

NO. 07-0085

IN THE SUPREME COURT OF TEXAS

BROOKSHIRE GROCERY COMPANY

PETITIONER

V.

BARBARA GOSS

RESPONDENT

BRIEF OF RESPONDENT
[filed by Respondent Barbara Goss]

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TABLE OF CONTENTS

	<u>Page</u>
Identities of Parties and Counsel.....	i
Table of Contents.....	iii
Index of Authorities.....	v
Statement of the Case.....	vii
Record Abbreviations.....	vii
Statement of Jurisdiction.....	viii
Issues Presented.....	viii
Introduction.....	1
Statement of Facts.....	1
Summary of the Argument.....	7
Argument.....	8
I. BROOKSHIRE’S HAD A DUTY OF REASONABLE CARE TO PREVENT GOSS FROM BEING INJURED BY A LOWBOY CART IN THE DELI COOLER.	8
A. <u>Brookshire’s Had a Duty Not to Unreasonably Create a Risk of Injury to Its Employees by Leaving an Unmaneuverable Lowboy Cart in the Confined Space of the Deli Cooler.</u>	9
B. <u>Encountering Lowboy Carts in the Deli Cooler Was in Any Event Not a Routine Part of Goss’s Duties.</u>	11
C. <u>The Risks of Entering the Deli Cooler When a Lowboy Cart Is Parked There Were Not Commonly Known or Already Appreciated by Goss.</u>	12
II. THERE IS NO CHARGE ERROR THAT WARRANTS REVIEW BY THIS COURT.	14

A.	<u>The Trial Court Did Not Abuse Its Discretion in Submitting the Case on a General Negligence Charge.</u>	14
B.	<u>Any Charge Error Was Harmless.</u>	17
Prayer	18
Certificate of Service	20
 Appendix		
		<u>Tab</u>
	Final Judgment (2 CR 197-98)	1
	Charge of the Court (2 CR 164-71)	2
	Court of Appeals' Opinion	3
	Court of Appeals' Judgment.....	4
	Tex. Lab. Code § 406.033	5

INDEX OF AUTHORITIES

Cases

<i>Borneman v. Steak & Ale, Inc.</i> , 22 S.W.3d 411 (Tex. 2000)	16
<i>Brookshire Grocery Co. v. Goss</i> , 208 S.W.3d 706 (Tex. App. – Texarkana 2006, pet. filed)	vii, 8
<i>Clayton W. Williams, Jr., Inc. v. Olivo</i> , 952 S.W.2d 523 (Tex. 1997)	viii, 14, 16, 17
<i>Coastal Corp. v. Garza</i> , 979 S.W.2d 318 (Tex. 1998)	viii
<i>Corbin v. Safeway Stores, Inc.</i> , 648 S.W.2d 292 (Tex. 1983)	passim
<i>Dallas Market Center Development Co. v. Liedeker</i> , 958 S.W.2d 382 (Tex. 1997)	14
<i>Exxon Corp. v. Tidwell</i> , 867 S.W.2d 19 (Tex. 1993)	16
<i>H. E. Butt Grocery Co. v. Bilotto</i> , 985 S.W.2d 22 (Tex. 1998)	14
<i>In re Goss</i> , 160 S.W.3d 288 (Tex. App. – Texarkana 2005), <i>mand. denied</i> , ___ S.W.3d ___, 51 Tex. Sup. Ct. J. 275 (2008)	7
<i>Jack in the Box, Inc. v. Skiles</i> , 221 S.W.3d 566 (Tex. 2007)	8, 9, 11
<i>Keetch v. Kroger Co.</i> , 845 S.W.2d 262 (Tex. 1992)	14, 15
<i>Kroger Co. v. Elwood</i> , 197 S.W.3d 793 (Tex. 2006)	passim
<i>Motel 6 G.P., Inc. v. Lopez</i> , 929 S.W.2d 1 (Tex. 1996)	14

<i>Southeastern Pipe Line Co. v. Tichacek</i> , 997 S.W.2d 166 (Tex. 1999)	16
<i>Spencer v. Eagle Star Insurance Co. of America</i> , 876 S.W.2d 154 (Tex. 1994)	16
<i>Timberwalk Apartments Partners, Inc v. Cain</i> , 972 S.W.2d 749 (Tex. 1998)	14
<i>Torrington Co. v. Stutzman</i> , 46 S.W.3d 829 (Tex. 2000)	16

Statutes

Act of June 2, 2003, 78th Leg., R.S., 2003 Tex. Gen. Laws ch. 204	viii
Tex. Gov't Code § 22.001(a)(2)	viii
Tex. Gov't Code § 22.001(a)(3)	viii
Tex. Gov't Code § 22.001(a)(6)	viii
Tex. Lab. Code § 406.033	iv, vii, viii
Tex. Lab. Code § 406.033(a)	16

