No. 09-0246

In The Supreme Court of Texas

ROSE BARTON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHRISTOPHER MARTIN DEAN,

Petitioner,

V.

WHATABURGER, INC.,

Respondent.

On Petition for Review from the First Court of Appeals
Houston, Texas, No. 01-06-01121-CV

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the case	Workplace safety case involving a non-subscribing employer. Whataburger hired a convicted crack cocaine dealer as a manager, giving him control of a late-night shift at a restaurant that lacked all the state-of-the-art security measures used in the fast-food industry. Recognizing the opportunity, the manager set up an armed robbery, which resulted in the fatal shooting of a co-employee.
Trial court	157th Judicial District Court, Harris County, Hon. Randall Wilson.
Disposition	Take-nothing summary judgment. Attached at **Tab A**.
Parties on appeal	Petitioner/Appellant Rose Barton, individually & as personal representative of the estate of her son Christopher Dean. Respondent/Appellee Whataburger, Inc.
Court of appeals	Houston [1st Dist.].
Disposition	Affirmed (Bland, J., joined by Radack, C.J., and Alcala, J.). En Banc rehearing denied by 6-3 vote with two dissenting opinions. The majority and the dissents disagreed over the proper analysis for foreseeability.
Dissent #1	Jennings, J. (author), joined by Keyes and Sharp, JJ.
Dissent #2	Keyes, J. (author), joined by Sharp, J.
Opinion	276 S.W.3d 456. Attached at **Tab B**.

STATEMENT OF JURISDICTION

Jurisdiction exists on three bases: conflict, dissent, and jurisprudential importance. *See* TEX. GOV'T CODE ANN. §§ 22.001(a)(1), (a)(2), and (a)(6).

1. Conflict jurisdiction is proper, because the decision below conflicts with *Sears, Roebuck & Co. v. Robinson*, 154 Tex. 336, 280 S.W.2d 238 (1955). The *Sears* decision instructs lower courts not to blur the line between ordinary premises liability cases and workplace safety cases: "The two fields of law (landowner-invitee and master-servant), are entirely separate, and they should be kept so." *Sears*, 280 S.W.2d at 240. The court of appeals majority, however, failed to heed. *See* Op. at 466-67. The majority extended the "prior similar incidents" test from premises law into non-subscriber cases.

2. Dissent jurisdiction is proper because of Justice Jennings' dissenting opinion. Justice Jennings would have reversed the summary judgment. He disagreed with the majority's rejection of *Sears*. He also disagreed with the majority's overall foreseeability analysis and its analysis of the summary judgment evidence.

3. Dissent jurisdiction is also proper because of Justice Keyes' dissenting opinion. Justice Keyes would have reversed the summary judgment. She would have done a foreseeability analysis that considers what the Restatement of Torts calls the "character of the business." RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965). She also would have applied the duty rules for employers found in the Second Restatement of Agency. *See* RESTATEMENT (SECOND) OF AGENCY § 493 cmt. a & § 495 cmt. b (1958).

4. The Court has (a)(6) jurisdiction because of the importance of the issues. Those issues include *Sears* and the Restatement provisions that divided the court below.

ISSUES PRESENTED

1. This Court holds that an employer's duty to provide a safe workplace is rooted in agency law, and RESTATEMENT (SECOND) OF AGENCY § 393 and § 395 (1958) obligate an employer to act with "special knowledge" about known risks in the industry when discharging that duty. Under that standard, does evidence of an industry consensus regarding industry-wide risks raise a fact question on the element of foreseeability?

2. Should the prior similar incidents test of premises liability law be extended into employer liability cases involving workplace safety?

3. RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965) teaches that foreseeability analysis in violent crime cases should take into account not only the location of a business and prior criminal activity, but also the "character of the business." If premises liability principles have any relevance to an employer's non-delegable duty to provide a safe workplace, does the employer's obligation to act with special knowledge include an obligation to foresee risks that arise from the character of the business? Alternatively, should Texas law consider the character of the business, as a general rule, when deciding whether criminal conduct is foreseeable?

4. Does hiring a convicted crack cocaine dealer as the manager of a late-night, cash-based business, when every representative of the employer agrees the drug dealer was unqualified and posed a potential risk, demonstrate legally sufficient evidence on the element of foreseeability in a negligent hiring claim?

STATEMENT OF FACTS

The facts are accurately described in the majority opinion and in the lead dissent (*i.e.*, the dissent by Justice Jennings). Indeed, the three opinions below contain almost everything that the Court needs to know about this case. The opinions lay out the facts, describe the legal issues, and give the arguments for affirmance or reversal.

Simply put, Whataburger hired a convicted crack dealer to manage a late-night, cash-based business, in an industry that has known for more than 20 years that there is a risk of violent crime in late-night, cash-based businesses that lack adequate security. Everyone agrees that the employer violated its own policies by hiring the cocaine dealer, and an unusually robust factual record reveals that the employer is a generation behind the industry standard for late-night security. Yet the Majority concluded that these facts did not make a violent crime foreseeable.

This is a case of a fox and a henhouse. Whataburger left the henhouse unguarded, then hired the fox to run it. Every child could tell you how that story will inevitably end. But when the obvious outcome came to pass, Whataburger claimed it had no reason to foresee that the story would not have a happy ending. Six justices agreed; three did not. Ultimately, they split over this question: Is it fair to demand at least as much foresight from employers in the 21st century as from children reading a Brothers Grimm fairy tale?

There are four parts to this story. Part I is the story of the henhouse. Part II is the story of the fox. Part III is the story of what happened when Whataburger brought the two together and closed its eyes to the consequences. And Part IV is the story of what happened when the Texas courts became involved.

I

The late-night retail industry recognizes the factors that attract violent crime

It is a sad fact of modern life that late-night retail businesses are crime magnets. Beginning in the 1970s, the late-night retail industry witnessed a rising tide of violence. The industry studied the problem and produced an unusually impressive consensus about the factors that give rise to the risk of violent crime in late-night, cash-based businesses. CR 518 ("The industry has known for years that it's a high-risk occupation"). At bottom, this case turns on whether courts are willing to recognize as "foreseeable" those risks that an entire industry does, *in fact*, foresee.

The seminal research in the field was the "WBSI Study." First conducted in 1975, this study was sponsored in part by 7-Eleven's parent. CR 438; Supp. CR 226-30, 237. Updated in 1985 and 1995, it now reflects a generation of industry knowledge. *Id*.

The WBSI Study has revealed that robbery of late-night businesses is not random. Supp. CR 226, 237. Instead, criminals select their targets based on their perceived risks. The most important factors are easy access to cash and an absence of deterrent measures (*i.e.*, cameras, alarms, deterrence signage, locked doors, self-closing windows, etc.). Supp. CR 228-30, 237.[1] The WBSI study shows that unprotected cash-based businesses are especially dangerous targets at night, while even modest protective measures and robbery prevention training can be effective deterrents. CR 438; Supp. CR 226-230.

[1] Specifically, the WBSI identified the following factors: amount of money and its easy availability; escape routes; armed guards; anonymity; police; armed clerks; interference; bullet-resistant barriers; number of clerks; alarms; number of customers; cameras and video. Supp. CR 228-30, 237.

As a result of the WBSI study, retailers began taking steps to reduce these risks. CR 438. By the early 1980s, virtually all the national convenience store chains adjusted their standard of care in response to the study. *Id*. At the same time, as fast-food chains began to enter the late-night market, national chains such as Jack-In-The-Box, KFC, Pizza Hut, and Taco Bell began to implement these same robbery prevention procedures. *Id*. Later in the 1980s, similar steps were taken by other chains, *e.g.*, Long John Silver, Hardee's, McDonalds, Wendy's, and Burger King. *Id*.

