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**No. 07-0085**

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**In the Supreme Court of Texas**

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**BROOKSHIRE GROCERY COMPANY,**

*Petitioner,*

v.

**BARBARA GOSS,**

*Respondent.*

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*ON APPEAL FROM THE SIXTH COURT OF APPEALS  
No. 06-05-00036-CV*

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**PETITIONER'S BRIEF ON THE MERITS**

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### **PETITIONER'S BRIEF ON THE MERITS**

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#### **STATEMENT OF THE CASE**

Barbara Goss worked as an employee of Brookshire Grocery Company, a company that was a nonsubscriber to Texas workers' compensation insurance. Goss was injured at work when she grabbed a shelf to prevent a fall as she tripped on a stock cart that she knew was in her path. (1 CR 7, 30.)

Goss sued Brookshire for negligence in the 402<sup>nd</sup> Judicial District Court of Wood County, before the Honorable Timothy Boswell. After a trial, the jury returned a verdict, finding Brookshire negligent and awarding Goss \$726,078.50 in damages for past and future physical pain and mental anguish, loss of earning capacity, physical impairment and medical expenses. (2 CR 167-69.) The court entered judgment on the verdict (2 CR

197-98; Apx. 1), but thereafter granted a new trial. (2 CR 229.) The new trial order was set aside and the judgment reinstated by the Texarkana Court of Appeals in a mandamus action styled *In re Goss*, 160 S.W.3d 288, 291 (Tex. App.—Texarkana 2005, orig. proceeding). A mandamus challenging that action was denied by this Court in Cause No. 05-0300, *In re Brookshire Grocery Co.*, 2008 WL 53702 (Tex. Jan. 4, 2008).

On a conventional appeal of the reinstated judgment, Justice Jack Carter, joined by Chief Justice Josh Morriss and Justice Donald Ross, of the Sixth Court of Appeals, affirmed. *See Brookshire Grocery Co. v. Goss*, 208 S.W.3d 706 (Tex. App.—Texarkana 2006, pet. granted) (Apx. 2). The court erroneously held that:

- (i) “Brookshire had a duty to enact policies and procedures regarding the location and use of the lowboy cart, and a duty to warn her of the dangers associated with these carts.” *Id.* at 716.
- (ii) There was legally sufficient evidence that Brookshire breached that duty and the breach proximately caused Goss’s injuries. *Id.*
- (iii) Brookshire’s “no duty” argument based on the notion that the danger was generally known and readily appreciated could not be maintained because the theory “is treated as one based on assumption of risk, a defense that Section 406.033 of the Texas Labor Code specifically denies Brookshire in these circumstances.” *Id.* at 715.
- (iv) The “*Corbin* elements” required generally in premises liability cases did not have to be submitted here because Goss elected to submit a “master-servant” claim, which is treated separately from a “landowner-invitee” claim, even though the two claims “may, in all material respects, be identical.” *Id.* at 718.

#### STATEMENT OF JURISDICTION

The Court has jurisdiction under §§ 22.001(a)(2), (3) and (6) of the Texas Government Code.

Section (a)(6) – Error of law important to Texas jurisprudence: The court of appeals’ holdings are based on errors of law important to maintaining a proper balance in the statutorily-regulated area of nonsubscriber litigation and, therefore, important to the jurisprudence of the state. Because those errors adversely affect all future cases, they require correction by this Court.

Section (a)(2) – Conflicts jurisdiction: The court of appeals’ decision conflicts with this Court’s decision in *Kroger Co. v. Elwood*, 197 S.W.3d 793 (Tex. 2006) (Apx. 3) and *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523 (Tex. 1997). In *Elwood*, this Court held that an employer has “no duty to warn of hazards that are commonly known or already appreciated by the employee,” and also held that “when an employee’s injury results from performing the same character of work that employees in that position have always done, an employer is not liable if there is no evidence that the work is unusually precarious.” *Elwood*, 197 S.W.3d at 794-95. In direct contradiction to those holdings, the court of appeals held that the “commonly known and already appreciated” doctrine was unavailable to Brookshire because the doctrine was akin to “assumption of risk,” a defense which the Labor Code denies to nonsubscribing employers. *Brookshire*, 208 S.W.3d at 715.