Secondary Sources

tadd.weather.gov	13
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STATEMENT OF THE CASE

<i>Nature of the Case</i>	Negligence suit against nonsubscribing employer pursuant to Tex. Lab. Code § 406.033 (1 CR 29-35)
<i>Trial Court</i>	402 nd District Court Wood County Hon. G. Timothy Boswell, presiding
<i>Trial Court Disposition</i>	Judgment for plaintiff (2 CR 397-401) (Appendix 1) on jury verdict (2 CR 164-71) (Appendix 2)
<i>Parties in the Court of Appeals</i>	Appellant (petitioner in this Court): Brookshire Grocery Company Appellee (respondent in this Court): Barbara Goss
<i>Court of Appeals</i>	Sixth District, Texarkana
<i>Court of Appeals Opinion</i>	Opinion by Jack Carter, J., joined by Josh Morriss, C.J., and Donald Ross, J. <i>Brookshire Grocery Co. v. Goss</i> , 208 S.W.3d 706 (Tex. App. – Texarkana 2006, pet. filed) (Appendix 3)
<i>Court of Appeals Disposition</i>	Trial court judgment affirmed (Appendix 4)

RECORD ABBREVIATIONS

Abbreviations used in record citations will be as follows:

(x CR yy):	Volume x of Clerk’s Record at Page yy
(x RR yy):	Volume x of Reporter’s Record at Page yy
PXaa	Plaintiff’s Exhibit aa
DXbb	Defendant’s Exhibit bb

Where an item appears in the appendix to this brief, that fact will be indicated by the notation “(Appendix cc),” where cc refers to the appropriate numbered tab in the appendix.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this appeal under Tex. Gov't Code § 22.001(a)(6), although upon inspection of the merits no error of law will appear, and certainly no error of law which is of such importance to the jurisprudence of the state as to require correction.

The Supreme Court also has jurisdiction of this appeal under Tex. Gov't Code § 22.001(a)(3), because it involves the construction of a statute (specifically Tex. Lab. Code § 406.033) necessary to a determination of the case.

The Supreme Court has no jurisdiction of this appeal under Tex. Gov't Code § 22.001(a)(2). The alleged conflict between the opinion in this case and *Kroger Co. v. Elwood*, 197 S.W.3d 793 (Tex. 2006), is spurious. *See* Section I, *infra*. The opinion is not inconsistent with *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523 (Tex. 1997), because the latter case did not involve the duties owed by employers to their employees. *See* Section II, *infra*. In short, the rulings in this case and the allegedly conflicting cases are not “so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other,” such that “one would operate to overrule the other in case they were both rendered by the same court,” as is required for conflict jurisdiction in this pre-House Bill 4 case, *eg. Coastal Corp. v. Garza*, 979 S.W.2d 318, 319-20 (Tex. 1998).

ISSUES PRESENTED

1. Brookshire's negligently placed a waist-high 500-pound unmaneuverable loaded stocking cart into the confined space of its deli cooler, and failed to warn or train its employees about what to do when encountering such a cart there. Although Goss routinely

entered the cooler, she did not routinely encounter such carts there; although she was aware of the cart's presence, she was seemingly unaware of the unusual risks it posed. Can Brookshire's nevertheless escape liability based on the principles articulated in *Kroger Co. v. Elwood*, 197 S.W.2d 793 (Tex. 2006), that protect employers from responsibility for ordinary and obvious workplace risks that they did not create?

2. In *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296 (Tex. 1983), and later cases, this Court developed a formula particularizing the elements of negligence in premises liability cases. Is a jury instruction as to the "*Corbin* elements" required in a non-subscriber case, where the statute broadly describes the standard of liability as one of negligence and where the courts have identified numerous duties, many of which are not premises-based, that are owed by employers to their employees?

3. It was undisputed in this case that Brookshire's was aware of the injury-causing condition (the first *Corbin* element). In light of the focus at trial on the unreasonableness *vel non* of the risk created by that condition, and the similarity of the remaining *Corbin* elements to the elements of general negligence found by the jury, was the failure to submit a particularized premises liability instruction in this case harmless error (if indeed it was error at all)?

INTRODUCTION

The petitioner has skillfully portrayed this case as an aberration inconsistent with this Court's jurisprudence concerning the duties owed by employers and premise occupiers. But that view of the case is a mirage. It depends on two false premises, which appear in the opening paragraph of the petition for review: that Goss's injuries were caused "not by active human conduct, but by a static condition on the employer's premises" and that the dangers of that condition "were apparent to anyone."¹ These premises can be supported only by stretching the concept of "static conditions" beyond recognition, by artificially circumscribing the duties owed by employers to their employees, and by ignoring the record and the standard of review. This case fits comfortably within the existing framework of nonsubscriber cases, and there is no need for this Court to review it.

