Premises Claims Under the TTCA and the Recreational Use Statute

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I. Government Immunity Generally

In the state of Texas, sovereign immunity deprives a trial court of subject matter jurisdiction for a lawsuit in which the state or certain governmental units have been sued unless the state consents to the suit. *Texas Dept. of Parks and Wildlife v. Miranda,* 133 S.W.3d 217, 224 (Tex. 2004). Such lawsuits "hamper governmental functions by requiring tax resources to be used for defending lawsuits and paying judgments rather than using those resources for their intended purpose." *Reata Constr. Corp. v. City of Dallas,* 197 S.W.3d 371, 375 (Tex. 2006). Accordingly, the Supreme Court of Texas has long recognized that "no State can be sued in her own courts without her consent, and then only in the manner indicated by that consent." *Hosner v. DeYoung,* 1 Tex. 764 (1847).

Sovereign immunity and its counterpart, governmental immunity exists to protect the State and its political subdivisions from lawsuits and liability for money damages. *Reata Constr. Corp. v. City of Dallas,* 197 S.W.3d 371, 374 (Tex. 2006). Sovereign immunity includes two distinct principals: immunity from suit and immunity from liability. *Miranda,* 133 S.W.3d at 224. Immunity from liability is an affirmative defense, and immunity from suit deprives the court of subject matter jurisdiction. *Id.*

The Texas Torts Claims Act (TTCA) located in the Civil Practices and Remedies Code creates a unique statutory scheme in which the two immunities are co-extensive: "Sovereign immunity to suit is waived and abolished to the extent liability is created by this chapter." Civ. Prac. & Rem. Code §101.025(a); *State ex rel. State Dep't of Highways &Pub. Transp. V. Gonzalez,* 82 S.W.3d 322, 326 (Tex. 2002). As such, a City is immune from suit unless the Tort Claims Act expressly waives immunity. *See* Civ. Prac. & Rem. Code §101.001(3)(B)(defining a governmental unit as a political subdivision of the state including any city).

Because the Legislature is better suited to balance the conflicting policy issues associated with waiving immunity, the courts look to pertinent legislative enactments to determine the extent to which immunity has been voluntarily relinquished. *See Wichita Falls State Hosp. v. Taylor,* 106 S.W. 3d 692, 695 (Tex. 2003). The courts interpret statutory waivers of immunity narrowly, as the Legislatures intent to waive immunity must be clear and unambiguous. *See* Tex. Gov't Code §311.034.

A. The Texas Tort Claims Act

The Texas Tort Claims Act (TTCA) provides for a limited waiver of sovereign immunity. Tex. Civ. Prac. & Rem. Code §§101.001-101.109. Specifically, the Texas Tort Claims Act waives immunity in the following circumstances and a governmental unit in the State is liable for:

(1) property damage, personal injury and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of his employment if:

  (a) the property damage, personal injury or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and,

  (b) the employee would be personally liable to the claimant according to Texas law; or

(2) personal injury or death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

Civ. Prac. Rem. Code §101.021.

The Texas Tort Claims Act further provides for caps recoverable on damages. Tex. Civ. Prac. & Rem. Code §101.023[1]. The Act generally waives governmental immunity to the extent that liability arises from an act or omission or the negligence of an employee acting within his scope of employment and it the injury or death "arises from" "use of a motor-driven vehicle of motor-driven equipment" or from "a condition or use of tangible personal or real property." *Id.* §101.021.

II. Premise and Special Defects under the TTCA

"When liability is predicated not upon the actions of the governmental unit's employee but by reference to the duty of care owed by the governmental unit to the claimant for premise and special defects as specified in the Texas Tort Claims Act, the claim is based on an allegation of premises liability." *Harris Cnty. v. Shook,* 634 S.W.3d 942 (Tex. App. 2021), *review denied* (May 27, 2022).

Texas Tort Claims Act imposes different standards of care upon a governmental unity for negligence claims based on condition of use of tangible personal property or on use of motor-driven equipment, as opposed to claims based on a condition of real property or a premise defect. *Harris Cty. Flood Control Dist. v. Halstead*, No. 14-20-00457-CV, 2022 WL 678277 (Tex.App.-

[1] Municipalities are capped at $250,000 per person and $500,000 per incident. Counties and other smaller governmental entities such as Irrigation and Drainage Districts are capped at $100,000 per person and $300,000 per incident. *Id.*

Hous. [14 Dist.] Mar. 8, 2022). A claim cannot be both a premise defect claim and a claim relating to a condition of use of tangible property. *Harris County v. Shook* 634 S.W.3d 942 (Tex. App. 2021), citing to *Miranda*, 133 S.W. 3d at 233 (The [TTCA's] scheme of a limited waiver of immunity from suit does not allow plaintiffs to circumvent the heightened standards of a premises defect claim contained in [S]ection 101.022 by re-casting the same acts as a claim relating to the negligent condition or use of tangible property.")