Additionally, in *Olivo*, this Court held that when a case involves a premises defect rather than negligent activity, the trial court must submit the *Corbin* elements. *Olivo*, 952 S.W.2d at 528-29. Without addressing *Olivo*, the court of appeals held that a plaintiff can avoid submitting those elements by pleading a “negligence” cause of action even though

nonsubscriber cases are treated as ordinary negligence cases. *Brookshire*, 208 S.W.3d at 719.

Section (a)(3) – Interpretation of a statute: This case involves the interpretation of Section 406.033 of the Texas Labor Code. (Apx. 4.) Because the interpretation of this statute is material to the outcome, the Court has jurisdiction on this basis.

### ISSUES PRESENTED

*Issue No. 1:* To prevail in a nonsubscriber case, a plaintiff must prove, just as in a simple negligence case, duty, breach of duty, causation and damages. But an employer is not required to (i) warn of dangers that are commonly known or already appreciated by the employee, (ii) provide unnecessary tools, or (iii) give instructions on performance of common, nondangerous activities that are part of the employee's regular duties. In this case, retrieving items from a cooler was a nondangerous activity and a regular part of Mrs. Goss's duties. The stationary lowboy cart on which she tripped was apparent to her and could have easily been avoided.

*Did Brookshire owe Mrs. Goss a duty to warn of the danger posed by a readily-apparent stationary object encountered as part of her regular duties?*

*Did the court of appeals err in equating Brookshire's no duty theory to an "assumption of risk" defense?*

*Did the court of appeals err in holding Brookshire had a duty, breached that duty, and thereby proximately caused Mrs. Goss's injuries?*

*Issue No. 2:* If the facts establish that the plaintiff's injury was due to a condition or defect in the premises and did not involve contemporaneous conduct by the defendant, the elements of premises liability must be submitted to the jury. If those elements are not

submitted, a verdict in plaintiff's favor based on general negligence will not support a judgment. Here, the injury was caused by a stationary object on Brookshire's premises. No contemporaneous conduct by Brookshire was involved. Nevertheless, the plaintiff submitted only a "general negligence" question without instructions on the *Corbin* elements.

*Since the accident was not caused by contemporaneous activity by Brookshire, was this a premises liability case as a matter of law?*

*Because Mrs. Goss failed to submit the predicate Corbin elements essential to a premises liability claim, was Brookshire entitled to a take-nothing judgment?*

*Did the court of appeals err in holding that Mrs. Goss could choose between general negligence and premises liability even though she failed to prove a contemporaneous activity by Brookshire was a cause of her injury?*

**Issue No. 3:** Alternative to the foregoing issues, should the court reverse the trial court judgment and remand the case for a new trial or remand it to the court of appeals for consideration of Brookshire's factual insufficiency issues?

**Issue No. 4 (briefed in the concurrent mandamus action):** Brookshire filed a motion for judgment notwithstanding the verdict or, in the alternative, for new trial. Judgment was rendered on December 9, 2004, and the JNOV motion was overruled on December 10, 2004. But, at the hearing on the motion, the trial judge stated he would enter a judgment "and go ahead and proceed on then with the, with the motion for new trial."<sup>1</sup> Within 30 days of the judgment, on January 7, 2005, Brookshire filed a motion for new trial raising factual and legal sufficiency grounds for reversal. (2 CR 200.) The

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<sup>1</sup> See *Brookshire*, 208 S.W.3d at 217, n.1.

trial court granted a new trial, but, on mandamus, the court of appeals held the trial court had lost plenary power to do so because the motion was not timely. On this appeal, the court of appeals refused to consider the factual sufficiency points for similar reasons.

*May a party file a second motion for new trial under Rule 329b within thirty days after a judgment is signed, even when an earlier motion for new trial has been overruled?*<sup>2</sup>

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<sup>2</sup> This issue is the subject of a current mandamus action. To save time and resources, this Court should address both causes at the same time.

## STATEMENT OF FACTS

The facts of this case are simple and relatively without dispute.

1. The accident: Barbara Goss worked for Brookshire in the bakery and deli departments. *Brookshire*, 208 S.W.3d at 711; (3 RR 47). While working in the deli cooler one day, she bumped into a loaded stock cart and injured herself when she grabbed a shelf to prevent a fall. 208 S.W.3d at 711; (3 RR 63-67, 128).