STATEMENT OF FACTS

On November 23, 2002, Barbara Goss ("Goss") suffered an on-the-job injury while working in the deli at Brookshire Grocery Company's ("Brookshire's") store in Quitman, Texas. The deli was busy that day, both because the store had recently been remodeled and because the Thanksgiving holiday was approaching. (3 RR 53-54; 7 RR 17; PX107 at 54).

About 2:00pm, Goss noticed that the steam cabinet was out of "potato logs," and went back to the deli cooler to retrieve them. (3 RR 63). Upon reaching the cooler, Goss saw that it was full of carts and "buggies." (3 RR 59, 63). These included a "lowboy" cart

¹Petition for Review at vi.

stacked with frozen turkey and ham dinners. (3 RR 64). The lowboy cart was located on one side of the cooler, near the shelves that contained the potato logs Goss was seeking. (DX76).

The lowboy carts used by Brookshire's are about 5 feet long and 2½ feet wide (3 RR 173-74; PX29-30), and weigh about 80 pounds unloaded (4 RR 193). They have a flat bed about 10 inches above the floor, and a curved handle that rises about 3½ feet above the floor. (*Id.*; PX29-23; PX29-25). Only the wheels at the handle end pivot, and so to turn the cart, one must be behind the handle. (3 RR 174). There were between two and four layers of dinners stacked on the cart, coming up to a little above the bar handle. (3 RR 66, 120; 6 RR 194; 7 RR 10; PX107 at 62; PX109 at 23). This corresponds to a loaded weight for the cart of between 352 and 624 pounds. (*See* 4 RR 193-94).² When loaded with the dinners, which extend over the sides of the cart, there is only about ½ inch of clearance between the cart and each side of the deli cooler door. (4 RR 232). A person would have to move the cart forward and backward to get it lined up with the door. (PX108 at 39).

Upon entering the confined space of the cooler, Goss stepped over the end of the lowboy cart, then moved along the shelves to the location of the potato logs. (3 RR 126). Because the cart was positioned at an angle, there was more room between the shelves and the cart at the end near the door than at the end near the potato logs; Goss did not realize this before entering the cooler. (3 RR 69, 126). When she reached the potato logs, she

²Goss's expert Robert Firmbach testified to a weight of 408 pounds for three layers of dinners, corresponding to 136 pounds per layer, or 272 to 544 pounds for two to four layers. To this must be added the 80-pound weight of the empty cart.

picked up one bag of them, and then started to turn to her right (3 RR 67, 127), apparently not realizing that the cart was so close to her legs at that end of the cooler.

As Goss turned, her left shin immediately hit the side of the lowboy cart, and she began to fall. (3 RR 67, 128). As she was falling, she turned to her right, and with her right and left hands grabbed the top shelf of the cooler at the level of her head to stop her fall. (3 RR 67-68, 128-29). The momentum of her body caused her to twist her back, resulting in excruciating pain. (3 RR 70). She was taken to the emergency room (3 RR 70-71), where she was given pain medication and told to follow up with her family physician. (3 RR 76).

After the accident, Goss experienced chronic debilitating pain in her lower back, radiating down into her leg. (3 RR 77-78, 80; PX25; PX117 at 26). Over the next year, she visited a long succession of doctors, who were unable to give her any relief. (3 RR 77-92). Ultimately, in January 2004, a neurosurgeon implanted a permanent spinal cord nerve stimulator to relieve Goss's pain. (PX20; PX114 at 12). This device, analogous to a heart pacemaker, includes electrical leads implanted very close to the spinal nerves. (5 RR 92-93; PX114 at 12-13; PX117 at 34-38). When switched on, the stimulator stimulates the spinal cord nerves, producing a tingling sensation in the affected area that blocks a large part, but not all, of the pain sensation. (5 RR 91-92; PX114 at 15; PX117 at 35-36).

Goss had an excellent response to the stimulator implant. (PX114 at 12). Nevertheless, she will continue to have a degree of pain, dependent on the level of activity she undertakes. (PX114 at 26; PX117 at 41). This condition is permanent. (5 RR 108-10). She cannot use the stimulator on a continuous basis, due to the need to preserve battery life. (5 RR 94).

Goss cannot do her former job and is limited to sedentary employment. (PX117 at 40-43; *see also* 5 RR 158). She has sought employment since her injury, but has been unsuccessful. (3 RR 112-13). In light of Goss's age, disability status, and limited education, her prospects for getting and keeping a job are not good. (PX115 at 15-19).

* * *

Brookshire's recognizes the safety hazard posed by stocking carts. Its safety inspection checklist identifies such carts as a tripping hazard on sales floor areas, and requires that employees be informed on safe use of stocking carts on the sales floor. (PX88; *see* 3 RR 191-92, 194). The reason for these requirements is that customers may be distracted, looking for merchandise on shelves, and may inadvertently injure themselves on the carts. (3 RR 191-92). With respect to "wareroom and receiving areas," the checklist identifies "stocking cards [sic]" as a "tripping hazar[d]" that should be "eliminated." (PX88; 3 RR 196).