By the 1990s, the federal government had taken note of this industry consensus. CR 438-39. In 1998, OSHA published its *Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments*. CR 439; Supp. CR 232-42. OSHA's recommendations include management commitment, worksite safety analysis, hazard prevention and control, safety training, and evaluation. Supp. CR 235.

Today, there is genuine consensus throughout the industry about the risks inherent in late-night, cash-based businesses. National chains have responded to this consensus by implementing prudent cash-handling measures and a wide range of deterrent measures. CR 438; Supp. CR 88-94, 159-77, 201-16, 225. That industry consensus is unusually well-documented in this record by government and industry publications, such as—

- OSHA, *Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments.* Supp. CR 232-42; *see also id*. at 88-89.
- OSHA, *Fact Sheet*. Supp. CR 198-99.
- National Convenience Store Study (1998). Supp. CR 225-30; *see also id*. at 88.
- National Food Service Security Council Newsletter. Supp. CR 395-97; *see also id*. at 201-16 (industry publications).

Whataburger ignores the industry consensus

Whataburger has lagged badly behind the industry consensus. It failed to adopt measures that are now industry standards for a business that handles a great deal of cash. CR 430-32, 436-39; Supp. CR 86, 89. Until 2003, Whataburger was the only national fast-food chain that refused even to perform security assessments, conduct risk analyses, and implement a corporate security policy. *Id*. As such, the only national fast-food chain without a thorough robbery prevention program was Whataburger. CR 430, 439, 526.

Whataburger operates over 600 24-hour restaurants throughout the state of Texas. CR 438. It has over 100 stores in Houston alone. CR 106. Yet despite its size and its access to the same information as the other national chains, Whataburger took the view that security issues should be deferred to the local level. CR 431, 439; Supp. CR 245-48. It left store security up to regional directors and local store managers who received no formal training from Whataburger in security measures. CR 431, 439; Supp. CR 245-48.

This approach may have worked in Corpus Christi in 1950, when Whataburger opened for business only during daylight hours (and never on Sundays). But it is not well-suited to the risks and realities of a 24-hour, cash-based business in an urban area. *See* CR 439. As the rest of the industry implemented cash-handling techniques to reduce the availability of cash and a variety of deterrent measures, Whataburger lagged behind. As a result, the lax Whataburger stores became more attractive targets in an increasingly vigilant environment, and suffered a high rate of robberies. CR 442; Supp. CR 330-31. Whataburger was "about twenty years behind the industry." CR 439.

Whataburger Unit No. 196 in Houston is symptomatic of this problem. CR 439. It is a 24-hour restaurant close to a freeway entrance ramp on Houston's Loop 610 near the intersection of Highway 290. CR 442; Supp. CR 355-56. With other national chains, one would expect such a store to exhibit many of the industry-standard security features. But Whataburger did not spend the capital needed to comply with the industry standard. *See* CR 436-38. As a result, Unit No. 196 exhibited many of the risk factors that have been recognized as magnets for late-night crime in this industry since 1975:

- Drive-thru window was large enough for a grown man to climb through;
- Drive-thru window lock was broken for 1-1/2 years before this incident;
- Drive-thru window was not self-closing or self-locking between sales;
- Drive-thru window was mounted flush so the cashier had no view of persons approaching the window in a car or on foot from the side;
- No robbery hold-up alarms at the drive-thru and in the refrigerators;
- No video surveillance cameras at the drive-thru window and menu board;
- No time-delay safe to restrict access and prevent robberies; and
- No robbery deterrence signage notifying potential robbers that staff had no access to safe; no alarms; no height markers.

CR 436-37.

Whataburger had to have known about the grave risks posed by such a workplace. Not only were the risks well-publicized in government and industry publications, *see* p. 3, but also several of its other Houston stores with similar vulnerabilities had been robbed. *See* CR 437, 441-42; Supp. CR 274-75, 301, 313. In fact, several crimes had taken place at or near this very 24-hour location. CR 441-42; Supp. CR 272-324. In particular:

- In July 1997, two customers were shot in the parking lot. Supp. CR 318, 322, 324.
- In July 1998, a customer was robbed in the drive-thru. Supp. CR 315-16.
- In June 1999, a customer's purse was stolen. Supp. CR 310.
- In July 2000, a customer was assaulted. Supp. CR 308.
- In April 2001, a customer was shot in the parking lot. Supp. CR 297-99.
- In August 2001, a customer was assaulted on the premises and taken by "HFD" (Houston Fire Department) to LBJ Hospital. Supp. CR 295.
- In February 2002, a customer's car was forcibly stolen in the parking lot; the customer struggled with the assailant for the keys. Supp. CR 290-91.
- In April 2002, still another customer was assaulted in the parking lot. Supp. CR 285-88.

This steady stream of crime led the store's general manager to add extra security. Supp. CR 254. He began paying for off-duty police protection during the overnight shift on weekends. CR 440; Supp. CR 255, 259. It is reasonable to assume that the crime rate would have been higher if he had not paid for such police protection. CR 440. After all, the whole point of hiring additional security is to deter potential wrongdoers. But a new general manager took over the store a few weeks before the incident involved in this case. Supp. CR 187, 258. She chose to discontinue the police presence as not "cost-effective." Supp. CR 263, 265; CR 440-41. The dangers of that decision should have been evident: Just days before this incident, there was an attempted late-night robbery of Unit No. 196. CR 441, 461; Supp. CR 272. But nothing changed; the store remained unprotected. Lacking this extra security, and in the absence of any other effective deterrence measures, Unit No. 196 was a prime target. *See* CR 440-41.

II

Whataburger hires a convicted crack cocaine dealer as a late-night manager

It was in this setting that Whataburger added a convicted crack dealer to the mix. In November 2002, Greg Love applied for a managerial job with the company. CR 59; Supp. CR 410. At the time, he was fresh from his second felony conviction. *Id*.

Greg Love was born in Marion, Indiana. CR 104. By his early twenties, he had a felony conviction in Indiana for two counts of selling crack cocaine. Supp. CR 433. Love served three years in the state penitentiary. CR 398. After his release from prison, Love applied for a job with Taco Bell—but Taco Bell did a criminal background check, discovered Love's crack conviction, and sent him packing. CR 446; Supp. CR 410, 415. Love eventually moved to Texas. *See* Supp. CR 411-12.

By early November 2002, Love had received a second felony conviction in Texas (for failure to pay child support). CR 394. That month, Love applied for a position with Whataburger as a store manager. CR 59; Supp. CR 410. This was before Whataburger had adopted a corporate security program. Whataburger did a cursory background check, but cut its costs by doing a 1-county check instead of checking for convictions elsewhere. CR 407-08; Supp. CR 374, 413, 430. The one-county background check cost only $11. Supp. CR 430. Whataburger could have obtained a national background check for $35, which would have revealed the drug trafficking conviction. CR 447; Supp. CR 433-34. By contrast, its $11 background check missed both the Texas felony for failure to pay child support and the Indiana felony for dealing crack. CR 408; Supp. CR 374, 413, 430. Love was hired as a night manager for Unit No. 196. CR 445; Supp. CR 405.

