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IN SUPREME COURT
OF TEXAS

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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 AT TEXARKANA
COURT OF APPEALS NO. 06-05-00036-CV

REPLY TO RESPONSE TO PETITION FOR REVIEW

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HAND DELIVER

TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES.....	iii
ARGUMENT	1
I. <i>Elwood</i> and <i>Skiles</i> cannot be distinguished legitimately and mandate summary reversal and rendition.....	1
A. Under <i>Elwood</i> whether the risk is employer-created is irrelevant.....	2
B. Under <i>Elwood</i> whether the method of injury is a routine part of the employee’s duties is irrelevant	2
C. Under <i>Elwood</i> whether the risk of entering the deli cooler when a lowboy cart was parked there was commonly known or subjectively appreciated is irrelevant	3
D. The court of appeals dodged <i>Elwood</i> ’s “no duty” analysis by mischaracterizing it as the “open and obvious risk” defense	4
II. The <i>Keetch</i> , <i>Tidwell</i> , and <i>Olivo</i> decisions cannot be distinguished legitimately and mandate summary reversal.....	5
CONCLUSION AND PRAYER	8
CERTIFICATE OF SERVICE	10

INDEX OF AUTHORITIES

Page

CASES

<i>Abalos v. Oil Dev. Co. of Texas</i> , 544 S.W.2d 627 (Tex. 1976)	7
<i>Brookshire Groc. Co. v. Goss</i> , 208 S.W.3d 706 (Tex. App.—Texarkana 2006, pet. filed)	1, 2, 5
<i>Clayton Williams, Jr., Inc. v. Olivo</i> , 952 S.W.2d 523 (Tex. 1997)	1, 5, 6, 7, 8
<i>Exxon Corp. v. Tidwell</i> , 867 S.W.2d 19 (Tex. 1993)	5, 6
<i>Hernandez v. Heldenfels</i> , 374 S.W.2d 196 (Tex. 1964)	7
<i>Jack in the Box, Inc. v. Skiles</i> , 221 S.W.3d 566 (Tex. 2007)	1, 2, 5, 6
<i>Keetch v. Kroger Co.</i> , 845 S.W.2d 262 (Tex. 1992)	5, 6, 7, 8
<i>Kroger Co. v. Elwood</i> , 197 S.W.3d 793 (Tex. 2006)	1, 2, 3, 4, 5
<i>In Re Prudential Ins. Co. of America</i> , 148 S.W.3d 124 (Tex. 2004)	8
<i>Redinger v. Living, Inc.</i> , 689 S.W.2d 415 (Tex. 1985)	7

STATUTES

TEX. R. APP. P. 59.1	1, 5, 8
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TO THE HONORABLE SUPREME COURT OF TEXAS:

In a calculated avoidance of this Court's recent opinion in *Kroger Co. v. Elwood*, 197 S.W.3d 793 (Tex. 2006) (per curiam), the court of appeals' opinion likens Brookshire's *Elwood*-based "no duty" argument to the long-defunct defenses of "open and obvious risk" and contributory negligence. See *Brookshire Groc. Co. v. Goss*, 208 S.W.3d 706, 715 (Tex. App.—Texarkana 2006, pet. filed). Mrs. Goss's response implicitly recognizes that the opinion is indefensible and tries to salvage her judgment with legally untenable distinctions of this Court's recent, controlling opinions — distinctions that neither this Court nor any other has relied upon. That gambit is plainly revealed on page vii of her response where her "unbriefed" issue invites this Court to overrule *Clayton Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523 (Tex. 1997).

Simply put, the danger of tripping over a lowboy cart is a hazard that is as well "known to all," including, on this record, to Mrs. Goss, as was the danger in *Elwood*. See *Elwood*, 197 S.W.3d at 795. If this Court's carefully-forged pronouncements on tort and premises liability law are to be honored as binding precedent, summary reversal of this case is required under Rule 59.1, TEX. R. APP. P.

ARGUMENT

I. *Elwood* and *Skiles* cannot be distinguished legitimately and mandate summary reversal and rendition.

Mrs. Goss tries to distinguish *Elwood* on three grounds. Each is unavailing and their fallacies are easily disclosed.

A. Under *Elwood* whether the risk is employer-created is irrelevant.

Mrs. Goss first tries to distinguish this case from *Elwood* on the ground that the risk involved here was employer-created. (Resp. Brief at 8-9.) But whether the risk was created by the employer, the employee, or a third party is never mentioned in *Elwood* or *Jack in the Box, Inc. v. Skiles*, 221 S.W.3d 566 (Tex. 2007). Indeed, this Court labeled the parking lot where Elwood was injured as “Kroger’s parking lot,” *Elwood*, 197 S.W.3d at 795, and the trailer involved in Skiles’ injury as a “company trailer[.]” *Skiles*, 221 S.W.3d at 566. The distinction so critical to Mrs. Goss’s response forms no part of the court of appeals’ opinion,¹ and whether the risk was created by another Brookshire employee is irrelevant to a proper analysis of this case under *Elwood* and *Skiles*.

