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Supreme Court of Texas.
City of Waco, Petitioner,
v.
Debra Kirwan, individually and as Representative of the Estate of Brad McGehee,
Deceased, Respondent.
No. 08-0121.

February 3, 2009.

Appearances:
Charles Olson, Haley & Olson, P.C., Waco, TX, for petitioner.
David S. Morales, State of Texas Attorney General, Austin, TX, for amicus curiae, State of Texas, for petitioner.
Michael C. Singley, Mundy & Singley, L.L.P., Austin, Texas, for respondents.

Before:

Wallace B. Jefferson, Chief Justice; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David M. Medina, Paul W. Green, Phil Johnson, and Don R. Willett, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 08-0121, City of Waco v. Debra Kirwan.
MARSHALL: May it please the Court, Mr. Olson will present argument for the Petitioner. Mr. Morales will present argument for the State of Texas. Mr. Olson will open with the first 10 minutes. The Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF CHARLES OLSON ON BEHALF OF THE PETITIONER

ATTORNEY CHARLES OLSON: May it please the Court, good morning. In this Court's opinion in the case of State v. Shumake, the Court held, ruled, found that Chapter 75 of Civil Practice and Remedies Code permits a premises defect claim for gross negligence under certain conditions. In the Court's opinion, the Court, after saying that, the Court said it's important to understand what those conditions are and, as we read it, in four short sentences set out a framework from which practitioners and those in the public can understand the Court's ruling and how the Recreational Use Statute should apply. The Court started with natural conditions, inherent dangers of nature. Acknowledging

Justice Brister's concerns in his dissent regarding the complications that could be brought about by requiring any landowner to warn of every inherent danger of nature, the Court wrote, "Contrary to the dissent's suggestion, we do not hold or even imply that a landowner may be grossly negligent for failing to warn of the inherent dangers of nature." We believe that Farm Step 1 of the framework to be looked at when determining whether or not a duty is owed as it relates to a premise condition in a recreational setting. Step 2, the next thing, the next concept dealt with was that of being open and obvious and the Court said that if it's an open and obvious condition that there's no duty to warn. So now we've address natural conditions, open and obvious conditions and here comes the third step as we see it and that is the Court said that a landowner can be liable for gross negligence in creating a condition that would, that a user would not expect to encounter. So the third step in the process, as we see it, is that if a landowner creates a condition that it knew, posed an extreme degree of risk, indicating conscious indifference to the safety of others that that landowner could be liable. That is, a duty to warn arises out of the creation of the condition through gross negligence. In this case, the Kirwan case, the pleadings and the evidence before the Court both clearly show that this is a natural condition. It's uncontroverted. Frankly, we believe that should have been the end of the analysis. As we understand Shumake, this is a natural condition. The Court has said that the Court is not holding or even implying that there is any duty to warn as it relates to a natural condition. The Court of Appeals disagreed with that. In dealing with this, rather than saying this is a natural condition, there is no duty to warn, one cannot be grossly negligent for failing to warn of an inherent danger of nature. Instead, the Court of Appeals drew the conclusion that the natural conditions to which this Court referred to were only open and obvious natural conditions and drawing that conclusion then moved on down the line and we'll talk in just a moment about the Court of Appeals' analysis.

JUSTICE DALE WAINWRIGHT: Mr. Olson.

ATTORNEY CHARLES OLSON: Yes, sir.

JUSTICE DALE WAINWRIGHT: I gather from your argument that you believe Shumake would have come out the other way if the manmade culvert that caused the condition that sucked the little girl under water and caused her to drown, which it happened several times before that and the State was aware of it, if that manmade culvert had, however, been a natural, naturally occurring underground tunnel that caused the same effect in the water, do you believe Shumake would have come out the other way?

ATTORNEY CHARLES OLSON: I do. I do and, in fact, the Court's example of a rushing river, as an example of an inherent danger of nature, which people should, that anyone would appreciate, would include that. I think the example of the rushing river includes not just topographically there goes the river, but snags in the river, whirlpools under the river, undertows under the river, shoals under the river, sandbars and all that sort of thing.

JUSTICE DALE WAINWRIGHT: And if four little girls had drowned the day before in the Shumake circumstance with a naturally occurring underwater tunnel, then even the little girl drowning the next day, because it was a natural tunnel not a manmade culvert, Shumake would have come out the other way.

ATTORNEY CHARLES OLSON: I believe that's what this Court said, yes, sir.

CHIEF JUSTICE WALLACE B. JEFFERSON: What if the, the City or the,

or the State has an expert report saying this natural structure is very likely to collapse within the next week and the park ranger says, yes, go camp there, that's fine. No duty there?

ATTORNEY CHARLES OLSON: Well, we have two different things possibly there, Your Honor. One is the naturally occurring condition and, again, I think Shumake is clear that naturally occurring conditions, there is no duty to warn and one cannot be grossly negligent for failing to warn. Now what if someone says about it may be something different than just the condition itself. We may have a negligent activity rather than just a premise.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, that wouldn't be an activity. What if, I mean, you know, I'm, I'm the park ranger, I know from an expert report that is sound that this structure is very likely to collapse, the rock wall that we're talking about here and someone comes and asks me where, where should I camp or where should I go to watch the boat races and I, knowing about the condition, I say, right there.

