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Supreme Court of Texas.
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.
No. 04-0460.

April 12, 2004

Appearances:
Danica Lynn Milios, (argued), Office of the Texas Attorney General, Austin, TX, for petitioners.
Les Mendelsohn, (argued), Les Mendelsohn & Associates, P.C., San Antonio, TX, for respondents.

Before:

Justice Wallace B. Jefferson, Justice Don R. Willett did not participate, Justice Harriet O'Neill, Justice David Medina, Justice P aul W. Green, Justice Nathan L. Hecht, Justice Dale Wainwright, Justice Phil Johnson, Justice Scott A. Brister.

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JUSTICE JEFFERSON: The Court is ready to hear argument in 04-0460, the State of Texas and the Texas Parks and Wildlife Department v. Ricky Shumake.
SPEAKER: May it please the Court. Ms. Danica Milios will present argument for the petitioner. Ms. Milios requested five minutes for rebuttal.

ORAL ARGUMENT OF DANICA LYNN MILIOS ON BEHALF OF THE PETITIONER

MS. MILIOS: May it please the Court. The Texas Tort Claims Act and the recreational use statute strictly define the class of cases for which a governmental entity may be liable in the suit. The Shumakes premises liability claims while outside the scope of the Tort Claims Act Waiver because they are barred as a matter of law the definition by the recreational use statute. And contrary to the Court of Appeals conviction, they may not rephrase their premises liability claims as claims for gross negligence. Therefore, the Court should reverse the

Court of Appeals decision and dismiss this case for lack of subject matter jurisdiction.

The proper resolution of this case depends upon two very basic principles. First is the common law trespasser standard and the second is this Court's holding in Keetch v. Kroger. For over 100 years, we have understood common law trespasser standard not to give the landowner any duty with respect to the premises. That means he owes no duty to seek out dangers on his property, correct dangers that he is aware of, or make warning regarding dangers that he is aware of with respect to trespassers. The only duty a landowner has as a trespasser on his property is as to his conduct, not to engage in gross negligence or intentional misconduct.

JUSTICE HECHT: But would you agree that the recreational use statute contemplates that the landowner knows that there will be people in and out of his property?

MS. MILIOS: Of course. The Legislature intended that that would be the effect of the recreational use statute.

JUSTICE HECHT: So, wouldn't it be consistent that the standards should be in some form of a known trespasser?

MS. MILIOS: No, your Honor. We do not believe that's the case at all. If the Legislature had intended the known trespasser standard to apply, it would've said so. And it could have done exactly what [inaudible]. In the discussions in the Legislature leading up to the enactment of the recreational use statute and subsequent amendments, the Legislature debated whether to acquire landowners to warn of dangerous conditions about which the landowner knew and the user of the property did not. Had the Legislature chosen that standard, that would've been the licensee standard. But that standard didn't pass the Legislature.

JUSTICE HECHT: I'm curious, what do you think the common law is apart from this? As I understand it, if I want to work on the sprinkler system in my backyard and I don't finish in the day and there's a big hole out there, I don't have any responsibility to work off that hole or trying to keep people from falling, is that your understanding?

MS. MILIOS: That's correct.

JUSTICE HECHT: Conveniently, however, I know that kids run back and forth in my backyard and sometimes at night, and it wouldn't hurt my feelings if they fell on that hole and quit doing that. I'm not really hoping for that but I'm just saying it wouldn't hurt my feelings, still no liability there?

MS. MILIOS: No, your Honor. Under that circumstance, the attractive nuisance doctrine would result [inaudible] --

JUSTICE HECHT: No, they don't know. They -- you think my yard isn't attractive [inaudible]? [laughs]

MS. MILIOS: If the -- you -- I would say that it is possibility I guess. If you know that children come and run around your yard and you know they're going to be there and you dug a hole in your backyard then that's -- that's a possible cause of action under the attractive nuisance doctrine. As to an adult trespasser though, your Honor, absolutely not. If the trespasser comes upon your property, you are not required to prepare for that trespasser to come, making and taking any reasonable precautions or post any warning signs in anticipation that that trespasser would come.

JUSTICE HECHT: Even though I'm relatively sure he's probably gonna come.

MS. MILIOS: That is absolutely true. The --

JUSTICE HECHT: What if I really do warning to stop common and I

hadn't been able to get him stopped, so I dig a hole hoping he'll -- I intend, I put it in his path.

MS. MILIOS: No, that of course will be a mantrap or a pitfall and that -- that would be intentional misconduct on your part, and the common law trespasser standard does make room for that liability. Intentional injury caused by traps set by the landowner will support liability for the trespasser against the landowner. Because we have no duty for the trespasser to take care with respect [inaudible] --

JUSTICE HECHT: Is there a carve out for grossly negligent conduct?

