

# IN THE SUPREME COURT OF TEXAS

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No. 99-0108

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TEXAS DEPARTMENT OF TRANSPORTATION, PETITIONER

v.

LUKE W. ABLE, BEN DEES AND GEORGE HANS KNOLL, COEXECUTORS OF THE  
ESTATE OF MARGARET ABLE, DECEASED, RAMONA LEE DEES, AND  
SYLVIA JANE KNOLL, RESPONDENTS

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ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

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**Argued on November 7, 1999**

JUSTICE OWEN, joined by CHIEF JUSTICE PHILLIPS and JUSTICE HECHT, dissenting.

I cannot join in the Court's opinion or judgment because it is based on the premise that vicarious liability can be imposed on the State of Texas for the negligence of one of its political subdivisions under the common-law theory of joint enterprise. There are two elements of a tort cause of action based on joint enterprise that are not satisfied by the relationship between the State and its political subdivisions when they are providing core governmental functions. One of those elements is that the members of a group must have an equal voice in the direction of the enterprise which gives rise to an equal right of control. The other is that there must be a common pecuniary interest in a commercial setting. Neither of those elements exists when the State is sued for the negligence of a state-created transit authority in carrying out day-to-day operations of a highway that runs through a city.

Because the jury in this case failed to find the State negligent and because joint enterprise is not a viable basis for imposing vicarious liability on the State for the negligence of its political subdivision, I must dissent.

## I

The jury in this case was asked to determine whether the State's negligence proximately caused the accident in question and whether Metro's negligence proximately caused the accident. The jury answered "no" with regard to the State, but "yes" as to Metro. Thus, the State's direct negligence was submitted to the jury. The Respondents, to whom I will refer collectively as the Ables, failed to obtain a finding that the State was negligent for its role in operating and maintaining the Highway 290 HOV lane.

The Ables nevertheless contend that Metro's negligence should be imputed to the State because, they claim, the State and Metro were engaged in a joint enterprise. A joint enterprise necessarily assumes that there are two or more individuals or distinct entities that are members of a group. This Court held in *Shoemaker v. Estate of Whistler* that one of the elements of joint enterprise is that there is an agreement, express or implied, "among the members of the group." 513 S.W.2d 10, 16 (Tex. 1974). Although Metro and the State are distinct in the eyes of the law for some purposes, just as a subsidiary corporation is distinct from its parent corporation in the eyes of the law for most purposes, Metro is part of the State itself. It is a political subdivision of the State. *See Metropolitan Transit Auth. v. Plessner*, 682 S.W.2d 650, 651 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, no writ).

One element of a tort cause of action based on joint enterprise is that the members of the group must have "an equal right to a voice in the direction of the enterprise, which gives an equal

right of control.” *Shoemaker*, 513 S.W.2d at 17. The State has a superior right of control over its political subdivisions. *See City of Fort Worth v. Zimlich*, \_\_\_ S.W.3d \_\_\_, \_\_\_ (Tex. 2000) (stating that a city “derives its existence and powers from legislative enactments and is subject to legislative control”). Indeed, the Operations and Maintenance Agreement between the State and Metro expressly recognizes that the State had the ultimate control of the HOV lane on which the Ables were injured. The Operations and Maintenance Agreement provides in its recitals that the “controlled-access highways . . . are under the ultimate control and supervision of the State.” Similarly, the Agreement provides in a paragraph entitled “Use of Facilities” that “the highway facilities upon which Transitways are constructed are under the ultimate control and supervision of the State.” This Court made clear in *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716 (Tex. 1995), that even when two separate entities have a common pecuniary interest in a jointly sponsored event, there cannot be a joint venture if one party has a superior right of control. In that case, the Court stressed no less than three times that the right to control was not equal. *See id.* at 718-19. The Court held in *Triplex* that the owner of a bar had a greater right of control over the serving of alcohol than the radio station that highly publicized and co-sponsored “Ladies Night” at the bar. *Id.*

In the case before us today, the jury has decided that the State, which had the superior right of control, was not liable, but that Metro, which had some right of control but not an equal one, was negligent. The overlay of joint venture liability does not fit the facts of this case.

## II

Another element of a joint venture that is absent in this case is a pecuniary interest in the common purpose of a venture. Over twenty-five years ago, this Court reassessed the requirements for establishing a joint enterprise in the common-law tort context. *See Shoemaker*, 513 S.W.2d at

10). We disavowed earlier decisions that had held that a joint enterprise could be established merely by a showing that there was joint ownership of an instrumentality or property involved in an injury. *See id.* at 16-17. We also disavowed earlier decisions that had imposed liability when there was no pecuniary interest in the common purpose. *See id.* The Court stressed in *Shoemaker* that tort liability for a joint venture would henceforth arise only in *commercial* situations. *Id.* at 17. Providing, operating, and maintaining public highways is not a commercial enterprise.

In *Shoemaker*, two owners of an aircraft along with two passengers perished when the plane crashed during a voluntary search and rescue mission. *Id.* at 11-12. This Court held that although the two owners had “a joint interest in the purposes of the enterprise and an equal right of control,” that was not enough to impute the negligence of the pilot-owner to the passenger-owner. *Id.* A pecuniary interest *in the purpose of the enterprise* was lacking. *See id.*

In the case before the Court today, the purpose of the Operations and Maintenance Agreement is to provide streets and highways for the citizens of Houston and of this state. While the State and Metro spend millions of dollars providing that service, they have no pecuniary interest in the purpose of the enterprise. They do not provide the service in order to benefit financially. They are providing a core governmental function. Their public service is no different from the public service that was at issue in *Shoemaker*, which was a civil air patrol. *Id.* at 12.

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Because Metro is a political subdivision of the State, because there is not an equal right of control, and because the State has no pecuniary interest in the purpose of providing, operating, and maintaining public highways, the State should not be vicariously liable under a joint venture theory. Accordingly, I dissent.

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Priscilla R. Owen  
Justice

OPINION DELIVERED: July 6, 2000