ATTORNEY CHARLES OLSON: Well, if it rises to the level of intent, we'd look at another issue under the Court Claims Act, but if it's arising out of a natural condition, I believe this Court said that if it arises out of a natural condition, there would be no duty to warn. One could not be grossly negligent for that.

JUSTICE HARRIET O'NEILL: What's the public policy behind such a bright line rule? For example, if you have a ski area that's subject to avalanches, that's naturally occurring, but don't you want to warn people? Or if you've got a public beach where there had been 10 shark attacks or undertows, don't you want a sign that warns people?

ATTORNEY CHARLES OLSON: Well, I would say, although it's and it's discussed some, I think, in your opinion in Shumake, the policy issue is the breadth and width of potential dangers and the prob--and possibility of warning about every possible danger of nature. Um, that is what I took from your opinion, from the Court's opinion in Shumake, is the breadth of that, it would be, um, I just don't know how it would be possible. In a place like Waco at Cameron Park where there's, you know, it's one of the largest parks inside a city in the United States and if we begin a list of every possible serious complication that comes from the nature there.

JUSTICE HARRIET O'NEILL: But there's, but there's a spectrum and shouldn't we if there's a known high probability of danger that has occurred and is likely to recur, even if it's a naturally occurring condition, at what point in that spectrum and we can all imagine both ends of that spectrum and where in the line should we draw some duty if it's, if it's something that happens often even though it's naturally occurring.

ATTORNEY CHARLES OLSON: Well I think you've, I think you've already drawn that line. That would be my statement to you in the Shumake case. If we start from the proposition that a trespasser owes no duty to warn, in common law, no duty, that's going to be a landowner owes no duty to warn a trespasser of a premise condition, that, that in and of itself is the same sort of complications as you have just laid out there, but if the statute says that, fiction or not, that those coming on to a piece of property for recreational purposes are owed no duty greater than that of a trespasser, then I think what the Court has already done in Shumake is, frankly, move beyond what I could consider to be the traditional notions of what a trespasser should be warned about.

JUSTICE SCOTT A. BRISTER: What would it do to the park if the City

had to, had to put up rails, walls, or fences to make sure that nobody could get to the edge of the cliffs.

ATTORNEY CHARLES OLSON: That wouldn't be a park, Judge.

JUSTICE SCOTT A. BRISTER: And how much would that cost?

ATTORNEY CHARLES OLSON: Well, I don't know. I represent a lot of cities a lot of times.

JUSTICE SCOTT A. BRISTER: We could make it, we could make it safe, I assume, but it wouldn't be much of a park.

ATTORNEY CHARLES OLSON: Well, it would be, um, something to look at through the fence, I guess, Your Honor.

JUSTICE DAVID M. MEDINA: There, there are barriers at the Grand Canyon. Does that make it any less of a park?

ATTORNEY CHARLES OLSON: Well, the, the, not within the record, but the barriers aren't much and.

JUSTICE DAVID M. MEDINA: There are signs there.

ATTORNEY CHARLES OLSON: There are signs up, sure. There are barriers. There are signs at Cameron Park. There are signs at Circle Point here.

JUSTICE SCOTT A. BRISTER: And when I went to the Grand Canyon, the ranger told us that of the 100 or so people that had fallen off the edge, every one of them had fallen off at a place where there were rails because, of course, what people do when there are rails is you walk up, stand on them and look over. Whereas when there's no rails, you stay back from them. Is that, do we make, in fact, the park more dangerous if we encourage people to go up to the edge and look off by putting rails there?

ATTORNEY CHARLES OLSON: I don't know that I'm qualified to say that it's more dangerous, but I would say this. I don't know to what extreme measures one would have to go in Waco, Texas, not to mention Big Bend State Park or Guadalupe Mountains or on the beach to protect against every possibly, arguably known natural dangerous condition.

[inaudible]

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court requisition.

ATTORNEY CHARLES OLSON: I'm sorry.

CHIEF JUSTICE WALLACE B. JEFFERSON: Why was the, the study by this student sought?

ATTORNEY CHARLES OLSON: It wasn't and, and, and it's a misnomer to call it a report because it was a student term paper. Some kids in class at Baylor had a project and one of them was to look at the rocks on the ground along the bottom of this line of cliffs in Waco and where there are openly and obviously a big pile of rocks, they'd look up and try to opine as to why the rocks fell. The fact of the falling of the rocks, the danger posed by rocks falling. There wasn't one place they could come from. Brazos River is on your right and river bottom as far as the eye can see. On the left, a sheer cliff, a fractured hundreds of thousands of year old limestone rock. If the rocks are in the piles on the ground, the young people would stop and then look up and say, well, based on our opinion, this is why they fell, but wasn't sought and, in fact, it was sent gratuitously to the City and put in a file.

CHIEF JUSTICE WALLACE B. JEFFERSON: There's a question?

[inaudible]

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court will hear from the Amicus, State of Texas.