MS. MILIOS: There is a carve out for -- I wouldn't call it a carve out though. Let me reanswer that question.

JUSTICE HECHT: What is contemporaneous grossly negligent conduct? What is that?

MS. MILIOS: Contemporaneous negligently -- negligent gross conduct --

JUSTICE HECHT: Correct.

MS. MILIOS: -- would be active gross negligence, which the Court stated as long ago in 1943 in Texas Gas Cities -- Texas Gas Cities Co. v. Dickens that the trespasser is only entitled to protection from active gross negligence and has no right to recover for passive gross negligence. Because --

JUSTICE O'NEILL: Let me ask about a different -- let's slightly change Justice Hecht's example. Let's suppose you know children are playing in your backyard. There is a big old hole back there. Kids know it's there. You know it's there. You know that when it rained -- rained heavily that hole fills up with water; the children don't. The child comes through your yard as they normally do and drowned in the hole. Are you liable?

MS. MILIOS: I think that again would fall under the category of attractive nuisance --

JUSTICE O'NEILL: But how is this different when you put a cover out there and you know that when the rain gets to a certain level, the river gets to certain level that's gonna be a problem. How is that any different?

MS. MILIOS: Well, I think in this case, the attractive nuisance doctrine doesn't apply because the attractive nuisance doctrine doesn't apply to the governmental unit.

JUSTICE O'NEILL: Why?

MS. MILIOS: Because the Texas Tort Claims Act says so.

JUSTICE O'NEILL: If it said -- it said you treat them just like private person for trespassers, why is their duty different than private person as to a trespasser?

MS. MILIOS: We have to back up and we have to look at the recreational use statute in relation to the Texas Tort Claims Act. The recreational use statute -- pardon -- expressively does not -- pardon me -- expressly does reserve the attractive negligence -- attractive nuisance doctrine with respect to private landowners. But the Tort Claims Act does not contemplate that sort of negligence against the governmental entity. So a private landowner may be responsible for an attractive nuisance with respect to children. In this case, of course, we are talking about the Shumakes, coming into a governmental property, to a property where they had no right to assume that the person would be safe for their enjoyment. That is exactly what the Legislature intended to do putting an act to the statute. The Legislature balanced the benefits of more property being available to the public with the potential harsh consequences of a wide class of cases for which there would be no recovery. The Legislature knew what it was enacting of the

trespasser standard that there was no duty to assure the safety of the premises between the landowner and common law.

JUSTICE HECHT: Well, the fact is understandable that there was a culvert installed here.

MS. MILIOS: That's right.

JUSTICE HECHT: There -- there was knowledge of fast-flowing water when the water was above the culvert. There was knowledge of near-drownings or other potential injuries, why isn't that gross negligent conduct?

MS. MILIOS: Because that would be gross negligent conduct with failure to warn or failure to make safe. That is the duty owed to a licensee. The landowner does not owe a duty with respect to his premises. And if he owes no duty with respect to his premises, it cannot be negligence for him to fail to take action with respect to his premises. Counsel not to be a gross negligence for him to fail to take --

JUSTICE O'NEILL: Where do you -- where is the attractive nuisance carved out?

MS. MILIOS: I'm gonna have to look that up for you, your Honor, while we're on the break, but it is in the Texas Tort Claims Act. And the Court of Appeals did address that section in the opinion below.

JUSTICE HECHT: But assuming he has a park and there's a nice little stream that runs through it, and they build a bridge over the stream and they say, "Well, how sturdy should we build this bridge?" And they have to say, "Well, let's make sure it holds 50 or 80 pounds." And knowing full, well, that lots of adults are gonna walk over that bridge and it was a while somebody is gonna fall and hurt himself, probably slip. At that, the patrons of the park are suspicious that the bridges that are constructed for their use are not gonna hold them up when they walk across it, but in your view they have no cause of action against the city?

MS. MILIOS: Well, your Honor, that's correct.

CHIEF JUSTICE JEFFERSON: What's the policy rationale for that?

MS. MILIOS: The policy rationale is that the Legislature wanted more lands to be made available to the public. And I would hasten to ask --

JUSTICE HECHT: But not so we can cripple them so they can have fun.

MS. MILIOS: Exactly and there's no reason to think that governmental landowners or private landowners out there are out there intentionally designing defects on their premises, it's quite the opposite. In the hundreds of thousands of -- or at least thousands of property that is on the block of state park, for example. We only know approximately two or three incidents involving this stretch of the river --

CHIEF JUSTICE JEFFERSON: What -- what did the record show as to why there was no warning when there were previous mishaps into this very location?