Brookshire's contended at trial, however, that these statements apply only to lowboy carts that are unloaded, and that a loaded lowboy cart is *never* a safety hazard anywhere in the store. (3 RR 197, 199, 216; 4 RR 115). In particular, Brookshire's believes that it is not a safety problem for this cart, along with as many other carts as can fit, to be left in the deli cooler. (3 RR 178-80; 4 RR 136-37). It has no rules regarding the number of carts that can be left in the cooler or where they may be placed. (3 RR 176-77; 4 RR 73; PX109 at 33-34; PX 110 at 17, 33). It does not train employees on whether or where to place carts in the cooler, or regarding what to do if they encounter a lowboy cart plus other carts in the cooler. (3 RR 58, 114, 177, 181; 4 RR 116; PX110 at 16). Its corporate safety committee has never discussed safety issues regarding lowboy carts (3 RR 154, 202), and apparently the Quitman

store safety committee (if it ever met)³ did not do so either (3 RR 202). Brookshire's employee handbook and training videos do not address these issues. (3 RR 201; PX85).

These lackadaisical attitudes toward lowboy cart and deli cooler safety were countered by testimony from safety engineer Robert Firmbach, who has had significant professional experience with grocery store safety issues. (4 RR 147). In Firmbach's opinion, the cart should not have been in the deli cooler, and Brookshire's should have known that. (4 RR 169, 175, 184, 221). He testified that there is no reason why lowboy carts are less of a trip hazard concern in work areas than in customer areas, because a person going into the deli cooler is, like a customer, looking for a product on a shelf and subject to distraction for that reason. (4 RR 173). In Firmbach's opinion, the placement of the lowboy cart in the deli cooler violated OSHA regulations requiring all places of employment to be kept in a clean, orderly, and sanitary condition, with sufficient safe clearance where turns or passages must be made and with adequate means of egress. (4 RR 182-83, 204).

Firmbach also testified that Brookshire's employees should have been trained on use and placement of the carts and on what to do when encountering one in a confined space. (4 RR 184). This is because employees will not necessarily be able to recognize the cart as a safety problem (4 RR 189), and will do what they have to do, and be injured in the process (4 RR 221-22). This cart training should be part of a more general material movement training. (*Id.*) The training program should be directed by Brookshire's corporate office, and work its way down to the stores. (4 RR 189-90).

³Assistant store manager Tomie Williams, who would have been a member of the committee (3 RR 155), was not aware of any safety committee meetings. (PX110 at 11).

The presence of the lowboy cart in the cooler was a rare event, having occurred only three times in the decade preceding the accident. (PX107 at 33, 35, 57-58). Nevertheless, Brookshire's recognizes the hazard of lowboy carts in the deli cooler. Wanda Hall, deli department cook in the Quitman store, testified that the lowboy cart creates a space concern and a safety issue when located in the deli cooler, and that for that reason, deli workers try to unload it and return it to the back room as soon as possible. (7 RR 19; PX108 at 20). Another deli worker testified that "at all costs," deli workers were supposed to return the carts to the back room or at least to move them to the side of the kitchen where people could get around them. (PX109 at 42-43). The deli supervisor testified that on the other occasions when the carts had been put in the deli cooler, they had been unloaded immediately and returned to the back room "because we don't like the big buggy in there." (PX107 at 76).

* * *

The case was tried to a jury, which found that Brookshire's negligence proximately caused Goss's accident, and that Goss's damages for pain, mental anguish, loss of earning capacity, physical impairment, and medical care aggregated \$729,300. (2 CR 168-69) (Appendix 2). After adding prejudgment interest and costs and making allowance for certain payments by Brookshire's, the trial court rendered judgment in favor of Goss for \$740,686.72 plus postjudgment interest. (2 CR 197-98) (Appendix 1). Brookshire's does not challenge in this Court the amount of the damages or the form of the judgment.

Brookshire's filed prejudgment motions for judgment notwithstanding the verdict and in the alternative for new trial. (2 CR 174-81). These motions were overruled. (2 CR 199). Brookshire's thereafter filed a second motion for new trial. (2 CR 200-16). The trial

court initially granted this motion (2 CR 229), but upon a holding by the Court of Appeals that the grant was outside the trial court's plenary power, *In re Goss*, 160 S.W.3d 288 (Tex. App. – Texarkana 2005), *mand. denied*, ___ S.W.3d ___, 51 Tex. Sup. Ct. J. 275 (2008), vacated its order granting the motion (2 CR 237).