"[N]egligent activity encompasses a malfeasance theory based on affirmative, contemporaneous conduct by the owner that caused the injury, while premises liability encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe." *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 776 (Tex. 2010) (internal citations omitted). Thus, when distinguishing between a negligent activity and a premises defect, the courts will focus on "whether the injury occurred by or as a contemporaneous result of the activity itself—a negligent activity—or rather by a condition created by the activity—a premises defect." *Sampson*, 500 S.W.3d at 388 (citing *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992)). "The distinction lies in whether it is the actual use or condition of the tangible personal property itself that allegedly caused the injury, or whether it is a condition of real property—created by an item of tangible personal property—that allegedly caused the injury." *Harris Cnty. v. Shook*, 634 S.W.3d 942, 949 (Tex. App. 2021), *review denied* (May 27, 2022)

"Given the Legislature's preference for a limited immunity waiver," courts must strictly construe the Act's waiver provisions. *Ryder Integrated Logistics, Inc. v. Fayette County*, 453 S.W.3d 922, 927 (Tex. 2015). In the Texas Tort Claims Act, the Legislature waived a governmental unit's immunity from suit and liability as to claims seeking to hold the governmental unit liable for personal injury caused by a condition of real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (West, Westlaw through 2021 C.S.).

The statute states the following:

> (a) Except as provided in Subsection (c), if a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises.
>
> (b) The limitation of duty in this section does not apply to the duty to warn of special defects such as excavations or obstructions on highways, roads, or streets or to the

> duty to warn of the absence, condition, or malfunction of traffic signs, signals, or warning devices as is required by Section 101.060.
>
> (c) If a claim arises from a premise defect on a toll highway, road, or street, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property.

Civ. Prac. & Rem. Code §101.022.

Subject to certain exceptions, if a claim against a governmental unit arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.022 (West, Westlaw through 2021 C.S.). This limitation on a governmental unit's duty "does not apply to the duty to warn of special defects such as excavations or obstructions on highways, roads, or streets." *Id.* When a special defect exists, the governmental unit owes the same duty to the claimant that a private landowner owes to an invitee. *Tex. Dep't of Transp. v. Perches*, 388 S.W.3d 652, 654–55 (Tex. 2012).

To establish liability—

a licensee must prove that:	an invitee must prove that:
(1) a condition of the premises created an unreasonable risk of harm to the licensee;	(1) a condition of the premises created an unreasonable risk of harm to the invitee;
(2) the owner actually knew of the condition;	(2) the owner knew or reasonably should have known of the condition;
(3) the licensee did not actually know of the condition;	(3) the owner failed to exercise ordinary care to protect the invitee from danger;
(4) the owner failed to exercise ordinary care to protect the licensee from danger;	(4) the owner's failure was a proximate cause of injury to the invitee.
(5) the owner's failure was a proximate cause of injury to the licensee.	

See State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 237 (Tex. 1992) *citing to Tennison,* 509 S.W.2d at 561; *see* RESTATEMENT (SECOND) OF TORTS § 342 (1965). *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 295 (Tex.1983); *Adam Dante Corp. v. Sharpe,* 483 S.W.2d 452, 454–455 (Tex.1972); *see* RESTATEMENT (SECOND) OF TORTS § 343 (1965).

There are two differences between the theories of licensee and invitee status. The first is that a licensee must prove that the premises owner *actually* knew of the dangerous condition, while an invitee need only prove that the owner knew or reasonably should have known. The second difference is that a licensee must prove that he did *not know* of the dangerous condition, while an invitee need not do so. *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992)

Whether a condition of real property is "premises defect" or a "special defect" under the Texas Tort Claims Act is a question of law. *Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608 (Tex. 2000); *Corbin v. City of Keller*, 1 S.W.3d 743 (Tex.App.—Fort Worth 1999, pet. denied). The TTCA provides different standards of care depending on whether the claim arises from an ordinary premises defect or a special defect. *City of Austin v. Rangel*, 184 S.W.3d 377 (Tex.App.—Austin 2006); *City of El Paso v. Chacon*, 148 S.W.3d 417 (Tex.App.—El Paso 2004). Additionally, liability for premise and special defects extends only to personal injury and death. It does not extend to property damage. In order to establish liability, the premises for which the governmental unit is sought to be held liable must be owned, occupied, or controlled by the governmental unit. *Kinnear v. Texas Comm'n v. Human Rights*, 14 S.W.3d 199, 300 (Tex. 2000).