The cart which Mrs. Goss tripped over is commonly called a “lowboy.” It was approximately ten inches high, five feet long and two and a half feet wide. 208 S.W.3d at 711; (3 RR 173). On the day of the accident, the cart was loaded with frozen turkey dinners stacked at least three to four boxes high. 208 S.W.3d at 711; (3 RR 64, 66, 120). (Apx. 5.)

Goss saw the cart when she entered the cooler and believed she could get in and out of the cooler without incident. 208 S.W.3d at 711; (3 RR 118-19, 127). But when she left, she bumped her shin on the cart, turned around, and grabbed a shelf to prevent a fall. 208 S.W.3d at 711; (3 RR 65-67, 128).

2. The lawsuit: Goss sued Brookshire for back injuries allegedly sustained when she grabbed the shelf. 208 S.W.3d at 712; (1 CR 7, 30). She pleaded theories of ordinary negligence and premises liability. 208 S.W.3d at 712; (1 CR 31-32). She then argued that the presence of the cart in the cooler posed an unreasonable risk of harm and created a dangerous condition. (1 CR 42-43; 3 RR 23.) She alleged that Brookshire failed to provide her with a safe workplace, and specifically, it failed to provide proper

training or adopt adequate policies to help her avoid the accident with the cart. (1 CR 31.)

Goss elected to submit the case to the jury on a general negligence theory. (2 CR 167.) The trial court thus refused Brookshire's request to include necessary predicate instructions relating to the legal duty in a premises liability case as set forth in *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292 (Tex. 1983); (2 CR 200). The jury returned a verdict in favor of Goss. (2 CR 164-71.) This appeal followed a judgment on the verdict.

### **SUMMARY OF THE ARGUMENT**

For either of two reasons, the judgment below should be reversed and rendered that plaintiff take nothing:

1. Commonly known and readily appreciated danger: Since nonsubscriber cases are tried as simple negligence cases, a plaintiff must prove duty, breach of duty, causation and damages. However, an employer does not have to (i) warn of dangers that are commonly known or already appreciated by the employee, (ii) provide unnecessary tools, or (iii) give instructions on performance of common, nondangerous activities that are part of the employee's regular duties.

Here, retrieving items from the cooler was one of Mrs. Goss's regular activities and was not inherently dangerous. The stationary lowboy cart on which she tripped was apparent to her and easily avoided. Brookshire thus had no duty to warn her or to give her instructions on how to avoid tripping on readily apparent objects in her path as she went about her regular duties.

The court of appeals mistakenly held that Brookshire's "no duty" theory was an affirmative defense based on "assumption of the risk" to which employers in nonsubscriber cases are not entitled. But, to the contrary, Brookshire's argument involves its duty to warn or instruct based on the condition of the premises, and not a qualitative evaluation of the employee's knowledge of danger and the employee's decision to encounter that danger, both of which are required by assumption of risk.

2. Failure to submit the *Corbin* elements: Even in nonsubscriber cases, the predicate elements of premises liability must be submitted to the jury if the facts prove that the injury was due to a condition or defect in the premises and not contemporaneous conduct by the defendant. If those elements are not submitted, a verdict for plaintiff based on general negligence cannot support a judgment. In this case, the injury was caused by a stationary object on Brookshire's premises; no contemporaneous activity by Brookshire or its employees was involved.

The court of appeals erred in holding that a plaintiff who pleaded both general negligence and premises liability may choose which theory to submit to the jury. Facts, not pleadings, determine whether a claim is based on premises liability. Because this is a premises liability case as a matter of law, Mrs. Goss's conscious choice to submit only a general negligence question without the *Corbin* elements was fatal to her claim.

This Court should thus reverse the judgments of the courts below on either of two grounds: (i) Brookshire neither owed nor breached a duty of care to Mrs. Goss because the harm she encountered in the cooler was already known to and readily appreciated by her, or (ii) Mrs. Goss's failure to obtain findings on the predicate elements of premises

liability, and to proceed on a general negligence theory, was fatal to her claim as a matter of law.

### BRIEF OF THE ARGUMENT

**I. Because Any Tripping Danger Posed by the Lowboy Was Readily Apparent, Brookshire Owed Mrs. Goss No Duty To Remove It, To Warn Her About It, or To Instruct Her How To Avoid It.**

The trial court submitted the case on a single broad form question that instructed the jury as follows:

[A]n employer owes its employees a non-delegable duty to provide a safe workplace, provide rules and regulations for an employee's safety, provide warnings with respect to any hazards, provide adequate help in the performance of its employees' work, and provide supervision of its employees' activities. (2 CR 167.)