MS. MILIOS: Well, of course, the record is in dispute on that, your Honor, but the information we pretty much can all agree on is there had been significant rain in the season immediately preceding the Shumakes' visit to the river and the river was at flood stage. It was up high. There were warnings posted by the department that said "Swim at your own risk. No lifeguard is on duty." The [inaudible]. The department had upon in the past experimented with putting flags up to demarcate where this culvert area was. The flags kept getting swept downstream so that didn't work. They had ordered signs. The signs that

actually expressively said "Beware of swimming in this area," but those signs had not been able to be erected prior to the Shumakes' accident. All of these though is extra duty. The -- the department didn't have a duty to warn with respect to the premises even though it took some action. It had signs posted as well at the area where people check in to pay and -- in the bathrooms, about swift water currents. The department went above and beyond the call of duty in trying to warn patrons even though it had no duty to do that. And we can't turn its' failure to warn about those defects into gross negligence because that imposes the licensee standard.

JUSTICE WAINWRIGHT: Counsel, do you agree -- I take it that Tort Claims Act carves out a limited waiver for among other things, premises defects, and injuries arising out of condition to use of the property? So your position that the recreational use statute, however, bars all premises defects claims?

MS. MILIOS: Yes, it is, your Honor, with respect --

JUSTICE WAINWRIGHT: What language in Section 75.002 provides such a bar? If certainly in (b)(2) says that the duty where first granted permission or to whom the invitation is extended is no greater than that owe to a trespasser?

MS. MILIOS: That's right.

JUSTICE WAINWRIGHT: Where does it say premises defects are expressively barred?

MS. MILIOS: Premises defect claims are barred to the trespasser and so we would urge the court to find that although, of course, you will not find language in the recreational use statute that says what I'm arguing that premises defects claims are barred. That's the effect. That was the known effect for what the Legislature did when it adopted the trespasser standard. Any comment?

JUSTICE WAINWRIGHT: So, you can't conceive of a situation where there could be a premises defect leading to injury that was caused by initially grossly negligent conduct?

MS. MILIOS: I'm certain that that could happen. But under the Court's opinion in Keetch v. Kroger, that cannot support a cause of action for premises law affirming for grossly negligent conduct. If an injury arises as the result of the premises, it is strictly a premises liability case. Premises liability cases are barred under the recreational use statute by virtue of the fact that the Legislature consciously chose the trespasser standard.

JUSTICE HECHT: But if the act were malicious, it wouldn't in matter if it happened in the past. If you maliciously constructed a defect on the property, hoping that people would be hurt, do you think there is liability or not?

MS. MILIOS: I think if a private landowner maliciously constructed a trap, hoping that patrons would fall in, absolutely that would fall unto the intentional misconduct --

JUSTICE HECHT: And that would be proved on the recreational use statute?

MS. MILIOS: It would be, for the private landowner, yes; as -- if we insert the state entity in that equation though, your Honor, no. That would be an intentional act for which the department would not be liable under Section 101.057 of the -- of the Texas Tort Claims Act. And to the extent, the Court might conclude that that act was grossly negligently done, it would simply be beyond the scope of the department.

JUSTICE WAINWRIGHT: So a state could intentionally dig a hole to intend to injure someone in a recreational use context and still have

immunity?

MS. MILIOS: Well, the Legislature has expressly stated that the state will not be liable for --

JUSTICE WAINWRIGHT: Yes or no?

MS. MILIOS: -- the intentional -- the individual absolutely would be liable.

JUSTICE WAINWRIGHT: The state?

MS. MILIOS: No, sir. The state would not be liable for the intentional misconduct. The state, absent of recreational use statute, forget that it's never liable for the intentional act, the intentional torts of its employees. The Legislature has made that clear, that certainly not on dispute today.

JUSTICE GREEN: Let me ask you this and see how far we go with this. Blanco State Park has a swimming area which recreational use and nearby are these high-tension electrical wires. One night there's a storm, one of the wires falls into the swimming area, and the state knows it. The state knows that if somebody gets into that water, they're gonna be electrocuted and killed. No liability?

MS. MILIOS: No liability, your Honor. We can sit here all day and posit horrible fact scenarios and there would be countless. In the hundreds of thousands of acres of public land that there are across the state, there are undoubtedly dangers that we know about and dangers that we don't know about. And the Legislature knew all of that when it considered how many causes of action would not get compensation if it adopted the trespasser standard under the recreational use statute. The words trespasser, invitee, or licensee have meaning that the Legislature is -- was charged with the knowledge of when it adopted the statute. It rejected a standard which would be similar to the licensee standard, duty to warn of unknown danger about which the department knows but the business and property do not. To impose liability on department in your scenario, Justice Green, would be the licensee standard. We can't do that in this case because the trespasser standard applies.

