In the Court of Appeals
for the
Fifteenth District of Texas,
Toyahville, Texas

Dixie B. Herbster,
Appellant

versus

The University of South Central Texas,
Appellee

On Appeal from the 82nd District Court
Luna County, Texas
The Honorable Grace Bouquett

BEFORE KELLY, J., RUDNICKI, J., AND VOGELSANG, CJ.

VOGELSANG, Chief Justice, in which RUDNICKI, J. joins.

Today we are called upon to decide a case between the Law School of the University of South Central Texas, one of the State's oldest and most venerated institutions of legal study, and Dixie B. Herbster, a former student of the law school.

Herbster sued the law school for damages resulting from injuries she suffered when she slipped and fell on ice that had accumulated outside the law school during a winter storm. The law school filed a single pleading labeled a "Motion to Dismiss" that contained (1) a plea to the jurisdiction alleging that immunity had not been waived under the Tort Claims Act, and (2) a motion for summary judgment alleging that it had no duty as a matter of law to protect Herbster from injury because the ice on which Herbster slipped did not pose an "unreasonable risk of harm." The trial court granted the motion to dismiss without specifying the grounds for its ruling. We affirm.

BACKGROUND

In December 2005, Dixie was a third-year law student. According to her deposition testimony, on December 24, 2005, she and her husband, Dan, also a law student, decided to study all day at the law school.[1] Although the law school was officially closed, Dixie claimed that school administrators and faculty had actively encouraged students to study over the holiday break because the law school operated on

[1] Because the students share the same last name, we will refer to them using their first names.

the "quarter system" and final exams were scheduled for January. The law school had left its entry doors open, and the Herbsters, both executive editors for the law review, had access cards to the law library. They were excited about the many hours of productive studying they would accomplish while their fellow law students were "slacking" on Christmas Eve.

During the previous afternoon, a severe winter storm had descended upon the city of Edinburgh, Texas, where the law school was located. The storm covered the area with frozen precipitation that accumulated overnight. The next morning, the roads throughout Edinburgh were blanketed with ice. The weather, however, would not deter the law students. They decided to brave the icy roads and drive to the law school early that morning, arriving at approximately 8:00 a.m.

In her deposition, Dixie described the area surrounding the law school. The law school itself is located on a small hill on the edge of campus. The hill is bordered on all sides by a sidewalk and a large parking lot, with a curb separating the sidewalk from the parking lot. There is only one stairway leading up from the sidewalk to the law school, and it is on the law school's north side.

When the Herbsters arrived at the law school, the parking lot was covered with ice. According to Dixie, there was no sanding anywhere in the parking lot. The couple trekked slowly but safely through the parking lot and sidewalk without incident. When they reached the stairway, they noticed that the ice that had accumulated on it looked especially thick and dangerous. Again, Dixie observed no sanding on the stairs. However, she noticed a large sign near the stairway. The sign appeared to be written by the law school's head groundskeeper, Willy Redbeard. The sign read:

> DO NOT USE THE STAIRS! THEY ARE DANGEROUSLY ICY!
>
> I HAVE SPENT THE PAST YEAR DESIGNING A PORTABLE RAMP WITH SUPERIOR TRACTION IDEAL FOR ICY CONDITIONS. ITS SURFACE IS EXACTLY LIKE SANDPAPER! I HAVE PLACED THE RAMP ON THE SOUTH SIDE OF THE LAW SCHOOL. AS AN ADDED PRECAUTION, I SANDED IT LAST NIGHT. I STRONGLY ENCOURAGE YOU TO USE THIS RAMP TO MAKE YOUR WAY UP TO THE LAW SCHOOL. BE SLOW AND DELIBERATE IN YOUR MOVEMENTS, BUT DO NOT WORRY ABOUT SLIPPING IF YOU ARE CAUTIOUS. GROUNDSKEEPER WILLY KNOWS WHAT HE IS DOING AND HAS DESIGNED THE SAFEST RAMP EVER!

Redbeard testified in his deposition that the law school had instructed him to make the grounds "as safe as possible" during the ice storm[2] but that the decision to

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[2] The university was required by city statute to keep the campus grounds safe for pedestrians during periods of inclement weather. Thus, the law school concedes that the

install the ramp on the premises during the storm was his. Redbeard believed that the ice storm was an emergency situation requiring his immediate attention. He knew that there was a possibility that some law students would want to study at the law school despite the weather conditions, and he thought the winter storm was a good opportunity to "test out" his ramp. When asked why he did not sand the stairs in addition to the ramp, Redbeard explained that he wanted to make sure people did not use the stairs. He believed the absence of sanding on the stairs would encourage people to use his ramp.

