

The Court states that “sitting on a swing is the type of activity that the Legislature intended to include as recreation when they enacted the Statute.” ___ S.W.3d at ___. But the Court gives no explanation why sitting on a swing is like the other activities on the list (which at the time included hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, cave exploration, water skiing and water sports), and cites no evidence of legislative intent to support its conclusion. The Court does note several courts of appeals’ decisions concluding that swinging is included within the scope of the recreational use statute, but none of those opinions contains anything more than the same conclusory statement the Court now makes about the Legislature’s intent. *See City of Lubbock v. Rule*, 68 S.W.3d 853, 858 (Tex. App.–Amarillo 2002, no pet.) (concluding that using playground equipment is “akin to ‘picknicking’ (albeit without the food)” and thus that it is an activity associated with enjoying nature or the outdoors “cannot reasonably be disputed”); *Flye v. City of Waco*, 50 S.W.3d 645, 647 (Tex. App.–Waco 2001, no pet.) (applying recreational use statute to pushing a swing when plaintiffs “agree on appeal that they went to the park to engage in activities that fall within the scope of [the statute]”); *Kopplin v. City of Garland*, 869 S.W.2d 433, 441 (Tex. App.–Dallas 1993, writ denied) (“We conclude that playing on playground equipment on the City’s playground is a recreational activity contemplated under [the recreational use statute.]”); *Martinez v. Harris County*, 808 S.W.2d 257, 260 (Tex. App.–Houston [1st Dist.] 1991, writ denied) (concluding that a “reasonable meaning of ‘recreation’ would include the activity of swinging on a swing-set provided for public use”), *disapproved of on other grounds by City of Dallas v. Mitchell*, 870 S.W.2d 21, 23 (Tex. 1994).

Neither this Court nor those courts of appeals explain why sitting on a swing is like the other activities on the list. Because the list includes some things but not others, and those choices represent the Legislature's policy decisions regarding those activities, in my view we should discern the common characteristics among the activities on the list, and then determine if swinging shares those characteristics, keeping in mind the history and purpose of the statute.

The Legislature enacted the recreational use statute in 1965. Act of May 29, 1965, 59th Leg., R.S., ch. 677, § 1, 1965 Tex. Gen. Laws 1551-52. The statute originally did not define recreation, but limited landowner liability only when the owner gave permission to another to enter the premises for purposes of "hunting, fishing and/or camping." *Id.* In 1981, the Legislature reorganized the statute, limiting landowner liability to when the owner gave permission to another to enter the premises for "recreational purposes," and defined recreational purposes as "activities such as hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing and water sports." Act of May 30, 1981, 67th Leg., R.S., ch. 349, § 1, 1981 Tex. Gen. Laws 934. The statute was codified as chapter 75 of the Civil Practice and Remedies Code in 1985. Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3229.

The Legislature further amended various provisions of the statute in 1989, 1995, 1997, and 1999. Act of April 26, 1989, 71st Leg., R.S., ch. 62, § 1, 1989 Tex. Gen. Laws 374-75; Act of May 15, 1989, 71st Leg., R.S., ch. 736, § 1, 1989 Tex. Gen. Laws 3299; Act of May 26, 1995, 74th Leg., R.S., ch. 520, §§ 1-4, 1995 Tex. Gen. Laws 3276-77; Act of April 24, 1997, 75th Leg., R.S., ch. 56, § 1, 1997 Tex. Gen. Laws 124; Act of May 18, 1999, 76th Leg., R.S., ch. 734, 1999 Tex. Gen. Laws 3345. And

it has added to the list of activities included as recreation by increments: adding “cave exploration” in 1989, and “bird watching” in 1997. Also in 1997, the Legislature added a general phrase to the end of the list: “any other activity associated with enjoying nature or the outdoors.” Act of April 24, 1997, 75th Leg., R.S., ch. 56, § 1, 1997 Tex. Gen. Laws 124. In 1999 the Legislature added to the definition of recreation certain activities taking place inside municipal facilities – hockey, in-line hockey, skating, in-line skating, roller-skating, skateboarding, and roller-blading. Act of May 18, 1999, 76th Leg., R.S., ch. 734, § 1, 1999 Tex. Gen. Laws 3345.