The Texas Supreme Court has held that, for a governmental unit or state to be liable for negligence in a personal injury suit, it must actually be the owner/occupier of the premises where the injury occurred. *County of Cameron v. Bro*wn, 80 S.W.3d 549, 554 (Tex. 2002), *City of Denton v. Page*, 701 S.W.2d 831, 835 (Tex. 1986). Additionally, the Texas Supreme Court has held that where there is no evidence that a Defendant owned or exercised control over an injury site, a defendant has no legal duty to warn of or eliminate the danger in question. *Cameron County v. Velasquez et a*l, 668 S.W.2d 776 (Tex. App. 1984). Furthermore, it is the Plaintiff's burden to show that the named governmental defendant possessed, owned, occupied, or controlled the premises where the injury occurred. *Brown*, 80 S.W.3d at 554.

A. Premise Defects

For claims arising from a premise defect the governmental entity owes the claimant only the duty that a private person owes to a licensee on private property unless the claimant pays for the use of the premises. Tex. Civ. Prac. & Rem. Code § 101.022. For the Plaintiff to prove a premise defect case he must show: (1) a condition of the premises created an unreasonable risk of harm to the licensee; (2) the owner actually knew of the condition; (3) the licensee did not actually know of the condition; (4) the owner failed to exercise ordinary care to protect the licensee from danger; and (5) the owner's failure was a proximate cause of the injury to the licensee. *Mogayzel v. Texas Dept. of Transp.*, 66 S.W.3d 459, 464 (Tex.App.-Ft. Worth 2001, no pet.).

Because the Act does not define the words "premises defect," the courts look to the ordinary meaning of the words. *Billstrom v. Memorial Med. Ctr*., 598 S.W.2d 642, 646 (Tex.App.—Corpus Christi 1980, no writ). "Premises" is defined as a building, its parts, grounds,

and appurtenances. *Id*. A "defect" is defined as an imperfection, shortcoming, or "want of something necessary for completion." *Id. Cobb v. Texas Dep't of Crim. Just.,* 965 S.W.2d 59, 62 (Tex. App. 1998)

Slippery, uneven floor of a butcher shop is a premise defect. *Cobb v. Texas Dep't of Crim. Just.,* 965 S.W.2d 59, 62 (Tex. App. 1998), *See also State v. Tennison*, 509 S.W.2d 560, 562 (Tex.1974) (a slippery floor held to be a premise defect); *Brazoria County v. Davenport*, 780 S.W.2d 827, 828–29 (Tex.App.—Houston [1st Dist.] 1989, no writ) (wet, slippery sidewalk was premise defect); *Blankenship v. County of Galveston*, 775 S.W.2d 439, 441–42 (Tex.App.—Houston [1st Dist.] 1989, no writ) (slippery, wet algae growth on rocks at the base of stairs leading down from the Galveston sea wall was a premise defect, not a special defect); *see also University of Texas Med. Branch v. Davidson*, 882 S.W.2d 83, 85–86 (Tex.App.—Houston [14th Dist.] 1994, no writ) (a defective elevator, while a separate piece of equipment, was held an integral part of the building, thus a premise defect); *Billstrom*, 598 S.W.2d at 646–47 (a defective window screen held to be a premise defect; the screen was an appurtenance to the building).

But the Recreational Use Statute—not the TTCA—may control where an injury or death results on property used for recreational purposes.[2] *State v. Shumake,* 199 S.W.3d 279, 284–85 (Tex. 2006); *see also Suarez v. City of Texas City,* 465 S.W.3d 623, 632 (Tex. 2015); *see* Tex. Civ. Prac. & Rem. Code § 75.003(g) ("To the extent that this chapter limits the liability of a governmental unit under circumstances in which the governmental unit would be liable under Chapter 101 [of the TTCA], this chapter controls."). Under the Recreational Use Statute, landowners are "effectively immunize[d]" from ordinary negligence claims, owing those who use their property for recreation only the duty not to injure them intentionally or through gross negligence. *Id.*; Tex. Civ. Prac. & Rem. Code §§ 75.002, .007(b); *Suarez v. City of Texas City*, 465 S.W.3d 623, 627 (Tex. 2015) (As applied to government landowners, the Recreational Use Statute waives immunity only for "gross negligence, malicious intent, or bad faith.").