To affirm the judgment based on that question, the court of appeals found that

Goss presented legally sufficient evidence that Brookshire had a duty to enact policies and procedures regarding the location and use of the lowboy cart, and a duty to warn her of the dangers associated with these carts.

*Brookshire*, 208 S.W.3d at 716.

While those legal principles are not incorrect in the abstract, well-known exceptions to the court's legal discussion apply here.

An employer has no duty to warn or instruct its employees about hazards "that are commonly known or already appreciated by the employee" or when the employees' work is not "unusually precarious." *Elwood*, 197 S.W.3d at 794-95; *see also Jack in the Box, Inc. v. Skiles*, 221 S.W.3d 566, 568 (Tex. 2007). (Apx. 6.) Those rules are based on decades of precedent. *See Nat'l Convenience Stores Inc. v. Matherne*, 987 S.W.2d 145, 149 (Tex. App.—Houston [14th Dist.] 1999, no pet.), and cases cited therein.

The following undisputed facts make those principles applicable to this case:

- Going in and out of the deli was a normal part of Mrs. Goss's duties. (3 RR 52-53.)
- A stationary, loaded lowboy does not pose a serious hazard because it is easily seen. (3 RR 199; 4 RR 115.)
- The lowboy did not impede access into the cooler. (6 RR 196.)
- This was not the first time a lowboy or similar storage vehicle had been in the cooler. Mrs. Goss likely had seen one in the cooler previously. (3 RR 118.)
- Mrs. Goss saw the lowboy stacked with dinners the day she entered the cooler. (3 RR 63-64.) She had room to get by it. (3 RR 118-19.)
- She did not believe the lowboy posed a problem because she could maneuver around it. (3 RR 127.)
- Upon entering the cooler, Mrs. Goss had to step over the corner of the lowboy to retrieve what she wanted to retrieve from the cooler. (3 RR 65-67.)

The deli manager gave a common sense summation of those facts when he said:

“anybody with common sense would know not to go and trip. I mean you see that cart there.” (6 RR 205.)

The facts are fatal to Mrs. Goss's claim for several reasons:

First, there is no evidence that retrieving items from a cooler was a hazardous or “unusually precarious” activity. In fact, it was part of Mrs. Goss's regular activities.

Second, the lowboy itself was not a hidden defect in the premises nor an inherently dangerous object. The presence of the lowboy (and whatever dangers it posed) was apparent to anyone, including Mrs. Goss. Indeed, she made sure to and did safely navigate by it when she entered the cooler, just as she had encountered lowboys at other times in the course of her work.

Finally, because she was not hurt moving the lowboy, instructions regarding its use were irrelevant.

The court of appeals' holding that Brookshire nevertheless had a duty to warn Mrs. Goss or instruct her how to avoid common objects in her path not only defies *Elwood*, but leads to absurd conclusions. The court of appeals' rule would require, for example, simplistic instructions or training like "Watch where you are walking" or "Take care not to trip over objects in your path." In similar situations, Texas courts have found no such duties. For example:

- employers need not take measures to prevent employees from putting their hands in an open car door jamb when the customer is about to close the door, *Elwood*, 197 S.W.3d at 795;
- employers need not instruct a licensed driver to obey the rules of the road during a garden-variety trip to the bank, *Matherne*, 987 S.W.2d at 149;
- employers need not supply safety equipment for employees to perform common tasks that employees already know how to perform safely, *Allsup's Convenience Stores, Inc. v. Warren*, 934 S.W.2d 433, 437-38 (Tex. App.—Amarillo 1996, writ denied);
- employers need not instruct or train employees in the use of ladders to gain access to the back of a defective truck, *Skiles*, 221 S.W.3d at 569;
- employers need not warn employees about the dangers associated with water on a floor, *Aleman v. Ben E. Keith Co.*, 227 S.W.3d 304, 313 (Tex. App.—Houston [1st Dist.] 2007, no pet.); and
- employers need not instruct or train employees about the danger of touching prongs of a plug while plugging it into a receptacle, *Hendrick Med. Ctr. v. Smith*, No. 11-06-00145-CV, 2007 WL 3309120, at \*12 (Tex. App.—Eastland, Nov. 8, 2007, pet. filed) (mem. op.).