ORAL ARGUMENT OF DAVID S. MORALES ON BEHALF OF THE PETITIONER

DAVID S. MORALES: May it please the Court. If left uncorrected, the opinion of the Court of Appeals below would improperly subject the state, cities and municipalities the liability for injuries caused by the myriad inherent natural conditions and dangers that exist in the hundreds of thousands of acres of state land and parks.

JUSTICE PAUL W. GREEN: Let me ask you a question I was going to ask Mr. Olson. The, the property owner in this case, the city or the state, whatever the park might be, many cases will undertake a duty putting up signs, putting on railings around the road. Does that change the, the dynamics here at all?

DAVID S. MORALES: No, it doesn't change the duty that is owed to the statutory trespasser in this case.

JUSTICE PAUL W. GREEN: But, but you put up signs.

DAVID S. MORALES: Yes.

JUSTICE PAUL W. GREEN: And you do, you do it, as Justice Brister pointed out, you could change peoples' behavior by the use of the signs. That's what signs are for aren't they?

DAVID S. MORALES: Yes, that is one use and that is a policy decision that is undertaken by the governmental body and right now, under Shumake, if it's properly interpreted unlike what the Court of Appeals did below, a governmental body such as the city and the state, are free to exercise those discretionary policy decisions whether to put a sign up, whether or not to put a sign up, what to put on the sign. One of the issues that I wanted to talk about today was the discretionary duty exception in the Tort Claims Act. That is one issue that got pushed aside. It's been briefed by in our Amicus as well in the City's Brief as well as in the Texas Municipal League's Brief, but it is an extremely important one to the state and I'll jump that, if you will, Justice Green, since that is an issue that probably we'll not, we'll not get around to.

JUSTICE NATHAN L. HECHT: Let me just ask one quick question before you do. Let me take the Brief's example just one step further. If the risk were certain to occur if encountered, something like quicksand or something, we've been talking about risks that might occur if you encountered them. The rocks might fall. The object might collapse, but what if the danger is there and there is no question if you walk into it, you're going to be hurt, does that make any difference?

DAVID S. MORALES: No it does not if it's a natural condition. Now, in practical terms, the state, the city, municipalities want people to come on to their lands for recreational use. That's the purpose and the policy behind the recreational use statute. It does the state and the city no good to have people dying in their parks. That's not the goal. What this is about is liability. Whether or not the city or the state owns that land on which the quicksand lies. Someone coming along, depending, it doesn't matter who owns it, the forces of nature would cause that quicksand to be there and any person, any animal, anybody that's coming across would, would probably suffer their demise. That would happen in any event and the purpose behind and I will go to Justice Brister's comments both in Miranda as well as in Shumake, we take nature as it comes. Part of the beauty and, and the reason behind the Recreational Use Statute is to encourage landowners, not just the state, but all landowners to provide their land for the public benefit. If we're putting up signs, if we're warning for every natural condition, then that purpose would be thwarted.

JUSTICE DALE WAINWRIGHT: Counsel, let me, now there's, there's good policy arguments, folks are going to argue both ways. We're interpreting a statute here, Recreational Use Statute. Where does

natural condition occur in the Statute?

DAVID S. MORALES: There is not, it's not distinguished in the, the text of the Statute.

JUSTICE DALE WAINWRIGHT: In the Statute at all?

DAVID S. MORALES: Yes, in the definitions, it talks about natural conditions. It does have a list of different premises that would, that would constitute this, so yes.

JUSTICE DALE WAINWRIGHT: [inaudible] talking about liability to a trespasser says there's none except for willful or wanton acts or gross negligence by the owner, lessee or occupant of the land. Um, how do we get to natural conditions?

DAVID S. MORALES: We get to natural conditions through the trespasser standard and the common law and as it, as this Court held in Miranda and later in Shumake, it talked, you talked about the duty that is owed to that trespasser and, clearly, this Court definitively said there is no duty to, to warn about inherent, natural conditions. If I could because I see my time, well, my time is up. If I could complete my thought.

CHIEF JUSTICE WALLACE B. JEFFERSON: You may complete the thought you had started.

DAVID S. MORALES: My quick thought, my quick statement because I know it's going to come up from the Respondent is that the argument has been made that this is an isolated incident, that, that this is not going to come up. It's very, it's, it's in the very minor circumstances where there, there's a report or some students got together and provided this information and for the vast majority of cases, the state will not be liable and this is not going to be a, a slipper slope type occurrence.

JUSTICE DAVID M. MEDINA: It just seems, it seems that it would create a whole entire avenue of litigation.

DAVID S. MORALES: Yes. What it would do. It would create a whole new avenue of litigation concerning the adequacy of signs for one.

JUSTICE DAVID M. MEDINA: And whether or not they have to be in English, Vietnamese or Swahili.

DAVID S. MORALES: Well that's exactly right because you take, if, if the Plaintiff, if the, of the goal is for the Plaintiff to know, to understand the danger, well how in the world could they understand it if they don't speak English or the like? What's going to happen is we're going to have signs not only littering the countryside with signs, but the signs are going to have to be huge. They're going to have to huge because you're going to have to anticipate every single natural condition that might come up.

JUSTICE HARRIET O'NEILL: Well, again, there's a spectrum.

DAVID S. MORALES: Yes.