The first element of a premise defect requires that the complained of premises condition creates an unreasonable risk of harm. *The Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 116 (Tex. 2010) (per curiam).

Texas courts have consistently held that natural occurring conditions that are open and obvious do no create an unreasonable risk of harm as a matter of law. *City of Austin v. Vykoukal*,

[2] Recreational Use State explained in further detail below.

No. 03-16-00261-CV, 2017 WL 2062259, at *4 (Tex. App.—Austin May 10, 2017, pet. denied) (mem. op.) (overgrown vegetation in bike lane was not a condition that posed an unreasonable risk of harm); *City of Hous. v. Cogburn*, No. 01–11–00318–CV, 2014 Tex. App. LEXIS 4722, at *9–13, 2014 WL 1778279 (Tex. App.–Houston [1st Dist.] May 1, 2014, no pet.) (mem. op.) (listing cases and holding that exposed tree roots near parking meter were open and obvious naturally occurring condition that, as matter of law, could not create unreasonable risk of harm); *Moya v. Goliad Cnty.*, No. 13–00–456–CV, 2002 Tex.App. LEXIS 3163, at *14, 2002 WL 32168958 (Tex.App.-Corpus Christi May 2, 2002, no pet.) (op., not designated for publication) (rejecting premise-defect claim and noting that road in question was located in rural section of county, not in city center, "thus a certain amount of grass and other vegetation along the side of the road is to be expected"). Tall grass is characteristic in rural areas during summer months and is not unexpected. *See Anderson v. Anderson County,* 6 S.W.3d 612, 615-16 (Tex.App.-Tyler 1999, pet denied) (vegetation on a rural road is not uncommon or expected during springtime.); *Chambers v. Kaufman Cnty.*, No. 05–11–00509–CV, 2011 WL 5088651, at *4 (Tex.App.-Dallas Oct. 26, 2011, pet. denied) (mem.op.)(grass and weeds growing alongside rural road in July is not unexpected).

A condition of property may be a basis for waiver of governmental immunity when it makes the property inherently dangerous and "poses a hazard when the property is put to its intended and ordinary use." *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 98 (Tex. 2012). When waiver of immunity is premised on a condition of property, "there must be a nexus between the condition of the property and the injury." *Dallas Cty. v. Posey*, 290 S.W.3d 869, 871 (Tex. 2009). "This nexus requires more than mere involvement of property; rather, the condition must actually have caused the injury." *Id*. (citing *Dallas Cty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 342–43 (Tex.1998)); *Rogge v. City of Richmond*, 506 S.W.3d 570, 577 (Tex. App. 2016), reh'g overruled (Jan. 10, 2017).

Under the licensee standard of care, actual knowledge on the part of the governmental unit requires two key components. First, the governmental unit must have had knowledge of the specific condition that caused the plaintiff's injury. *Martinez v. City of Lubbock,* 993 S.W.2d 882, 886 (Tex.App.—Amarillo 1999, pet. Denied). Second, the Defendant must have had knowledge that the condition was dangerous. *Sipes v. Texas DOT*, 949 S.W.2d 516, 521 (Tex.App—Texarkana 1997, pet. denied).

Additionally, to prove a TTCA claim for a premises defect under the licensee standard of care, a plaintiff must establish that he did not have actual knowledge of the condition on the premises that posed an unreasonable risk of harm. *Texas DOT v. York*, 284 S.W.3d 844, 847 (Tex.2009). If a plaintiff knew about the defect, he or she can recover only if he or she can prove gross negligence or willful, wanton conduct. *Weaver v. KFC Mgmt., Inc.*, 750 S.W.2d 24, 26 (Tex.App.—Dallas 1988, writ denied); *see Davenport*, 780 S.W.2d at 829 (because jury found plaintiff knew of slippery condition, on appeal, judgment could only be sustained if evidence supported finding of gross negligence of county). Thus, in the case of *Cobb*, since the plaintiff admitted he knew the floor was slippery and uneven, he would only recover under the Act if he could show defendant were grossly negligent or acted willfully or wantonly. *Cobb v. Texas Dep't of Crim. Just.*, 965 S.W.2d 59, 62 (Tex. App. 1998)