The text and history of the recreational use statute demonstrate that its purpose, like that of similar statutes around the country, is to encourage landowners to allow the public to enjoy outdoor recreation on the landowner’s property by limiting the landowner’s liability for personal injury. *See Tarrant County Water Control & Improvement Dist. No. 1 v. Crossland*, 781 S.W.2d 427, 437 (Tex. App.–Fort Worth 1989, writ denied), *disapproved of on other grounds by City of Dallas v. Mitchell*, 870 S.W.2d 21, 23 (Tex. 1994); *see also McMillan v. Parker*, 910 S.W.2d 616, 618 (Tex. App.–Austin 1995, writ denied) (“The statute appears to have been intended as a limited exception to the traditional common-law duties owed by landowners for the specific purpose of creating recreational facilities for the general public.”); *Lipton v. Wilhite*, 902 S.W.2d 598, 600 (Tex. App.–Houston [1st Dist.] 1995, writ denied) (“[T]he purpose of the 1981 amendment [adding additional activities to definition of recreation] was to encourage private landowners to open their land for public recreation free of charge by reducing the possibility of lawsuits by persons injured on the premises.”); *see generally Centner, Revising State Recreational Use Statutes to Assist Private Property Owners and Providers of Outdoor Recreational*

Areas, 9 BUFF. ENVTL. L.J. 1 (2001); Miller, Annotation, *Effect of Statute Limiting Landowner's Liability for Personal Injury to Recreational User*, 47 A.L.R.4th 262 (1986).

Torres was injured in 1996, when the list of recreational activities included hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, cave exploration, and water skiing and other water sports. Whether one considers playing competitive softball at a municipal softball complex the determinative activity, as did the court of appeals, *see* 40 S.W.3d at 664, or sitting on a swing as the determinative activity, as the Court does today, neither of those activities seems to me to be encompassed within the plain language of the Legislature's nonexhaustive list. The list suggests that recreation includes outdoor activities that generally take place in an open, natural setting, but it does not indicate that all activities that may take place outdoors are included. Nothing in the list or the Court's opinion identifies legislative intent to include sports facilities and playgrounds.

Moreover, neither of the two most recent additions to the definition of recreation support the Court's conclusion that sitting on a swing is included within the statute's scope. The 1997 amendment adding the general phrase, "any other activity associated with enjoying nature or the outdoors" does not mean that the Legislature intended to expand the scope of the statute to all activities that occur outdoors. While playing or watching softball or using or sitting on a swing are activities that can occur outdoors, the general phrase must be read in connection with the list that precedes it. Hunting, fishing, hiking, camping, nature study, and the other listed activities limit the broader general meaning of recreation and convey a theme different from that of sports facilities and playgrounds. And, as the court of appeals explained, when a statute sets out a specific list followed by a general phrase, "the general phrase is interpreted by the

‘*ejusdem generis*’ canon of construction, which states that the general phrase is limited to the same types of things that are listed more specifically.” 40 S.W.3d 662, 665. The 1999 amendment that expanded the definition of recreation to include certain indoor activities also does not indicate a broader, general intent to include all sports and playground activities, but instead identifies specific hockey and skating activities.

These later amendments reinforce to me that the Legislature intended the recreational use statute to govern outdoor nature activities and certain specified sporting activities—but not playing organized sports or using playground equipment. The common characteristics of activities on the list are that they take place out on open land or water in places that would typically not be available for public use, not that they simply occur outdoors. And the Court’s decision today has the effect of removing parks from the list of governmental functions for which a municipality’s sovereign immunity is waived under the Tort Claims Act, simply because parks are usually located outdoors and the Court has decided that any activity occurring outdoors is within the scope of the recreational use statute. *See* TEX. CIV. PRAC. & REM. CODE § 101.0215(a)(13). By expanding the statute to include things unlike those on the list, the Court is making very different policy choices from those made by the Legislature. And the Court’s decision today has the effect of removing parks from the list of governmental functions for which a municipality’s sovereign immunity is waived under the Tort Claims Act, simply because parks are usually located outdoors and the Court has decided that any activity occurring outdoors is within the scope of the recreational use statute. *See* TEX. CIV. PRAC. & REM. CODE § 101.0215(a)(13). If the Legislature had intended to include a municipality’s negligent maintenance of a swing set in a municipal park as within the scope of the recreational use statute, it could have easily said so; but it is not this Court’s province to enlarge upon the

Legislature's policy choices when neither the language of the statute nor the legislative history supports that expansion.

Because the Court attributes more to the Legislature's intent than the Legislature has said in the statute, without citing to any legislative history or other supporting authority, I cannot join its opinion.

Accordingly, I respectfully dissent.

Deborah G. Hankinson
Justice

OPINION DELIVERED: October 31, 2002