JUSTICE GREEN: But if there's a known trespasser --

MS. MILIOS: Under the known trespasser standard as the court here has found, yes. If that's the standard that applies then of course, liability applies.

JUSTICE WAINWRIGHT: You cite several times in your brief for the proposition that the state hold no duty in these circumstances to Miranda but you cite to the dissent. What in the majority opinion in Miranda support your position if there's no duty?

MS. MILIOS: Well, of course, certainly in the majority of opinion in Miranda, the court have reached the conclusion that there was no active negligence or at least there was not enough pleading and allegation of active negligence to support a cause of action under the act, and the court --

JUSTICE WAINWRIGHT: We didn't use the term active negligence in Miranda.

MS. MILIOS: You didn't, your Honor. You did not. But those were the allegations that the Miranda has had. Of course, in addition to several premises liability claims, now the department did not argue in that case. It was not presented to the court. The court did not briefing or argument on the position that we are taking here today and that is premises liability claims are not actionable. But in Miranda, the court dismissed the Miranda's claims because there was no active gross negligence although the court didn't do that case --

JUSTICE WAINWRIGHT: Well, the Miranda wasn't the issue about

whether the plaintiffs had plead gross negligence and if they had been whether there was a fact issue raised as to whether gross negligence should be determined by the finder of fact in order to determine immunity. What was the issue in Miranda about active versus passive or some other types of gross negligence?

MS. MILIOS: Of course, the court was not asked to pass upon active versus passive. That is my characterization of the Miranda's claims. The court was not asked to pass upon whether active versus passive was required. The court was not asked to pass upon whether premises liability claims existed. The plurality of the court determined that the gross negligence allegations were sufficient to bring the cause of action under the recreational use statute under Tort Claims Act. But there was not sufficient evidence to survive the department's pleading of jurisdiction. We would submit that Miranda is really the precursor to this case. This case presents the question assuming the Miranda -- pardon me -- the Shumakes have made allegations of gross negligence. Do those allegations of gross negligence arise to the type of conduct that is actionable? Not it pleads a cause of action under survival, it plead the jurisdiction based on the pleading. But does it affirmatively bring the cause of action under the Tort Claims Act or does it lack jurisdiction on its face?

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. Are there any further questions? The Court is ready to hear argument from the respondents.

SPEAKER: May it please the Court. Mr. Les Mendelsohn and Mr. Ricky Poole will present argument for the respondents. Mr. Les Mendelsohn will open with the first 12 minutes.

ORAL ARGUMENT OF LES MENDELSOHN ON BEHALF OF THE RESPONDENT

MR. MENDELSOHN: May it please the Court, Counsel. I'm Les Mendelsohn from [inaudible].

In this case, we will show the following in regard to the opinion by the court below. We are applying the statute here, and in applying the statute, the court strictly construed the terms of the statute initially in order to determine what the purpose of the statute was and the ill-effect to that purpose. Gross negligence has never, by this Court, required any contemporary conduct. We will explain to you how and why that is becoming drafted by some Courts of Appeals. Please note that the state does not challenge in its brief that we established by our pleadings and by our summary judgment evidence that the two elements of gross negligence were in fact established at the trial court level. That is, that the pleadings were sufficient and secondly that there was evidence of gross negligence that at least created a fact question.

JUSTICE O'NEILL: Your brief seems in two parts, maybe I misunderstood. I wanna be cleared about this. In the first section you argued this premises liability. There is a premises defect, it doesn't matter where -- whether it was artificial or not and the second part of your brief although you said, well, at least adopt the Restatement where they are creating artificial condition, is that correct?

MR. MENDELSOHN: Yes. But as we will show, there really is no difference if you're going to apply gross negligence as to whether the gross negligence statute is applied to a naked trespasser as opposed to the known trespasser. I will explain to you how's that true.

The standard of liability will be discussed by Mr. Poole that there was never an intent by the Legislature to eliminate a premises defect case. And under the state's theory of torts, there can -- there can never be a gross negligence case based on this premises defect. Now, the statutory cause of action --

JUSTICE O'NEILL: And my question is, does your position include -- it's just -- or just the premises itself regardless of whether it is artificially created or not?

MR. MENDELSOHN: Under the facts of this case --

JUSTICE O'NEILL: I'm not -- I'm talking about your position on the statutory construction.

