Nos. 21-0363, 21-0650

In the Supreme Court of Texas

IN RE WALMART, INC. AND WAL-MART STORES TEXAS, LLC,

Relators,

Original Proceedings from the 448th Judicial District Court,
El Paso County, Texas, No. 2019DCV3471

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

INDEX OF AUTHORITIES
(continued)

Other Authorities

INDEX OF AUTHORITIES
(continued)

Rules

INTEREST OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters nationwide, including many in Texas. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus curiae*, in state courts across the country, to defend these values. *See*, *e.g.*, *Cessna Aircraft Co. v. Garcia*, No. 19-0381 (Tex. 2020); *Frlekin v. Apple Inc.*, 457 P.3d 526 (Cal. 2020); *Burningham v. Wright Med. Tech., Inc.*, 448 P.3d 1283 (Utah 2019); *DeLisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018); *Sharon P. v. Arman*, 989 P.2d 121 (Cal. 1999).

WLF's Legal Studies division, the publishing arm of WLF, has also published numerous articles by outside experts on premises liability and discovery issues like those presented here. *See*, *e.g.*, Frederick D. Baker & Denise A. Cole, *Property Owners' Liability for Criminal Acts on Their Premises: Are There Foreseeable Limits?*, WLF Contemp. Legal Notes (Nov. 1, 1997); Mark A. Behrens & Andrew W. Crouse, *High Courts Reject Premises Liability for Secondhand Asbestos Exposure*, 15 WLF Legal Op. Ltr. 25 (Dec. 16, 2005); WLF Litig. Update, *Court Refuses to Expand Premises Liability Doctrine* (Jan. 5, 2000); Mark A. Behrens &

Christopher E. Appel, *States are Embracing Proportional Discovery, Moving into Alignment with Federal Rules*, 29 WLF Legal Op. Ltr. 5 (July 17, 2020); Glenn G. Lammi, *Supreme Court Must Take Action on Lawless Discovery Order in Generic-Drug Antritrust MDL*, WLF Legal Pulse (Mar. 6, 2020).[*]

No party's counsel authored this brief in whole or in part, and no party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to this brief's preparation or submission. *See* Tex. R. App. P. 11.

[*] Available at https://www.wlf.org/wp-content/uploads/1997/11/Baker-CLN.pdf; https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/121605LOLBehrens.pdf; https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/01-05-00.pdf; https://www.wlf.org/wp-content/uploads/2020/07/07172020BehrensAppel_LOL.pdf; https://www.wlf.org/wp-content/uploads/2020/03/03062020Lammi_WLFLegalPulse.pdf, respectively.

INTRODUCTION

Twenty-three people tragically lost their lives in August 2019 at the hands of a deranged mass murderer who drove 600 miles and 11 hours from his home in North Texas to massacre shoppers at a random store in El Paso. No one but the killer could have predicted that he would commit such a heinous crime, let alone that he would do so in a city—and at a store—so wholly unconnected to himself and so far from his home. The victims' families understandably want someone to answer for this unspeakably evil act. But this lawsuit directs their sorrow and anger at the wrong target.

The law of premises liability has long held that "a person has no legal duty to protect another from the criminal acts of a third person," *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998)—with a narrow exception for instances where those acts were foreseeable. As a result, under this Court's decision in *Timberwalk*, before a premises-liability plaintiff can subject a defendant to free-ranging and burdensome discovery, he first must show that the defendant could have reasonably foreseen his injury.

This Court's intervention is needed because the trial court not only refused to apply that principle, but also derided it—criticizing *Timberwalk* as "too restrictive," and faulting this Court for what it viewed as inadequate guidance. Pet. for Writ of Mandamus (No. 21-0650) at MR_0462–63 (App. 4). But what the trial court considered "too restrictive" is the *law*—and whatever discretion trial courts might enjoy in managing discovery, there is no discretion to misapply the law.

This Court should grant mandamus relief and direct the trial court to limit discovery to the threshold question—whether Walmart could reasonably foresee that a mass murderer would choose its El Paso store to commit one of the most horrific killing sprees in history.[1]

[1] Plaintiffs have raised mootness concerns, in part because they withdrew the original problematic discovery after Walmart sought relief from this Court. But the trial court itself acknowledged that a live dispute exists over the appropriate scope of discovery in this case—during a hearing necessitated by plaintiffs' attempt to obtain by depositions the information they sought in the withdrawn discovery requests. Pet. for Writ of Mandamus (No. 21-0650) at MR_0470 (App. 4) ("appl[ying]" the September 2020 order underlying the first petition "to the scope of depositions being taken in this case"). There is little doubt that the trial court's September 2020 discovery order remains operative, rests on legal error, and continues to infect ongoing discovery proceedings. *See id.*; *In re Allied Chem. Corp.*, 227 S.W.3d 652, 655 (Tex. 2007) (refusing to find petition moot when doing so would "encourage parties to manipulate pretrial discovery to evade appellate review").