How did this happen? Not only did Whataburger fail to conduct a national search, but it also ignored red flags on the face of Love's application. The application purported to list his work history, but a reasonable inquiry would have revealed odd discrepancies. CR 59, 410-12, 445-46; Supp. CR 411-14. The company that did the background check indicated that all these red flags required further inquiry. CR 410-12; Supp. CR 426-28. Had Whataburger inquired further, it would have learned that Love had given false dates of employment with both Sonic and Popeye's—concealing a one-year unexplained gap. CR 59, 61, 410; Supp. CR 410, 411-14. Whataburger also would have learned that Love had been fired by both companies, most importantly by Sonic after being disciplined for theft and cash-handling misconduct. CR 141-42, 224. But Whataburger did not inquire.

Although it had disdained a thorough background check and ignored the red flags, Whataburger still might have learned the truth about Love in the managerial interview. The managerial interview is intended to allow an employer to obtain information missing in the application, to explain chronological gaps and other red flags, and to get an idea of the candidate's honesty and reliability. CR 445. Whataburger's official hiring policy required all managerial applicants to be interviewed twice—with the second interview to be conducted by a corporate officer responsible for hiring management-level candidates. CR 315-16, 445; Supp. CR 487. But here, Whataburger's officer told his subordinates not to bother him unless an applicant had a criminal record. CR 445; Supp. CR 402, 487. That was of little use, since the $11 criminal background check covered just one county. And as it turned out, Whataburger hired Love as a manager before his background check even had been completed. CR 93, 445; Supp. CR 405.

One might think that these alarming facts would disqualify any potential manager of a cash-based business that is open 24 hours a day—and in fact, that is exactly the case. As noted above, one of Whataburger's competitors in the fast-food industry, Taco Bell, had fired Love after learning of his drug conviction. Supp. CR 415; *see also id*. at 96. And Whataburger's very own witnesses have *admitted* that he posed a foreseeable risk. Although the majority opinion does not acknowledge this evidence, the record reveals that Whataburger's own witnesses agreed that Love posed a foreseeable risk:

- Whataburger's area manager responsible for hiring Love testified that felons are ineligible to be managers at Whataburger: "If I was aware that he had committed a felony, sir, I would not have hired him." CR 474; Supp. CR 405, 449, 510-11.

- Whataburger's security consultant testified that Love's conviction for drug dealing made him ineligible for any management position in the fast food industry. Why? "I don't know quite how to answer that – it's so obvious, I don't know how to answer the question. He's not the type of person that you would want running the store." Supp. CR 452; *see also* CR 465-66; Supp. CR 86, 95-97.

- Whataburger's security expert testified that Love's dishonesty on his application would have disqualified him from a management position. CR 401.

- Whataburger's screening agent testified that he would not have hired a drug dealer because, if a managerial applicant has a history of drug dealing or violent crime, "it's a chance they'll do it again." Supp. CR 55-56; CR 406.

- Whataburger's expert agreed that an untrustworthy convicted felon like Greg Love "has a potential to steal from the company" and has "the capability of setting up, as an inside job, a robbery that could end up hurting either an employee or a bystander." Supp. CR 363 ("The answer is yes."). Whataburger's expert admitted this risk is a well-known matter of historical fact. *Id*. ("It has happened, yes."). "Whether it was foreseeable in certain industries," Whataburger's expert admitted, "the answer is yes." Supp. CR 364; *accord id*. at 370 ("Yes. The corporation can suffer and so can their co-workers, correct.").

But because Whataburger did nothing to recognize these risks in advance, Love was hired as a night manager for Unit No. 196. CR 445; Supp. CR 405.

III

Whataburger's security flaws tempt Love to rob the store, with fatal consequences

It did not take long for the fox to take advantage of the unguarded henhouse. Exploiting the lax cash-handling procedures and security deficiencies at Unit No. 196, *see* p. 5, above, Love saw his chance at the start of his late-night shift on May 10, 2003. CR 334. Love took over the night shift at 9:30 p.m. CR 437, 461. The prior manager did not count the cash on hand and drop it into the safe, as cash-handling rules required. *Id*. Instead, he simply entrusted the money (about $1,600) to Love. CR 437, 458, 461.

At that point, Love put his plan into motion. First, he called three accomplices with whom he had made prior arrangements and ordered them to rob the store that night. CR 418. Second, he left the restaurant (after pilfering some of the petty cash himself), leaving a mentally challenged employee named Chris Dean in charge. CR 437, 461-62. He left the $1,600 out of the safe. *Id*. At this point Love's plan began coming unraveled: Dean protected the $1,600 by counting it and dropping it into the safe. CR 462.

At about 4:30 a.m. on May 11, 2003, Love's accomplices arrived and approached the oversized drive-thru window, the only unlocked access to the restaurant. CR 436; Supp. CR 182. Climbing through the window, one robber took control of the store. *Id*. Dean tried to escape, but he could not get away. CR 422. With all the cash in the safe, the robbers threatened Dean and demanded the key. CR 422-23. But Dean repeatedly told them he did not have the key and could not comply with their demands. CR 423-24. Love had told his accomplices not to believe anyone who claimed he did not have access to the safe. Enraged, the robbers shot Dean in the head, killing him. CR 424.

IV

The Texas courts hold this incident criminally obvious, but civilly unforeseeable

Love and his accomplices were all caught and criminally prosecuted. On appeal, Love argued that there was evidence to support a conviction for robbery, but not murder, on the theory that the murder was unforeseeable. The court of appeals flatly disagreed. Justice Bland held "the jury reasonably could have concluded that Love should have reasonably anticipated the possibility of a murder occurring in the course of the robbery." *Love v. State*, 199 S.W.3d 447, 454 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).[2] In the criminal case, therefore, foreseeability was not controversial.

But the courts saw the civil suit differently. Dean's mother sued Whataburger for its negligence in failing to maintain a safe workplace, its negligence in hiring Greg Love, and its negligent supervision and training. *See* CR 8. Summary judgment was granted. CR 548. On appeal, the Majority found foreseeability to be lacking. **Tab B**.

First, the Majority addressed the negligent hiring claim. The Majority agreed that Whataburger should not have hired Greg Love as a store manager, but it concluded that nobody should have foreseen that the result of hiring a drug felon for a manager's job in this 24-hour retail store might be an armed robbery resulting in murder. Op. at 464-65. Interestingly, the Majority failed to address the admissions of the Whataburger witnesses, who all conceded that a manager with Love's record posed a foreseeable risk. *See* p. 9.

[2] *See Marshall v. State*, 210 S.W.3d 618 (Tex. Crim. App. 2006); *Worthy v. State*, No. 01-06-00134-CR (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd); *Calliham v. State*, No. 14-05-01080-CR (Tex. App.—Houston [14th Dist.] 2006, no pet.) (other criminal decisions arising from this incident).

Second, the Majority addressed the safe workplace claim. Barton urged the court to hold that the industry and government consensus on late-night, cash-based businesses provided sufficient evidence of foreseeability. She noted that the Restatement of Torts recognizes that violent crime may be foreseeable due to the "character of the business." And she stressed that the Restatement of Agency obligates employers to take into account "special knowledge" in discharging their duty to maintain a safe workplace. But instead, the Majority concluded that this employer-employee case should be analyzed under the "prior similar incidents" test that applies in premises liability cases of random assault. Op. at 466-67. Thus, the Majority felt itself justified in ignoring the industry consensus and government publications recognizing the risks of late-night, cash-based businesses.