* Note Landlord-tenant caveat:

The general rule regarding landlord-tenant relationships is that the landlord has *no duty* to tenants or their guests for dangerous conditions on the leased premises. *Johnson Cty. Sheriff's Posse, Inc. v. Endsley*, 926 S.W.2d 284, 285 (Tex. 1996)(*emphasis added*). This rule stems from the notion that a landlord relinquishes possession of the premises to the tenant. *Endsley*, 926 S.W.2d at 285. In cases involving premises defect claims arising from a condition of a tenant's rental property, the courts have determined that paying rent does not automatically confer an invitee standard of care. *Brenham Housing Authority v. Davies*, 158 S.W.3d 53 (Tex. App.—Houston [14th Dist.] 2005) (overruled on other grounds). The only way a tenant can become an invitee is where the landlord either *retains control* of the premises or where the landlord is aware of *concealed* defects on the premises and does not warn the tenant or make them safe. *Endlsey*, at 285. A "lessor's contractual right to enter the premises to make repairs and alterations is not a reservation of control over a part of the premises." *Shell Oil Co. v. Khan*, 138 S.W.3d 288, 295–97 (Tex.2004); *De Leon v. Creely*, 972 S.W.2d 808 812–13 (Tex.App.-Corpus Christi 1998, no pet.); also see *Brenham Hous. Auth. v. Davies*, 158 S.W.3d 53, 60 (Tex. App. 2005), *disapproved of by Rusk State Hosp. v. Black*, 392 S.W.3d 88 (Tex. 2012).

B. Special Defects

As for a special defect, a governmental unit has the same duty to warn as a private landowner owes to an invitee: "to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition of which the owner is or reasonably should be

aware." *Payne*, 838 S.W.2d at 237. *See also City of Irving v. Muniz*, No. 05-21-00099-CV, 2021 WL 5410410, at *3 (Tex. App. Nov. 19, 2021), *reh'g denied* (Jan. 13, 2022), *review denied* (June 17, 2022).

The Supreme Court of Texas has determined that conditions can be special defects only if they pose a threat to the ordinary users of a particular roadway. *Denton County v. Beynon*, 283 S.W.3d 329, 331 (Tex. 2009). A court cannot classify a condition as a special defect if the defect is not like an excavation or obstruction on a roadway. *Beynon*, 283 S.W.3d at 331–32.

Although the TTCA does not define "special defect," it provides that special defects include "excavations or obstructions on highways, roads, or streets." Tex. Civ. Prac. & Rem. Code Ann.§ 101.022(b). The supreme court "has never squarely confronted whether a hazard located off the road can (or can never) constitute a special defect," but it has recognized that some intermediate courts of appeals have held that certain conditions located off the road were special defects. *Denton Cty. v. Beynon*, 283 S.W.3d 329, 331 (Tex. 2009) (citing *Payne*, 838 S.W.2d at 238–39 n.3).

For example, in *Morse v. State*, the Beaumont court held that a six to twelve inch drop off on the side of the road was a special defect. 905 S.W.2d 470, 475 (Tex. App.—Beaumont 1995, writ denied). The court explained that a condition does not have to exist upon the surface of the roadway itself but must pose a threat to the ordinary user of the roadway. *Id.* And, in *Texas Department of Transportation v. Dorman*, this court held that a four-inch drop-off on the edge of the roadway constituted a special defect. No. 05-97-00531-CV, 1999 WL 374167, at *3 (Tex. App.—Dallas June 10, 1999, pet. denied) (not designated for publication). "A condition may be a special defect without actually being on the roadway if it is close enough to present a threat to the normal users of the road." *Id.* "[A]s *Payne* clarified, '[w]hether on a road or near one,' conditions can be special defects like excavations or obstructions 'only if they pose a threat to the ordinary users of a particular roadway.'" *Beynon*, 283 S.W.3d at 331 (quoting *Payne*, 838 S.W.2d at 238 n.3).

