immaterial whether [the defendant's] duty arose because [the plaintiff] was an invitee or because he was an employee" since it "*was the same duty in either event*."²⁰ Accordingly, the Court held that unless defendant was

¹⁷ 112 Tex. 439, 247 S.W. 848 (Tex. Comm. App. 1923).

¹⁸ 112 Tex. at 444, 247 S.W. at 849.

¹⁹ *Id.*

²⁰ 112 Tex. at 448, 247 S.W. at 851 (emphasis added); *see also Moore v. J. Weingarten, Inc.*, 523 S.W.2d 445, 448 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.) ("The duty to furnish an employee a safe place to work, in a situation involving a foreign substance upon the floor, is identical with the duty involved in a 'slip and fall' case."); *Sears, Roebuck & Co. v. Robinson*, 154 Tex. 336, 280 S.W.2d 238 (Tex. 1955) (same duty).

exempted from liability by compliance with the provisions of the Workers' Compensation Act, the judgment should stand.²¹

The Texas Supreme Court has long held that “the standard of conduct required of the employer is ordinary care based on general negligence principles.”²² Until now, Texas appellate courts have always regarded “[t]he duty to furnish an employee a safe place to work, in a situation involving a foreign substance upon the floor, [as] identical with the duty involved in a ‘slip and fall’ case”²³:

- *Hall v. Sonic Drive-In of Angleton, Inc.*, 177 S.W.3d 636, 644 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (“[T]he parties do not dispute that Hall, as Sonic’s employee, was an invitee when the incident in question occurred. Thus, Sonic owed Hall a duty to exercise reasonable care to protect her from conditions on the property that created an unreasonable risk of harm of which Sonic knew or should have known by the exercise of reasonable care.”).
- *Beach Bait & Tackle, Inc. v. Bull*, 82 S.W.3d 663 (Tex. App.—San Antonio 2002, no pet.) (reversing judgment against employer in action brought by employee who slipped and fell on wet floor where the evidence was legally insufficient to support constructive knowledge).
- *Tri-State Wholesale Assoc. Grocers, Inc. v. Barrera*, 917 S.W.2d 391 (Tex. App.—El Paso 1996, writ dism’d by agrmt.) (holding evidence was insufficient to support employee’s injury claim because there was no evidence employer knew or should have known of ice on warehouse floor).
- *Villalobos v. Fiesta Mart, Inc.*, No. 01-93-00969-CV, 1994 WL 543311 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (trial court properly presented employee’s slip-and-fall claim as a premises-liability claim, because “[p]remises liability is not a cause of action separate from

²¹ *Id.* at 448. The Court ultimately held that defendant failed to allege and prove that it complied with the notice requirements of the Act, and therefore could not rely on its exemption.

²² *Exxon Corp. v. Tidwell*, 876 S.W.2d 19, 21 (Tex. 1993).

²³ *Moore v. J. Weingarten, Inc.*, 523 S.W.2d at 448.

negligence; it merely establishes the particular standard of care that an owner of land must adhere to.”).

- *Texas Pacific Coal & Oil Co. v. Grabner*, 10 S.W.2d 441, 442 (Tex. Civ. App.—Eastland 1928, no writ) (although plaintiff-employee pleaded recovery “only on the theory of breach of duty owing by a master to its servant,” court of appeals held upon prior appeal that case was properly submitted “on the theory of a breach of duty by a [landowner] to an invitee upon its premises”).

The fact that premises-liability law applies to nonsubscriber cases is further evidenced in cases involving criminal activity, which the Texas Supreme Court has long held is a premises-liability claim.²⁴ For example, in *Allen v. Connolly*, 158 S.W.3d 61 (Tex. App.—Houston [14th Dist.] 2005, no pet.), the plaintiff asserted—like Goss in this case—that her employer’s duty to provide a safe workplace was broader than its duties to invitees as a property owner. The Fourteenth Court of Appeals disagreed:

Allen argues that her claim is based upon Connolly's failure to provide a safe work place and asserts that evidence of prior criminal conduct at or near the premises is not an element of that claim. As explained below, we conclude that the risk of criminal violence against employees, in a small office open to the public, is virtually identical to the risk of criminal violence there against invitees. Likewise, we conclude an employer's duty to use reasonable care to provide a reasonably safe place to work is, with respect to the risk of violent crime, based upon the same considerations that determine whether a premises occupier must protect invitees against the same risk. Thus, we analyze this issue under *Timberwalk*.

In holding that Plaintiff’s failure to prove the *Timberwalk* factors was fatal to her claim, the Houston court noted, “nothing in *Timberwalk* indicates that it is limited to the

²⁴ *Timberwalk Apts, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex.1998).

landlord-tenant context.”²⁵ As the court explained, the duty is the same in any event because employees are merely invitees:

Indeed, the Texas Supreme Court in *Timberwalk* confirmed that the duty owed by the controller of the premises, if any, is owed to invitees. It has long been the law in Texas that employees of an owner or occupier of premises are considered invitees of the employer.²⁶

Here, too, the duty that Brookshire owed Goss is the same whether Brookshire’s liability is evaluated as a property owner or employer.