MR. MENDELSOHN: Our -- our --

JUSTICE O'NEILL: Does it matter?

MR. MENDELSOHN: Yes. As it applies to the facts in this case as to the statute, if you're going to apply the so-called known trespasser --

JUSTICE O'NEILL: Let's suppose you have a trail, a mountainous trail. It's not maintained by the state but the state knows that people hike on it and then after it rained, it's partially [inaudible] and it becomes dangerous. And they know that.

MR. MENDELSOHN: You go back to the standard. If that -- if in fact that creates an extreme risk of harm, that is it's likely to cause injury and/or death, that they know those facts that it's likely to cause injury or death and they do nothing other than just let things go as -- as they were --

JUSTICE O'NEILL: What do you do about rattlesnakes?

MR. MENDELSOHN: Rattlesnakes are not what we're talking about. We're talking about --

JUSTICE O'NEILL: Well, they're on your premises. You know the rattlesnakes have been up there. You know that people hike. You know that people had been bitten several times. It's an extreme risk of harm. And you do nothing.

MR. MENDELSOHN: That is not this case, your Honor. This case deals with the artificial --

JUSTICE O'NEILL: But I'm -- I'm trying to test the limits.

MR. MENDELSOHN: Okay. Well --

JUSTICE O'NEILL: Is -- is it artificial or isn't? I mean, what are the instances --

MR. MENDELSOHN: Definitely, it's artificial. It may be a case to be decided on another day if they do not actively create the harm. They are not actively creating the harm when they allow the rattlesnakes which are part of nature to be there.

JUSTICE O'NEILL: What about the trail of survivor?

MR. MENDELSOHN: They created the trail --

JUSTICE O'NEILL: They did not create the trail but they know people have followed the trail and created it --

MR. MENDELSOHN: That -- that perhaps is not actual. But that's not this case. We're talking about where the state creates an artificial dangerous condition that it knows is likely to cause death or serious injury to a patron. That is this case and based on that concept, they should be liable --

JUSTICE BRISTER: So -- so in other words, if we set aside Big Ben Park but we have no roads leading to it, therefore we know everybody will be safe. Of course nobody can get into it, okay. What's the point of having parks that no one can get into?

MR. MENDELSOHN: Well, that is again respectfully, your Honor, that is not this case.

JUSTICE BRISTER: I know that. You say that's not your case. I know

you want a rule that just says culverts they're liable for it. Nothing else there --

MR. MENDELSOHN: Nothing. May --

JUSTICE BRISTER: -- but we can't write that rule. We're trying to say what with the statute we have, why is it applied only to your case and not everybody else's? You say, well, because it's artificially created. But if a park is to be used, they will have to be roads. There will have to be signs. There will have to be bathrooms and all these other stuff and each one of those, if the -- once the government does that then they become liable --

MR. MENDELSOHN: No --

JUSTICE BRISTER: -- potentially liable.

MR. MENDELSOHN: Well, they don't become liable unless they know in fact of a risk or a peril that is likely to cause injury or death, that they know that. And they don't do anything. That's what this Court held in the Andrade case. It said that ordinary negligence rises to the level of gross negligence when the defendant or landowner knows of a risk of harm that is likely to cause injury or death and does nothing. That's your law in 1999. So, what we're -- all that we're saying is that what the court below did, let's say that when there is an edifice or a structure or something that is done by the State that it knows, not should know, but knows will cause or has caused injury or death, it then has a duty to remedy that situation --

JUSTICE O'NEILL: But there's a --

MR. MENDELSOHN: -- in one way or another.

JUSTICE O'NEILL: There's a -- there's a [inaudible] of these cliffs that rock climbers have constantly going up there and climbing on and let's suppose three or four of them will fall off and has risked injuries, what's the state's --

MR. MENDELSOHN: They don't create that danger, your Honor. They don't -- it's not an artificially created situation --

JUSTICE O'NEILL: So, you are limiting your argument to artificially --

JUSTICE BRISTER: Well, they didn't tell your client to go swimming either.

MR. MENDELSOHN: They invited her to go swimming because the family had a pass. The park was open for swimming. There was nothing that that prevented them from swimming.

JUSTICE BRISTER: So they could avoid this problem by preventing all the swimming --

MR. MENDELSOHN: They could -- they could avoid --

JUSTICE BRISTER: -- when they have only parts where you can't go swimming?