The Herbsters decided to use the ramp. When they arrived at the ramp's location they noticed that, while there was some sand on the surface, there was also a lot of ice. Additionally, there were no handrails on the ramp (Redbeard believed that the surface of the ramp was so safe that handrails were not necessary). Nevertheless, the ramp looked safer than the stairs. They proceeded up the ramp slowly and deliberately, as Redbeard instructed. To their relief, they made it up the ramp safely and proceeded inside the law school.

At approximately 11:00 p.m., the Herbsters decided to call it a night. More ice had accumulated during the day. Because it was now dark, it was more difficult to see the ice on the ground, even though the area around the law school was well lit. Again the students were slow and deliberate in their movement down the ramp. They reached the bottom of the ramp but, as Dixie was stepping off the ramp and onto the sidewalk, she slipped on the ice and fell backwards. Her head and back hit the ground, and she was rendered unconscious. Dan promptly called 911 and Dixie was rushed to the hospital. Although she eventually regained consciousness, Dixie sustained severe injuries to her head and spinal cord.

One year later, Dixie sued the law school for negligence. In her petition, she alleged that the law school, a governmental unit of the State of Texas, was liable for her injuries caused by a condition or use of tangible personal property. See Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2) (West 2005). Specifically, Dixie claimed that the ramp on which she slipped and fell was defectively designed and / or misused by law school personnel.

In response, the law school filed a combined plea to the jurisdiction / motion for summary judgment. The law school claimed that it was immune under the Tort Claims Act because Dixie's injuries were not caused by "the condition or use of tangible personal property." Additionally, the law school asserted that it had no duty to protect Dixie from natural accumulations of ice because such accumulations did not pose an "unreasonable risk of harm."

Following a hearing, the district court granted the law school's motion for summary judgment. This appeal followed.

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discretionary powers exception to the Tort Claims Act does not apply in this case. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.056 (West 2005).

DISCUSSION

Standard of review

Sovereign immunity deprives a trial court of subject-matter jurisdiction in suits against the State or certain governmental units, including school districts, unless the governmental unit consents to suit. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004); *see* Tex. Civ. Prac. & Rem. Code Ann. § 101.051 (West 2005). Because sovereign immunity, if not waived, defeats a trial court's jurisdiction, it is properly asserted in a plea to the jurisdiction. *Miranda*, 133 S.W.3d at 225-26; *Texas Dep't of Transp. v. Jones*, 8 S.W.3d 636, 639 (Tex. 1999). Subject-matter jurisdiction presents a question of law; we review de novo the district court's grant or denial of a plea to the jurisdiction. *See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998); *Texas State Employees Union/CWA Local 6184 v. Texas Workforce Comm'n*, 16 S.W.3d 61, 65 (Tex. App.—Austin, 2000, no pet.).

Likewise, we review the district court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). Summary judgment is proper when there are no disputed issues of material fact and the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Shell Oil Co. v. Khan*, 138 S.W.3d 288, 291 (Tex. 2004) (citing *Knott*, 128 S.W.3d at 215-16).

In deciding whether there is a disputed material fact issue precluding summary judgment, proof favorable to the non-movant is taken as true, and the court must indulge every reasonable inference and resolve any doubts in favor of the non-movant. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995); *Texas Woman's Univ. v. Methodist Hosp.*, 221 S.W.3d 267, 276 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

We may affirm a summary judgment only when the record shows that a movant has disproved at least one element of each of the plaintiff's claims or has established all of the elements of an affirmative defense as to each claim. *Am. Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997); *Four Bros. Boat Works, Inc. v. Tesoro Petroleum Cos.*, 217 S.W.3d 653, 660-61 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

Plea to the jurisdiction

In her first issue, Dixie argues that the law school is not immune from liability under the provisions of the Tort Claims Act. We agree.

In Texas, sovereign immunity deprives a trial court of subject matter jurisdiction for lawsuits in which the state or certain governmental units have been sued unless the

state consents to suit. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). The Texas Tort Claims Act provides a limited waiver of sovereign immunity. Tex. Civ. Prac.& Rem. Code Ann. §§ 101.001-.109. Sovereign immunity includes two distinct principles, immunity from suit and immunity from liablity. *Miranda*, 133 S.W.3d at 224. Immunity from liability is an affirmative defense, while immunity from suit deprives a court of subject matter jurisdiction. *Id*. The Tort Claims Act creates a unique statutory scheme in which the two immunities are co-extensive: "Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter." Tex. Civ. Prac. & Rem. Code Ann. § 101.025(a).