Justice Terry Jennings dissented. First, with respect to the negligent hiring claim, he argued that "common sense dictates that hiring an individual with a felony conviction on two counts of delivery of narcotics and placing him in a night-time management position at a fast-food restaurant in charge of other employees would obviously endanger the restaurant and the safety of those employees." Op. at 479 (Jennings, J., dissenting).

Second, with respect to the safe workplace claim, Justice Jennings pointed out that the Majority had asked the wrong question by treating a safe workplace claim like a premises liability claim. The Majority relied on *Allen v. Connolly*, 158 S.W.3d 61, 65 (Tex. App.—Houston [14th Dist.] 2005, no pet.). But Justice Jennings noted that *Allen* misreads this Court's precedent, which holds "'[t]he two fields of law (landowner-invitee and master-servant), are entirely separate, and they should be kept so.'" Op. at 480 (quoting *Sears, Roebuck & Co. v. Robinson*, 154 Tex. 336, 280 S.W.2d 238 (1955)).

Finally, Justice Jennings argued, the Majority not only asked the wrong question but it also returned the wrong answer. The Majority (like the unreviewed *Allen* decision) focused exclusively on the "prior similar incidents" test used in premises liability cases. But that test was intended for cases of random crime—not targeted crimes like this case. Justice Jennings agreed with Chief Justice Jefferson that the prior similar incidents test, which is applicable to random crime, does not "'account for crimes that may have been eminently foreseeable despite their never having occurred at a particular place before.'" Op. at 480 n.4 (Jennings, J., dissenting) (quoting *Trammell Crow Cent. Texas, Ltd. v. Gutierrez*, 267 S.W.3d 9, 19 (Tex. 2008) (Jefferson, C.J., concurring). For this reason, Justice Jennings argued the prior similar incidents test is "not applicable." Op. at 480-81. Under the correct legal standard, he concluded this incident was highly foreseeable. *Id*.

Justice Evelyn Keyes also dissented, agreeing that this incident was foreseeable. She chided the majority for failing to heed the extensive evidence of industry knowledge, noting that the Restatement instructs courts to consider the "character of the business" when deciding whether violent crime is foreseeable. Op. at 481 (Keyes, J., dissenting); RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965). This evidence is most powerful, she noted, in a safe workplace case—because a master owes a duty to provide a servant with a safe workplace, a duty that goes beyond the duty owed by landowners to invitees. A master must act in accordance with any "special knowledge" that "persons experienced in the business and having special acquaintance with the subject matter have.'" *Id*. (citing RESTATEMENT (SECOND) OF AGENCY § 493 cmt. a & § 495 cmt. b (1958)). Applying those mainstream rules, she concluded, this tragedy was foreseeable. *Id*.

SUMMARY OF ARGUMENT

Review is proper because this case presents questions of exceptional importance. Those questions relate to one of the great themes of American tort law: foreseeability. Since Cardozo wrote "the risk reasonably to be perceived defines the duty to be obeyed," *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 100 (N.Y. 1928), American jurists have labored to define the parameters of negligence law in terms of foreseeability. Over time, American courts have fashioned numerous tests for foreseeability in a variety of contexts, and this case presents two variations on that theme—foreseeability in the hiring context, and foreseeability in the context of workplace injuries resulting from criminal activity. But there is a common denominator at the core of this case: Foreseeability is undisputed in this case by the actual actors in the field—Whataburger's own witnesses (as to hiring) and the industry and government consensus (as to workplace safety). That fact provokes this important question: May a court hold an event "unforeseeable," as a matter of law, when the industry and the actors involved actually foresee it, as a matter of fact?

Foreseeability does not require one to anticipate the "precise manner" in which an injury occurs; it is enough if the injury's "general character" can reasonably be foreseen. Here, authoritative industry sources and Whataburger witnesses uniformly admit that the "general character" of this injury was foreseeable. When a cash-based, 24-hour business with a history of violent incidents turns over the management of a poorly-protected store to a crack dealer, an armed robbery resulting in violence might reasonably be foreseen. Indeed, it is virtually inevitable. If Whataburger hires more crack dealers as managers and puts them in charge of equally inviting stores, it should expect more of the same.

When the controlling legal rules are applied correctly, foreseeability is obvious. According to black-letter agency law, an employer's duty to maintain a safe workplace is evaluated in light of the employer's "special knowledge" of known risks in its industry. RESTATEMENT (SECOND) OF AGENCY §§ 493, 495 (1958). Here, Barton introduced unusually definitive evidence from industry and government authorities that demonstrate, beyond all doubt, the "special knowledge" of employers in the late-night retail industry.

But turning safe workplace law upside down, the Majority refused even to discuss the industry evidence and the controlling rules of agency law about "special knowledge." Instead, it opted to extend the prior similar incidents test applicable to random crime in premises liability cases to an employer liability case—contrary to this Court's precedent. *See Sears, Roebuck & Co. v. Robinson*, 154 Tex. 336, 280 S.W.2d 238 (1955). Worse, even in premises liability law, that test applies only to random crime—not targeted crime. Chief Justice Jefferson has noted that it does not "account for crimes that may have been eminently foreseeable despite their never having occurred at a particular place before." *Trammell Crow Central Texas, Ltd. v. Gutierrez*, 267 S.W.3d 9, 19 (Tex. 2008) (Jefferson, C.J., joined by Hecht, Brister & Johnson, JJ.). Nobody seriously disputes that, in certain industries, violent crime is foreseeable due to the "character of the business." RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965). The industry consensus that has emerged among late-night, cash-based businesses is a compelling illustration of that rule. This is not a premises liability case, but even if the Court wishes to view it in that light, this unique record and the "character of the business" test meet Chief Justice Jefferson's call for a more comprehensive view of foreseeability. The judgment should be reversed.

ARGUMENT

As a non-subscriber to the worker's compensation system, Whataburger is liable for negligence that causes injury to its employees. TEX. LABOR CODE ANN. § 406.033. Every employer owes certain non-delegable duties to its employees, which include a duty to provide a safe workplace and a duty to use reasonable care in hiring fellow servants. These duty rules have been settled since the 19th Century:

> *It is the duty of the master to exercise ordinary care to furnish him a safe place in which to work,* safe machinery and appliances, *to select careful and skillful co-workers,* and, in case of a dangerous and complicated business, *to make such reasonable rules for its conduct as may be proper to protect the servants employed therein.*

Texas & New Orleans R. Co. v. Bingle, 91 Tex. 287, 288, 42 S.W. 971, 971 (1897) (emphasis added); *see also Farley v. M. M. Cattle Co.*, 529 S.W.2d 751, 754 (Tex. 1975); *Fort Worth Elev. Co. v. Russell*, 123 Tex. 128, 135-36, 70 S.W.2d 397, 401 (1934); PROSSER & KEETON ON TORTS § 80 (5th ed. 1984). Thus, the existence of a duty is not seriously contested in this case.

Still, the Majority used foreseeability analysis to narrow the scope of the duty, looking to premises liability law rather than employer-employee law. *See* Op. at 462. That approach is technically erroneous, and it reveals that the Majority viewed this case from a fundamentally distorted perspective—viewing the case as a suit among strangers, rather than a suit against a master for injuries to a servant. But that is not the fatal flaw. Barton readily acknowledges that foreseeability must exist to prove proximate causation, so the Majority was right to search for evidence of foreseeability. The fatal flaw is that, when the Majority did so, it applied the wrong test of foreseeability to these claims.

