

**THE TEXAS SUPREME COURT DELIVERS A RARE VICTORY TO PERSONAL INJURY PLAINTIFFS IN *STATE V. SHUMAKE***

*By David V. Wilson II*

In an opinion which “bucks the trend” of its anti-Plaintiff reputation, the Texas Supreme Court resolved a split among the intermediate appellate courts by ruling that Texas’ recreational use statute does not reinstate sovereign immunity for premises liability claims arising on state-owned recreational properties. *State v. Shumake*, 49 Tex. S. Ct. Journal 769 (June 23, 2006). The case arose when nine year old Kayla Shumake was drowned while swimming and tubing in the Blanco River in Blanco State Park. In the wrongful death suit against the State of Texas, her parents alleged that the undertow which caused her to drown was created by a submerged man-made culvert. Further, the plaintiffs contended the State knew of this danger because of reports of previous near-drownings made to the Parks Department.

At the trial court, the State urged a plea to the jurisdiction asserting that the recreational use statute barred Plaintiffs’ premises defect claims by eliminating the waiver of governmental immunity provided by the Texas Tort Claims Act for such claims. The trial court denied the plea. On the interlocutory appeal, the court of appeals affirmed the trial court, concluding that the Shumakes had adequately pled a premises liability claim as contemplated by the Texas Tort Claims Act, and that the recreational use state dealt with a lower standard of care, not immunity. See *State v. Shumake*, 131 S.W.3d 66, 73-81 (Tex. App. – Austin 2004, pet. granted). The Texas Supreme Court granted the State’s petition for review, concluding it had jurisdiction over the interlocutory appeal due to certain courts of appeal reaching differing results on the same issue.

The State’s logic before the Texas Supreme Court pointed to language at Texas Civil Practice & Remedies Code Sec. 75.002 which provides that the State only owes a claimant

injured on State-owned recreational property the duty owed to a trespasser. The State contended that by classifying the entrant and user of recreational property as a trespasser, the Legislature reinstated the immunity for premises defects waived by the Tort Claims Act. Its reasoning concluded that because a landowner generally has no duty to warn trespassers of dangerous conditions or make its property safe for them, it follows that a trespasser cannot complain of such things.

In an opinion authored by Justice Medina, a majority of the Texas Supreme Court disagreed with the State's logic. First, the Court pointed out that both the Restatement of Torts and Texas common law contemplate circumstances under which a landowner can be liable to a trespasser. In particular, landowners owe a duty to refrain from injuring the trespasser willfully, wantonly or through gross negligence. Second, the Court looked to language in the statute at 75.002(d) which provides it is not intended "to limit the liability of [a landowner] who has been grossly negligent or has acted with malicious intent or in bad faith." Thus, a landowner can be liable for gross negligence by creating a condition that the recreational user would not reasonably expect on the property in the course of the permitted use. Since the Shumakes' pleadings alleged just such a condition, they sufficiently stated a premises liability claim under the recreational use statute, a claim which was covered by the waiver of sovereign immunity in the Tort Claims Act. The Court of Appeals was, therefore, affirmed.

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