To take one example in particular, the facts in *Skiles* posed an even greater danger to the employee in an extraordinary situation because (i) the equipment supplied to the

worker (the truck) was broken, and (ii) the employee had to devise extraordinary means to access the truck. *See Skiles*, 221 S.W.3d at 567. Neither of those factors are present here. Instead, Goss was performing the commonest of duties – walking in and out of a cooler as a normal, regular part of her job.

Not only did the court of appeals refuse to consider the “no duty” rule at all – *i.e.*, that Brookshire had no duty to remove or warn of a danger that was commonly known and already appreciated, when Goss’s work was not “unusually precarious” – but it also avoided any discussion of *Elwood*, even though that case had been decided five months earlier. The court justified its holding by reference to inapplicable doctrines and inapposite cases without ever acknowledging this Court’s dispositive holding less than six months old:

Brookshire argues Goss noticed the cart on entering the cooler and should have known not to bump into it. Brookshire’s argument is very close to sounding in terms of open and obvious risk, a defense flatly rejected by the Texas Supreme Court in *Sears, Roebuck & Co. v. Robinson*, 280 S.W.2d 238, 240 (Tex. 1955). We likewise reject Brookshire’s contentions. A defense that the danger was open and obvious is treated as one based on assumption of risk, a defense that Section 406.033 of the Texas Labor Code specifically denies Brookshire in these circumstances.

The court’s analysis is faulty for two reasons:

First, the “no duty” rule on which Brookshire relies is not the “assumption of risk” doctrine abrogated by the Labor Code. That doctrine was a “defense” based on the employee’s subjective knowledge and appreciation of a danger and her conscious decision to encounter that risk. *See Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 377-81 (Tex. 1963). The doctrine at issue here, however, concerns the existence of

“duty” as an element essential to liability. “Duty” is not a defense, and the “no duty” rule in *Elwood* and *Skiles* does not depend on the subjective knowledge and conscious decision-making of the employee. Instead, it turns on the nature of the harm or premises defect as determined by the undisputed facts. *See Skiles*, 221 S.W.3d at 568-69; *Elwood*, 197 S.W.3d at 795.

Second, the lower court’s holding in this case and this Court’s recent holdings in *Elwood* and *Skiles* are irreconcilable. Having just held that “[an employer] owes no duty to warn of hazards that are commonly known or already appreciated by the employee”, *Elwood*, 197 S.W.3d at 794, and that dangers that are “common and obvious to anyone” require “no duty to warn”, *Skiles*, 221 S.W.3d at 569, surely this Court has decided that the rule announced in those cases does not violate the Labor Code’s abrogation of “assumption of risk” in nonsubscriber cases.

Moreover, several courts of appeals have taken this Court’s cue and have refused to find a fact issue on negligence where the dangers that caused injury to employees are open and obvious. *See Aleman*, 227 S.W.3d at 313; *Smith*, 2007 WL 3309120, at \*12.

This Court should reach a result similar to that reached in *Elwood* and its progeny that “[Brookshire] has no duty to warn [Goss] of a danger known to all and no obligation to provide training or equipment to dissuade an employee [from not looking where she was walking in the deli cooler]. Employers are not insurers of their employees.” *See Elwood*, 197 S.W.3d at 795.

Because the premises condition that caused Mrs. Goss’s injury was readily apparent and known to her, and her job did not involve hazardous activity, a result the

same as that decreed in *Elwood* should be rendered here as well – a holding that Brookshire owed no duty as a matter of law – and a take-nothing judgment must be rendered for that reason.

**II. Because This Case Is Governed by Principles of “Premises Liability,” Mrs. Goss’s Failure To Submit the Essential “Corbin Elements” Requires Rendition of Judgment for Brookshire.**

Section 406.033 of the Labor Code, which governs nonsubscriber cases, provides:

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.

TEX. LAB. CODE § 406.033(d).