This Court frequently says that foreseeability does not require a party to anticipate "the precise manner in which an injury will occur"; it is enough if the "general character" of the injury might reasonably have been foreseen. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001). Accordingly, the Majority started with the right idea, explaining that "[t]he question involves a practical inquiry, based on common experience applied to human conduct." Op. at 463 (citing *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995)). Unfortunately, the Majority failed to heed what "common experience" actually teaches, as well as the facts admitted by Whataburger's own officers and experts, which decisively establish the element of foreseeability.

I. Because the Duty to Provide a Safe Workplace Requires Employers to Act With Special Knowledge of Known Risks, Industry and Government Data Identifying an Industry-Wide Risk Raises a Fact Issue on Foreseeability.

A. Employers Owe a Duty to Maintain a Safe Workplace.

As one of its non-delegable duties, every employer owes a duty to provide its workers with a safe place to work. *Birmingham v. Gulf Oil Corp.*, 516 S.W.2d 914, 917 (Tex. 1974); RESTATEMENT (SECOND) OF AGENCY § 492 (1958); *see Leitch v. Hornsby*, 935 S.W.2d 114, 117 (Tex. 1996) ("For decades, this Court has recognized that this duty is an implied part of the employer-employee relationship.") (citing *Missouri, Kan. & Tex. Ry. v. Hannig*, 91 Tex. 347, 351, 43 S.W. 508, 510 (1897)). Of course, this duty does not make the employer an insurer of its employees' safety; it simply means that the employer has a duty to use ordinary care in providing a safe workplace. *I.M. Werner v. Colwell*, 909 S.W.2d 866, 869 (Tex. 1995). In doing so, employers are obligated to act in light of the special knowledge they possess about their industry.

B. Discharging the Safe Workplace Duty Requires Employers to Act With "Special Knowledge" of the Known Risks in Their Field.

This Court has held that the safe workplace duty arises from the law of agency. *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 21 (Tex. 1993) ("Under the principles of agency law employers are responsible for providing a safe workplace to their own employees."); *Stier v. Reading & Bates Corp.*, 992 S.W.2d 423, 433 (Tex. 1999) ("We held in *Exxon Corp. v. Tidwell* that an employer's duty to provide a safe workplace is generally derived from agency principles."). The doctrinal framework is crucial, because the law of agency plainly instructs that employers must act with "special knowledge" in their field.

To provide a safe workplace, an employer must act with "special knowledge," RESTATEMENT (SECOND) OF AGENCY § 493 cmt. a (1958), which is defined in terms of "such knowledge as to the conditions likely to harm his servants as persons experienced in the business and having special acquaintance with the subject matter have." *Id*. § 495. Thus, an employer owes a duty to "operate his business in light of expert knowledge" and "utilize any additional knowledge which in fact he has for the protection of his servants." *Id*. at cmt. b. The employer also "is required to inform himself of current advances and of the progress in industries of the same nature as his own." *Id.* at cmt. c.

This rule is only fair. Employers that opt out of the workers compensation system and elect to retain common-law liability agree to be measured by common-law principles. Freedom to choose the common-law standards entails a responsibility to live up to them or live with the consequences—a point that Justice Keyes made succinctly in her dissent. *See* Op. at 482 (Keyes, J., dissenting). By opting out, Whataburger chose these rules.

For all these reasons, Whataburger cannot seriously deny that it is bound by the "special knowledge" rule set forth in Sections 493 and 495 of the Restatement of Agency. Indeed, those sections are just a specific application, in the employer-employee context, of a very general rule: "General industry practice or knowledge may establish a basis for foreseeability to show negligence." *Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 581 (Tex. 2001); *see also Leadon v. Kimbrough Brothers Lumber Co.*, 484 S.W.2d 567, 568 (Tex. 1972) (holding that "the custom in the industry would be proper evidence on the issue of negligence"). The "special knowledge" rule is Texas law.

C. The Evidence Overwhelmingly Proves Foreseeability Under This Test.

We have recounted in detail evidence of the "special knowledge" possessed by the late-night, cash-based fast-food industry. *See* pp. 2-3, above. The fast-food industry has known for more than 20 years that armed robberies are foreseeable at 24-hour restaurants. CR 438-40, 526. Studies began in the 1970s and were widely published by the 1990s. CR 438, 526; Supp. CR 225-30, 237. In the 1980s and 1990s, most fast-food restaurants adopted these concepts and implemented state-of-the-art robbery prevention procedures. CR 438. OSHA even published official guidelines for late-night employers in the 1990s. CR 439; Supp. CR 198-99, 218. This record contains compelling proof of a consensus among industry and government authorities about the risk posed by late-night, cash-based businesses that fail to implement adequate safety measures and cash-handling protocols. Because Whataburger had to know "of current advances and of the progress in industries of the same nature as [its] own," RESTATEMENT (SECOND) OF AGENCY § 495 cmt. c, there is no doubt that this risk was foreseeable under the controlling legal rules.

This consensus is a paradigm of "common experience applied to human conduct," the classic test for foreseeability. What is more, Whataburger *actually foresaw* this risk. Whataburger itself proved foreseeability when it reacted to the risk of crime at No. 196 by employing off-duty police officers for protection. CR 440; *see* Supp. CR 254, 258-59. Without this off-duty police coverage, the crime rate at No. 196 would have been higher. CR 440. Unfortunately, the new general manager thought hiring off-duty police officers was not "cost-effective," so she terminated their services shortly before Dean's murder. CR 440-41; Supp. CR 87, 90, 258-59, 263-65. That fact *alone* establishes foreseeability. Because Whataburger had to "utilize any additional knowledge which in fact [it] has for the protection of [its] servants," RESTATEMENT (SECOND) OF AGENCY § 495 cmt. b, evidence of such "additional knowledge which in fact [it] has" is independently sufficient to raise a triable issue of fact on the question of foreseeability.

The notion that an employer could employ additional security, then deny that it had any reason to anticipate the "general character" of criminal activity at this location, blinks reality. Justice Jennings politely said as much in his thorough dissenting opinion: "Although the restaurant did temporarily employ off-duty police officers after these robberies, it terminated their services, and Whataburger should have foreseen the risk that violent crime would return because 'basic fast-food robbery prevention measures were not implemented to fill the deterrence void.'" Op. at 476 (Jennings, J., dissenting).

What did the Majority say about this industry consensus and actual knowledge? Nothing. It ignored the evidence entirely, choosing to apply a different legal rule instead. But it followed the wrong legal rule.

D. The Prior Similar Incidents Test Is Inapplicable to Targeted Crime in the Employer-Employee Context and Inadequate on Its Own Terms.

The Majority eschewed the Restatement rules regarding special knowledge in an employer-employee safe workplace case, treating this case like a premises liability suit among strangers. Based on that paradigm, the Majority held the sole test of foreseeability is the "prior similar incidents" test from *Timberwalk Apartments Partners, Inc. v. Cain*, 972 S.W.2d 749 (Tex. 1998). There are three significant problems with that approach.

First, this Court has long held that premises liability rules among strangers do not govern safe workplace claims between master and servant. That distinction was honored for half a century, until a stray opinion by the Fourteenth Court of Appeals rejected it. The Majority was seduced by the Fourteenth Court's heresy, leading it astray.

Second, even if premises liability rules are to be applied to safe workplace claims, at the very least those rules must be applied in harmony with the employer's obligation to act with "special knowledge" of the risks in its field. The same Restatement section that sets forth the prior similar incidents test for foreseeability of violent crime on a premises also sets forth a corollary concerning "the character of the business." At a minimum, employers cannot ignore "the character of the business" in providing a safe workplace.