MR. MENDELSOHN: No, sir. When they know that there is a -- this is a very important distinction. Whether they know that there is a risk, using the Moriel standard which was -- which was again adopted or reaffirmed in the Andrade case if they --- and in the Miranda case it was cited. If they know that there is an extreme risk of harm and they have subjective knowledge of the effect of doing nothing and they do nothing then that is a standard for gross negligence. All we're saying is that it's a gross negligence standard. We're not saying you have to warn, you have to keep out. It is a very high standard but we have met that standard with our pleadings and with our sovereign judgment proof to which the state has not --

JUSTICE HECHT: Do you think your --

MR. MENDELSOHN: -- [inaudible] brief is not adequate.

JUSTICE HECHT: Do you think your standard would apply to security

concerns in parks that are in urban areas? And would you -- there are always walkways and places for people to stroll to the trees and -- but at night somebody can lurk out there and do violence.

MR. MENDELSOHN: That would normally be an ordinary negligence situation. It could possibly rise to a higher level if you can show that they have created a manmade structure of some kind that they know itself is dangerous. That's completely different. You're talking about a human conduct. You're talking about engaging in activities. We're talking about a situation where the state affirmatively does something. The State has this wonderful idea that in order to get rid of javelinas that might come off into the park, it's going to put a mountain lion out there, and they're going to get rid of the javelinas. And they know that the mountain lion had already sucked up at least a couple of people, yeah, if you might be able to prove in that situation. I'm not -- our position is not that we have established it, we're saying that there is at least a fact question and the important point is that if I can move on, that there is no requirement by this Court in any case serving out a Miranda and not in the cases that are relied upon, showed that there must be contemporaneous conduct. If you look at the fact -- if you look at the cases that are relied upon by those Courts of Appeals which are engaging truly in legislative -- judicial legislation by engrafting onto the statute, something that was never intended by the language of the statute or by anything that has been brought before this Court. The whole concept of contemporaneous conduct is a throwback to the Keetch case. The Keetch case is different. We're not talking about the Keetch case. Keetch, there was a need -- and for there'd to be an activity, there was a need for there to be contemporaneous conduct because of the fact that that conduct had to be a cause of the harm. It had to actively cause the harm. That's not what the requirements are in this instance. In this instance --

JUSTICE HECHT: But did the culvert that was placed on the premises, that cause a harm with the deluge of rain or over flooding?

MR. MENDELSOHN: Several times of over flooding. And I would tell the court that although we did not present this as an activity case, if the court feels that it should be an active case then we would ask that the case be remanded because the facts that are shown by us in our summary judgment prove that there was -- the reason why the water was flowing so rapidly was not just a natural phenomena, it was because the powers that the -- for the department to determine and this is in the record. They decided to release waters and they also inadequately marked off the property. And they also inadequately protected the public from the vegetation that grew there. And there were no grace. It was a combination of things. And the court could take the position if you go to that extreme that the state wants, that there has to be an activity. The activity was allowing the water to flow so rapidly through these areas --

JUSTICE WAINWRIGHT: So, you're seeking --

MR. MENDELSOHN: And that activity was on going at the time that the child was drowned.

JUSTICE WAINWRIGHT: So, Counsel, you're saying if that's the conclusion of the court that we should remand the case to give you an opportunity to amend?

MR. MENDELSOHN: Yes, your Honor. The --

JUSTICE WAINWRIGHT: How many times did you amend at the trial court after it was filed?

MR. MENDELSOHN: It was -- I beg your pardon?

JUSTICE WAINWRIGHT: How many times did you amend at the trial

court after the pleading was filed?

MR. MENDELSOHN: I think there were three amendments or two. I'm not certain, but there's no question that there were amendments, however, we posited the case as a premises case.

JUSTICE JEFFERSON: Mr. Mendelsohn, your 12 minutes has expired and continue as you wish.

ORAL ARGUMENT OF RICKY J. POOLE ON BEHALF OF THE RESPONDENT

MR. POOLE: May it please the Court. My name is Ricky Poole and I also represent the Shumake family.

Justice O'Neill, I wanna briefly supplement part of the answer that Les Mendelsohn gave your question regarding briefly on this case. The initial issue that is briefed in the case was to directly address the question of, is this only a negligent activity case or is there also still a premises defect claim? The position by the Park's department is that from this point forward or perhaps even before, there is no premises defect --

JUSTICE O'NEILL: I understand. I'm just trying to get --

MR. POOLE: So -- so --

JUSTICE O'NEILL: - your position.

MR. POOLE: Yes. Well, our position is there is a premises defect claim --

JUSTICE O'NEILL: And based on artificial or not?

MR. POOLE: Artificial, because we adopt the Court of Appeals' opinion. The Court of Appeals, we believe, got it right because the Court of Appeals struck a balance.