SUMMARY OF THE ARGUMENT

Employers owe a variety of negligence-based duties to their employees. Although there are exceptions to these duties, they are inapplicable here. No exception excuses Brookshire's from its duty not to affirmatively create an unreasonable risk of injury to Goss. The exception for injury suffered by an employee from performing routine work that is not unusually precarious is in any event inapplicable here, inasmuch as the presence of a lowboy cart in the deli cooler is not a routine employment risk for deli workers. Finally, the exception whereby there is no duty to warn of commonly known or already appreciated hazards does not apply in this case; although the injury-causing condition was obvious, its dangerousness was not.

A premises liability instruction was not required in this non-subscriber case. Whereas premises occupiers owe invitees only the premises-based duty to provide reasonably safe premises, an employer owes its employees a panoply of duties, many of which are not premises-based. Equating non-subscriber liability with premises liability in cases not involving contemporaneous negligent activity would inappropriately circumscribe employers' duties to take proactive steps to promote their employees' welfare. Finally, any failure to instruct the jury on premises liability principles was at most harmless error, because the entire case at

trial centered on whether the presence of the cart in the cooler was a dangerous condition requiring remediation, training, supervision, or prohibition through safety rules.

ARGUMENT

I. BROOKSHIRE'S HAD A DUTY OF REASONABLE CARE TO PREVENT GOSS FROM BEING INJURED BY A LOWBOY CART IN THE DELI COOLER.

The Court of Appeals correctly summarized “[a]n employer’s nondelegable and continuous duties to its employees” as including “providing a safe place in which to work and [furnishing] reasonably safe instrumentalities; warning employees of the hazards of their employment, and supervising their activities,” as well as “provid[ing] rules and regulations for the safety of employees.” *Brookshire Grocery Co. v. Goss*, 208 S.W.3d at 712. Brookshire’s acknowledges that “those legal principles are not incorrect in the abstract,” but invokes “well-known exceptions” to them. *See* Petitioner’s Brief on the Merits (“Petitioner’s Brief”) at 4-5. In particular, Brookshire’s relies on this Court’s statements that an employer “owes no duty to warn of hazards that are commonly known or already appreciated by the employee,” and that there is no liability “when an employee’s injury results from performing the same character of work that employees in that position have always done” unless “the work is unusually precarious.” *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794-95 (Tex. 2006); *see Jack in the Box, Inc. v Skiles*, 221 S.W.3d 566, 568 (Tex. 2007).

In applying the *Elwood* exceptions to the present case, however, Brookshire’s ignores its own conduct in creating the risk to Goss. Moreover, Brookshire’s stretches the concepts of routine duties, routine risks, and common knowledge beyond the breaking point and dis-

regards significant portions of the evidence in violation of the standard of review.

A. Brookshire's Had a Duty Not to Unreasonably Create a Risk of Injury to Its Employees by Leaving an Unmaneuverable Lowboy Cart in the Confined Space of the Deli Cooler.

Brookshire's ignores a key feature of the risk faced by Goss in the deli cooler, namely, that a Brookshire's employee affirmatively created that risk by negligently placing the lowboy cart there. This case is thus materially different from such cases as *Skiles*, where the employer did not cause the broken lift gate that led to the employee's injury; *Elwood*, where the sloped parking lot that led to the employee's accident was not itself an employer-created danger; and *National Convenience Stores Inc. v. Matherne*, 987 S.W.2d 145 (Tex. App. – Houston [14th Dist.] 1999, no pet.), where the employer was not responsible for the traffic accident that killed the employee. Those cases were based solely on the employer's failure to warn or train its employees regarding a risk extrinsic to the employer's own conduct. Here, although a warning or proper training might have averted the accident, its primary cause was Brookshire's negligent placement of the lowboy cart in the cooler in the first place.

There was ample basis for the jury to find that the placement of the cart in the cooler was negligence apart from any failure to warn or train. Based on its common sense and life experience, the jury could permissibly infer that allowing employees to put a 500-pound loaded cart, maneuverable from only one end and with less than one inch of clearance through the door, into a confined space into which deli employees must enter dozens of

times each day in search of items, was a foolish and dangerous thing to do.⁴ It could credit Robert Firmbach's testimony that "[i]f you have a stocking cart and it's in, in their way and they have to get to where they have to go because of, of what their pressures are at work, they will do what they have to do and then they will get injured." (4 RR 221-22).

Brookshire's itself recognized that these carts, notwithstanding their bulk and visibility, constituted a tripping hazard in the customer and receiving areas of the store. (PX88). The jury could readily have concluded that they were no less so in other areas, and particularly in the confined space of the deli cooler. (See 4 RR 233). It could have agreed with Firmbach that a worker going into the deli cooler is "looking for a product[,] [j]ust like someone that's out shopping," and hence apt to become distracted and trip over the cart even though he or she knows the cart is there. (4 RR 173).