Third, even in the pure premises liability context, the prior similar incidents test is under criticism nationwide and requires refinement. Chief Justice Jefferson has called for a more comprehensive test of foreseeability. This case is *not* a premises liability action, but even if it is viewed in that light, this record of industry and government knowledge easily satisfies the "character of the business" rule set forth in the Restatement of Torts.

1. The Majority opinion violates this Court's *Sears* decision.

First, the Majority opinion erases a traditional distinction between employer cases and premises liability cases. For 50 years, this Court has condemned such intrusions: "The two fields of law (landowner-invitee and master-servant) are entirely separate, and they should be kept so." *Sears, Roebuck & Co. v. Robinson*, 154 Tex. 336, 340, 280 S.W.2d 238, 240 (1955). Unfortunately, a flawed opinion from the Fourteenth Court led the Majority astray.

This is not a premises liability case. If passing hoodlums spotted a Whataburger customer in the parking lot and tried to snatch her purse, her case against Whataburger would be a premises case. Her case would rise or fall under the prior similar incidents test of *Timberwalk* and its progeny. But this is a nonsubscriber case against an employer. The employer owes its employees the duty to provide a safe workplace. If an employee sues for breach of that duty, that is not a premises case. *See Sears*, 280 S.W.2d at 240. The distinction is material, for reasons that we have alluded to in the previous section: Employers owe their employees a greater duty than premises owners owe to strangers. Hence the two distinct fields of law should not be confused.

This Court's opinion in *Sears* explained the reasons underlying this legal rule. *Sears* noted that similarities exist between premises liability law and master-servant law, but it insisted that these two areas must remain separate nonetheless. The Majority, however, quotes *Sears* in such a way as to imply the opposite. It quotes only the language that *Sears* found to be *unpersuasive*, removing the qualifying word "While" and inserting ellipses thereafter to replace this Court's actual conclusion:

The Supreme Court in *Sears*	**The Majority Opinion Below**
The two fields of law (landowner-invitee and master-servant), are entirely separate, and they should be kept so. While 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, we see no sound reason for extending the no-duty concept of denying liability from the landowner-invitee field of the law to the master-servant field. [280 S.W.2d at 240]	Although premises liability and employer liability are distinct theories, the Texas Supreme Court has observed that "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 …." [276 S.W.3d at 466]

The Majority turned *Sears* upside down. In its defense, this error did not start in the First Court. It started in *Allen v. Connolly*, 158 S.W.3d 61 (Tex. App.—Houston [14th Dist.] 2005, no pet.), in which Justice Kem Thompson Frost admitted that she "found no Texas case" using the prior similar incidents rule of premises law to evaluate an employee's case against an employer. *Id.* at 67. But she used it anyway.

The Majority erred in following *Allen* and skidding from employer liability law to premises liability law. If *Sears* is to be overruled, that power belongs only to this Court, not to a lower court. This Court should not allow the *Allen* heresy to persist any longer, especially since it has spread to another court of appeals and caused a 6-3 en banc split. *See* Op. at 480 (Jennings, J., dissenting) ("*Sears* does not support the panel's and the Fourteenth Court's conclusions that a *Timberwalk* analysis applies in either case."). Reaffirming *Sears* is especially crucial because it is correct.

2. Employers are required to evaluate the foreseeability of crime in light of the "character of the business."

This Court's holding in *Sears* that premises liability law and safe workplace law "are entirely separate, and they should be kept so," *Sears*, 280 S.W.2d at 240, was not an artificial effort to maintain doctrinal lines for the sake of theoretical purity. It was rule with a reason: Employers owe statutory and common-law duties to employees that they do not owe to invitees. That distinction matters because the prior similar incidents test is just one aspect of the Restatement's approach to the foreseeability of violent crime. Additionally, the Restatement instructs courts to consider "the character of the business." RESTATEMENT (SECOND) OF TORTS § 344 cmt. f. The "character of the business" rule fuses perfectly with the employer's obligation to act with "special knowledge" about the known risks inherent in its field. As such, the Majority committed two errors in this case: first, it erroneously looked to premises liability law rather than employer-employee law, and second, it overlooked the one part of premises liability law that fits in this context.

To be clear, this is not a premises liability case and the lines should not be blurred. But insofar as there is fusion between premises liability and employer liability principles, it turns on the character of the business. An employer's long-standing obligation to act with "special knowledge" of the risks in its field (which traces back to the early cases of the 19th Century, *see* p. 16) is all about risks rooted in the "character of the business." *See* pp. 18-19, above. That rule is black-letter law. *See* 27 AM.JUR.2D § 205 (2009 ed.) ("It is the duty of the employer to exercise ordinary or reasonable care, commensurate with the nature of the business, to protect the employee from the hazards incident to it.").

Recognizing the fusion of these rules is theoretically sound, and it also reconciles the injustice of the decision in this case with the apparent justice of the decision in *Allen*. Here, as we have explained, there is a litany of industry and government authorities that highlights the risks faced by late-night, cash-based businesses. Where the industry itself recognizes that a particular risk goes with the territory, the law should reflect that reality. In the *Allen* case, by contrast, the plaintiff was working at a suburban insurance agency. "While at work during regular business hours, Allen was robbed and sexually assaulted by an armed assailant." *Allen*, 158 S.W.3d at 63. No employee participated in the crime. There is no reason to think the "character of the business" (a suburban insurance agency) posed any foreseeable risk; that case was a far cry from the circumstances of this case. Thus, the result in *Allen* appears to be right, even if its handling of *Sears* was wrong.

By clarifying that an employer's obligation to act with "special knowledge" entails an obligation to foresee dangers that are associated with the "character of the business," the Court can defend the honor of its *Sears* decision and harmonize this case with *Allen*. This record of industry and government authorities reveals a foreseeable risk based on the "character of the business," whereas the *Allen* case revealed no similar basis for liability. Lacking any colorable basis to allege foreseeability based on the character of the business and the special knowledge of her employer, Allen had no evidence at all of foreseeability. But this case is different precisely because it includes unusually robust evidence of the "character of the business," and this Court should say so. As Justice Keyes explained, under that standard there is no question that the summary judgment must be reversed. Op. at 482 (Keyes, J., dissenting).

3. The "character of the business" rule satisfies the need for a comprehensive approach to the foreseeability of violent crime.

Because this is not a premises liability case, there is no need to proceed beyond the "special knowledge" rules of agency law to decide this case. Still, Chief Justice Jefferson has called for a more comprehensive approach to foreseeability in premises liability law, *Trammell Crow*, 267 S.W.3d at 19 (Jefferson, C.J., concurring), and courts nationwide are retreating from exclusive reliance on the prior similar incidents test. Ronald Steiner, *Policy Oscillation in California's Law of Premises Liability*, 39 MCGEORGE L. REV. 131 (2008) (citing cases). This record perfectly illustrates the "character of the business" test, which completes the foreseeability analysis set forth in Section 344 of the Restatement.

At the outset, it is essential to realize that the prior similar incidents test is rooted in RESTATEMENT OF TORTS § 344. *See Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 n.28 (Tex. 1998) (citing § 344). Section 344 sets forth the rule that foreseeability is the necessary predicate to any duty to guard against criminal conduct: "Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur." RESTATEMENT OF TORTS § 344 cmt. f. It then proceeds to set forth a variety of circumstances under which foreseeability is established:

> ***If the place or character of his business, or his past experience***, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965) (emphasis added).