In deciding whether a condition is a special defect, the Supreme Court of Texas has considered characteristics of the class of special defect, such as (1) the size of the condition, (2) whether the condition unexpectedly and physically impairs a vehicle's ability to travel on the road, (3) whether the condition presents some unusual quality apart from the ordinary course of events, and (4) whether the condition presents an unexpected and unusual danger to the ordinary users of the roadway. *See Hayes*, 327 S.W.3d at 116.

The class of special defects contemplated by the statute is narrow. *Id.* Courts determine whether a condition is a special defect based on the objective expectations of an "ordinary user" who follows the "normal course of travel." *Id.* A claimant's subjective knowledge or lack of knowledge of a condition is not relevant to a court's determination of whether the condition is a special defect.

In *Hayes*, a bicyclist rode around a barricade, into a metal chain, and suffered injuries. 327 S.W.3d at 115. The court explained that the bicyclist did not take the normal course of travel: "Road users in the normal course of travel should turn back or take an alternate route when a barricade is erected to alert them of a closed roadway"; "an ordinary user would not have traveled beyond the barricade." *Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113 at 116–17. (Tex. 2010). The Court found that the bicyclist saw the barricade and, "without braking, without slowing down significantly," chose to go around it. *Id.*

In *Beynon*, the supreme court held that a seventeen-foot floodgate arm located approximately three feet off a two-lane rural roadway was not a special defect because an ordinary driver would not encounter it on the roadway. *Denton Cty. v. Beynon*, 283 S.W.3d 329 at 330, 332 (Tex. 2009) **"[T]he arm was neither the condition that forced [the driver's] car off the road initially nor the condition that caused the car to skid sideways and crash into the floodgate arm."** *Id.* at 332. The driver lost control of the vehicle when he moved to the far right of the road to avoid an oncoming car drifting into his lane and his tire hit a steep drop off. *Id.* at 330, 332.

See also *City of Dallas v. Giraldo*, where the Dallas Court of Appeals held that a bulldozer was not a special defect because it would not have been encountered by an ordinary driver. 262 S.W.3d 864, 871–72 (Tex. App.—Dallas 2008, no pet.). In *Giraldo*, the driver was over the legal limit of intoxication and had lost control of his vehicle, which skidded of the road and collided with a bulldozer. *Id.* at 867. He was later charged and convicted of intoxication manslaughter. *Id.*

In *City of Irving v. Muniz*, the Dallas Court of Appeals did find that there was a special defect. In *Muniz*, when Muniz reached an intersection, he observed construction signs indicating a detour. A detour sign directed him to merge slightly to the left. Muniz looked for another sign to guide him, but never saw one. Suddenly, he saw a mesh fence in front of him and tried to brake, but it was too late. He traveled through the mesh fence and down an excavation that was approximately thirty-foot deep by twenty-five-foot wide. The Irving Fire Department had to extricate him. The excavation existed as part of a project to replace underground sewer pipes. Both

parties additionally argue that the detour was a "lane shift away" from the excavation. *City of Irving v. Muniz*, No. 05-21-00099-CV, 2021 WL 5410410, at *1 (Tex. App. Nov. 19, 2021), *reh'g denied* (Jan. 13, 2022), review denied (June 17, 2022). The Court distinguished the facts in this case with the above cases in that Muniz did not choose to go through barricade like the plaintiff in *Hayes;* did not go off road to avoid another car, like the plaintiff in *Beynon*, and he wasn't intoxicated like the driver in *Giraldo. City of Irving v. Muniz*, No. 05-21-00099-CV, 2021 WL 5410410, at *5 (Tex. App. Nov. 19, 2021), *reh'g denied* (Jan. 13, 2022), *review denied* (June 17, 2022).

III. Recreational Use Statute

Section 101.058 of the Tort Claims Act further modifies a governmental unit's waiver of immunity from suit by imposing the limitations of liability articulated in the recreational use statute. Tex. Civ. Prac. & Rem. Code § 101.058 ("To the extent that Chapter 75 limits the liability of a governmental unit under circumstances in which the governmental unit would be liable under [the Tort Claims Act], Chapter 75 controls.").