JUSTICE HARRIET O'NEILL: You know, if, if, if there is no duty when nothing's ever occurred, but if you've got 15 drownings because of a naturally recurring condition over a course of time, it seems to me that's just a different scenario.

DAVID S. MORALES: It is and, again, from a practical standpoint, what would happen on behalf of the city or the state or any governmental body is that they would take discretionary actions in that regard.

JUSTICE HARRIET O'NEILL: But they wouldn't have to?

DAVID S. MORALES: They would not have to.

JUSTICE _____: But they would show up at the City Council or the Park Board and they'd made some, a lot of demands.

DAVID S. MORALES: Yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counselor. The Court is ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Singley will present argument for the Respondents.

ORAL ARGUMENT OF MICHAEL C. SINGLEY ON BEHALF OF THE RESPONDENT

ATTORNEY MICHAEL C. SINGLEY: May it please the Court, good morning. This is an unusual combination of circumstances that we have in this case and I believe an analogy might help frame the discussion and the natural risk that we have at issue. Let's suppose I'm in my office on the 16th floor and I've got my window open and let's pose two scenarios starting from that point. In one of them, I'm clumsy and I stumble and fall out the window and in the second scenario, before, right by the window collapses out from beneath me in a five-foot diameter chunk because the girders or supports are defective and have rotted away.

JUSTICE DAVID M. MEDINA: Well that, that seems more like a premise defect claim. We're talking about nature being outside. So I can't even understand your analogy from that viewpoint. So why don't you give me a situation where you're standing outside and, and something bad happens to you or what happens in a situation like Jacobs Well, which is a famous Well in this area. Many people have drowned in that well because you have to through that chamber, take off your tanks and I was out there six weeks ago and people still go diving there and there's no signs that. So what duty would the State, that's right in the middle of the Bunco River. So it should be on State property. What duty does the State have there?

ATTORNEY MICHAEL C. SINGLEY: The duty that the State has there, Your Honor, is the duty that was set forth in Shumake, that there is a gross negligence duty for conditions that are not open and obvious and neither the Recreational Use Statute nor this Court in Shumake, um, imposed any limitation that would exclude natural conditions and I believe to do so would be against, directly against the core holding of Shumake.

JUSTICE DAVID M. MEDINA: So should the State go and close all these natural underground caverns where divers go just put cement in there so no one can enjoy them?

ATTORNEY MICHAEL C. SINGLEY: Certainly not, Your Honor. In those rare circumstances where we have a danger that's not open and obvious, but it's one that the State or the City knows about, the Recreational Use Statute and Shumake impose a duty either a gross negligence duty only either to warrant or to make the conditions safe and so, depending on the particular facts, the government has an array of choices about warning or making it safe that would be appropriate to the conditions.

JUSTICE SCOTT A. BRISTER: If somebody gets killed, isn't that some evidence in every case that it was not open and obvious?

ATTORNEY MICHAEL C. SINGLEY: I don't believe so, Your Honor.

JUSTICE SCOTT A. BRISTER: I mean unless, assume with me the pers-- there's no evidence the person was suicidal.

ATTORNEY MICHAEL C. SINGLEY: Yes.

JUSTICE SCOTT A. BRISTER: Get killed. Isn't that some evidence in every case that the danger was not open and obvious because otherwise they wouldn't have gotten killed?

ATTORNEY MICHAEL C. SINGLEY: I don't believe so, Your Honor, and I think highlighting the two different possible risks associated with a

cliff is instructive here. One, is clearly an open and obvious risk as this Court said in Shumake if you slip and fall off the edge of a cliff, that's an open and obvious risk and everybody knows it. Here we have a very, very different risk. We have a five-foot diameter chunk of rock that collapsed away due to a pervasive structural defect that was not obvious and, and a captain and the firefighter said it was not obvious to the average park user.

JUSTICE SCOTT A. BRISTER: Point one I agree with you. One's more obvious than the other, but doesn't everybody know rocks fall off a cliff?

ATTORNEY MICHAEL C. SINGLEY: I think.

JUSTICE SCOTT A. BRISTER: Where, where do cliffs come from?

ATTORNEY MICHAEL C. SINGLEY: At a certain level.

JUSTICE SCOTT A. BRISTER: Where do those little rocks come from? They fall off of bigger rocks.

ATTORNEY MICHAEL C. SINGLEY: And if we're talking about.

JUSTICE SCOTT A. BRISTER: Everybody, everybody knows that's what cliffs do.

ATTORNEY MICHAEL C. SINGLEY: I think at some level that's certainly true, Your Honor. Not to the extent that we're dealing with here. There are loose pebbles on the edge of a cliff. I think everyone knows that small amounts of rock can break away and if we had a situation here where Mr. McGehee had slipped on loose pebbles, that'd be a completely different case.

JUSTICE PAUL W. GREEN: But as Mr. Olson pointed out, the base of the cliff are these very large rocks as you see in most rock cliffs. Isn't that some indicator that, that the rock fell off the edge of the cliff? I mean it's not a matter of loose gravel. It's, it's that big rocks fall off of cliffs as a natural state, a natural condition.

