RECREATIONAL USE STATUTE UPDATE

by
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What is the Recreational Use Statute?

The recreational use statute, in the most basic sense, limits the liability of not only the state, but also the liability of others who open their land for recreational purposes.[1] The recreational use statute limits the liability of a landowner or an occupier of real property by establishing that the owner or occupier does not assure that the premises are safe for recreational purposes and does not assume responsibility for the actions of those admitted to the property.[2] The statute creates a classification classifying an invited recreational user of the property as a trespasser, therefore, imposing that limited standard of care upon the landowner.[3] The recreational use statute, however, does not limit the liability of a landowner who has been grossly negligent or has acted with malicious intent or bad faith.

State of Texas v. Shumake [4]

The Texas Supreme Court in *State of Texas v. Shumake* considered the effect of the recreational use statute on a premises liability claim against the state. The Court addressed the significant question presented by the state—the state's claim that the recreational use statute reinstates governmental immunity for premises liability claims arising on state-owned recreational properties. The Court responded that the recreational use statute does not reinstate immunity for premises liability claims, but only raises the burden of proof by classifying a recreational user of state-owned property as a trespasser and requiring proof of gross negligence, malicious intent, or bad faith.[5] The majority opinion recognized an obvious implication arising out of their analysis—specifically the question of whether a landowner owes a duty to warn of the inherent dangers of nature. The *Shumake* Court reasoned, perhaps too abruptly, that a landowner has no duty to warn or protect a trespasser from obvious defects and dangers; therefore, a property owner may assume that the recreational user does not need to be warned to appreciate natural dangers such as a cliff, a rushing river, or a concealed rattlesnake.[6]

City of Waco v. Kirwan[7]

It took a little less than three years for the question regarding the danger presented by natural conditions to make it back before the court when the court heard arguments in *City of Waco v. Kirwan*.[8] The *City of Waco* case was based upon an accident occurring in April 2004 where a college student fell off a cliff to his death while he was watching boat races in Cameron

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1 *See* TEX. CIV. PRAC & REM CODE §§ 75.001-.004.
2 See TEX. CIV. PRAC & REM CODE § 75.002(c)(1), (3).
3 *See State of Texas v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006)
4 199 S.W.3d 279 (Tex. 2006)
5 *See id*. at 281.
6 *See id*. at 288.
7 298 S.W. 3d 618 (Tex. 2009)
8 *See id*.

Park. To reach to the cliff's edge, the student apparently crossed a low rock wall constructed by the City that was situated in front of the cliff's edge which was accompanied by a sign that stated: "FOR YOUR SAFETY DO NOT GO BEYOND THE WALL." The student sat on the edge of the cliff whereupon the rock beneath him crumbled causing the student fell 60 feet to his death.[9] The evidence showed that the cliff was in its natural state and was never modified or altered by the City.[10] The case was dismissed in favor of the City at the trial court level. The City relied upon the *Shumake* decision in its plea to the jurisdiction for the proposition that the City, as the landowner, may not be grossly negligent for failing to warn of the "inherent dangers of nature." The trial court agreed and dismissed the case.[11]

The Court of Appeals in a divided opinion ruled that *Shumake* does not stand for the proposition that all natural conditions are per se open and obvious or that a natural condition may never serve as the basis for a premises defect claim.[12] The Court of Appeals ruled that the recreational use statute allows a premises defect claim based upon natural conditions as long as the condition is not open and obvious and the plaintiff furnishes evidence of the landowner or occupant's gross negligence. The Court of Appeals reversed and remanded.[13]

The Supreme Court granted the City of Waco's petition for review to determine whether, under the recreational use statute, a landowner owes a duty to warn or protect recreational users against the dangers of naturally occurring conditions. Restated slightly the question considered by the court was as follows: does a landowner owe a duty to warn or protect recreational users under the recreational use statute against the dangers of naturally occurring conditions?