Several important principles are applicable to cases tried under that provision:

- The employee’s action is a traditional negligence case that requires proof of duty, breach of duty, and proximate cause. *Werner v. Colwell*, 909 S.W.2d 866, 869 (Tex. 1995).
- “The employer’s standard of care for employees is ... the same as the standard for invitees generally.” *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 71 (Tex. App.—Austin 1998, no pet.); see also *Hernandez v. Heldenfels*, 374 S.W.2d 196, 197 (Tex. 1963).
- One of the duties owed by an employer to the employee invitee is the “duty to use ordinary care in providing a safe workplace.” *Elwood*, 197 S.W.3d at 794.
- “Safe workplace” claims are governed by principles of “premises liability.” *Brookshire*, 208 S.W.3d at 713; *Hall v. Sonic Drive-In of Angleton, Inc.*, 177 S.W.3d 636, 644-45 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2005, pet. denied).
- Regardless of how a plaintiff pleads her case, plaintiff must prove and submit a “premises liability” case if she does not allege an injury “as a contemporaneous result of any activity of [the employer]”. *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998).

Those principles also require a take nothing judgment for Brookshire because Mrs.

Goss failed to submit the predicate elements of a premises liability claim.

***A. As a Matter of Law, This Is a Premises Liability Case.***

Mrs. Goss's injury was caused by a stationary object in a deli cooler. No contemporaneous conduct by any Brookshire employee was involved in the events leading to her injury. Under recent decisions of this Court, the absence of such contemporaneous activity makes this a premises liability case. *See Timberwalk*, 972 S.W.2d at 753.

For example, this Court has held that a claim based on an injury from a descending elevator gate with an inoperative warning bell stated only a premises liability claim, even though the bell had been "muffled" by defendant's employee. *Dallas Mkt. Ctr. Dev. Co. v. Liedeker*, 958 S.W.2d 382, 385 (Tex. 1997). One year later, this Court explained that a claim based on an apartment complex's failure to provide adequate security was rooted in premises liability doctrine because plaintiff did "not assert that she was injured by or as a contemporaneous result of any activity of defendants." *Timberwalk*, 972 S.W.2d at 753. So it is here. Because our fact situation is indistinguishable from those cases, our case likewise is classified as a premises liability case, as a matter of law.

***B. Plaintiff's Failure To Submit the Corbin Elements Was Fatal To Her Claim.***

Premises liability cases, like this one, have two unique features:

First, the jury must be instructed on and must find the so-called "Corbin elements," which are: "(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." *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264-65 (Tex. 1992) (citing *Corbin*, 648 S.W.2d at 296).

Second, if plaintiff chooses not to submit the *Corbin* elements in a premises liability case, the legal result is not merely a judgment based on a defective charge, but a complete failure to submit the claim. Or, as this Court has held in the leading case,

[b]ecause ... [plaintiffs] did not obtain a jury finding that included essential elements of their premises defect claim, they cannot recover against [defendant].

*Olivo*, 952 S.W.2d at 529.

That holding describes this case perfectly. Because Mrs. Goss made a conscious choice to submit her premises defect case without the predicate elements, she has not obtained findings to support her theory, and a take-nothing judgment should be rendered.

The court of appeals' erroneous holding is based on the flawed reasoning that Mrs. Goss's *pleadings* could overrule the legal principles just discussed. The following holding is the first time a Texas court has held that an employee of a nonsubscriber may change how premises liability principles operate or when they apply through pleading.

Goss abandoned pursuit of any action that she might have based on premises liability and placed her entire theory of recovery on the form of negligence involving a breach of a duty that an employer owes to an employee. . . . Theoretically, Goss could have recovered on two alternative theories-(1) that Brookshire failed to provide a reasonably safe place to work to her as an employee and (2) that Brookshire knew or reasonably should have known of an unreasonable risk of harm and failed to exercise ordinary care to protect her by failing to adequately warn her and failed to make the condition reasonably safe.

*Brookshire*, 208 S.W.3d at 718.

To the contrary, this Court's decisions make clear that a nonsubscriber case is treated like any other simple negligence case with respect to primary liability. In particular, *Timberwalk*, *Liedeker*, and *Keetch* stand for the proposition that the *facts*, not pleadings or tactical choices, determine whether a case is a premises liability case. Because Mrs. Goss has never alleged her injury is due to the concurrent activity of Brookshire, her claim is one based in premises liability and must be judged accordingly.