The prior similar incidents test set forth in *Timberwalk* and other premises cases governs the criteria to judge whether foreseeability of criminal activity has been proved on the basis of "place" and "past experience." It requires that "the evidence must reveal 'specific previous crimes on or near the premises' in order to establish foreseeability." *Timberwalk*, 972 S.W.2d at 756. The various categories of proof required by that test (similarity, frequency, locality, proximity, publicity, etc.) are derived from the focus on "place" and "past experience" in Section 344—a point that is made explicit by the cases upon which *Timberwalk* relied. *See Timberwalk*, 972 S.W.2d at 756 n.34 (citing cases); *see also Boren v. Worthen Nat. Bank of Arkansas*, 921 S.W.2d 934, 940-41 (Ark. 1996) ("The second test is the Prior Similar Incidents Test. Courts that have employed this approach have focused on the existence of prior similar incidents to determine whether a particular crime was foreseeable. The duty to police premises found in the Restatement (Second) of Torts is the underpinning of this approach, *see* § 344, cmt. f.)."

The Court may wish to seize this occasion (and this exceptional record) to make clear that Texas follows *all* of Restatement § 344, not just the prior similar incidents test. This is the analytical approach to which Chief Justice Jefferson alluded last year when he observed that the prior similar incidents test is unsuitable as a one-size-fits-all yardstick, arguing that a mature law of foreseeability must "account for crimes that may have been eminently foreseeable despite their never having occurred at a particular place before." *Trammell Crow*, 267 S.W.3d at 19 (Jefferson, C.J., concurring). What would make a crime "eminently foreseeable" despite the lack of prior incidents at a particular location? Obviously, it is the "character of the business."

This truth should be self-evident. If the nature of a business makes no difference to the foreseeability of crime, why do neighboring stores often have different security? Because all businesses are not created equal. Banks, bars, and 24-hour burger joints are more tempting targets than a real estate office. For example, suppose a jewelry store sits next door to a realtor's office. The prior similar incidents test treats them all the same. Yet "common experience applied to human conduct" tells each of us that the risks differ. The jewelry store needs more security because of the "character of the business."

To take another example, the reader of this document may be sitting in an office protected by keyed elevators, metal detectors, and armed security guards downstairs. Why? Is something wrong with the neighborhood? No. After all, no such protection is needed around the corner at the Texas Chili Parlor. The issue is the nature of the work, *i.e.*, "the character of the business," not the street address.

In its focus on the "character of the business" as well as "place" and "experience," Section 344 reflects a fundamental tenet of tort law. As Prosser & Keeton explain it, foreseeability (or "risk") is "defined as a danger which is apparent, or should be apparent, *to one in the position of the actor*." PROSSER & KEETON ON TORTS § 170 (5th ed. 1984) (emphasis added); *see also* RESTATEMENT (SECOND) OF TORTS § 289(b) & cmt. m (explaining that actors with superior knowledge must exercise their superior knowledge). In this context, "one in the position of the actor" knows more than the street address and recent criminal activity in the area. Business owners also know the nature of the business and whether it is a magnet for crime. For this reason, foreseeability analysis must take account of industry knowledge about the "character of the business."

There is nothing novel about this idea. As a general principle, it is well-settled. "General industry practice or knowledge may establish a basis for foreseeability to show negligence." *Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 581 (Tex. 2001); *Leadon v. Kimbrough Bros. Lumber Co.*, 484 S.W.2d 567, 568 (Tex. 1972) (holding that "the custom in the industry would be proper evidence on the issue of negligence"). While this Court has not had an opportunity to apply the general principle to the particular context of foreseeable criminal activity, other Texas courts have done so, adopting the Restatement test. *See Kendrick v. Allright Parking*, 846 S.W.2d 453, 456-57 (Tex. App.—San Antonio 1992, writ denied); *Garner v. McGinty*, 771 S.W.2d 242, 246 (Tex. App.—Austin 1989, no writ).[3] The Court may wish to make it clear that Texas law follows *all* of Restatement § 344—not simply one part of the Restatement approach.

This case perfectly illustrates the wisdom of the rule. This crime was not random; it attacked a specific target—the cash register—in an effort to take advantage of known weaknesses in store security. The crime did not come at the hands of a drunk teenager who just happened upon the store and impulsively attacked a customer in the parking lot. The *Timberwalk* tool for determining the foreseeability of random crimes by strangers does not fit this fact pattern. The Majority agreed the prior similar incidents test seems "more applicable to random crime than targeted crime." Op. at 467. Yet it felt obliged to apply that test just the same. That is unsound, and this Court should say so.

[3] *See, e.g., Walkoviak v. Hilton Hotels Corp.*, 580 S.W.2d 623, 625 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.); *Morris v. Barnette*, 553 S.W.2d 648, 649 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.); *Allright, Inc. v. Pearson*, 711 S.W.2d 686, 690 (Tex. App.—Houston [1st Dist.] 1986), *aff'd in part and rev'd in part on other grounds*, 735 S.W.2d 240 (Tex. 1987).

This case perfectly illustrates the wisdom of "the character of the business" test because the very risks that invited this criminal act are the risks that had been publicized in industry and government publications for a generation. Greg Love chose to orchestrate an armed robbery of his own store precisely because it lacked the security measures and cash-handling procedures that have become industry standards. *See* pp. 2-6, above. Chris Dean was not the unlucky victim of random crime. He was the targeted victim of a crime that is characteristic of an entire industry. It was "eminently foreseeable."

This Court is now considering a case that involves the prior similar incidents test. *Del Lago Partners, Inc. v. Smith*, No. 06-1022 (orally argued December 6, 2007). There, the Court is asked to decide whether particularized facts relating to a single incident can satisfy the foreseeability test (without regard to the *Timberwalk* analysis of prior events). That case illustrates that there is tension at the margins of the prior similar incidents test. This case offers another aspect of the same basic problem: The prior similar incidents test is well-suited to claims about random criminal acts that take place without prior warning, but it is not a one-size-fits-all test of foreseeability. Under the full Restatement approach, the "character of the business" may make a risk just as foreseeable as prior criminal acts.

To be clear, this is not a premises liability case, and it can be decided narrowly under the "special knowledge" rules applicable to employer liability cases. Nevertheless, given this unusual record, the Court might wish to use it as an opportunity to make clear that Texas follows the full Restatement approach to the problem of foreseeable crime. Doing so would fill the gap identified by Chief Justice Jefferson in *Trammell Crow* and it would maintain harmony between Texas law and Restatement § 344.

II. An Employer's Admissions of Foreseeability Cannot Be Ignored in a Negligent Hiring Case.

The Majority did not question the existence of a duty to use reasonable care in hiring managers. RESTATEMENT (SECOND) OF AGENCY § 505 (1958). Nor did it doubt that Whataburger breached that duty by failing to conduct a thorough background check and application process, thereby failing to learn that Love was a convicted crack dealer. Op. at 463-64. But it held that his conviction as a drug dealer "did not make his eventual participation in an aggravated robbery leading to murder reasonably foreseeable." *Id*. Because there was no indication that Love had been involved in a violent crime before, the Majority held his orchestration of an armed robbery was unforeseeable. Op. at 464. In this respect, the Majority erred by focusing on what was *not* in the record while ignoring what *was* staring it in the face. This theory offers a distinct basis for reversal.