ARGUMENT

I. The trial court abused its discretion in discarding *Timberwalk*, which promotes predictability and prevents intrusive, unfounded discovery.

This Court has long recognized that predictability—that is, the avoidance of unforeseen litigation expenses—is important to both the rule of law and the economic health of the State, both of which redound to the benefit of all its citizens. *See*, *e.g., Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 29 (Tex. 2014) (noting "the consistency and predictability that is basic to the rule of law in our society"). In premises-liability suits, the foreseeability inquiry promotes predictability and takes precedence—and the trial court committed legal error by not limiting the initial discovery in this case to that question.

A. Foreseeability is the threshold consideration in any premises-liability suit.

In *Timberwalk*, this Court reinforced that holding a business liable for the criminal acts of a third party is the "exception," not the rule. 972 S.W.2d at 756. The exception applies only when a business knew or had "reason to know of an unreasonable and foreseeable risk of harm to" its patrons. *Id.* (internal quotation marks omitted); *id.* at 757 ("foreseeab[ility] must not be determined in hindsight"). In this way,

Texas's law of premises liability promotes accountability while ensuring that businesses aren't wrongly held responsible for the acts of criminals. *See id.* at 756 ("If a landowner had a duty to protect people on his property from criminal conduct whenever crime might occur, the duty would be universal. This is not the law.").

The foreseeability requirement in particular restrains the exception's scope. That requirement "protects" businesses "from liability for crimes that are so random, extraordinary, or otherwise disconnected from them that they could not reasonably be expected to foresee or prevent the crimes." *Trammell Crow Cent. Tex., Ltd. v. Gutierrez*, 267 S.W.3d 9, 17 (Tex. 2008) (internal citations omitted).

Foreseeability is thus the "*prerequisite* to imposing a duty," as *Timberwalk* taught when it disposed of a premises-liability claim because the landlord couldn't have foreseen a brutal sexual assault. 972 S.W.2d at 756, 759 (emphasis added) (foreseeability ordinarily involves consideration of five "factors—proximity, recency, frequency, similarity, and publicity"). That is, foreseeability must be established *before* the court considers the secondary question of whether it would be unreasonable to impose a duty at all. *See UDR Tex. Props., L.P. v. Petrie*,

517 S.W.3d 98, 101 (Tex. 2017) ("Foreseeability is a prerequisite to imposing a duty. But once foreseeability is established, the parameters of the duty must still be determined.") (internal quotation marks omitted).

This Court's decisions since *Timberwalk* confirm the point. Nearly all premises-liability suits considered by this Court have been decided on foreseeability alone. *See*, *e.g.*, *Trammell Crow*, 267 S.W.3d at 17 (rendering judgment in favor of business on foreseeability prong without discussion of unreasonableness); *Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654, 655 (Tex. 1999) ("focus[ing] [court's] attention in this case on 'foreseeability'"); *accord UDR*, 517 S.W.3d at 101–02 ("foreseeability has received the lion's share of the attention from Texas courts . . . we have yet to dispose of a post-*Timberwalk* case on unreasonableness grounds") (internal quotation marks omitted); *see also* Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409, 426 (2006) ("The tragically bizarre cases, which seem to feature assailants driven by a deep desire to do harm or kill, demonstrate most courts' views that, at some level of

heinousness, a criminal act causing great harm will be deemed less foreseeable than a less serious criminal act of the same variety.").

The common theme running through these cases is that foreseeability is a threshold consideration. So it follows that a premises-liability plaintiff must establish that threshold issue before he can unlock the gates to full-blown discovery.[2] *See K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431–32 (Tex. 1996) (limiting discovery in premises-liability suit when plaintiff sought "overly broad" discovery about "criminal conduct" at other K Mart stores, including those "outside Texas").