From all these things, the jury could reasonably have concluded that the cart simply should not have been in the deli cooler, and that Brookshire's should have taken steps to prevent that from happening.⁵

There simply is no doctrine, nor should there be, that an employer may affirmatively create unreasonable risks for its employees so long as it does so on a routine and obvious basis. Such a doctrine would allow all manner of unsafe workplaces and the most egregious

⁴Brookshire's statements that "[a] stationary, loaded lowboy does not pose a serious hazard because it is easily seen" and that "[t]he lowboy did not impede access in the cooler," Petitioner's Brief at 5, reflect a stubborn reliance on its own evidence rather than a dispassionate evaluation of the entirety of the record in light of the applicable standard of review. To call these facts "undisputed," *id.*, is particularly inaccurate and inappropriate.

⁵These could have included leaving the cart outside the deli cooler and unloading it into the cooler (4 RR 18788, 218-19), leaving it in the market cooler, unloading it into the market cooler, arranging for the turkey dinners to be delivered to the store closer to the holiday (4 RR 186), enlarging the deli cooler, or simply not taking orders for a volume of frozen Thanksgiving dinners the store was not equipped to handle.

failures to properly equip and train employees, and would generally eviscerate the duties of employers toward their employees. The Court should reject Brookshire's attempt to twist a doctrine applicable to warnings about routine risks created by nature or by third parties into a doctrine that would excuse the employer's own affirmative negligent conduct.

B. Encountering Lowboy Carts in the Deli Cooler Was in Any Event Not a Routine Part of Goss's Duties.

Brookshire's attempts to bring this case within the *Elwood* exceptions by noting that "[g]oing in and out of the deli [cooler] was a normal part of Mrs. Goss's duties," and was not especially hazardous. *See* Petitioner's Brief at 5. But that is the wrong standard. 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. *See, e.g., Elwood*, 197 S.W.3d at 795. The guiding principle of *Elwood*, *Skiles*, and similar cases is not that an employer's duties to its employees are limited to occasions when it asks them to deviate from their routine tasks or when the employee's routine tasks are especially hazardous, but rather that employers are not responsible for the ordinary risks that employees encounter in their everyday workplace experience. Had Brookshire's loosed a live Bengal tiger in the deli cooler, it could not avoid liability simply by saying that the job of a deli worker is not unusually hazardous and includes going into the cooler. A lowboy cart may not pose the same level of risk as a tiger, but if its presence in the cooler presents an unreasonable and unusual risk, it is no answer to say that the risk was encountered by the em-

ployee in the course of routine non-hazardous duties there.⁶

The presence of a lowboy cart in the deli cooler was not a routine risk of Goss's job, or of the job of deli workers generally. Although the presence of the smaller and much less problematic grocery "buggies" in the cooler was commonplace (3 RR 58-59, 134, 171; PX107 at 33), the deli manager in the Quitman store testified that lowboy carts had been in the deli cooler only 3 times in the 10-11 years she had been the deli manager. (PX107 at 32-33, 35, 57-58). Goss testified that she might have seen them there, but that they were usually parked outside the cooler door to be unloaded into the cooler. (3 RR 117). Thus a lowboy cart parked in the deli cooler was not one of the routine job risks that Brookshire's had no duty to avoid, eliminate, or warn against.

C. The Risks of Entering the Deli Cooler When a Lowboy Cart Is Parked There Were Not Commonly Known or Already Appreciated by Goss.

Assuming *arguendo* that the presence of a lowboy cart in the deli cooler was a regular part of a deli worker's job, *but see* Section I.B, *supra*, the jury could have reasonably concluded that Goss and other deli workers should have been warned about the risks of entering the deli cooler with a lowboy cart parked there, and trained on what to do upon encountering such a situation -- to remove the cart before entering the cooler, to ask for assistance, or at least to exercise extreme caution when entering the cooler while the cart was there.

⁶A less florid example further illustrates the point. Suppose that a sales clerk in a sporting goods store is engaged in his routine, non-hazardous duties, stocking fishing equipment on the store shelves. At the nearby firearms counter, another clerk negligently hands a customer a loaded gun, which accidentally discharges and injures the first employee. Would the non-subscribing employer be excused from liability merely because the injured employee was doing his usual, safe job at the time of the injury? Surely not.

Brookshire's argues vigorously that no such warning or training was required because the danger of tripping over the cart was obvious. *See* Petitioner's Brief at 5-6. Once again, Brookshire's poses the wrong inquiry. The omitted warning and training in this case was not "[w]atch where you are walking" or "[t]ake care not to trip over objects in your path." *Cf.* Petitioner's Brief at 6. Instead, it was that "entering a confined space such as the cooler with a lowboy cart there is dangerous, because you may get into a situation where you will injure yourself." The risk posed by a condition may not be obvious even if the condition itself is obvious, as the number of motorists killed every year from driving into high water attests.⁷ Indeed, Brookshire's inadvertently proves this point when it notes that Goss "did not believe the lowboy posed a problem because she [thought she] could maneuver around it." Petitioner's Brief at 5, *citing* 3 RR 127.

