

Texas 1st District Court

Provides Favorable Nonsubscriber Ruling

The Court of Appeals for the 1st District of Texas, Houston, issued a key ruling July 31 that helps clarify requirements Nonsubscribing employers must meet to provide a safe work environment.

In *Barton v. Whataburger, Inc.* 2008 WL 2930114, the court said that while a Nonsubscriber employer has a duty to its employees to provide a safe place to work, that duty is limited to "foreseeable harms." The case evolved from the fatal shooting of a northwest Houston Whataburger restaurant employee in May 2003.

The plaintiff, Rose Barton, acting on behalf of her deceased son, Christopher Dean, alleged that Whataburger was negligent in hiring Gregory Love to manage the restaurant. Dean was fatally shot when three men attempted a late-night robbery at the restaurant. Love was found to have conspired in the crime and is serving a life sentence now.

Duty to Provide Safe Work Place Limited to "Foreseeable Harms"

Barton contended that Love's prior convictions for drug possession and failure to pay child support should have been a red flag for Whataburger. Plaintiff contended the restaurant should not have hired Love to help manage the facility, and specifically that Whataburger should have foreseen this type of outcome.

The court upheld a lower court ruling and said "a danger is foreseeable if its general character might reasonably be anticipated, if not its precise manner."

To impose liability on a defendant for negligence in failing to prevent the criminal conduct of another, the facts must show more than conduct that creates an opportunity to commit a crime. The ruling, citing case law, said "...foreseeability requires more than someone, viewing the facts in retrospect, theorizing an extraordinary sequence of events whereby the defendant's conduct brings about the injury."

History of Crime Must Relate to a Specific Area or Location

The court also rejected plaintiff's argument that the restaurant generally knew of an increased risk of violent crimes at restaurants at night and should have taken steps to prevent them. It said the Texas Supreme Court has specifically held that "general evidence of crime rates and of robberies in other locales cannot create an industry standard of foreseeability" sufficient to impose a duty to prevent crime. Rather, the test for foreseeability based on such an argument depends on:

- whether any criminal conduct previously occurred on or near the property,
- how recently it occurred,
- how often it occurred,
- how similar the conduct was to the conduct under review, and
- the publicity of the occurrences, as to indicate that the landowner knew or should have known.

Crime Prevention Measures Upheld

The court wanted to make clear that businesses that take steps to prevent crime should not be punished for their efforts. It said equating preventive measures to foreseeability would virtually eliminate the foreseeability requirement for a negligence claim against a business that installs a security system or takes other preventive measures to guard against crime.

[View the full ruling](#)