The Court, in its analysis, reviewed the recreational use statute and the common law principles underlying premises liability and took into consideration the type of harm, the overall purpose of the recreational use statute, and the public policy considerations in imposing a higher duty of care upon the government. In general, in its analysis, the Court focused upon the following factors and considerations:

1. The Tort Claims Act waives immunity and sets forth the duty owed in premises liability cases—that the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property unless the claimant pays for the use of the property;[14]

2. As recognized in *Shumake*, while the recreational use statute references a trespasser standard, it actually creates a specialized standard of care that differs from the common law trespasser standard—and that this specialized standard requires landowners to refrain from gross negligence or from acting with malicious intent or in bad faith;[15]

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[9] *See id*. at 620.
[10] *See id*.
[11] *See id*. at 621.
[12] *See id*.
[13] *See id*.
[14] *See id*. at 623.
[15] *See id*.

3. Applying the common law principles with trespassers, the City would have no duty to warn or protect against natural conditions; [16]

4. However, as stated in *Shumake*, the common law trespasser standard is not determinative; instead the statutory standard which adopts the gross negligence standard does control which means that the Court must refer to the traditional common-law duty analysis; [17]

5. Unique to this analysis is the fact that liability is premised on a statute, therefore, the court cannot ignore its text and purpose;[18]

6. That nature is full of risks and that while landowners can be assumed to be knowledgeable of the types of animals and formations located upon their property and can foresee the risks associated with human interaction, reasonable recreational users visiting the property for recreational purposes will also have or at least should have awareness of the inherent risks involved in interacting with nature. Therefore, relying on its opinion in *Shumake*, the Court reasoned that inherent risks associated with natural conditions will be foreseeable for both the landowner and the recreational user;[19]

7. That while foreseeability of the risk is the dominant consideration, foreseeability alone is not sufficient to justify the imposition of a duty; other factors such as the likelihood of harm must also be considered;[20]

8. The likelihood of harm resulting from specific natural conditions (and the type of recreational activity) will of course vary depending upon the location and type of natural condition. Applying the facts from this case, the Court reasoned that the likelihood of harm at the edge of a sheer cliff has the potential to be great since a cliff's edge is an inherently dangerous condition;[21]

9. The public policy implications of imposing a duty of care and thus liability upon the City; the question is whether it is appropriate to impose upon the City or any other landowner, any duty that would force a property owner to resort to defensive measures if only to avoid showing "conscious indifference to the rights, safety, or welfare of others;"[22]

10. That to impose a duty upon the City or other property owners, a landowners would err on the side of avoiding obvious harm to others from dangers on their property by posting warning signs, use of fences, or closing dangerous areas—in other words—simply closing off certain property from recreational use altogether; such actions begin to conflict with and defeat the general purpose behind the recreational use

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[16] *See id*.
[17] *See id*.
[18] *See id*. at 624.
[19] *See id*.
[20] *See id*.
[21] *See id*. at 624-625.
[22] *See id*. at 625 (quoting *Shumake*, 199 S.W. 3d at 284).

statute which is to encourage landowners to open up their property for recreational use in the first place;[23]

11. and, it is generally unreasonable and unduly burdensome to ask the landowner to seek out and warn or make safe every naturally occurring condition that may be dangerous. The magnitude of such a burden would be intense.[24]

The Court's Ruling

The Court did not exclude the possibility of a claim that may be premised upon an injury caused by a naturally occurring condition under limited circumstances, however, the court held that under the recreational use statute, a landowner generally owes no duty where a claim is premised on an injury caused by a naturally occurring condition.

What the Court's Ruling Does Not Address

As specifically stated by the Court, the Court's holding in *City of Waco v. Kirwan* does *not* mean:

1. That a landowner may never be liable for gross negligence related to a natural condition under circumstances not involved in this case;

2. The Court has defined which conditions are transformed from "natural" to "artificial" due to a landowner's modifications;

3. That a party may escape liability even if acting in bad faith or with malice just because the conduct relates to a natural condition; and,

4. That a landowner may not be held liable under certain circumstances who has undertaken affirmative acts related to natural conditions, such as recommending a certain area or assuring a user's safety.[25]

Summary

In terms of effectively summarizing purpose and intent the *City of Waco v. Kirwan* opinion contains the most fitting and appropriate summary of the purpose behind the recreational use statute:

> The Legislature has left decisions about what size human footprint should be left on our state's lands to landowners, park rangers, and patrons. The recreational use statute imposes duties and liability in some instances as discussed above, but exhibits an overall policy choice to leave wild lands as they are and trust visitors to use reasonable caution.[26]

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[23] *See id*.
[24] *See id*. at 625-626.
[25] *See id*. at 627.
[26] *See id*.