JUSTICE O'NEILL: Well, common [inaudible] to the Restatement notes that we don't see any reason why this should be limited to an artificial condition and we -- nor do we see reason why it should be limited to risk or harm less than death or serious bodily injury?

MR. POOLE: The Court is not required to adopt in total the Restatement position.

JUSTICE O'NEILL: But your argument to us now as if we were -- a common law -- making a common law decision but we're dealing with a statute and legislative to it. And do we think the Legislature intended to adopt this section of restatement or not, common it be or not, we're not making this decision in the back here.

MR. POOLE: I understand that, your Honor. We believe that the Legislature intended to adopt a trespasser standard; however, that standard has to be read in context of the situation that was being addressed. The Legislature was looking at persons that it knew would be coming on to the property. Now, opposing counsel has argued to the court that there is a 100 years of trespasser law that this Court should adopt in this case. The problem with that is that the statute wasn't around for a 100 years. In fact, that case law applies to a very different set of circumstances. And those circumstances should be considered by the court.

JUSTICE O'NEILL: I'm sorry. I'm confused, I really am. We throw around the premise defect and all these monikers, but my understanding of what your co-counsel just argued was really premises defect doesn't matter if someone's grossly negligent then this really have to be contemporaneous conduct but gross negligence is enough. That those old common law constructs of trespasser would work in this situation

irrespective of premises liability. So I'm confused as to why we keep focusing on whether there is a premises claim left. We have an amicus brief in Texas [inaudible] and they say that the common law trespasser definition that existed at the time of the statute was enacted, was that a landowner's only duty to trespasser is to refrain from injuring them willfully or maliciously. Now, I understand you to be arguing -- that's what you're claiming here. And so, I'm a little bit confused as to why we're delving into the premises defect aspects of this.

MR. POOLE: Well, our argument in this case is that with a premises defect claim, you can have gross negligence. As this Court recognized or we believe recognized in Miranda, allegations of gross negligence do not require that it be a negligent activity case.

JUSTICE O'NEILL: I guess that's what I'm saying. But nor do they require that it be a premises case either?

MR. POOLE: That's true. But this is.

JUSTICE O'NEILL: But I just thought I heard your co-counsel say that -- that you weren't complaining about a failure to warn. That it was active gross negligence and -- and not rectifying a known dangerous situation.

MR. POOLE: Well, I believe what my co- counsel stated was that there -- we could survive under either theory. We could either be under a negligent activity theory, in which case this Court we would ask this case be remanded back at the trial court so that that could be more adequately plead, because that was not an issue that was raised in the plea of the jurisdiction of the trial court; that the state did not make that argument in the trial court. In this case though as plead, we have pleaded as a premises defect case. So that's why that makes a difference. You can be grossly negligent in failure to warn of a dangerous condition of which you know assuming that that dangerous condition creates an extremely high degree of risk.

Now in this case, there's no question that the dangerous condition does. We have seen it. We have evidence testimony in the record that three people nearly drowned at the same location. The issue that was raised earlier by one of the questions by this Court was whether or not this is they want it to mean that we're gonna close down the parks and I know that's an issue that has been raised to some degree by the amicus briefs that had been filed. That has absolutely no bearing on what this Court decides today if this Court adopts the holding of Court of Appeals --

JUSTICE WAINWRIGHT: With regard to the Court of Appeals' opinion, the supplemental opinion, do you agree that our opinion in Miranda overruled [inaudible] rule and the contemporaneous gross negligence rule?

MR. POOLE: You know, I don't think the court addressed it in that way. I would --

JUSTICE WAINWRIGHT: Which court?

MR. POOLE: This Court. I don' think this Court expressly overruled rule in Miranda but I think to the extent that rule holds that you could only have a negligent activity theory under the recreational use statute, this is the case where the court can say that's incorrect. And I think that would be consistent with the court's holding in Miranda. There was no question in Miranda that there could be a claim made for gross negligence under a premises defect theory. Now, going back to closing the parks, the fact that you have a road in a park does not -- because you have a road mean that there can be a claim raise under the recreational use statute. However, if that road for whatever reason creates a condition that may kill or severely injure a person, there

should be a duty on the part of the owner of that road to the extent beyond who knows that that condition exists. There should be a duty. That that information be transmitted with failure --

JUSTICE BRISTER: Which -- in your case is three people say, I almost got hurt in the same way.

MR. POOLE: That's right, your Honor.

JUSTICE BRISTER: And after that, whatever it is that you built is grossly [inaudible]?