B. Under *Elwood* whether the method of injury is a routine part of the employee’s duties is irrelevant.

Mrs. Goss next tries to distinguish *Elwood* on the ground that her routine duties did not include encountering a lowboy cart in the cooler. (Resp. Brief at 10-11.) But that purported distinction (nowhere mentioned in the court of appeals’ opinion, either) has no legal relevance.

In *Elwood* this Court did not examine whether Elwood’s routine duties included using a hand in a car doorjamb for leverage (the method of injury). Instead it examined whether Elwood was injured while performing a routine part of his duties. This Court held that he was because he placed his hand in the car doorjamb and was injured while

¹ That opinion only cites *Elwood* for the unremarkable proposition that a negligence plaintiff must prove a breach of duty. *Goss*, 208 S.W.2d at 714. The same is true of *Skiles*, which is cited as a “no pet.” case only for the usual elements of negligence, *id.* at 713, even though the *Skiles* petition was filed October 27, 2006, over three weeks before the opinion in *Goss* issued.

“loading purchases into vehicles.” The Court described that activity as “a task performed regularly – without any special training or assistance – by customers throughout the grocery and retail industry.” *Elwood*, 197 S.W.3d at 795.

Precisely the same is true here. Mrs. Goss tripped over the lowboy cart and was injured while performing a routine part of her duties – entering the deli cooler for potato logs to cook and sell in the deli. (3 RR 52-53.)

C. Under *Elwood* whether the risk of entering the deli cooler when a lowboy cart was parked there was commonly known or subjectively appreciated is irrelevant.

Mrs. Goss’s last attempt to distinguish *Elwood* argues that “the risks of entering the deli cooler when a lowboy cart is parked there were not commonly known or appreciated by [her]”; therefore, she should have been warned that “entering the cooler with a lowboy cart there is dangerous.” (Resp. Brief at 11.) But that purported distinction – again nowhere evident in the court of appeals’ opinion – demonstrates simply that Mrs. Goss, like the court of appeals, refuses to follow the analysis in *Elwood*.

This Court made clear in *Elwood* that an employer “owes no duty to warn of hazards that are commonly known or already appreciated by the employee.” *Elwood*, 197 S.W.2d at 794. The focus of the “commonly known or subjectively appreciated” inquiry is the “hazard” that causes injury. The dispositive evidence in the case thus was Elwood’s testimony that “he knew it was dangerous to place his hand in a vehicle’s doorjamb.” *Id.* at 795. Because of that appreciation of danger, this Court held that “Kroger had no duty to warn Elwood not to place his hand in a doorjamb.” *Id.* at 794.

In this case, the “hazard” for purposes of *Elwood*’s duty analysis is not, as Mrs. Goss argues, “entering the deli cooler when a lowboy cart is parked there.” That conduct is not hazardous. Indeed, when she entered the cooler, Mrs. Goss saw the lowboy cart, believed she could maneuver around it, and in fact stepped over the corner of the cart and retrieved the potato logs without incident. (3 RR 63-64, 65-67, 127.) Under *Elwood*, therefore, the question is whether Brookshire had a duty to warn Mrs. Goss not to trip over the cart whose presence – and any danger posed by it – was apparent to anyone. As the deli manager testified: “[A]nybody with common sense would know not to go and trip. I mean you see that cart there.” (6 RR 205.) His point was ably demonstrated by Mrs. Goss on her way into the cooler. She saw the cart, knew to step over it, and did – successfully with no specialized training and no warning.

Mrs. Goss thus has the cart before the horse when she repeatedly argues that the “primary cause” of the accident “was Brookshire’s negligent placement of the lowboy cart in the cooler in the first place.” (Resp. Brief at 8.) Under *Elwood*, Brookshire owed no duty, and could not be negligent, if any hazard from the cart was open and obvious to Mrs. Goss.

D. The court of appeals dodged *Elwood*’s “no duty” analysis by mischaracterizing it as the “open and obvious risk” defense.

Finally, Mrs. Goss rebukes Brookshire for what she characterizes as our “chastis[ing] . . . the Court of Appeals for allegedly confusing its ‘no duty’ argument with the abolished defense of open and obvious. . . .” (Resp. Brief at 12.) We disagree that any “chastisement” was “misplaced,” *id.*, and believe we have only stated the obvious:

The lower court did not “confuse” Brookshire’s “no duty” argument with the abolished “open and obvious” defense. Rather, the court of appeals fired the opening salvo in a silent rebellion by refusing to acknowledge – much less follow – this Court’s holding in *Elwood* 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. To preserve the integrity of the clear analysis and holding in *Elwood*, the rebellion must be quelled, here and now, by summary reversal under Rule 59.1.

II. The *Keetch*, *Tidwell*, and *Olivo* decisions cannot be distinguished legitimately and mandate summary reversal.

A second and equally tenable ground of reversal is the failure to submit the predicate elements of a premises liability case. On that point, the court of appeals’ opinion (i) properly cites *Keetch* for the proposition that “[a] simple negligence question, unaccompanied by the *Corbin* elements as instructions or definitions, cannot support a recovery in a premises defect case” and (ii) correctly recognizes that Mrs. “Goss abandoned pursuit of any action that she might have based on premises liability” but (iii) then holds, in a rather stunning non-sequitur, that “Goss elected her remedy before the issues were submitted to the jury.” *Goss*, 208 S.W.3d at 717-718.

