

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
No. 06-05-00036-CV*

PETITIONER'S REPLY BRIEF ON THE MERITS

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The court of appeals affirmed Goss's judgment because it believed the "no duty" doctrine urged by Brookshire was the same as "assumption of risk" – a defense unavailable to Brookshire as a non-subscriber to Workers Compensation. It made that holding even though the "no duty" decision in *Elwood* was on the books at the time of the lower court's decision and was even cited by that court for a general principle. Goss's response brief wisely chooses not to support that holding. But, the arguments it does make are no more availing than the holdings of the court of appeals.

BRIEF OF THE ARGUMENT

The proper point of beginning is with the parties' points of agreement. In their competing briefs, Brookshire and Goss agree on three things:

(i) Personal injury cases by employees against non-subscriber employers are governed by and tried under ordinary negligence principles – i.e., Goss "must establish negligence by [Brookshire] in order to recover." *Werner v. Colwell*, 909 S.W.2d 866, 868-869 (Tex. 1995).

(ii) A non-subscriber employer's conduct cannot be negligent unless the employer owes a duty to exercise ordinary care to eliminate or warn of the hazard that causes the employee's injury – i.e., "[t]he nonexistence of a duty ends the inquiry into whether negligence liability may be imposed." *Nat'l Convenience Stores, Inc. v. Matherne*, 987 S.W.2d 145, 148 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (cited with approval in *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794-795 (Tex. 2006)).

(iii) An employer has no duty to instruct its employees or warn them about hazards that are “commonly known or readily appreciated by the employee. *** And, 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 795.

Application of those principles to the arguments in the response brief confirms that the judgment below should be set aside and judgment rendered that Goss take nothing under Rule 59.2, TEX. R. APP. P.

I. Any Hazard Merely From the Presence of a Large, Stationary, Inert Object in the Path of an Employee Is Inherently Known and Appreciated, and There Is No Duty To Warn or Instruct Employees About Such Common Hazards.

Most of Goss’s Statement of Facts (Response 1-6) and the first section of arguments (Response 8-12) are aimed at one proposition:

That lowboy carts are a “tripping hazar[d]’ that should be ‘eliminated’.” (Response 4.)

“[T]he cart should not have been in the deli cooler”. (Response 5.) “[A] Brookshire’s employee affirmatively created that risk by negligently placing the lowboy cart there.” (Response 9.)

“[T]he jury could reasonably have concluded that the cart simply should not have been in the deli cooler”. (Response 10.)

While Goss aggressively argues that Brookshire “stretches the concepts of routine duties, routine risks, and common knowledge beyond the breaking point” (Response 8), in fact, it is Goss’s arguments that stray far outside standard negligence principles that govern this case, virtually to the point of absurdity.

A. The Controlling Issue Is Whether Brookshire Owed Goss a Duty To Train Her or Warn Her; It Is Not Where and How Lowboy Carts Are Placed.

The essence of Goss's argument is that using lowboy carts generally, or using them specifically to store items in a cooler, poses such an unreasonable risk of harm that grocers owe a duty to ban them from their stores altogether. There is no evidence to support that conclusion.

Lowboy carts are common tools or implements in the grocery business. They are routinely used throughout grocery stores. (3 RR 118.) The carts obviously eliminate risk to employees from lifting injuries associated with carrying items that are transported by or stored on the carts. The food items on the cart in this case were perishable; and, certainly, they required refrigeration and an easy way to move them from the cooler to the deli counter. That is why, obviously, such carts have been placed in Brookshire's deli cooler on prior occasions. (3 RR 117-18; Response 6.)

Surely, if lowboy carts are "tripping hazards" in grocery stores, as Goss argues repeatedly, so are mops, brooms, buggies, grocery racks, advertising displays, checkout stands, and even customers. It is absurd to suggest that grocers owe a duty to their employees and the public to remove from their stores all customers, employees, groceries, grocery racks, advertising displays, and the implements essential to the trade. Such a sterile premises would certainly be "safe", but it would be a moonscape, not a grocery store.