ATTORNEY MICHAEL C. SINGLEY: I think not to the extent that a person standing at the top of the cliff that it would be as a matter of law conclusively open and obvious that standing up there at the top of the cliff, a five-foot diameter chunk of rock could fall away.

JUSTICE HARRIET O'NEILL: Let me ask you, didn't Mr. McGehee cross the fence and there was a fence and there was a sign.

ATTORNEY MICHAEL C. SINGLEY: There's a low retaining wall and there was a sign that said "For Your Safety Do Not Go Beyond This Wall."

CHIEF JUSTICE WALLACE B. JEFFERSON: Why doesn't that answer the question? If he had heeded that warning, then we wouldn't be here today correct?

ATTORNEY MICHAEL C. SINGLEY: That is true, Your Honor, and that doesn't answer the question because the duty is to provide an adequate warning and this Court has repeatedly held that an adequate warning needs to be one that identifies the risk at issue and also the, um, the severity of the risk.

JUSTICE DAVID M. MEDINA: Something like, Dear Moron, do not cross this thing because you're going to injure yourself. I mean, how, how specific do you need to be?

ATTORNEY MICHAEL C. SINGLEY: Um, it depends on the circumstances. In this situation, Your Honor, perhaps something like "DANGER, UNSTABLE ROCK, FATAL HAZARD."

JUSTICE DAVID M. MEDINA: And he dies anyway, then the argument is going to the warning wasn't good enough. Should have been a warning and a retention wall with glass so that you can see through it and not, not go over the cliff. I mean, there's not ever going to be a warning adequately to warn people that, that for whatever reason, assume that

every risk that is, they encounter when they try to get closer to the edge of a cliff in this, as in this instance.

ATTORNEY MICHAEL C. SINGLEY: Your Honor, under this gross negligence duty, if we had a warning that identified the nature of the risk at issue here, we have a very different case and I think this Court has said in, in past cases that when a warning does identify the specific risk, you have a different, very different case than one that in which the risk is not identified.

JUSTICE DAVID M. MEDINA: And these underground caves were divers go in Texas, there should be a warn, you're saying there should be a warning, you, if you go to this cave, you risk drowning, enter at your own risk, and the State would have to go put all these signs because they certainly have knowledge of divers drowning in, in these underground caves.

ATTORNEY MICHAEL C. SINGLEY: They wouldn't if that condition is open and obvious, Your Honor. I'm not familiar enough with that situation.

JUSTICE DAVID M. MEDINA: It's, it's not open and obvious until, you got to get in the water. So it, it's never open and obvious unless you're a diver to see what's going down.

ATTORNEY MICHAEL C. SINGLEY: All right, if the situ--since I'm not familiar with the facts, I'm a bit handicapped. If we're just talking about the danger of potentially swimming and drowning from swimming, that would seem to be open and obvious. If there's a particular condition that's unexpected or unusual beyond being in water and drowning and it's something that the government has actual knowledge of, Shumake and the Recreational Use Statute impose a duty to warn or make safe.

JUSTICE PAUL W. GREEN: How could it be gross negligence if the City undertook to warn in the first place?

ATTORNEY MICHAEL C. SINGLEY: This Court has held in a number of cases, um, I'm thinking of the Lee Lewis case and Mobil v. Alender that using some care does not [inaudible] gross negligence as a matter of law and, again, we're on the summary judgment of standard care, I think that Mobil v. Alender case is very instructive, Your Honor. That was a benzene exposure case at a Mobil plant in which Mobil was able to put on evidence that it had taken some precautions to protect its workers from benzene exposure, but it did not take all possible precautions. There was a challenge after the verdict to the gross negligence finding and this Court upheld it saying the fact that some care was taken does not conclusively negate gross negligence as a matter of law.

JUSTICE DAVID M. MEDINA: In this case, Counsel, you've acknowledged that if your client had heeded the warning, he wouldn't have died.

ATTORNEY MICHAEL C. SINGLEY: That's true.

JUSTICE DAVID M. MEDINA: So what about the argument that the City of Waco's actions were intended to and would have precluded the injury entirely if they were followed. So the argument would be that the City's actions were sufficient to have precluded this.

ATTORNEY MICHAEL C. SINGLEY: Right and, Your Honor.

JUSTICE DAVID M. MEDINA: Response to that.

ATTORNEY MICHAEL C. SINGLEY: Response is that this Court, I believe, has previously held that just because a warning, a warning is not adequate and we don't have a matter of law situation if, um, the warning does not identify the specific risk. I mean, someone looking at that sign could think statement or don't go beyond the wall, that could refer to the obvious risk of falling off the cliff. If a specific risk

is mentioned, such as the unstable cliff rock that's hidden, then a person understands that something more than the obvious risk is at issue.

JUSTICE HARRIET O'NEILL: It's my understanding the report that was done by the student doesn't relate to this area. It's a different area entirely.

ATTORNEY MICHAEL C. SINGLEY: It relates to an area very near here. That's correct. The Circle Point area is not specifically mentioned, Your Honor. The Emmons Cliff area, which is a similar limestone formation and is next to the Circle Point area is specifically mentioned as is another area over from that.