In relevant part, the Tort Claims Act provides that:

> 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 employment if:
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> > (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; and
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> (2) personal injury and 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.

Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (West 2005). The Tort Claims Act also waives immunity for a premises defect, or the condition of real property. *See id*. § 101.022 (West 2005). Liability for premises defects is also implied under section 101.021(2) because a premises defect arises from a condition existing on real property. *Perez v. City of Dallas*, 180 S.W.3d 906, 910 (Tex. App.—Dallas 2005, no pet.).

Dixie contends that her injuries were caused by a condition or use of tangible personal property, namely, the portable ramp on which she allegedly slipped and fell.

Tangible personal property means something that has a corporeal, concrete, and palpable existence. *Univ. of N. Tex. v. Harvey*, 124 S.W.3d 216, 220 (Tex. App.—Fort Worth 2003, pet. denied). There can be little doubt that the portable ramp constitutes tangible personal property. The question is whether a "condition or use" of the ramp was the cause of Dixie's injuries. We hold that it was.

The supreme court has recognized that for "use" of tangible personal property to occur under the terms of the Act, one must "put or bring [the property] into action or

service; to employ for or apply to a given purpose." *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582 (Tex. 1996). However, a governmental unit does not "use" personal property merely by allowing someone else to use it and nothing more. *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244, 246 (Tex. 2004).

Texas courts have split over the issue of how broadly to interpret the terms "condition" and "use." *See, e.g., Tex. State Tech. College v. Beavers*, 218 S.W.3d 258 (Tex. App.—Texarkana 2007, no pet.); *Retzlaff v. Tex. Dep't of Crim. Justice*, 135 S.W.3d 731, 741 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Tarrant County Hosp. Dist. v. Henry*, 52 S.W.3d 434, 442 (Tex. App.—Fort Worth 2001, no pet.); *Laman v. Big Spring State Hosp.*, 970 S.W.2d 670, 672 (Tex. App.—Eastland 1998, pet. denied) *Vela v. City of McAllen*, 894 S.W.2d 836 (Tex. App.—Corpus Christi 1995, no writ); *City of Waco v. Hester*, 805 S.W.2d 807 (Tex. App.—Waco 1990, writ denied).

Of all the courts that have analyzed this issue, we conclude that the Texarkana court's interpretation of "use" in *Beavers* is most consistent with supreme court precedent. *See* 218 S.W.3d at 265-67. In *Beavers*, the court held that "when a governmental unit does more than merely allow another access to personal property, but also negligently equips the property, intentionally puts it into service for use by another with full knowledge of its intended use, and instructs the manner of its use, and when the personal property so supplied is in fact used in the manner and for the purpose the governmental unit intended and such use of the tangible personal property is a proximate cause of injury, the governmental unit has used tangible personal property in such a manner as to waive immunity under the Tort Claims Act." *Id*. at 267.

In this case, Redbeard did more than merely allow people to use his portable ramp. He negligently equipped it without handrails and intentionally put it into service with full knowledge of its intended use. In the sign that he posted by the stairs, Redbeard also instructed people in how to use the ramp, and the students used the ramp as instructed. This is exactly the type of situation the legislature had in mind when it waived immunity under the Act.

Finally, we note that the concurring justice argues that the "emergency exception" to the Tort Claims Act applies to this case. *See* Tex Civ. Prac. & Rem. Code Ann. § 101.055(2) (West 2005). We disagree. It is abundantly clear that, in failing to install handrails on the ramp and in failing to sand the stairs so that students would have an alternative to the ramp, Redbeard acted with conscious indifference or reckless disregard for the safety of others. Furthermore, we do not think winter weather is the type of situation that qualifies as an "emergency situation." *See, e.g., City of Amarillo v. Martin*, 971 S.W.2d 426, 430, 41 (Tex. 1998); *City of San Angelo Fire Dept. v. Hudson*, 179 S.W.3d 695, 702 (Tex. App.—Austin 2005, no pet.); *Smith v. Janda*, 126 S.W.3d 543, 546 (Tex. App.—San Antonio 2003, no pet.); *Fernandez v. City of El Paso*, 876 S.W.2d 370, 376 (Tex. App.—El Paso 1993, writ denied).