In response, we must repeat what was said earlier in our Petition: So far as we know this represents the first time in Texas jurisprudence that a court “has held that an employee of a non-subscriber may change how premises liability principles work or when they apply through pleading.” (Pet. at 12.) Obviously, that is why Mrs. Goss does not even try to defend the court of appeals’ reasoning and tries to shield her patently

inadequate jury findings behind the trial court's "wide latitude to determine the propriety of explanatory instructions and definitions." (Resp. Brief at 12.) The "abuse-of-discretion standard" does not cure error this Court has already found fatal in an identical context, nor does it exempt Mrs. Goss's fatal decision to submit her premises liability case as an active negligence one.

Mrs. Goss argues that this Court's holding in *Olivo* – *i.e.*, that a general negligence question will not support a judgment in favor of the plaintiff in a premises liability case – does not apply in a non-subscriber case like this one. (Resp. Brief at 13.) But, she admits on the next page, that "[t]his Court stated in *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 21 (Tex. 1993), that 'the standard of conduct required of the employer is ordinary care based on general negligence principles'." (Resp. Brief at 14.) And, chief among the "general negligence principles" referenced in *Tidwell* is that "recovery on a negligent activity theory requires that the plaintiff be harmed by or as a contemporaneous result of the activity itself." *Olivo*, 952 S.W.2d at 527 (quoting *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992)).

Because it is indisputable that Mrs. Goss was not injured by or as a contemporaneous result of an activity, she is bound by that principle's corollary:

[A] simple negligence question, unaccompanied by the *Corbin* elements as instructions or definitions, cannot support a recovery in a premises defect case.

Id. at 529.

Applied here, that principle requires a judgment in Brookshire's favor. Like the *Olivos*, Mrs. Goss simply "did not secure proper jury findings on [her] only viable cause

of action, premises defect” and, as a result, “waived that claim and is not entitled to any relief against” Brookshire. *Id.* at 530.

Mrs. Goss’s last-gasp defense is that her failure to obtain the proper jury findings is harmless, because “it is hard to imagine that the jury” would have found against her on the *Corbin* elements since it found in her favor on the general negligence question actually submitted. (Resp. Brief at 15.) Reduced to its essence, Mrs. Goss’s argument asks this Court to ignore *Olivo* and its recognition that premises defect and negligent activity are “independent theories of recovery.” Just as important, she asks the Court to ignore that case’s consequent refusal to deem the *Corbin* elements found in support of the trial court’s judgment, thus treating the two independent theories as one. *See Olivo*, 952 S.W.2d at 529. That argument seeks the same result in Mrs. Goss’s “unbriefed” issue – that the Court overrule *Olivo*’s holding that jury findings in response to a *general* negligence question will *not* support a judgment in plaintiff’s favor when the facts establish that plaintiff’s case is a premises liability case. *Id.*

Mrs. Goss’s “unbriefed” but critical plea to overrule *Olivo* would actually require this Court to cast aside opinions far older than *Olivo* and *Keetch* and far more important than the result in this one case. As this Court recognized in *Keetch*, whether a negligence case hinges on a contemporaneous negligent activity or premises liability can determine the scope of the duty owed. *See Keetch*, 845 S.W.2d at 264 (citing *Redinger v. Living, Inc.*, 689 S.W.2d 415 (Tex. 1985); *Abalos v. Oil Dev. Co. of Texas*, 544 S.W.2d 627 (Tex. 1976); *Hernandez v. Heldenfels*, 374 S.W.2d 196 (Tex. 1964)).

Such a wholesale rejection of Texas precedent – such a complete disruption of established Texas law – is unwarranted. What is warranted is a summary reversal without oral argument. Only that swift kick will ensure courts of appeals’ adherence to the negligent activity—premises liability dichotomy so clearly explained in *Keetch*, *Olivo*, and their progeny.

CONCLUSION AND PRAYER

As we stated in our Petition, the judgment in this case can and should be reversed and judgment rendered in Brookshire’s favor on either of two solid legal grounds:

Brookshire owed no duty to warn or instruct Mrs. Goss about how to perform the simple act of entering and exiting a workspace and avoiding common objects in her path.

This is a premises liability case, as a matter of law, and Mrs. Goss’s intentional failure to secure findings on the *Corbin* elements is fatal to her claim.

We urge this Court to summarily reverse the court of appeals’ judgment under Rule 59.1, TEX. R. APP. P., before that court’s “novel” analysis “become[s] a repeated error” by other courts trying to find a way around precedents this Court has crafted after carefully balancing all competing policy interests. *See In Re Prudential Ins. Co. of America*, 148 S.W.3d 124, 137 (Tex. 2004).

Respectfully submitted

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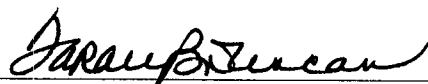
CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2007, I served a true and correct copy of the foregoing by United States mail, postage prepaid on the following counsel of record:

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