

No. 09-0061

**In the
Supreme Court of Texas**

TEXAS STATE UNIVERSITY—SAN MARCOS

Petitioner,

v.

SAM AND BETTY BONNIN, INDIVIDUALLY, AND AS INDEPENDENT
CO-ADMINISTRATORS OF THE ESTATE OF JASON LEE BONNIN

Respondents.

On Petition for Review from the
Third Court of Appeals in Austin, Texas

REPLY IN SUPPORT OF PETITION FOR REVIEW

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondents have provided the Court with no reason to deny the University's petition for review. Indeed, their response is largely unresponsive to the arguments advanced by the University. Respondents contend that the Court has already decided the issue presented by the University's petition in *State v. Shumake*, they attack the correct portion of the court of appeals's judgment and ask the Court to reverse that decision, and they incorrectly assert that the Court does not have jurisdiction over this appeal.

Shumake did not address the issue presented by the University's petition. And although the Court need not—because it cannot—reconsider the correct portions of the court of appeals's judgment that Respondents did not appeal, it indisputably has jurisdiction to grant the University's petition because the justices on the court of appeals disagree on *the* material issue in the case. The Court should exercise its jurisdiction to stop the courts of appeals from treating the Recreational Use Statute as a new cause of action, rather than a limitation on landowners' liability.

The Court should grant the petition, reverse the court of appeals's remand order, and dismiss for lack of subject-matter jurisdiction.

ARGUMENT

In its petition for review, the University demonstrated that the court of appeals's remand order was erroneous and should be reversed for several reasons. First, because the court of appeals correctly determined that Respondents' premises-defect claims arising from the design of the dam were barred by sovereign immunity under the Tort Claims Act's discretionary-design exception, TEX. CIV. PRAC. & REM. CODE §101.056—and granted the University's plea to the jurisdiction on that point—the court of appeals erred in remanding for additional pleading on a supposed gross-negligence claim arising from the water's undertow. The undertow was allegedly caused by the design of the dam, and thus any claim arising from the undertow would likewise be barred by the discretionary-design exception.

Second, even if the undertow claim could survive the discretionary-design exception, the court of appeals still should not have remanded the case because that hypothetical claim

fails as a matter of law. The uncontroverted plea-to-the-jurisdiction evidence demonstrates that Bonnin had actual knowledge of the undertow when he voluntarily jumped from the deck at Joe's Crabshack twice into the rushing water below. Because Bonnin knew of the undertow, the University had no duty to warn about it, and Respondents' claim fails. Moreover, it is uncontroverted that the University *did* warn that the area was dangerous. Thus, the University did not act with conscious indifference and was not, as a matter of law, grossly negligent.

The court of appeals should not have remanded this case for additional pleading. Respondents' claims—however, they may be framed—are barred by sovereign immunity.

I. SHUMAKE DID NOT DECIDE THE QUESTION PRESENTED BY THE UNIVERSITY'S PETITION.

Respondents attempt to justify the court of appeals's remand order by referring to the Court's decision in *State v. Shumake*, 199 S.W.3d 279 (Tex. 2006). They contend that the Court must have considered the discretionary-design exception in *Shumake*, and must have implicitly held that the exception does not apply to claims like Respondents'. Resp. at 9-11. Respondents' characterization of *Shumake* is entirely inaccurate. Indeed, the Court in *Shumake* never even used the term "discretionary-design exception", or any iteration thereof, much less referred to §101.056 of the Tort Claims Act.

To begin, the State never contended that the Shumakes' claims were barred by §101.056 (although they almost certainly were) because the State argued that, *categorically*, premises-defect claims were barred in cases governed by the Recreational Use Statute.

Shumake, 199 S.W.3d at 283. To be sure, the Court rejected that categorical contention. *Id.* at 287. *Shumake* holds that the Recreational Use Statute allows a claim arising from a premises defect if (and only if) the defect was created by the landowner's gross negligence. *Id.* The opinion says nothing about the discretionary-design exception.

Section 101.056 was, however, the basis for the Court's holding in *Texas Department of Transportation v. Ramirez*, 74 S.W.3d 864, 865 (Tex. 2002) (per curiam). There, the Court held that the design of a roadway was a discretionary act and any claims arising from the roadway's design or features—even to the extent they created dangerous conditions—were barred by §101.056. *Id.* at 866. Importantly, the Court refused to allow the plaintiffs to replead their claims, holding that “the pleadings and the evidence affirmatively show[ed] that all Ramirez's factual complaints concern[ed] discretionary decisions . . . [and thus] it [wa]s impossible for Ramirez to amend the pleadings to invoke the [court's] jurisdiction.” *Id.*

The court of appeals's remand would allow a claim for alleged gross negligence in creating a dangerous condition when the alleged dangerous condition was created as a result of the University's discretionary acts. The court of appeals's remand is contrary to the Court's decision in *Ramirez*, and demonstrates the court of appeals's misunderstanding of the limited holding in *Shumake*.

II. SHUMAKE DID NOT ELIMINATE THE REQUIREMENT THAT A PLAINTIFF HAVE AN ACTIONABLE CLAIM TO MAINTAIN A SUIT AGAINST A STATE ENTITY.

Even if *Shumake* could be read as implicitly foreclosing application of the §101.056 discretionary-design exception in cases governed by the Recreational Use Statute, it certainly

says nothing to imply that plaintiffs do not have to satisfy their burden of proof on the necessary elements of their claims to survive a plea to the jurisdiction. Because Respondents cannot prove either that Bonnin did not know of the undertow or that the University acted with conscious indifference, their lawsuit is barred by sovereign immunity, and the court of appeals should have dismissed it entirely, rather than remand for additional pleading.