MR. POOLE: Well, if three people say that I nearly drowned or I nearly died because of the --

JUSTICE BRISTER: Or merely got run over because there is a blind corner or --

MR. POOLE: -- if there --

JUSTICE BRISTER: -- curve was too sharp or anything else.

MR. POOLE: Right. And, your Honor, you know, we can have those fact scenarios on both sides. We can have the horrible fact scenarios or we can have those that are not so horrible, but ultimately it comes back to how are you going to craft a remedy? And we argue in this case that the remedy should be crafted in such a way that if there is knowledge of that artificially created condition, if that knowledge exists and the knowledge is that it's going to cause death or serious injury, there should be responsibility. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel.

REBUTTAL ARGUMENT OF DANICA LYNN MILIOS ON BEHALF OF THE PETITIONER

MS. MILIOS: Justice, I want to answer your question. Section 101.059 of the Tort Claims Act states that this chapter does not apply to claims based on the theory of attractive negligence -- pardon me, attractive nuisance. Accordingly, the Tort Claims Act does not provide a waiver of immunity for those claims. So independent of the recreational use statute causes of action, arising under attractive nuisance theory, are not actionable against the state. I think it's very telling that Mr. Poole described the Court of Appeals' opinion as striking of balance. That is exactly what it was. Court of Appeals was clearly troubled with the fact that these -- the facts of this case are very sympathetic. And it is a harsh result to tell the Shumakes and others like them that they have no recovery against the department for the injuries that they sustain. There is no disputing that fact. But it was not the Court of Appeals place to strike a balance. It was the Court of Appeals place to apply the statute and the statute as written adopts the common law trespasser standard. It makes no mention of the known trespasser standard. In fact, it applies these facts to a situation where the Legislature knew the trespassers would be --

JUSTICE O'NEILL: I mean, you'd agree that's sort of an odd application and a bit obtuse if that's what the Legislature [inaudible]. They are crafting this with title that says recreational use. It's a premise of both [inaudible] lands so people can use it or is the common law formulation doesn't anticipate people coursing your land.

MS. MILIOS: True, exactly. And they are artificially ratcheting down the duty that landowners ought. The Legislature took an entire class of cases where in common law there would be liability because these visitors to property would have at least been entitled to

licensee status if not invitee. And the Legislature artificially imposed the trespasser standard. And in the debates and the bill analysis, the argument was about whether or not we should impose upon the duty that is requested by the Shumakes, more of unreasonably dangerous conditions about which the landowner owns. That's the common law licensee standard. That's not the standard that the Legislature imposed. And the proponents of the bill in the bill analysis state that the users of the property should assure -- pardon me, assume the risk of the dangers in the property. The Legislature knew that it was imposing a very harsh structure and it did nonetheless to ensure that more property would be open to the public. It is not correct to say that the Legislature was not aware that gross negligence as -- in respect to a trespasser, not gross negligence in other context. You can certainly have failure to warn and gross negligence by omission in other context such as the Andrade opinion that's [inaudible] but that's not a gross negligence is applicable in the trespasser standard.

Again, dating back to this Court's opinion in Dickens from 1943, trespasser may only recover for active negligence; he has no right to be free from passive negligence. And as respect to artificial conditions on the property, the common law recognized that landowners would have artificial conditions on their property and nonetheless did not require them to fix them, repair them, inspect them for dangers in anticipation of trespassers. The Court's decision in Galveston Oil Co. v. Morton expressly contemplates dangerous machines or contrivances on the land. And unless they are illegal, the landowner owes no duty to do anything with those contrivances in anticipation of a trespasser. He only has a duty not to inflict injury caused by grossly negligent conduct or intentional misconduct.

This Court should not engage in the balancing act that the Court of Appeals engaged in and that the Shumakes would like the court to engage in. Because as all the hypotheticals that we have positive here today would demonstrate the exact situation that the Legislature was trying to control for and eliminate, that is dangerous conditions that arise everyday on property.

JUSTICE WAINWRIGHT: Counsel, do you see a difference between degree of care and duty owed?

MS. MILIOS: I don't think so. I think those are two sides of the same coin. We speak in terms of a duty of care being the duty to act as a reasonable person, duty of care being the level of duty that we require landowner to act with -- with respect to trespassers and licensees. I think they are the same.

JUSTICE WAINWRIGHT: Statutes speaks of degree of care, do you think that means duty as well?

MS. MILIOS: That's how I will interpret the statement, your Honor, yes. To get back to my point, the Court should not be troubled if they can help it by the harsh consequences of this case. This is what the Legislature intended. The Legislature knew [inaudible] within act of the statute.

JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. That concludes the argument and the Court will take a brief recess.

SPEAKER: All rise.

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