JUSTICE HARRIET O'NEILL: So you would say that once this report was written that they had to go through the entire park and put a sign at every cliff to say, "Danger. Cliff Could Fall"?

ATTORNEY MICHAEL C. SINGLEY: For any of the cliff formations that have the similar type of geologic structure and potential danger, yes, there would then be a duty either to warn or make safe in whatever is the best way to do that.

JUSTICE SCOTT A. BRISTER: It is a large park isn't it?

ATTORNEY MICHAEL C. SINGLEY: It is a large park.

JUSTICE SCOTT A. BRISTER: My recollection from my schoolboy days, it's one of the largest city parks around, correct?

ATTORNEY MICHAEL C. SINGLEY: It's a large park. That's correct, Your Honor.

JUSTICE SCOTT A. BRISTER: And this is a big bunch of cliffs.

ATTORNEY MICHAEL C. SINGLEY: And there are a lot of cliffs, that's correct, Your Honor. The one thing I wanted to.

JUSTICE DAVID M. MEDINA: Can they do testing by just observation or do they have to bring in an expert in to determine the geo, the geological structure of the rock?

ATTORNEY MICHAEL C. SINGLEY: Um, I'm not sure, Your Honor. It seems like it might require some expert survey in order to determine which cliffs are subject to that same hazard and risk and which are not.

JUSTICE DAVID M. MEDINA: Who's going to pay for that?

ATTORNEY MICHAEL C. SINGLEY: Uh.

JUSTICE DAVID M. MEDINA: Taxpayers [inaudible]?

ATTORNEY MICHAEL C. SINGLEY: Apparently so. I would think so because it's a city park, Your Honor.

JUSTICE DALE WAINWRIGHT: What did the record say about Mr. McGehee's awareness of the risk?

ATTORNEY MICHAEL C. SINGLEY: Um, there, the evidence that we. There's no direct evidence about Mr. McGehee since he was alone and he died. So there's certainly nothing from him. The evidence we have about that comes from Captain Benjamin Samarripa, who was the City of Waco firefighter, the first responder who found his body. He had been out in that same area many times on training and testified and so he's very familiar with the area. He said he was not personally familiar that the rocks could collapse away in that fashion and also in his lay opinion that the average park patron not be aware that the rocks could collapse like that and so, again on the Summary Judgment standard, um, if a City of Waco firefighter isn't aware and doesn't think people would be aware, um, that would raise a fact issue on the question of open and obviousness here. I'd like to turn back to the construction of Shumake, if I may, and I believe the main problem with the, the City's argument here is that it runs directly contrary to the core holding of Shumake. This Court was very clear, as I read Shumake, that the Recreational Use

Statute allows gross negligence claims without under the traditional definition without limitation as long as, of course, they are not open and obvious and as the opinion is written, I mean obviously the claim there was that there could only be concurrent negligent activity claims and not premises defect claims and the rationale for rejecting that argument and holding that premises defect claims are allowed is that the Statute supplants the common law so common law notions of, of trespassers don't apply. The Statute simply says gross negligence and does not impose any type of limitation on what type of gross negligence is actionable. And here it's a different species of the same argument. The City is requesting a limitation on the type of gross negligence that's actionable here just.

JUSTICE SCOTT A. BRISTER: But just negligence, our negligence standard in all cases, all kinds of cases, car wrecks, everything, is considering all the surrounding circumstances so that what may be negligent on a busy highway may or may not be negligent on a city street or a rural highway. So you take everything. So when you're talking about parks, it is a little bit different from the parking lot at the city auditorium because those, by nature, are supposed to be rough and wild and things like that right?

ATTORNEY MICHAEL C. SINGLEY: I can absolutely see that there's a difference and I think in many times, there would be and particularly under this gross negligence standard, one immediate, one immediate, um, example of that, Your Honor, is, um, if you have a condition, an artificial condition or something that's created, a building, a structure, it's much more likely the government entity is going to have knowledge to treat the gross negligence standard. Typically, in, in the, many, many cases involving natural conditions in a park, one thing that makes it different is if you have a condition that's open and obvious, there's not a case. If the condition is not open and obvious, many times the government entity is not going to have the requisite knowledge for a gross negligence standard and I'm thinking of the situation in Miranda with the, with the, the tree branches. So that's one immediate difference.

JUSTICE SCOTT A. BRISTER: But it has to be, does it have to be specific knowledge? In other words, do you have to know about the specific tree branch because everybody knows trees do drop branches.

ATTORNEY MICHAEL C. SINGLEY: We know it has to be more specific knowledge than knowledge in Miranda that tree branches can drop. So in that sense, absolutely, Your Honor.

JUSTICE SCOTT A. BRISTER: So in our situation, if, if everybody knows that rocks do fall off of cliffs, especially limestone, but even granite if I recall the man in the mountain in New Hampshire is no more because the granite man's face fell off, um, despite the state's best efforts to keep it up there. I mean, rocks fall off of cliffs. Don't you by the same then wouldn't you have to have known this specific rocks would have fallen off because otherwise if it's just general, do you know rocks can fall off, trees can drop, you always know that.