B. The courts below permitted unwieldy discovery.

Against that backdrop, there is little doubt that the trial court applied the wrong law to reach the wrong conclusion. In particular, the trial court complained that *Timberwalk* is "too restrictive" and refused to obey its limits. The court of appeals likewise failed to treat foreseeability as a threshold inquiry, permitting expansive discovery into the *secondary* question of unreasonableness. Both clearly erred.

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[2] *See In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999) ("[C]ourts may limit discovery pending resolution of threshold issues like venue, jurisdiction, forum non conveniens, and official immunity."); *Miller v. State & County Mut. Fire Ins. Co.*, 1 S.W.3d 709, 716 (Tex. App.—Fort Worth 1999, pet. denied) ("The discovery rules specifically grant a court broad discretion in limiting discovery in the interests of justice.") (citing Tex. R. Civ. P. 192.6(b)).

Start with the trial court. In a July 2020 hearing—memorialized in a September 2020 order—the trial court showed little interest in this Court's *Timberwalk* framework. In fact, its order went on to permit discovery requests plainly contrary to *Timberwalk*—requests that would require Walmart to produce burdensome materials entirely unrelated to the sole threshold question whether the horrific crime in question was reasonably foreseeable. *See* Pet. for Writ of Mandamus (No. 21-0363) at MR_0001–04 (App. 1).

The trial court recently doubled down—stating in a hearing just weeks ago that *Timberwalk* doesn't supply the relevant standard and ordering the parties to continue to adhere to its September 2020 order. *See* Pet. for Writ of Mandamus (No. 21-0650) at MR_0451–52, 0462–63 (App. 4). So right now, Walmart is under an order directing it to sit for depositions not on the foreseeability of what occurred at the El Paso store, but on crimes at Walmart stores region-wide—as well as "discovery on all the other issues of breach, a duty, . . . causation, and all the other relevant factors to the case." *Id.* at MR_0464–65, 467–70. None of this is permissible.

Rather than correct the trial court's clear abuse of discretion, the court of appeals made the same mistake. Instead of limiting the plaintiffs' inquiry to foreseeability, the court of appeals jumped ahead to secondary questions of "public policy," asking "whether . . . it is preferable to impose [some] burdens [on the premises owner] or, instead, accept the risk that a crime will occur." *In re Walmart, Inc.*, 620 S.W.3d 851, 860–61 (Tex. App.—El Paso 2021, pet. pending) (quoting *UDR*, 517 S.W.3d at 102–03). The court readily admitted that this question requires "more" discovery that goes beyond the *Timberwalk* factors. *Id.* (quoting *UDR*, 517 S.W.3d at 102–03). That's because "[b]ound up in this second question [of unreasonableness] is the social utility of the actor's conduct, the consequences of imposing the burden on the actor, and any other relevant competing individual and social interests implicated by the facts of the case." *Id.* (internal quotation marks omitted).

That error is as clear as it was avoidable. Indeed, the court of appeals *acknowledged* that the free-ranging, burdensome, and expensive discovery requests lodged against Walmart are unrelated to the foreseeability of the horrific mass murder here. *Id.* at 861–63, 865–67. But rather than end the matter there and correct the trial court's error

in refusing to apply *Timberwalk*, the court of appeals instead allowed the fishing expedition because the requests weren't "*patently* irrelevant" to the secondary question of unreasonableness. *Id.* (emphasis added).

Each request "*might*" reveal the risk of "an armed person, harboring evil intent" or "*might* inform" the "feasibility of security measures." *Id.* (emphases added). But for all the court's conjecture, it ignored *Timberwalk*'s teaching that none of this speculatively relevant evidence will mean anything *unless* plaintiffs first establish foreseeability.

In short, the trial court erred in refusing to apply *Timberwalk*, and the court of appeals compounded that error instead of correcting it. This Court should intervene to correct the errors below and direct the trial court to limit discovery to foreseeability. *Accord K Mart*, 937 S.W.2d at 431 ("The likelihood that criminal conduct on the parking lot of a[nother] K Mart store or other property [either in Texas] or outside Texas . . . will have even a minuscule bearing on this case is far too small to justify discovery.").

II. If permitted to stand, the overbroad discovery orders here will have serious implications far beyond this case.

Not only are the orders below clearly erroneous as a matter of law, but they also open the door to similar fishing expeditions in other cases

throughout the State—raising litigation costs, overburdening the judiciary, and harming businesses and consumers alike.