Brookshire's chastisement of the Court of Appeals for allegedly confusing its "no duty" argument with the abolished defense of open and obvious risk, *see* Petitioner's Brief at 7-8, is misplaced. The Court of Appeals' analogy was between Brookshire's argument that "Goss noticed the cart on entering the cooler and *should have known* not to bump into it" (*i.e.*, was contributorily negligent) and the assumption of risk defense. 208 S.W.3d at 715 (emphasis supplied). Its ultimate, manifestly correct, conclusion on this point was that "[e]ven if Goss was *contributorily negligent* in this incident ... Brookshire cannot rely on that as a defense. *Id.* (emphasis supplied). Elsewhere, the Court of Appeals carefully noted the "no duty"

⁷*See* add.weather.gov for an explanation of the National Weather Service's "Turn Around Don't Drown" public awareness campaign. Brookshire's argument implies that this entire campaign is unnecessary, because the existence of flood waters is usually obvious.

standards on which Brookshire's bases its position in this Court. 208 S.W.3d at 714.

II. **THERE IS NO CHARGE ERROR THAT WARRANTS REVIEW BY THIS COURT.**

A. **The Trial Court Did Not Abuse Its Discretion in Submitting the Case on a General Negligence Charge.**

Brookshire's second complaint is that the trial court did not submit an explanatory instruction describing the elements of negligence as applied to premises liability claims. Petitioner's Brief at 9-13. But "[t]he trial court is given wide latitude to determine the propriety of explanatory instructions and definitions," *eg*, *H. E. Butt Grocery Co. v. Bilotta*, 985 S.W.2d 22, 23 (Tex. 1998); there was no abuse of discretion here.

Brookshire's bases its argument on *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 529 (Tex. 1997), where the Court stated that "a simple negligence question, unaccompanied by the *Corbin* [*v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296 (Tex. 1983),] elements as instructions or definitions, cannot support a recovery in a premises defect case." But neither *Olivo* nor the other cases from this Court⁸ cited by Brookshire's and the *amici* in support of the *Corbin* elements⁹ were non-subscriber cases.

The *Corbin* elements measure the duty owed by a landowner toward its invitees; they do not, however, encompass the full scope of an employer's duties toward its employees.

⁸*Timberwalk Apartments Partners, Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998); *Dallas Market Center Development Co. v. Liedker*, 958 S.W.2d 382, 385 (Tex. 1997); *Motel 6 G.P., Inc. v. Lopez*, 929 S.W.2d 1 (Tex. 1996); *Keetch v. Kroger Co.*, 845 S.W.2d 262 (Tex. 1992).

⁹We call them "elements" for simplicity because the *Olivo* Court called them that, but the *Corbin* standards are more accurately characterized as a "summary description," *Corbin*, 648 S.W.2d at 295, of the negligence elements of duty, breach, and causation of injury as applied in a premises liability case.

Although “the 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,” *Sears, Roebuck & Co. v. Robinson*, 154 Tex. 336, 340, 280 S.W.2d 238, 240 (1955), the broader scope of the employer’s overall duties means that the premises liability elements are not appropriate descriptors of the elements of negligence in a non-subscriber case. Indeed, as the *Sears* Court noted, “[t]he two fields of law (landowners-invitee and master-servant) are entirely separate, and they should be kept so.” 154 Tex. at 340, 280 S.W.2d at 240.

In *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992), this Court characterized all liability not resulting from a premise occupier’s contemporaneous negligent activity as premises liability governed by the *Corbin* elements. A premises occupier’s duties to its invitees necessarily relate in one way or another to the premises themselves, since that is the only relevant connection between the parties. The *Keetch* characterization thus makes sense in a premise-centered legal relationship where the defendant’s only duties are to refrain from contemporaneous injury-causing behavior *on the premises* and to avoid suffering known dangerous conditions *on the premises*.

But the employer-employee connection runs much deeper and is not logically centered (and sometimes not physically centered) on the employer’s premises. The employer’s proactive duties to warn, to train, to equip, to supervise, and to regulate have no analogue in the occupier-invitee context, and may often require affirmative injury-avoiding conduct by the employer long before the injury-causing condition arises and injury occurs. Requiring a

premises submission in such cases would create an artificial distinction between employee injuries that occur on the employer's premises and those that do not, and would impose arbitrary constraints that would inappropriately narrow the duties owed by employers to their employees. This 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*.” (Emphasis supplied). The Court of Appeals properly recognized that the statutory negligence standard, *see* Tex. Lab. Code § 406.033(d), should not be embellished with extraneous criteria tailored to narrower areas of the law.