Goss thus puts the cart before the horse when she argues that the "primary cause" of the accident "was Brookshire's negligent placement of the lowboy cart in the cooler in

the first place.” (Response 9.) The first issue here is “duty”, not negligence or causation. If lowboy carts are a “tripping hazard”, Brookshire had a duty to instruct about or warn of the hazard *only* (i) if the hazard was not “commonly known or readily appreciated by the employee” or (ii) if the hazard is encountered during performance of work that is not “unusually precarious.” *Elwood*, 197 S.W.3d at 795. That is the question that controls this case.

B. The Undisputed Facts Establish that Goss Appreciated any Hazard from the Stationary Cart in the Deli Cooler.

Although she calls the lowboy cart a “tripping hazard”, Mrs. Goss did not actually “trip” on the cart with her feet. In her response she says “her left shin hit the side of the lowboy cart and she began to fall.” (Response 3.)

Hitting the side of a stationary cart at shin height obviously in the employee’s path of travel inherently is a risk “commonly known or readily appreciated by the employee” seeking to walk around the cart or any similar object in the store. *Elwood*, 197 S.W.3d at 795. On that point, the following facts are admitted or conclusively established:

- Mrs. Goss saw the lowboy cart stacked high with frozen dinners the day she entered the cooler. (3 RR 63-64.)
- She had room to get by it. (3 RR 118-119.)
- She did not believe it posed a problem to her task because she could get around it. (3 RR 127.)
- In fact, she did step over the corner of the cart without harm or difficulty to get what she needed from the cooler. (3 RR 65-67.)
- There is no evidence that the cart moved or changed position after she stepped over it.

- No hidden defect in the cart or on the premises contributed to the accident.

There is no substantive distinction between those facts and the facts in *Elwood* or *Skiles* or the recent decision in *Hendrick Medical Center v. Smith*, No. 11-06-00145-CV, 2007 WL 3309120 (Tex. App.—Eastland, Nov. 8, 2007, pet. denied), which held that an employer owed no duty to warn an employee not to touch the prong of an electrical socket while plugging it into an outlet.

The result on the facts here should be the same – a holding that there was no duty to instruct about or warn of the obvious presence of the lowboy cart and any associated dangers from encountering it in a deli cooler.

A dose of common sense is necessary in assigning duties to employers to provide a safe place to work. If employers owe a duty to either eliminate all objects in an employee's path or, alternatively, owe a duty to warn employees not to bang their shins into huge, stationary objects in plain view, that mocks and repudiates the rule that “an employer is not an insurer of its employees' safety.” *Elwood*, 197 S.W.3d at 794.

C. Entering the Deli Cooler Was a Routine, Non-precarious Task for Goss, Even When Carts or Storage Vehicles Were in the Deli.

To avoid the alternative “routine work” approach to “no duty” in *Elwood*, Goss makes this distinction:

The test is not whether the employee's injury occurs *during* the performance of routine work that is not unusually precarious, but rather whether the injury results *from* the performance of such work.

(Response 11.)

The precise language this Court used in *Elwood* says:

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 795 (emphasis added).

Goss's paraphrase of that holding essentially says that, only if the injury results from *precisely* the same fact pattern, performed over and over by the employee, does it arise from "the same character of work."

No such narrow distinction is apparent in *Elwood*. In its discussion of that point, this Court did not examine whether Elwood's routine duties included regularly putting his hand in a car doorjamb for leverage (the method of injury). It examined, instead, whether Elwood was injured while performing a routine part of his duties – *loading groceries*. The Court held that he was performing such routine duties, because he placed his hand in the car doorjamb and was injured while "*loading purchases into vehicles*," which the Court described 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 (emphasis added). It was the routine act of *loading groceries* that controlled, not the particular way in which the ground sloped or the way in which groceries were loaded into the customer's car on the occasion in question.