ATTORNEY MICHAEL C. SINGLEY: I'm not exactly sure where you draw the line, but I think we're on the right side of the line in this case. It does need to be a certain level of specific knowledge. Here what we have is that Rodusky report and does that Rodusky report say this very rock that collapsed under [inaudible]? No it doesn't, but I don't believe that's necessary for the gross negligence standard. What we have is a very extensive description of the many structural defects that can not only cause rocks to come away in, in smaller chunks or pebbles or even fist-size chunks, but there's described a plain wedge

fault where, you know, cubic, all kinds of cubic yards of rock can come tumbling down and the specific knowledge that the [inaudible] structure limestone geologic structure that have these faults and I think there's about three different types of faults described, um, that would be specific enough knowledge that there is that type of risk that that's not expected and a rock coming down in that kind of volume is a very different matter than rocks cracking away from the edge of the cliff. So, yes.

JUSTICE NATHAN L. HECHT: On that subject.

ATTORNEY MICHAEL C. SINGLEY: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: In regards to the objective prong of gross negligence, there's quite a bit of evidence here about the risk of injury if the rocks fall.

ATTORNEY MICHAEL C. SINGLEY: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: What evidence is there of the risk that the rocks will fall? Is there any probability assigned to that? Anything in the record that indicates that this is going to happen regularly, rarely, routinely, anything?

ATTORNEY MICHAEL C. SINGLEY: Yes, Your Honor, there is. The Rodusky report says that due to one of these faults, the [inaudible] fault, that there is a hazard for large volumes of rock threatening to come down at any time and so the report.

JUSTICE NATHAN L. HECHT: What does that mean? It's going to happen daily? There's a 50% chance or?

ATTORNEY MICHAEL C. SINGLEY: There are no measures like that, Your Honor. There are no percentages or there are no time periods, daily or weekly, but I think what the report makes clear is that this is an ongoing hazard that at any time could pose serious.

JUSTICE NATHAN L. HECHT: Well I understand, but so are earthquakes in California, but they haven't happened yet and people haven't moved away and I'm just wondering is it like that or yes, these structures are unstable and over time, they might fall or is it something like it's impending.

ATTORNEY MICHAEL C. SINGLEY: I believe it's different than the recurring danger cases. I believe the City cited the Dannon and Thompson cases and the earthquake is another example. The earthquake happens and until it's, it's happening again, there's no permanently present risk until the earthquake happens again or in Dannon and Thompson, I think we had an airport with a footplate that, they screw it down, it'd be safe. At some point, it would come loose, but it's not always presenting a risk of a hazard and that only happens recurringly. I think what the Rodusky report tells us very urgently is that that risk is omnipresent. It doesn't make a prediction about how often the rocks will actually fall, but as for the risk, that's always there and doesn't come and go away as the footplates in the airport or an earthquake, Your Honor. And so, in the interpretation of Shumake, in addition to the City's position imposing a type of, of limitation on gross negligence that this Court rejected and said couldn't be done, I believe the discussion about natural conditions is framed pretty clearly by the Court and then it says in the middle of that section, "A landowner has no duty to warn or protect trespassers from obvious defects or conditions. Thus, the owner may assume that the user needs no warning to appreciate the dangers of natural conditions." I think putting the core holding of Shumake together with that, what we understand is there are going to be no duty to warn of the open and obvious conditions of nature and there's examples of natural conditions, but that the core holding of Shumake tells us that an

absolute prohibition on natural conditions. What the City's arguing for is a limitation that was saying let's stipulate there's a gross negligence. We all agree it's not open and obvious. We'll all agree that there's horrendous gross negligence. Still, no claim as a matter of law and that's contrary to the core.

JUSTICE DON R. WILLETT: The report came in in '95, is that right?

ATTORNEY MICHAEL C. SINGLEY: Yes, Your Honor.

JUSTICE DON R. WILLETT: In the last, um, 13, 14 years, is Mr. McGehee's death the one and only falling-rock related injury or death that's occurred at Cameron Park?

ATTORNEY MICHAEL C. SINGLEY: No it's not, Your Honor. In Captain Samarripa's deposition, he mentioned that there had been six others to his knowledge, um.

JUSTICE DON R. WILLETT: Since the report?

ATTORNEY MICHAEL C. SINGLEY: Since the, it's not clear from the record what the timing of all of them were. Um, I think the majority of them had been since the report although the record leaves open the possibility that, that one happened before.

JUSTICE DALE WAINWRIGHT: Only one of those deaths though was from rock collapsing beneath the feet of the, the visitor to the park, though. The other were from rocks falling on the persons, right?

ATTORNEY MICHAEL C. SINGLEY: Actually, Your Honor, what the record says is that Captain Samarripa testified that Brad McGehee's death was the only one he knew about in which the, the large volumes of rock collapsed and the others were slips or falls, if we're talking about from the top of the cliff. Um, and very briefly, the argument about applying the discretionary acts immunity, the City is relying on highway cases where what this Court held is that the decision to design highways and public works was a discretionary act. That's very different than what we have here, the adequacy of a warning about this kind of condition and that is not a discretionary act for a couple different reasons. First of all, there's a specific legal duty here from the Recreational Use Statute that says you have to warn or make safe a gross negligence duty. I see that my time is up. May I finish that thought or?