The statute further creates a legal fiction, classifying the invited recreational user of the property as a trespasser, and imposing that limited standard of care upon the landowner. *Id.* § 75.002(c)(2). The statute, however, also provides that the recreational user's status as trespasser "shall not limit the liability of an owner, lessee, or occupant of real property who has been grossly negligent or has acted with malicious intent or in bad faith." *Id.* § 75.002(d). *State v. Shumake*, 199 S.W.3d 279, 284–85 (Tex. 2006)

As *Shumake* explains, a trespasser at common law was one who entered upon property of another without any legal right or invitation, express or implied. *Texas–Louisiana Power Co. v. Webster*, 127 Tex. 126, 91 S.W.2d 302, 306 (1936). At common law, the landowner owed no duty but to refrain from injuring the trespasser "willfully, wantonly, or through gross negligence." *Tex. Utils. Elec. Co. v. Timmons,* 947 S.W.2d 191, 193 (Tex.1997); *Burton Constr. & Shipbuilding Co. v. Broussard,* 154 Tex. 50, 273 S.W.2d 598, 603 (1954). The rule is based on the principle that a landowner has no obligation to protect a trespasser in the wrongful use of the landowner's property: trespassers, who come uninvited for purposes of their own "must take the premises as they find them; and if they fall into an unsuspected danger, the loss is their own." *Tex. Cities Gas Co. v. Dickens,* 140 Tex. 433, 168 S.W.2d 208, 210 (1943). Thus, as a general proposition, a landowner is entitled to the exclusive use of his property and "is not liable for injury

to trespassers caused by his failure to exercise reasonable care to put his land in a safe condition for them, or to carry on his activities in a manner which does not endanger them." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 58 at 393–94 (5th ed.1984). *State v. Shumake,* 199 S.W.3d 279, 285 (Tex. 2006)

The Texas Supreme Court has recently held that the Recreational Use Statute applies when a person (1) enters premises owned, operated, or maintained by a governmental unit and (2) engages in recreation on those premises. *Univ. of Texas v. Garner*, 595 S.W.3d 645, 650 (Tex. 2019), *reh'g denied* (Apr. 3, 2020) (citing Tex. Civ. Prac. & Rem. Code § 75.002(f)). If both conditions are met, arguably, the Recreational Use Statute applies. *Id.* (for example: plaintiffs entering governmental land while driving an off-highway vehicle—an activity specifically listed in the Recreation Use Statute's definitions as "recreation" ("[P]leasure driving, including off-road motorcycling and off-road automobile driving and the use of off-highway vehicles."). Tex. Civ. Prac. & Rem. Code § 75.001(3)(H).

The recreational use statute states:

> If an owner, lessee, or occupant of real property other than agricultural land gives permission to another to enter the premises for recreation, the owner, lessee, or occupant, by giving the permission, does not:
>
> (1) assure that the premises are safe for that purpose;
>
> (2) owe to the person to whom permission is granted a greater degree of care than is owed to a trespasser on the premises; or
>
> (3) assume responsibility or incur liability for any injury to any individual or property caused by any act of the person to whom permission is granted.

Tex. Civ. Prac. & Rem. Code Ann. § 75. 002(c)(1)-(3).

"Recreation" means an activity such as:

(A) hunting;
(B) fishing;
(C) swimming;
(D) boating;
(E) camping;
(F) picnicking;
(G) hiking;
(H) pleasure driving, including off-road motorcycling and off-road automobile driving and the use of off-highway vehicles;
(I) nature study, including bird-watching;
(J) cave exploration;
(K) waterskiing and other water sports;
(L) any other activity associated with enjoying nature or the outdoors;
(M) bicycling and mountain biking;
(N) disc golf;
(O) on-leash and off-leash walking of dogs;
(P) radio control flying and related activities; or
(Q) rock climbing.

Tex. Civ. Prac. & Rem. Code Ann. § 75.001 (West).

As applied to a governmental unit, the recreational use statute limits liability even if the person pays to enter the premises. *Id.* § 75.003(c) (excepting governmental units from the chapter's exclusion of landowners who charge a fee for recreational use of land).

The recreational use statute limits the governmental unit's duty for premises defects to that which is owed to a trespasser. *Id.* The limited duty owed to a trespasser is not to injure that person willfully, wantonly, or through gross negligence. *Tex. Utils. Elec. Co. v. Timmons,* 947 S.W.2d 191, 193 (Tex.1997). Therefore, a governmental unit waives sovereign immunity under the recreational use statute and the Tort Claims Act only if it is grossly negligent. Tex. Civ. Prac. & Rem. Code § 75.002(c)-(d); *City of Bellmead v. Torres,* 89 S.W.3d 611, 613 (Tex.2002); *Timmons,* 947 S.W.2d at 193. "[G]ross negligence involves two components: (1) viewed objectively from the actor's standpoint, the act or omission complained of must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others." *Louisiana–Pacific Corp. v. Andrade,* 19 S.W.3d 245, 246 (Tex.1999) (citing *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex.1994)).