The same is true under our facts. Going in and out of the deli cooler to retrieve potato logs to cook and sell in the deli was a routine part of Mrs. Goss's duties. (3 RR 52-53.) That is enough in itself for this prong to apply, but Goss's response further admits that, during those routine trips, it was even "commonplace" for her to encounter

storage vehicles – or, as she describes them, “much less problematic grocery ‘buggies’ in the cooler.” (Response 12.) Indeed, Goss conceded she had likely seen a lowboy cart itself in the cooler previously. (3 RR 118.) There is no explanation why entering the cooler with a stationary lowboy cart was “unusually precarious” but entering the cooler when it contained “buggies” was not. Both involve “trip hazards”. Thus, entering the cooler to retrieve merchandise not only was routine, encountering items in the cooler that could be “trip hazards” was “commonplace”.

The dramatic example Goss poses about Brookshire loosing “a live Bengal tiger in the deli cooler” (Response 11) only underscores Goss’s faulty analysis. The lowboy cart in the deli the day of Goss’s accident was dead, not “live”. It did not pounce on or even growl at her when she entered the deli with the cart in full view.

A slight change in the example, however, highlights the crucial distinction. Brookshire has a well-known wildlife museum on the west edge of its Tyler campus. Assume that Brookshire, in preparation for an upcoming exhibit, temporarily stored a stuffed Bengal tiger in a storeroom that Goss regularly entered to retrieve items essential to her daily routine. If Goss entered the storeroom, saw the stuffed tiger, walked past it, got the items she needed, and bumped her shin on the tiger’s head as she was leaving, would Brookshire owe a duty to erect a sign that said: “Warning: Beware of Stuffed Bengal Tigers In the Storeroom!”? Or, should it have conducted a class on “How to Avoid Tripping Over Stuffed Bengal Tigers During Your Normal Work Day”?

The “no duty” rules in *Elwood* and *Skiles* protect against such absurdities in law. Clearly, the undisputed and admitted facts establish the alternative “no duty” prong in *Elwood*, as a matter of law.

D. The “Already Known and Readily Appreciated” No-duty Doctrine in Elwood Does Not Depend on Who Created the Hazard.

Goss is considerably off the mark in her reading of *Elwood* and the later decision in *Jack in the Box, Inc. v. Skiles*, 221 S.W.3d 566 (Tex. 2007), when she tries to distinguish them on the ground that “the employer did not cause” the premises condition that led to the employee’s injury in those cases. (Response 7.)

In neither case was it relevant to the Court’s analysis “who” created the hazard, because each case was decided on the absence of “duty” rather than the presence of “fault” or “negligence”. Indeed, in *Skiles*, the employer could have been at fault, because one nondelegable duty employers owe to employees, as Goss herself argues, is the duty to furnish “reasonably safe instrumentalities”. (Response 8.) Even though the employer-owned truck in *Skiles* was broken, the Court never inquired whether it was broken due to the fault of the employer, because the:

dangers associated with the use of a ladder to climb over a lift gate are common and obvious to anyone. Following our holding in *Elwood* ..., we conclude that Jack in the Box owed no duty to warn Skiles of the danger posed by his intended use of the ladder. We reverse the court of appeals’ judgment and render a take-nothing judgment in favor of Jack in the Box.

Skiles, 221 S.W.3d at 569.

It is also incorrect for Goss to suggest, as she does (Response 9), that the outcome in *Elwood* turned on the fact that the injury occurred on the parking lot, not in the store.

In the right circumstances, premises owners can owe a duty to eliminate or warn of unreasonably dangerous conditions that exist on parking lots. *See, e.g., Harwood v. Hines Interests Ltd. P'ship*, 73 S.W.3d 450 (Tex. App.—Houston [1st Dist.] 2002, no pet.) Even though the Court labeled the parking lot where Elwood was injured as “Kroger’s parking lot,” *Elwood*, 197 S.W.3d at 795, it did not find it necessary to find fault in the circumstances that caused the injury on the parking lot, because, just as in this case, the danger of putting one’s hand in a car door about to be closed was commonly known or readily appreciated by the employee.