CHIEF JUSTICE WALLACE B. JEFFERSON: You may finish your thought, Counsel.

ATTORNEY MICHAEL C. SINGLEY: Thank you and because there is a specific legal duty imposed here by contextual terms, 10156 does not apply.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you very much.

ATTORNEY MICHAEL C. SINGLEY: Thank you.

JUSTICE DAVID M. MEDINA: Mr. Olson, if this, is this is true that six other individuals were killed in that area because of some faulty rock formation, does that now become a known danger and create some duty?

REBUTTAL ARGUMENT OF CHARLES OLSON ON BEHALF OF PETITIONER

ATTORNEY CHARLES OLSON: It wasn't because of a faulty rock formation. In fact, the evidence is just the opposite. Um, and.

JUSTICE HARRIET O'NEILL: But would if it had been? Would if there had been many of these throughout the park and even in this specific area?

ATTORNEY CHARLES OLSON: We have a park with a cliff that is as

open and obvious as any sheer cliff I, I think this Court would have had in mind when it wrote this opinion. There was a four-foot wall in place. There were two signs, not one, but two big signs. They're in the record. For your safety, do not go beyond this wall. In this situation, if there had been more than one fall here, I would, I'd be asking the Court, I don't know how much more, how much further we'd be required to go. There are two signs that people of reasonable intelligence we believe would read and say for your safety, don't go climbing over this wall. The conclusion as to why should be obvious. It's a 70-foot cliff. The fractured limestone is obvious. The rocks on the ground are obvious. The danger is obvious. So I would say to you in this situation, short of Justice Brister's question about fencing off the entire park, this is not just a cliff in a limited area. This is a line of cliffs. This is [inaudible]. So, I would say to Your Honor, we've had the wall. We had the signs. I don't know how much more the City could do reasonably and especially in light of the open and obvious risk posed by any cliff. And, Justice Wainwright, may I respond to the question that you posed to the State just a moment ago as to where in the Statute we find this, this, because I have the same question and I have to admit to you that prior to Shumake, I understood Chapter 75 to mean that there was no duty owed to, to a person to come on the property because of the trespasser's standard. So when I was and, and, and in that regard 75002D, which is the section that says "A, B, and C shall not limit the liability of an owner of real property who has been grossly negligent or has acted with malicious intent or bad faith," I had understood that to mean negligent activity because you can't be grossly negligent if you didn't do something. In this situation, when I read that what the Court has done in Shumake was to say that in order for there to be a liability, there must be gross negligence in the creation of the condition, that made sense to me because under 75002D, the legislature has said one must be grossly negligent. The City of Waco was not grossly negligent in creating Cameron Park and, and Circle Point cliff. So it, the logic to me, Justice Wainwright, was in 75002D, I understand that that requires action. I understood it to require activity until Shumake came down. It makes sense to me, your ruling in Shumake, that requires that there be activity to create the dangerous condition. So that's how, that's how I understand the difference between the requirement that it be created through gross negligence and the natural condition.

JUSTICE DALE WAINWRIGHT: I see. Counsel, can you think of any natural conditions where there's a duty of the governmental entity to do something, warn or make it safe?

ATTORNEY CHARLES OLSON: I would have to say I'm, I'm reading the Court's words and, and when I read here.

JUSTICE DALE WAINWRIGHT: I'm taking you outside of the Court's words.

ATTORNEY CHARLES OLSON: Okay.

JUSTICE DALE WAINWRIGHT: We, we get these cases and it's important to get it right.

ATTORNEY CHARLES OLSON: Certainly.

JUSTICE DALE WAINWRIGHT: For the parties here, but what we write applies to every situation like this.

ATTORNEY CHARLES OLSON: Certainly.

JUSTICE DALE WAINWRIGHT: That's going to happen in Texas in the future. So I'm talking big picture.

ATTORNEY CHARLES OLSON: I think this.

JUSTICE DALE WAINWRIGHT: Can you think of any natural conditions

where a duty would arise?

ATTORNEY CHARLES OLSON: My response to you, I think, Your Honor, is I think the legislature has made that decision. I think, again, before Shumake, I understood the legislature to have said there is no duty owed in a premise defect situ--in a premise condition claim in a recreational use setting because of the trespasser's standard. Whether I agree with it, don't agree with it, I think the legislature made that call.

JUSTICE DALE WAINWRIGHT: For natural conditions.

ATTORNEY CHARLES OLSON: For any condition. That's how I understood it before Shumake.

JUSTICE DON R. WILLETT: Is the sign today as it was then?

ATTORNEY CHARLES OLSON: Sir?

JUSTICE DON R. WILLETT: Are the warnings today as they were then?

ATTORNEY CHARLES OLSON: Waco passed the big bond issue and a bunch of work is being done all over the park as well as the contingents and everything else. I, to be honest, Your Honor, I don't know. I don't know that. If, if, if there's a change it's because of the passage of the bond issue and the work that's being done. We would ask that the Court reverse the Court of Appeals, affirm the Trial Court and dismiss the case.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Olson. The cause is submitted and the Court will take a brief recess.

2009 WL 288199 (Tex.)