The problem begins with the extraordinary costs associated with litigation in the digital age—costs this Court has long recognized. *See, e.g.*, *In re State Farm Lloyds*, 520 S.W.3d 595, 610 (Tex. 2017) (noting that "e-discovery is very expensive and quite complicated"); *Brookshire Bros.*, 438 S.W.3d at 24 n.17 (recognizing "staggering costs" of discovery in the electronic age) (internal quotation marks omitted).[3] The average cost of e-discovery *alone* in a case is estimated at about $1 million, or "16 times the median household income." Eleanor Brock, *eDiscovery Opportunity Costs: What Is the Most Efficient Approach?*, Logikcull (Nov. 21, 2018).[4] In the financial give-and-take of running a business, these litigation expenses pose at least two significant problems.

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[3] S*ee also* Lawyers for Civil Justice, Civil Justice Reform Grp. & U.S. Chamber Inst. for Legal Reform, *Litigation Cost Survey of Major Companies* at 4 (2010), https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf ("Litigation transaction costs, independent of judgments awarded in disputes or settlements reached between parties, constitute a significant economic cost of doing business in the United States.").

[4] Available at https://www.logikcull.com/blog/ediscovery-opportunity-costs-infographic.

First, research confirms what common sense suggests—that consumers ultimately bear litigation costs. *See* Frederick D. Baker & Denise A. Cole, *Property Owners' Liability for Criminal Acts on Their Premises: Are There Foreseeable Limits?*, WLF Contemp. Legal Notes at 26–27 (Nov. 1, 1997).[5] *Second*, litigation costs may drive firms out of business altogether—regardless of the merits (or the lack thereof) of the litigation. *See id.*; *see also Williams v. Cunningham Drug Stores, Inc.*, 379 N.W.2d 458, 460 (Mich. Ct. App. 1985) ("[H]olding businessmen, especially those in 'high crime areas', responsible for policing the criminal conduct of third parties carries the economic potential for driving store owners out of business."); *Stafford v. Church's Fried Chicken, Inc.*, 629 F. Supp. 1109, 1110 (E.D. Mich. 1986); La Fetra, *A Moving Target*, 28 Whittier L. Rev. at 460–61.

Against that backdrop, the critical importance of enforcing *Timberwalk's* limits becomes clear. Requiring premises-liability plaintiffs to prove that their injury was reasonably foreseeable to the defendant avoids the problem of surprise litigation expenses that can raise prices for consumers and drive firms out of business. *See, e.g.*,

[5] Available at https://www.wlf.org/wp-content/uploads/1997/11/Baker-CLN.pdf.

Lefmark Mgmt. Co. v. Old, 946 S.W.2d 52, 56 (Tex. 1997) (Owen, J., concurring) ("[I]n an increasingly violent society, in which crime may be visited upon virtually anyone at any time or place, there should be some certainty and predictability about what actions will satisfy the duty of care.").

The law thus promotes predictability and stability when it requires companies to account for costs they can reasonably foresee—and doesn't hold them responsible for those they can't. Requiring businesses to pay for the unforeseen—as the orders below threaten—ultimately forces them to act as insurers. *See* La Fetra, *A Moving Target*, 28 Whittier L. Rev. at 459 ("Courts should not attempt to assist crime-fighting efforts by enlisting property owners in the battle through the threat of tort liability.") (internal quotation marks omitted). But that "is not"—and never has been—"the law." *Timberwalk*, 972 S.W.2d at 756.[6] By discarding *Timberwalk*, the decisions below threaten to upend the law—ushering in a regime in which businesses will be "treated as [ ] vicarious

[6] *Accord* Michelle Smith, *Effects of Liability Cases Are Felt Beyond Business*, Orlando Political Observer (May 30, 2020), https://orlando-politics.com/2020/05/30/effects-of-liability-cases-are-felt-beyond-business/ (encouraging the use of "smart and forward-thinking limits" in premises-liability suits to avoid "[h]olding [businesses to an] impossible standard [that] is not only unfair, [but] threatens their business, employees and wider community as well").

criminal[s]," litigation costs will increase, even meritless claims will extract settlements, and consumers will ultimately bear the brunt. Baker & Cole, *Property Owners' Liability*, WLF Contemp. Legal Notes at 26–27.

This Court should intervene, reaffirm that *Timberwalk* means what it says, and restore the limits it sensibly imposes on discovery in premises-liability cases.

PRAYER

For the foregoing reasons, the Court should grant Walmart's request for mandamus relief.

Dated: August 13, 2021

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In compliance with Texas Rule of Appellate Procedure 9.4(i)(2), I certify that this brief contains 2,879 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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Respondent

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