

# IN THE SUPREME COURT OF TEXAS

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No. 04-0460  
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THE STATE OF TEXAS AND THE TEXAS PARKS AND WILDLIFE DEPARTMENT,  
PETITIONERS,

v.

RICKY SHUMAKE AND SANDRA SHUMAKE, INDIVIDUALLY AND AS PERSONAL  
REPRESENTATIVE OF THE ESTATE OF KAYLA SHUMAKE, DECEASED,  
RESPONDENTS

=====  
ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS  
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**Argued April 12, 2005**

JUSTICE WAINWRIGHT, concurring.

This case is relatively straightforward. The question is whether the plaintiffs pled facts sufficient to constitute a claim for gross negligence against the Texas Department of Parks and Wildlife. If so, they satisfied the pleading requirements for a limited waiver of sovereign immunity created by the Legislature under the recreational use statute.

Kayla Shumake and her parents were swimming and tubing at Blanco State Park when an undertow pulled Kayla underneath the water into a culvert where she drowned. The Shumakes pled that the Department constructed and maintained a drainage culvert under a park road that created a

dangerous and hidden undertow in an apparently popular swimming area when the level of the Blanco River was elevated. The Shumakes pled that the Department knew that, only days before Kayla Shumake drowned, one or more persons had nearly drowned at the same site from the same risk. The Shumakes also pled that the Department knew of the continuing risk yet failed to warn of the undertow in the swimming area. The Shumakes pled that they did not know of the undertow and could not have known of the danger in the exercise of ordinary care. Thus, the Shumakes alleged facts to support their contention that (1) viewed objectively from the Department's standpoint, its failure to warn involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others and (2) the Department had actual, subjective knowledge of the risk involved but nevertheless acted with conscious indifference to the safety of the guests swimming in the park. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225 (Tex. 2004); *City of Bellmead v. Torres*, 89 S.W.3d 611, 613 (Tex. 2002).

Under the recreational use statute and the Texas Tort Claims Act, the Legislature waives sovereign immunity if the Department is grossly negligent. TEX. CIV. PRAC. & REM. CODE §§ 75.002(c)-(d), 101.058. That holding is a bridge we crossed in *Miranda*, relying on the common law gross negligence standard. 133 S.W.2d at 225. I agree with the Court that the Shumakes pled a claim for gross negligence and satisfied the Legislature's requirements for a limited waiver of liability for their lawsuit against the Department. I do not concur in any broader view of the limited waiver in the recreational use statute.

The dissent suggests that the Court's conclusion defies common knowledge: "[n]o one needs to be warned that it is dangerous for a nine-year-old child to go tubing in a rushing river during high

water.” \_\_ S.W.3d \_\_, \_\_. If the Department presented evidence that the danger was obvious by virtue of observable “rushing” water flowing through the swimming area, the result in this case might be different. But the Shumakes’ pleadings contain no such reference and the Department presents no assertions or evidence to controvert the Shumakes’ allegation that they had no knowledge of the undertow. The dissent also criticizes the Court’s result as imprudent, commenting that “[n]ature is not safe. In many instances, that is its beauty. We can make a river safer by removing every rock and posting warning signs every 50 feet, but it is no longer a river—it is a waterpark. We can make a bridge safer by creating higher and longer spans, but only at some cost in both dollars and scenic beauty.” *Id.* No one would doubt the truth of these statements. But surely the dissent would concede that the Legislature knew these elementary facts about parks and rivers when it passed the recreational use statute. In fact, the Legislature is in a superior position to determine the conditions and dangers of the State’s parks, as well as the Department’s ability to warn of perils or make them safe. From this position of greater knowledge, the Legislature made its decision and drafted the recreational use statute as a limited waiver of the State’s sovereign immunity. Even if we disagreed with the Legislature’s assessment of parkland risks, we are bound by the Legislature’s choice and should not displace it with our own.

I concur in the Court’s judgment.

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J. Dale Wainwright  
Justice

**OPINION DELIVERED:** June 23, 2006