A. Whataburger Admits That Its Manager Posed a Foreseeable Risk.

The Majority went astray by turning the foreseeability inquiry into an abstract test, legalistically parsing various criminal offenses. *See* Op. at 464 (explaining that Love's "criminal acts of selling cocaine and failing to pay child support are different from an aggravated robbery—neither crime inherently requires violence or theft, the two essential ingredients of an aggravated robbery"). Is this analysis "a practical inquiry based on 'common experience applied to human conduct'"? *Doe*, 907 S.W.2d at 478. Surely not. The relevant question is not whether a judge thinks drug dealing "indicate[s] a propensity for violent criminal conduct" in the technical manner of a sentencing guidelines decision, *id*., but whether Whataburger management thought so (or should have).

According to the orthodox statement of the rule, a particular risk is foreseeable if its "general character" should have been foreseen by "a person of ordinary intelligence." *Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 546, 549-51 (Tex. 1985); *see also Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001); *Read v. Scott Fetzer*, 990 S.W.2d 732, 737 (Tex. 1998). Whether a risk is foreseeable is judged from the perspective of the reasonable person under the circumstances—no more, and no less. *Id*. Plaintiffs cannot prove foreseeability by "theorizing an extraordinary sequence of events whereby the defendant's conduct brings about the injury," *Doe*, 907 S.W.2d at 478; likewise, defendants cannot deny risks that "might reasonably have been contemplated." *Id*. The Majority badly lost sight of that standard here, substituting a legalistic analysis of criminal law for the "practical inquiry" of a reasonable person—as shown in this record, with exceptional clarity, by the admissions of Whataburger's own witnesses.

The record reveals that Whataburger's own witnesses agreed that Love posed a foreseeable risk. Merely summarizing this evidence exposes the fact issue.

Whataburger's area manager testified that felons are not eligible to be managers, and Love should never have been hired. "If I was aware that he had committed a felony, sir, I would not have hired him." CR 474; Supp. CR 405, 449, 510-11.

Whataburger's security consultant testified that Love's conviction for drug dealing made him ineligible for any management position in the cash-based fast food industry. Why? "I don't know quite how to answer that — it's so obvious, I don't know how to answer the question. He's not the type of person that you would want running the store." Supp. CR 452; *see also* CR 465-66; Supp. CR 86, 95-97.

Whataburger's screening agent testified that he would not have hired a drug dealer because, if a managerial applicant has a history of drug dealing or other violent crime, "it's a chance they'll do it again." Supp. CR 55-56; CR 406.

Whataburger's expert agreed that a convicted felon "has a potential to steal from the company" and has "the capability of setting up, as an inside job, a robbery that could end up hurting either an employee or a bystander." Supp. CR 363 ("The answer is yes."). Whataburger's expert admitted that his risk is a well-known matter of historical fact. *Id*. ("It has happened, yes."). "Whether it was foreseeable in certain industries," Whataburger's expert admitted, "the answer is yes." Supp. CR 364; *accord id*. at 370-71 ("Yes. The corporation can suffer and so can their co-workers, correct.").

Whataburger's witnesses simply admitted what everyone in this industry knows: In the fast-food and convenience store industries, managers are frequently responsible for illegal activity, theft of cash, and robberies. *See* CR 444-45; *see also* Supp. CR 395-96. If a cash-based, 24-hour retail restaurant hires a crack cocaine dealer as a night manager, what "general character" of event might occur? Justice Jennings found it "self evident":

> It is reasonable to infer that a person who is willing to sell narcotics to acquire money unlawfully, a crime that carries with it the threat of serious criminal punishment and significant periods of confinement, and a person who has in fact been convicted on two counts of dealing narcotics, would also be willing to engage in other unlawful conduct, such as theft and robbery, to acquire money unlawfully. It seems self evident that a fast-food restaurant, in order to provide a safe working environment for its other employees, should consider these simple facts before hiring a convicted narcotics dealer to serve as the night manager of one of its restaurants.

Op. at 478 (Jennings, J., dissenting). Justice Jennings was absolutely correct.

B. The Panel's Effort to Divorce Criminal and Civil Law Is Unsound.

How, in light of this record, did the Majority conclude the risk was unforeseeable? The Panel ignored Whataburger's admissions entirely in favor of a legalistic distinction between drug trafficking and violent crime. That is not "a practical inquiry based on 'common experience applied to human conduct.'" *Doe*, 907 S.W.2d at 478. In addition, the Majority's distinction cannot be tolerated. Since the 1980s, federal courts have been noting the link between drugs and violence.[4] Texas courts agree.[5] Any claim that denies that link is "false to the point of absurdity." *Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991) (Kennedy, J., joined by O'Connor & Souter, JJ., concurring).

Still, the Majority dismissed this reality. It "acknowledge[d] that courts, including ours, have recognized a street-level connection between drugs, weapons, and violence." Op. at 465. Yet the Majority denied that someone who poses a danger to the police may pose a danger to the public. The Majority felt that the drug-violence link is just "stereotypical, and is necessary to protect police officers and to deter drug crimes." *Id.* "A stereotypical connection, however, is insufficient to raise more than a scintilla of evidence that a person convicted of selling cocaine, without any accompanying evidence of violence, will foreseeably commit aggravated robbery leading to murder in the future." *Id.* That holding, which is difficult even to follow, should be overturned.

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[4] *See, e.g., United States v. Brown*, 913 F.2d 570, 572 (8th Cir. 1990); *United States v. Trullo*, 809 F.2d 108, 113 (1st Cir. 1987); *United States v. Post*, 607 F.2d 847, 851 (9th Cir. 1979); *United States v. Oates*, 560 F.2d 45, 62 (2d Cir. 1977); *United States v. Brown*, 188 F.3d 860, 865 (7th Cir. 1999) (drug dealing is a crime "infused with violence.").

[5] *See, e.g., Carmouche v. State*, 10 S.W.3d 323, 330 (Tex. Crim. App. 2000); *Davis v. State*, 119 S.W.3d 359, 363 (Tex. App.—Waco 2003, pet. ref'd); *Farmer v. State*, 47 S.W.3d 187, 193 (Tex. App.—Texarkana 2001, pet. ref'd).

If foreseeability truly turns on "common experience applied to human conduct," then a "street-level connection" is sufficient. This risk is obvious to an entire industry, Whataburger's own officers and experts, and criminal law. Why is civil law different? Whataburger defends this contradiction, but the federal courts and American criminal law know foreseeability when they see it. Justice Jennings, an experienced former prosecutor, thoroughly debunked the idea that the connection between drugs and violence is purely stereotypical and somehow unworthy of consideration in civil law: "[T]he harsh reality, as recognized by the law and the public, is that the connection between narcotics dealing and violent crime is quite real—it is not merely 'stereotypical.'" Op. at 478.

Finally, this Court should not tolerate the suggestion that constitutional rights are being abridged on the basis of a "stereotypical connection" that is not legitimate enough to withstand scrutiny in a civil case among polite society. This is a very dangerous idea, and it should be stamped out. If the "stereotypical connection" is strong enough to affect the Fourth Amendment rights of U.S. citizens and to justify harsher criminal sentences, this Court should not tolerate the notion that it would be "highly extraordinary" to permit civil liability on that same basis. RESTATEMENT (SECOND) OF TORTS § 435(2) (1965). Nothing could be more demeaning to the rule of law than a suggestion that Texas courts place greater importance on protecting capital than on protecting constitutional rights. That is not Texas law, and this Court should reject the Majority's reasoning emphatically.

PRAYER FOR RELIEF

The petition should be granted, and the judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 29, 2009, a true and correct copy of the foregoing Petitioner's Brief on the Merits was properly forwarded to the following counsel of record in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure, by Federal Express, addressed as follows:

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