2. The Goss Opinion Erred by Holding That a Landowner Owes Employee Invitees and Non-Employee Invitees Different Duties.

The *Goss* opinion contradicts the *Adair* opinion by holding a landowner to different duties depending upon whether the plaintiff became an invitee through employment or otherwise.²⁷ Because the *Goss* opinion has at best muddied the water and at worst directly contradicted 75-year-old precedent, this Court should grant review to clarify that landowners owe *the same duty* to all invitees regardless of employment status and regardless of plaintiff’s various theories of breach of that duty.

²⁵ *Allen*, 158 S.W.3d at 65.

²⁶ *Id.*

²⁷ *Brookshire Groc. Co. v. Goss*, 208 S.W.3d 706, 717-18 (Tex. App.—Texarkana 2006, pet. filed).

POINT TWO: THE ONLY DIFFERENCE BETWEEN AN EMPLOYEE'S PREMISES-LIABILITY CLAIM AND A NON-EMPLOYEE'S PREMISES-LIABILITY CLAIM IS THE AVAILABILITY OF CERTAIN DEFENSES.

A. The Texas Workers' Compensation Act Restores Common-Law Rights to Nonsubscribing Employers and Employees, With the Exception of Certain Common-Law Defenses.

The Texas Workers' Compensation Act does not create a new, statutory cause of action for employees of nonsubscribers who are injured on the job.²⁸ Rather, it merely returns nonsubscribing employers and employees of nonsubscribers to the common law—which, of course, allows but one cause of action for negligence.²⁹

The only difference between a negligence claim against a nonsubscribing employer and a negligence claim against a non-employer is the unavailability of certain common-law defenses. Unlike a typical defendant, a nonsubscribing employer is prohibited from asserting defenses of contributory negligence, assumption of risk, and negligence of fellow employee.³⁰

²⁸ See TEX. LAB. CODE § 406.033(d) “In an action... against an employer who does not have workers' compensation insurance coverage, the plaintiff must prove negligence of the employer or of an agent or servant of the employer acting within the general scope of the agent's or servant's employment.”); cf. TEX. LAB. CODE § 406.034(b) (an employee may elect to “*retain the common-law right of action* to recover damages for personal injuries or death”) (emphasis added) and § 406.033(d) (“An employee who elects to retain the right of action or a legal beneficiary of that employee may bring a cause of action for damages for injuries sustained in the course and scope of the employment *under common law* or under a statute of this state.”) (emphasis added); see also, *Hook v. Morrison Milling Co.*, 38 F.3d 776 (5th Cir. 1994) (an unsafe-workplace claim against a nonsubscriber is merely “a common law negligence claim.”)

²⁹ *Motel 6 G.P., Inc. v. Lopez*, 929 S.W.2d 1, 2-3 (Tex. 1996).

³⁰ See TEX. LAB. CODE § 406.033(a).

B. The Texarkana Court Misinterpreted The 1955 *Robinson* Decision.

When holding that a landowner owes additional duties to an employee invitee, the *Goss* Court of Appeals placed great weight on this Court's 1955 decision in *Sears, Roebuck & Co. v. Robinson*.³¹ In the *Robinson* case, the Court held that the "no duty" concept for open-and-obvious dangers should not be extended from landowner-invitee to master-servant law in light of the Legislature's prohibition against nonsubscribing employers asserting "assumption of the risk" as a defense.³² The *Robinson* court did not, as the Texarkana Court of Appeals wrongly held in *Goss*, constitute a wide sweeping mandate "against merging... premises liability duties and an employer's duties to its employees."³³

In *Robinson*, the plaintiff-employee prevailed at trial on a negligence claim, and *Sears* (a nonsubscriber) appealed on the grounds that plaintiff failed to prove negligence because it owed plaintiff "no duty" since the condition that injured plaintiff was open and obvious.³⁴ Although *Sears* acknowledged that as a nonsubscriber it was not entitled to defend on the grounds of assumption of the risk, it asserted "that the question is not one

³¹ 154 Tex. 336, 280 S.W.2d 238 (Tex. 1955).

³² 154 Tex. at 340; 280 S.W.2d at 240.

³³ *Brookshire Grocery Co. v. Goss*, 208 S.W.3d 706 (Tex. App.—Texarkana 2006 pet. filed).