We conclude that immunity under the Tort Claims Act has been waived in this case.

Summary judgment

In her second issue, Dixie asserts that the law school had a legal duty to take precautions to protect her from the ice that had accumulated during the winter storm. We disagree.

A cause of action for negligence consists of three elements: (1) the existence of a legal duty owed to another; (2) a breach of that duty; and (3) damages proximately resulting from the breach. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990); *Waddill v. Phi Gamma Delta Fraternity*, 114 S.W.3d 136, 140 (Tex. App.—Austin 2003, no pet.). "The threshold inquiry in a negligence case is duty." *Phillips*, 801 S.W.2d at 525; *Pichardo v. Big Diamond, Inc.*, 215 S.W.3d 497, 501 (Tex. App.—Fort Worth 2007, no pet.). "Whether a duty exists in a particular case is a question of law for the court to decide from the facts surrounding the occurrence in question." *Texas Home Mgmt., Inc. v. Peavy*, 89 S.W.3d 30, 33 (Tex. 2002).

In a negligence case based on a theory of premises liability, the owner or occupier of the premises owes a duty to its invitees[3] to exercise reasonable care to protect them from dangerous conditions on the premises known or discoverable to it. *Wal-Mart Stores v. Gonzalez*, 968 S.W.2d 934, 936 (Tex. 1998). "However, a land possessor's duty toward its invitee does not make the possessor an insurer of the invitee's safety." *Id*. Thus, to establish the owner's liability, the invitee must prove the following elements: (1) actual or constructive knowledge of a condition on the premises by the owner or occupier; (2) that the condition posed an unreasonable risk of harm; (3) that the owner or occupier did not exercise reasonable care to reduce or eliminate the risk; and (4) that the owner or occupier's failure to use such care proximately caused the plaintiff's injury. *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 99 (Tex. 2000).

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[3] **Error! Main Document Only.** The law school concedes that Dixie was an invitee because, as a law student, she paid for the use of the premises. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.022 (West Supp. 2007). An invitee is a person who enters the premise of another at the express or implied invitation from the owner or occupier for their mutual benefit. *Wong v. Tenet Hosps. Ltd.*, 181 S.W.3d 532, 537 (Tex. App.—El Paso 2005, no pet.). The owner or occupier owes an invitee the duty to keep the property safe and must use reasonable care to protect the invitee from reasonably foreseeable injuries. *Id*. A licensee is a person privileged to enter and remain on the premises of another by express or implied permission of the owner, and not by any express or implied invitation. *Id*. A lower standard of care is due to a licensee. *Id*. The duty a property owner owes a licensee is the duty not to injure the licensee through willful, wanton, or grossly negligent conduct or to make safe a dangerous condition of which the owner is aware. *Id*. A landowner or occupier is liable to a licensee only if the owner or occupier has actual knowledge of the condition that injured the plaintiff. *Id*.

The law school's motion for summary judgment focused on the second element, whether the icy conditions posed an unreasonable risk of harm. A condition presenting an unreasonable risk of harm is defined as one in which there is a "sufficient probability of a harmful event occurring that a reasonably prudent person would have foreseen it or some similar event as likely to happen." *County of Cameron v. Brown*, 80 S.W.3d 549, 556 (Tex. 2002); *Seideneck v. Cal Bayreuther Assocs.*, 451 S.W.2d 752, 754 (Tex. 1970); *Wong v. Tenet Hosps. Ltd.*, 181 S.W.3d 532, 539 (Tex. App.—El Paso 2005, no pet.). Foreseeability requires only that the general danger of a harmful event occurring be foreseeable. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996); *Sanmina-SCI Corp. v. Ogburn*, 153 S.W.3d 639, 642 (Tex. App.—Dallas 2004, pet. denied). Foreseeability does not require anticipation of just how injuries will grow out of the dangerous situation. *Clark v. Waggoner*, 452 S.W.2d 437, 440, (Tex. 1970); *Ogburn*, 153 S.W.3d at 642.

