

## **FALL 2015 NEWSLETTER**

### **PREMISES LIABILITY LITIGATION UPDATE**

**By Gerald B. Lotzer**

- 1. *Edith Suarez, Individually and as Surviving Parent of A.S. and S.S., Deceased, and as Surviving Spouse of Hector Suarez, Deceased v. The City of Texas City, Texas* (Tex. Sup. Ct., No. 13-0947, opinion delivered June 19, 2015).**

This is an interlocutory appeal to the City of Texas City, Texas' plea to the jurisdiction in a premises-liability case arising from the drowning deaths of three family members at a man-made beach. The surviving spouse and mother of the decedents alleges that the drowning deaths resulted from a peculiar risk of harm created by a confluence of artificial and natural conditions at the beach and that the municipality was "grossly negligent" in failing to warn or protect the public against those dangers. The trial court denied the jurisdictional plea, but the court of appeals reversed and dismissed the claims for want of jurisdiction. *See*, No. 01-12-00848-CV, 2013 WL 867428, at \*1 (Tex.App. – Houston [1st Dist.] March 7, 2013). At issue is whether there is some evidence of the municipality's liability to invoke the Texas Tort Claims Act's waiver of governmental immunity, as limited by the recreational use statute. *See*, TEX. CIV. PRAC. & REM. CODE §§ 75.003(e)-(g), 101.021-.022, .025.

The Texas Tort Claims Act generally waives governmental immunity in premises liability cases when a governmental unit breaches the duty of care that a private party would owe to a licensee. *Id.* at §75.003, 101.021-.022, .025. If a premise is open to the public for recreational activities, however, the recreational use statute elevates the burden of proof required to invoke the Tort Claims Act's immunity waiver by classifying recreational users as trespassers and requiring proof of gross negligence, malicious intents, or bad faith. *Id.* at § 75.002; *State v. Shumake*, 199 S.W.3d 279, 281 (Tex. 2006). In previous cases applying these statutes, the court has held that landowners owe a duty to warn or protect recreational users when "artificial conditions create dangerous conditions that are not open and obvious, but have no duty to warn or protect against conditions that are open or inherent, and thus obvious, regardless of whether such conditions are naturally or artificially created." *Id.* at 281-82 (man-made culvert created dangerous, hidden undertow) and compared with *City of Waco v. Kirwan*, 298 S.W.3d 618, 626 (Tex. 2009) (edge of cliff is inherently dangerous); and to *Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 660 (Tex. 2007)(artificial condition was visible and known to recreational cyclist).

The allegation in this case was that artificial conditions interacted with natural conditions to exacerbate and increase inherent risks well beyond what a reasonable recreational user might reasonably anticipate. In other words, a convergence of natural and artificial conditions as well as open, inherent, and latent dangers.

Regardless of whether a duty existed, however, when gross negligence is alleged, immunity is waived only if the governmental entity (1) knew about a condition of the property

giving rise to an extreme degree of risk and (2) proceeded with conscious indifference to the rights, safety, or welfare of others. *Shumake*, 199 S.W.3d at 287; and TEX. CIV. PRAC. & REM. CODE § 41.001(11). The court construed the record in the light most favorable to the Petitioner, and found that there was no evidence that the municipality had knowledge of a concealed condition at the beach creating an extreme risk of harm and therefore affirmed the court of appeals judgment with regards to the cause of action for gross negligence.

The remaining issues on appeal were limited to the existence of evidence to support Texas City's liability under the recreational use statute as it pertains to the Texas Tort Claims Act's waiver of immunity.

After construing the evidence and every reasonable inference in Suarez's favor, the court concluded that there was no evidence from which a reasonable factfinder could conclude that Texas City possessed actual, subjective awareness that the combined effect of the Dike's size and location, along with the deposition of fine-grained sediment, altered the natural conditions in the water at the beach. Likewise, they found that there was no evidence that Texas City knew about or appreciated the gravity of any danger created by the combined effect of man-made and natural conditions in the water at the beach. Because the evidence failed to raise a general and material fact issue concerning gross negligence, Texas City retained immunity from suit and the trial court lacked jurisdiction over Suarez's claim. Suarez failed to produce evidence sufficient to invoke the Texas Tort Claims Act's waiver of immunity from suit and they affirm the court of appeals judgment dismissing the petitioner's claims for want of jurisdiction.

**2. *Magdalena Adrienna Abutahoun, Individually and as Personal Representative of the Heirs and Estate of Robert Wayne Henderson, Deceased, and Tanya Elaine Henderson, Individually in her own right and as next friend of Z.Z.H., a Minor v. The Dow Chemical Company* (Tex. Sup. Ct., No. 13-0175, opinion delivered May 8, 2015).**

The Dow Chemical Company contracted with Win-Way Industries to install insulation on a system of pipelines at Dow's facility in Freeport, Texas. Robert Henderson was a Win-Way employee and assisted with insulation work at the facility from 1967 to 1968. The insulation materials contained asbestos. Mr. Henderson was allegedly exposed to asbestos dust by Dow employees who were installing, sawing, and removing asbestos insulation nearby. Prior to his death, Mr. Henderson testified that he was doing the same kind of work as Dow employees and that he was frequently, regularly, and proximately exposed to asbestos-based insulation as a bystander to Dow's employees performing similar insulation work nearby. Eventually, he was diagnosed with mesothelioma. The case was originally filed in the 160th Judicial District Court of Dallas County but was transferred to the asbestos multi-district litigation ("MDL") pretrial court in Harris County for pretrial proceedings. *See*, TEX.GOV'T CODE § 74.162.

Dow moved for summary judgment arguing that Chapter 95 of the TEXAS CIVIL PRACTICES & REMEDIES CODE applied to the Hendersons' negligence claims against Dow and precluded any recovery. The court, in a case of first impression, interpreted Chapter 95 of the TEX. CIV. PRAC. & REM. CODE which relates to limitations on a property owner's liability for injury, death, or property damage as an independent contractor.

The Court of Appeals correctly held that Chapter 95 applies to independent contractors' claims against property owners for damages caused by negligence when those claims arise from the condition or use of an improvement to real property whether the independent contractor constructs, repairs, renovates, or modifies the improvement. Chapter 95 limits property owner liability on claims for personal injury, death, or property damage caused by negligence, including claims concerning a property owner's own contemporaneous negligent activity.

After analyzing the facts specific to this case, the court held that Chapter 95 applies to all independent contractor claims for damages caused by a property owner's negligence when the requirements of § 95.002(2) of the TEX. CIV. PRAC. & REM. CODE are satisfied. They affirmed the court of appeals judgment that "[t]he plain meaning of the text of Chapter 95 does not preclude its applicability where a claim is based upon the negligent actions of the premises owner." In sum, the court held that the Hendersons failed to challenge the court of appeals' conclusion that: (1) their specific claims against Dow, as pleaded and applied, fell within Chapter 95, and (2) their claims were barred by Chapter 95 because the Hendersons did not establish Dow's liability under § 95.003. This alleviated the need to address remaining issues Dow raised on appeal.