

# The Non-Subscriber Case Law Update

A Bi-Monthly Publication Dedicated to Detailing Recent Cases Pertaining to Non-Subscription Issues.  
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## Third Party Criminal Acts

In most cases, in order for a defendant to be negligent, even a non-subscriber employer, the plaintiff must show the event and injury are foreseeable. Below is a case that applies the requirement of foreseeability in the context of the death of an employee at the hands of a third party criminal.

In Barton v. Whataburger, Inc., 2008 WL 2930114 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2008), an employee was killed in an attempted robbery of a Whataburger restaurant in northwest Houston. What makes this case unique is a manager of the Whataburger was later convicted of conspiring with the criminals to rob the restaurant. The mother of the deceased employee sued Whataburger, a non-subscriber, arguing that Whataburger was negligent in hiring the manager, failed to provide a safe workplace and failed to exercise reasonable care to prevent the robbery. The trial court granted a no evidence motion for summary judgment in favor of Whataburger which was appealed by the Plaintiff to the First Court of Appeals in Houston. The court cited to established Texas law that criminal conduct of a third party is a superseding cause of any negligence of a defendant. That said, if the criminal conduct is a foreseeable result of the prior negligence of a defendant, the criminal act may not excuse the defendant's negligence. To impose liability on a defendant for failing to prevent another's criminal act, the plaintiff must show not just that the negligence created an opportunity for a criminal act, but must show that the defendant knew or should have known, that as a result of its acts, the crime, or one like it, might occur. Texas law requires that the criminal conduct must have been reasonably foreseeable at the time the defendant engaged in the negligent conduct.

With regard to negligent hiring, the First Court of Appeals held Whataburger's failure to discover a criminal conviction in Indiana from 1993 for selling cocaine and a felony conviction for non-payment of child support were insufficient to establish foreseeability because had Whataburger discovered these convictions, it is not reasonably foreseeable that someone with this criminal history would participate in an aggravated robbery. The court distinguished his criminal history from the aggravated robbery by stating that the two convictions do not contain either of the elements present in an aggravated robbery; namely, theft and violence. The court of appeals also noted that the conspiring manager had not engaged in any conduct during his seven months as manager which would have led Whataburger to anticipate he would participate in the aggravated robbery.

With regard to her unsafe workplace allegation, the plaintiff argued that Whataburger knows generally of the risk of crime at restaurants that are open late at night and failed to take reasonable security measures to prevent crime. To show a crime was foreseeable, the plaintiff must show the premises owner had certain knowledge or should have had certain knowledge which demonstrated a risk of criminal conduct. In determining whether Whataburger breached a duty, Texas courts generally examine five factors: 1) whether criminal conduct occurred on or near the property prior to the criminal event at issue; 2) how recently the prior criminal conduct occurred in relation to the event at issue; 3) how often the prior crimes occurred; 4) how similar the prior crimes were to the crime at issue; and 5) the publicity of the crimes in order to show the property owner/ employer knew or should have known about the prior crimes. The plaintiffs had evidence of nine criminal incidents in the six years prior to the crime at issue. The prior crimes ranged from shootings to an arrest for refusing to leave the premises. The court of appeals found it noteworthy in upholding the summary judgment that there had been no aggravated assault, aggravated robbery, sexual assault or murder on the premises in the three years before the Plaintiff's death and the restaurant had not been robbed nor had there been any attempted robberies. As a result, the court of appeals found that there was no evidence of rampant, violent criminal activity which was needed to raise a fact issue on foreseeability. The Plaintiff even had expert testimony that there was an industry standard of foreseeability arising from other Whataburger robberies and convenience store robberies which was likewise rejected by the court of appeals. Instead, the court of appeals cited to established case law that in analyzing the five factors the court is to look at a small geographic area that is in the vicinity of the property. The court of appeals even rejected as sufficient evidence of foreseeability that the prior manager of the Whataburger restaurant had employed a security guard for early morning hours, a practice which was discontinued for budgetary reasons. The court held that Whataburger's preventative measures did not mean it was foreseeable that a manager would participate in an aggravated robbery or third parties would commit an aggravated robbery.

Finally, the court of appeals found that the acts of the manager and his violent accomplices were superseding causes to the alleged negligence of the other Whataburger managers in failing to follow proper money handling procedures.

### Comment:

*As egregious as the facts can sound in a case where an employee has been injured or killed by the criminal acts of a third party, Texas law has limited even a non-subscribing employers liability for those third party's acts. What would seem to be relevant, and what plaintiff's counsel will focus on, are preventative measures and events that occur at other locations. What is clearly the key in analyzing the employer's risk is what they knew about the criminal activity at the location where the crime took place.*

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