This Court's opinion in *Torrington Co. v. Stutzman*, 46 S.W.3d 829 (Tex. 2000), drives home the linkage between the *Corbin* elements and the absence of duties unrelated to the premises. There, the Court grappled with the familiar but vexing question of whether a particular incomplete jury submission is immaterial or merely defective. 46 S.W.3d at 839-40. The Court held that the distinction between *Oliva*, where a broad-form negligence question was held to be immaterial absent submission of the *Corbin* elements, and other cases in which the Court had found the submission merely defective,¹⁰ lay in the presence or absence of factual predicates to the existence of a duty:

But in *Oliva*, the defendant owed no duty toward the plaintiff unless specific factual predicates were established. Without any determination that the specific factual predicates were met, the question did not submit a controlling issue. In other words, absent any determination that the factual predicates giving rise to a legal duty were satisfied, the defendants' failure to use reasonable care was of no legal consequence.

¹⁰*Borneman v. Steak & Ale, Inc.*, 22 S.W.3d 411, 413 (Tex. 2000); *Southeastern Pipe Line Co. v. Tichacek*, 997 S.W.2d 166, 172 (Tex. 1999); *Spencer v. Eagle Star Insurance Co. of America*, 876 S.W.2d 154, 158 (Tex. 1994).

46 S.W.3d at 840. Had the defendant in *Olivo* owed duties to the plaintiff independent of the *Corbin* factual predicates, as Brookshire's undoubtedly did here, the general negligence submission would have been not only material but proper.

Drawing a distinction between premises cases and non-subscriber cases does not, as Brookshire's argues, cf. Petitioner's Brief at 11, permit manipulation of substantive standards through artful pleading. It is the *fact* that the injured party was the non-subscribing defendant's employee, and the *law* that employers owe their employees broader duties than premise occupiers owe their invitees, that control the scope of the required submission. All the plaintiff's pleading does is invoke that fact and that law.

B. Any Charge Error Was Harmless.

This case is in any event an unsuitable vehicle for a decision from this Court regarding the proper submission of non-subscriber cases, because the failure to submit the proffered premises liability instruction, if error at all, was harmless error. As for the first *Corbin* element, actual or constructive knowledge of the premise condition, it is undisputed that Brookshire's deli manager knew the cart was in the cooler. (4 RR 128). As for the remaining elements, it is hard to imagine that the jury, which found against Brookshire's on a general negligence charge, would have found (2) that the lowboy cart in the deli cooler did not pose an unreasonable risk of harm, or (3) that Brookshire's exercised reasonable care to reduce or eliminate the risk, or (4) that Brookshire's failure to use such care did not proximately cause Goss's injuries. The entire liability case revolved at trial on whether the cart in the cooler was a dangerous condition; this finding affected whether there was an unsafe workplace, whether Goss should have been warned, trained, or supervised on the subject of

carts in coolers, and whether Brookshire's needed to promulgate rules and regulations regarding them. The presence or absence of the proffered instruction is therefore unlikely to have affected the outcome of the case.

CONCLUSION

Brookshire's makes this out as a simple case, in which the Court of Appeals simply overlooked or misapplied recent controlling precedents from this Court. (Petitioner's Brief at ix, 13). To accomplish this feat of legerdemain, however, Brookshire's must ignore its own affirmative conduct in creating the injury-causing condition, must characterize an unusual occurrence as a routine risk, must mischaracterize the warning and training that its employee should have received, and must pretend that an employer owes its employee only premise-based duties. Once these distortions are eliminated, the case becomes an ordinary non-subscriber case, properly addressed by the Court of Appeals and an unsuitable candidate for this Court's review.¹¹

PRAYER

The respondent respectfully prays: (1) that the petition for review be denied or refused; (2) in the alternative, if the petition for review is granted, that the judgments below be

¹¹Goss is, frankly, nonplussed by Brookshire's proffer of a "sample opinion" by this Court. (See Petitioner's Brief at 13 & Appendix 7). Were Brookshire's counsel not a respected dean of the Texas appellate bar, the proffer could be construed as presumptuous. We content ourselves merely to point out that Brookshire's counsel is not yet a member of this Court, to note that the proffered opinion suffers from the distorting oversimplifications we have just described, and to proffer our own proposed disposition, even shorter and simpler than Brookshire's: "Today the Supreme Court of Texas denied the petition for review in the above-referenced case."

affirmed; and (3) for such other and further relief to which she may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this Brief of Respondent has been served on all parties to this appeal by mailing copies thereof to: Charles H. Clark, Esq., Attorney for Petitioner, Clark, Lea, Ainsworth & Porter, P.O. Box 98, Tyler, Texas 75710; Deborah Race, Esq., Attorney for Petitioner, Ireland, Carroll & Kelley, P.C., 6101 S. Broadway, Suite 500, Tyler, Texas 75703; and Mike A. Hatchell, Esq., Attorney for Petitioner, Locke Liddell & Sapp LLP, 100 Congress Avenue, Suite 300, Austin, Texas 78701; all on this 26th day of March, 2008.

P. MICHAEL JUNG