A. The University Demonstrated With Uncontroverted Evidence That Respondents' Claims, No Matter How They Are Framed, Fail as a Matter of Law.

In response to a tort claim, a state entity may assert its sovereign immunity through a plea to the jurisdiction, and it may provide evidence to establish the lack of subject-matter jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). Once the entity has done so, the burden shifts to the plaintiff to come forward with evidence to show that a material fact issue exists regarding subject-matter jurisdiction. *Id.* If the plaintiff fails to do so, and the uncontroverted evidence shows that the court lacks subject-matter jurisdiction, the court must rule on the plea as a matter of law. *Id.*

The University's plea-to-the-jurisdiction proof negated two essential elements of Respondents' purported undertow claim. *See* Pet. at 2-3. First, the uncontroverted evidence demonstrates that Bonnin knew about the undertow. *Id.* And because he knew about the danger that he willingly encountered, the University was not required to warn him of it, and the undertow claim is barred as a matter of law. *Cameron County v. Brown*, 80 S.W.3d 549, 557-58 (Tex. 2002).

Second, the University proved—again with uncontroverted evidence—that it was not consciously indifferent to the danger present in the water because it warned people not to jump from the dam. *See* Pet. at 2. Because the University was not consciously indifferent, it did not, as a matter of law, act with gross negligence, and the claim is barred. *Miranda*, 133 S.W.3d at 232; *Guadalupe-Blanco River Auth. v. Pitonyak*, 84 S.W.3d 326, 341 (Tex. App.—Corpus Christi 2002, no pet.).

The evidence provided with the University’s plea to the jurisdiction demonstrated that Respondents cannot prove essential elements of the supposed undertow claim. Therefore, the University is immune from suit and the trial court should have dismissed Respondents’ claims for lack of subject-matter jurisdiction. The court of appeals erred in ignoring that evidence and remanding for additional pleading.

B. Respondents Did Not Controvert Any of the Evidence Concerning Bonnin’s Knowledge or the University’s State of Mind, and They Cannot Do So Now, on Appeal, Through Vague References to Extra-Record Evidence.

In an apparent attempt to demonstrate a fact issue that would defeat the University’s plea to the jurisdiction, Respondents state, both in their statement of facts and argument section, that Bonnin did not know about the dangerous undertow. Resp. at 2, 3, 7, 8, 15. Respondents provide no record cites for any of these statements. This is not surprising, given that there are none.¹

1. Indeed, Respondents cite to the record only twice in reference to their live pleadings. Resp. at 4, 5.

In response to the University's plea to the jurisdiction, Respondents were required to come forward with controverting evidence that would raise a fact issue as to Bonnin's knowledge or the University's alleged gross negligence. *Miranda*, 133 S.W.3d at 228. The Court expressly held in *Miranda* that

after the state asserts and supports with evidence that the trial court lacks subject matter jurisdiction, [the Court] simply require[s] the plaintiffs, when the facts underlying the merits and subject matter jurisdiction are intertwined, to show that there is a disputed material fact regarding the jurisdictional issue.

Id. Respondents failed to do so and cannot rely on any supposed non-record evidence now.

Id.; *Phan Son Van v. Pena*, 990 S.W.2d 751, 753 (Tex. 1999).

Respondents' vague references to other deposition testimony, Resp. at 3, n.1, 15, and records, *id.* at 8, cannot save their claims. If that evidence existed, Respondents were required to bring it the trial court's attention in response to the University's plea to the jurisdiction. Their failure to controvert the University's evidence is fatal.

III. RESPONDENTS CANNOT ATTACK THE COURT OF APPEALS'S JUDGMENT THAT THE DISCRETIONARY-ACTS EXCEPTION TO THE TORT CLAIMS ACT BARS THEIR SUIT.

Respondents devote a fair amount of their response to attacking the court of appeals's now-final judgment dismissing their claims for lack of subject-matter jurisdiction under the discretionary-acts exception to the Tort Claims Act. Resp. at 11-13. But that argument, and all the non-record evidence offered to support it, is not properly before the Court. Respondents did not file a petition for review. They cannot, therefore, seek to alter the court of appeals's judgment. TEX. R. APP. P. 53.1.

IV. THE COURT HAS JURISDICTION OVER THIS INTERLOCUTORY APPEAL BECAUSE THE JUSTICES ON THE COURT OF APPEALS DISAGREE ON AN ISSUE MATERIAL TO THE DECISION.

Curiously, Respondents contend that the Court lacks jurisdiction over the University's petition. Resp. at 14-15. Jurisdiction is clear. Justice Waldrop dissented from the majority's decision to remand—the precise subject of the University's petition for review. Under §22.001(a)(1) and §22.225(c) of the Texas Government Code, the Court unquestionably has jurisdiction.

CONCLUSION

The Court should grant the petition, reverse the court of appeals's remand order, and dismiss this case for lack of subject-matter jurisdiction.

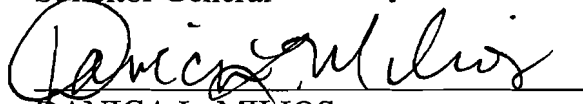
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A handwritten signature in black ink, appearing to read "Danica L. Milios", written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that on July 17, 2009 a true and correct copy of this Reply in Support of Petition for Review was served by certified U.S. mail, return receipt requested, on counsel of record in this proceeding as listed below:

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