The distinction over “who” created the hazard on which Goss relies so heavily thus forms no part of the *Elwood* or *Skiles* rationale, and, in fact, no part of the court of appeals’ opinion. Whether the risk was created by another Brookshire employee is irrelevant to a proper analysis of this case under *Elwood* and *Skiles*.

To sum up ...

Goss rebukes Brookshire for what she characterizes as “chastisement” of “the Court of Appeals for allegedly confusing its ‘no duty’ argument with the abolished defense of open and obvious risk.” (Response 13.) We disagree that any “chastisement” was “misplaced”. *Id.* Brookshire has 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 well-grounded policy in *Elwood*, the rebellion must be quelled by summary reversal under Rule 59.1 holding that (i) any danger from encountering the lowboy cart was well known and readily appreciated by Goss, or (ii) the events leading to the accident were part of Goss's routine duties, and not unusually precarious, and, thus (iii) Brookshire owed "no duty" to either instruct Goss or warn her about the common danger of encountering familiar objects in her path of travel as part of her normal duties.

II. Because Non-subscriber Cases Are Governed by Ordinary Negligence Principles, Premises Defect Criteria Apply When an Employee's Injury Is Due to a Premises Defect.

The court of appeals held that the *Corbin* elements did not have to be submitted, even if this were a premises defect case, because an employee suing a non-subscriber for an on-the-job injury has a choice or election between suing for premises liability or general negligence:

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. *While the elements of these separate actions for negligence overlap, the Texas Supreme Court has recognized the distinction between them and admonished that the two fields of law (landowners-invitee and master-servant) are entirely separate and should be kept so.*

Brookshire Grocery Co. v. Goss, 208 S.W.3d 706, 718 (Tex. App.—Texarkana 2006, pet. pending) (emphasis added).

For the italicized statement, the court cited a 1955 non-subscriber case, *Sears, Roebuck & Co. v. Robinson*, 154 Tex. 336, 280 S.W.2d 238, which discussed the theories of “no duty” and “assumption of risk”. In the course of its discussion in *Sears*, the Court commented:

The two fields of law (landowners-invitee and master-servant), are entirely separate and they should be kept so. *** [W]e see no sound reason for extending the no-duty concept of denying liability from the landowner-invitee field of the law to the master.

Id. at 240. Thus, it held that the “no duty” doctrine was unavailable because it was akin to the “assumption of risk” defense barred by the compensation statute. *Id.*

Sears is the only justification for the court’s holding that the *Corbin* elements need not be submitted. If *Sears* stands for the proposition that the “no duty” doctrine is inapplicable to non-subscriber suits, obviously, it has been overruled on that point by *Elwood* and *Skiles*, and it is no authority, thus, for the proposition that an employee can elect a general negligence theory of recovery, and submit the case on that theory, even when the facts establish that the claim is based on a premises defect, as opposed to active human conduct.¹

¹ *Sears* can be explained by its legal and procedural context in fields of law that have undergone substantial change since it was decided:

(i) First off, the issue in *Sears* was whether the so-called “no duty” doctrine applied to the facts of the case – not whether it was a premises liability case. The Court’s opinion 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*, 371 S.W.2d 368. 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 a premises liability case mainly to determine the nature of the duty owed, not the constituent elements of the claim. The requirement that a premises liability case *must* submit the *Corbin* elements came along much later. The *Sears* decision thus could not have spoken to that issue.

The fallacy in Goss's and the court of appeals' attempt to avoid the legal consequences from her decision not to submit the essential predicates of a premises defect case (Response 14-17) is their failure to heed the simple principle mentioned at the beginning of this brief: Personal injury cases by employees against non-subscriber employers are governed by and tried under ordinary negligence principles. *Werner v. Colwell*, 909 S.W.2d 866, 868-869 (Tex. 1995). Indeed, Goss concedes in her response that "[t]his Court said in *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 21 (Tex. 1993), that '[t]he standard of conduct required of the employer is ordinary care based on general negligence principles'." (Response 16, emphasis added.)