³⁴ See *Robinson*, 154 Tex. at 337-38, 280 S.W.2d at 238-39.

of assumption of risk but one of no breach of duty as a separate concept for denying liability.”³⁵

The *Robinson* recognized that Texas law had evolved to allow “two theories for denying liability where the unsafe condition of the premises or unsafe condition of tools and appliances furnished by the master were open and obvious to the servant and the dangers therein were appreciated by him.”³⁶ One theory was the defensive theory of “assumption of risk”; the other theory was an argument of “no duty.” While at the time of the *Robinson* opinion “assumption of the risk” was a defense still allowed in general landowner-invitee law—whether asserted under the “assumption of the risk” or the “no duty” rubric—the Legislature had prohibited “assumption of the risk” as a defense in nonsubscriber cases. Since allowing a nonsubscriber the defense under the “no duty” rubric would in effect revive a defense the Legislature had prohibited for nonsubscribers, the Court refused to extend the “no duty” theory as a way of asserting assumption of the risk in master-servant cases.³⁷ In other words, while the Court recognized the availability of different defenses in landowner-invitee law and master-servant law, it did not create separate duties for employer/landowners, nor did it create distinct causes of

³⁵ 154 Tex. at 338; 280 S.W.2d at 239.

³⁶ 154 Tex. at 239; 280 S.W.2d at 339.

³⁷ 154 Tex. at 240; 280 S.W.2d at 340 (“Certainly the concept should not be so extended when its extension would serve to defeat and nullify the obvious and clearly expressed intention of the Legislature to take away from the nonsubscribing employer the defense of assumed risk...”; see also *Halespeska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 377 (Tex. 1963) (“[T]he ‘no duty’ concept [is] not applicable in a master-servant relationship”).

actions for employee/invitees. To the contrary, the Court emphasized that the duties were the same:

[T]he nature of the duty of the landowner to use reasonable care to make his premises reasonably safe for the use of his invitees *may, in all material respects, be identical* with the nature of the duty of the master to use reasonable care to provide his servant with a reasonably safe place to work...³⁸

By misinterpreting *Robinson*—and by further relying on an unpublished 2001 Corpus Christi opinion that likewise misinterpreted *Sears*³⁹—the *Goss* court incorrectly held that a plaintiff injured by a condition on her nonsubscribing employer’s property may assert unsafe workplace and premises liability as distinct causes of action. As a result, the *Goss* opinion threatens to upend premises-liability law by allowing a premises-liability plaintiff who happens to be employed by the landowner to circumvent the “notice” element of premises-liability law by “electing” to prosecute only an unsafe-workplace claim. Accordingly, amici curiae respectfully request that review be granted to clarify nonsubscriber and premises-liability law.

³⁸ 154 Tex. at 240; 280 S.W.2d at 340. Texas has since abrogated the assumption-of-the-risk and open-and-obvious doctrines in all contexts in favor of comparative negligence and proportionate responsibility, regardless of whether those doctrines are asserted under the rubric of “no duty” or as an affirmative defense. *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 517 (Tex. 1978) (“We now expressly abolish the so-called no-duty concept in this case and... henceforth in the trial of all actions based on negligence.”) (citations omitted). The Court reasoned that allowing those defenses to serve as a total bar to liability in any type of negligence case would be “incompatible with the legislative purpose of the comparative negligence statute.” *Id.* at 518.

³⁹ *Caballero v. Licciardello*, No. 13-98-577-CV, 2001 WL 1000683 (Tex. App.—Corpus Christi May 17, 2001, pet. denied).

VI. PRAYER

Amici Curiae pray that the court **GRANT** Brookshire's Petition for Review in order to correct the Texarkana Court of Appeals' errors in:

- (1) disregarding this Court's mandate in *Motel 6 G.P., Inc. v. Lopez*, 929 S.W.2d 1 (Tex. 1996) that a negligence plaintiff cannot assert different theories of breach as distinct causes of action;
- (2) disregarding this Court's proclamation in *Keetch v. Kroger Co.*, 845 S.W.2d 262 (Tex.1992) that a plaintiff injured by a condition of the premises must submit her negligence claim as a premises-liability claim;
- (3) disregarding the Court's pronouncement in *Armstrong Co. v. Adair*, 112 Tex. 439, 247 S.W. 848 (Tex. Comm. App. 1923) that a landowner owes employee invitees and non-employee invitees the same duty; and
- (4) misinterpreting *Sears, Roebuck & Co. v. Robinson*, 154 Tex. 336, 280 S.W.238 (Tex. 1955) as creating distinct duties for landowners who are also employers.

These errors have confused Texas common law on negligence and have improperly potentially created a new, distinct cause of action for employees of nonsubscribing employers. Because the Texas Legislature intended for nonsubscribing employers and employees to retain their common law rights—with the exception of certain enumerated common-law defenses—this Court should not allow the Texarkana Court of Appeals unilaterally to rewrite the Texas Worker's Compensation Act. Accordingly, —Amici Curiae pray that the Court **GRANT** Brookshire's Petition for

Review to clarify the rights and duties of the 107,300 nonsubscribing employers in Texas.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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