Mrs. Goss made a conscious, tactical choice to submit her case without the *Corbin* elements – *i.e.*, as the court of appeals observed, she “*abandoned* pursuit of any action that she might have based on premises liability.” *Brookshire*, 208 S.W.3d at 718 (emphasis added). Because this is a premises liability case as a matter of law, her choice was a fatal one. The court of appeals' misguided reasoning and flawed analysis do not excuse the consequences of that choice. *See Olivo*, 952 S.W.2d at 530.<sup>3</sup> The failure to

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<sup>3</sup> It is revealing that the court justified giving Mrs. Goss the right to choose what legal principles governed her claim only on the strength of *Sears, Roebuck & Co. v. Robinson*, 154 Tex. 336, 280 S.W.2d 238 (Tex. 1955). The decision is irrelevant for several reasons:

(i) Whether the facts did or did not make it a premises liability case was not the issue in *Sears*. The issue was whether the so-called “no duty” doctrine applied to the facts. The court's discussion of the doctrine evidences the confusion between “no duty”, “*volenti non fit injuria*”, and “assumption of the risk” that this Court tried to untangle in *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (Tex. 1963). The elements of those doctrines and the differences between them have nothing to do with whether a case is or is not a premises liability case. The issue is now academic, because those doctrines have been abrogated. *See Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978).

(ii) When *Sears* was decided, it was important to know whether a case was or was not a premises liability case mainly to determine the nature of the duty owed, not the constituent elements of the claim. The requirement that premises liability cases *must* submit the *Corbin* elements came along much later. The *Sears* decision thus could not have spoken to that issue.

(iii) If, as the court of appeals implies, *Sears* gives plaintiff a choice between general negligence and premises liability principles where the claim would otherwise be recognized *only* as a premises liability claim, the case has surely been overruled by intervening authority (cited above) that nonsubscriber cases are treated as any other negligence case, the only exception being that defendant is shorn of certain defenses.

secure findings on a premises liability claim also requires that the judgment of the trial court be reversed and judgment rendered that Mrs. Goss take nothing.

### CONCLUSION AND PRAYER

The foregoing arguments make clear that this case is important to Texas jurisprudence because the two controlling principles are the subject of recent, directly on-point decisions by the Court. If this Court's rulings are to be binding, the Court must ensure that they are strictly followed by lower courts. Here, those rulings have been avoided by legally untenable distinctions that turn a blind eye to this Court's precedent.

There are two legal bases for reversal:

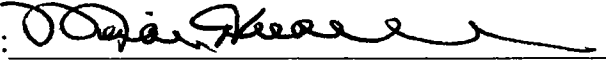
- Brookshire owed no duty to warn or instruct Mrs. Goss about how to perform the simple act of entering and exiting her regular workplace and avoiding common objects in her path; and
- This is a premises liability case as a matter of law, and plaintiff's intentional failure to secure findings on the *Corbin* elements is fatal to her claim.

Both grounds require reversal of the judgments below and rendition of judgment that plaintiff take nothing. Brookshire so prays. Brookshire also prays, in the alternative, that the judgments below be set aside and the cause remanded for a new trial or remanded to the court of appeals for assessment of Brookshire's factual sufficiency complaints.

We continue to believe that this case is worthy of reversal under Rule 59.1, Tex. R. App. P., without hearing oral argument. A sample opinion to demonstrate the simplicity of that disposition is attached as Appendix 7.

Respectfully submitted,

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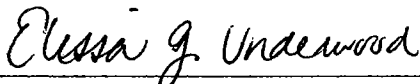
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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing was served upon the following counsel of record by certified mail, return receipt requested on this 14th day of February, 2008.

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# No. 07-0085

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## In the Supreme Court of Texas

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**BROOKSHIRE GROCERY COMPANY,**

*Petitioner,*

v.

**BARBARA GOSS,**

*Respondent.*

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*ON APPEAL FROM THE SIXTH COURT OF APPEALS  
No. 06-05-00036-CV*

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### APPENDIX

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Tab

- 1 Trial Court's Judgment of December 9, 2004
- 2 Court of Appeals' Judgment and Opinion of November 20, 2006, *Brookshire Grocery Company v. Goss*, 208 S.W.3d 706 (Tex. App.—Texarkana 2006, pet. granted)
- 3 *Kroger Co. v. Elwood*, 197 S.W.3d 793 (Tex. 2006)
- 4 TEX. LAB. CODE § 406.033
- 5 Plaintiff's Exhibit 34-19 (photograph)
- 6 *Jack in the Box, Inc. v. Skiles*, 221 S.W.3d 566 (Tex. 2007)
- 7 Sample opinion