Those general principles are fatal to Goss's theory and the court of appeals' holding.

A. Nothing About the Employer-Employee Relationship Requires an Exception to Premises Liability Law When an Employee Sues a Non-subscriber Employee for a Premises Defect.

General negligence principles in Texas draw a clear distinction between "negligent activity" cases and "premises defect" cases, such that a "premises owner may be liable for two types of negligence in failing to keep the premises safe: 1) that arising from a premises defect, and 2) that arising from an activity on the premises." *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 156 (Tex. 1999). As we noted in the Brief On the Merits, an injury on premises arises from a premises defect when, as in this case, no contemporaneous human conduct causes plaintiff's injury. See *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749 (Tex. 1998) (failure to provide security at an apartment complex alleges only a premises defect); *Dallas Mkt. Ctr. Dev. Co. v.*

Liedeker, 958 S.W.2d 382, 385 (Tex. 1997) (injury from a descending elevator was a premises defect case even though the elevator’s warning bell was disabled by human conduct).

Goss does not challenge the rule that failure to submit the so-called *Corbin* elements² required in a premises defect case is fatal to such a claim, nor can she, given the holding in *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523 (Tex. 1997) that, because plaintiffs

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

Id. at 529 (emphasis added).

Instead, Goss draws a tenuous distinction between cases that involve invitees vs. landowners and those that involve employees vs. employers – a distinction that is not mentioned in *Elwood* or *Skiles*. But the premise of the argument – i.e., that a “premises occupier’s duties to its invitees necessarily relate in one way or another to the premises themselves” (Response 15) – is simply wrong. The policy reasons for imposing a duty not to carelessly back a company truck over an invitee, or an employee, or a pedestrian on a public street are precisely the same whether the accident occurs on the premises or off.

Goss is passionate in her argument that “the “broader scope of the employer’s overall duties means that the premises liability elements are not appropriate descriptors of

² The *Corbin* elements – which are found in *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296 (Tex. 1983) – require that, to find liability for a premises defect, the jury must be charged that it has to find: “(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.” See *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264-265 (Tex. 1992).

the elements of negligence in a non-subscriber case” (Response 15), but she never explains why that is true or cites authority to support it. Self-evidently, the principles underlying the “premises defect” doctrine in *Olivo* are precisely the same whether the injured party is an employee whose claim is governed by general negligence principles (as here) or an invitee whose claim is governed by the same general negligence principles.

Even if it is true, as Goss argues, that “the employer-employee connection runs much deeper and is not logically centered (and sometimes not physically centered) on the employer’s premises” (Response 15), that is irrelevant because liability for breach of any particularized duties an employer owes an employee in situations unrelated to a pure premises defect is girded and protected by the “negligent activity” doctrine and general negligence principles applicable to non-premises-defect situations.

B. Failure To Submit the Corbin Elements in a Premises Defect Case is Tantamount to Failure To Submit the Theory At All; Thus Such Failure Can Never Be Harmless Error.

A fundamental misreading of *Olivo* underlies Mrs. Goss’s assertion that her decision not to submit the *Corbin* elements 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. (Response 17.)

That argument ignores *Olivo*’s recognition that premises defect and negligent activity are “independent theories of recovery”, and it overlooks this Court’s refusal in *Olivo* to deem the *Corbin* elements found in support of the trial court’s judgment, which would have resulted in treating the two independent theories as one. *See Olivo*, 952

S.W.2d at 529. In essence, this Court held in *Olivo* that the defective submission was not just a procedural error, but a complete waiver of a premises defect claim that entitled defendant to rendition of judgment, rather than remand for a procedural error. A complete failure to submit a theory essential to a judgment is never harmless.

Mrs. Goss's covert 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 Tex.*, 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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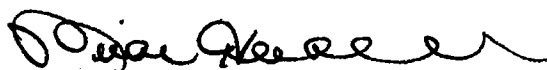
CERTIFICATE OF SERVICE

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 21st day of May, 2008.

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