The statute requires a higher burden of proof and requires the plaintiff to allege facts that affirmatively demonstrate that the injury arose from gross negligence, malicious intent or bad faith. *See* Tex. Civ. Prac. & Rem. Code § 75.002(d); *State v. Shumake,* 199 S.W.3d 279 (Tex.2006). Gross negligence is an act or omission involving subjective awareness of an extreme degree of risk indicating conscious indifference to the rights, safety or welfare of others. *Transp. Ins. Co. v. Moriel,* 879 S.W.2d 10, 21 (Tex.1994); *Missouri Pac. Ry. Co. v. Shuford,* 72 Tex. 165, 10 S.W. 408, 411 (1888); Tex. Civ. Prac. & Rem. Code § 41.001(11). Plaintiff must show that the District knew about the peril, but that their acts or omissions demonstrate that they did not care. *Louisiana-Pacific Corp. v. Andrade,* 19 S.W.3d 245, 247 (Tex. 1999).

A landowner has no duty to warn or protect trespassers from obvious defects or conditions. Thus, the owner may assume that the recreational user needs no warning to appreciate the dangers of natural conditions, such as a sheer cliff, a rushing river, or even a concealed rattlesnake. But a landowner can be liable for gross negligence in creating a condition that a recreational user would not reasonably expect to encounter on the property in the course of the permitted use. *See,*

e.g., Golding v. Ashley Cen. Irrigation Co., 902 P.2d 142, 145 (Utah 1995) ("If [ ] a landowner has knowledge of an uncommon, hidden peril or danger on the land that is not inherent in the use to which the land is put and that would not be reasonably discovered or avoided by a trespasser, the landowner's failure to warn or guard against such a danger could amount to willful, wanton, or malicious inaction."); *City of Houston v. Cavazos,* 811 S.W.2d 231 (Tex.App.-Houston [14th Dist.] 1991, writ dism'd) (knowledge that numerous people had drowned over a period of years at the same artificially created, but hidden, hazard without any action by the city to warn or remedy the hazard was some evidence of gross negligence); *see also Burnett v. City of Adrian,* 414 Mich. 448, 326 N.W.2d 810 (1982) (reaching same conclusion under Michigan's recreational use statute); *cf. Smither v. Tex. Utilities Elec. Co.,* 824 S.W.2d 693, 696 (Tex.App.-El Paso 1992, writ dism'd) (landowner's use of signs warning of dangerous waters created by company's discharge canal demonstrated conscious concern of landowner "for the safety even of trespassers"). Gross negligence requires that the landowner be subjectively aware of, and consciously indifferent to, an extreme risk of harm. *See* Tex. Civ. Prac. & Rem. Code § 41.001(11); *Louisiana–Pacific Corp. v. Andrade,* 19 S.W.3d 245, 246–47 (Tex.1999) ("what separates ordinary negligence from gross negligence is the defendant's state of mind; in other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrate that he did not care"). This is consistent with our approach in *Texas Department of Parks and Wildlife v. Miranda* that a premises defect claim might be brought under the recreational use statute as long as there existed a factual dispute regarding the landowner's gross negligence with respect to the alleged defect. 133 S.W.3d at 230–31. The recreational use statute limits the state's liability for premises defects, but its effect is not to reinstate the state's immunity from suit. *State v. Shumake*, 199 S.W.3d 279, 288 (Tex. 2006).

	Standard of Care and Elements	
Ordinary Premise Defect *invitee standard if user paid to enter premises	Licensee	(1) a condition of the premises created an unreasonable risk of harm to the licensee; (2) the owner actually knew of the condition; (3) the licensee did not actually know of the condition; (4) the owner failed to exercise ordinary care to protect the licensee from danger; (5) the owner's failure was a proximate cause of injury to the licensee.

Special Defect	Invitee	(1) a condition of the premises created an unreasonable risk of harm to the invitee; (2) the owner knew or reasonably should have known of the condition; (3) the owner failed to exercise ordinary care to protect the invitee from danger; (4) the owner's failure was a proximate cause of injury to the invitee.
Recreational Use Statute	Trespasser	Landowner to not to injure that person willfully, wantonly, or through gross negligence. Even if user paid for entry to premises for governmental entities.