The issue of whether natural accumulations of ice pose an unreasonable risk of harm has not yet been heavily litigated in Texas. The Eastland Court of Appeals first addressed this issue in *Wal-Mart Stores, Inc. v. Surratt*, 102 S.W.3d 437 (Tex. App.—Eastland 2003, pet. denied). The Eastland court examined two conflicting rules that had been adopted by jurisdictions in northern states, the "Massachusetts" or "natural accumulation" rule and the "Connecticut" rule. *See id*. at 442-43. Under the "Massachusetts" rule, the owner of the premises generally owes no duty to protect invitees from conditions caused by natural accumulations of snow and ice. *Id*. at 442 (citing *Mucsi v. Graoch Assocs. Ltd. P'ship # 12*, 144 Wn.2d 847, 31 P.3d 684, 688 (Wash. 2001)). Under the "Connecticut" rule, which the Eastland court recognized as the modern or "restatement rule," the owner "has a general duty to remove or eliminate all dangerous conditions on the premises irrespective of their source." *Id*. The Eastland court rejected the "Connecticut" rule and adopted the "Massachusetts" rule, holding that "a premises owner/operator does not have a duty to protect its invitees from conditions caused by a natural accumulation of frozen precipitation on its parking lot because such an accumulation does not constitute an unreasonably dangerous condition." *Id*. at 443.

We agree with the reasoning of the Eastland court. Requiring landowners in Texas to protect invitees from frozen precipitation on their property would be a heavy burden that Texas landowners are ill-equipped to bear due to the infrequent nature of frozen precipitation in Texas. Besides, on the rare occasions when frozen precipitation does occur, it most certainly does not last long. If people are concerned about slipping on ice, they can wait to go out until after the ice melts. We do not want to create a situation in which landowners feel forced to close down their property for short but often critical periods of time in order to avoid liability. The public is better served when premises remain open during times of harsh weather conditions.

We also note that two other courts have followed Eastland's lead in embracing the "Massachusetts" rule. *See Gagne v. Sears, Roebuck & Co.*, 201 S.W.3d 856, 858 (Tex. App.—Waco 2006, no pet.) (applying holding in *Surratt* to injury from slipping on ice on mall sidewalk); *Griffin v. 1438, Ltd.*, No. 02-03-00255-CV, 2004 Tex. App. LEXIS 6403, *10 (Tex. App.—Fort Worth July 15, 2004, no pet.) (mem. op., not designated for

publication) (applying holding in *Surratt* to injury from slipping on ice in restaurant parking lot).

Finally, we find indirect support for the law school's position in a decision by the Texas Supreme Court. In *M. O. Dental Lab v. Rape*, 139 S.W.3d 671 (Tex. 2004) (per curiam), the plaintiff slipped and fell on a "slippery mud substance" that had allegedly accumulated on the sidewalk adjacent to the business's parking lot. 139 S.W.3d at 672. The supreme court upheld summary judgment in favor of the landowner, holding that "[o]rdinary mud that accumulates naturally on an outdoor concrete slab without the assistance or involvement of unnatural contact is, in normal circumstances, nothing more than dirt in its natural state and, therefore, is not a condition posing an unreasonable risk of harm." *Id*. at 676. The court explained:

> Holding a landowner accountable for naturally accumulating mud that remains in its natural state would be a heavy burden because rain is beyond the control of landowners. Most invitees in Texas will encounter natural conditions involving ordinary mud regularly, and accidents involving naturally accumulating mud and dirt are bound to happen, regardless of the precautions taken by landowners. Generally, invitees like Rape are at least as aware as landowners of the existence of visible mud that has accumulated naturally outdoors and will often be in a better position to take immediate precautions against injury. Finally, following the rationale of Johnson County, to hold otherwise would make the landowner strictly liable for injuries resulting from ordinary mud or dirt in its natural state. The ordinary mud found on the concrete slab outside of the M.O. Dental Lab accumulated due to rain and remained in its natural state; thus, as a matter of law, it was not a condition that posed an unreasonable risk of harm to Rape necessary to sustain her premises liability action.

Id.

We conclude that ice, like mud, is a naturally occurring condition. It accumulates due to frozen rain and, as long as it remains in its natural state, does not pose an unreasonable risk of harm. For that reason, we affirm the district court's grant of summary judgment in favor of the law school.

KELLY, Justice (Concurring)

I, too, would affirm the judgment of the district court. However, I would affirm based on sovereign immunity.

Regarding the "no duty" issue, I believe the majority's reliance on *Surratt* and *M.O. Dental Lab* is misplaced. First, I disagree with the Eastland court's adoption of the "Massachusetts" rule. In today's world, it defies common sense to not require landowners to take at least some precautions to guard against injuries to invitees from

frozen precipitation. Landowners are certainly in a better position than invitees to take such precautions because they are more familiar with their property. Because of the infrequent nature of frozen precipitation in Texas, I do not think this would be a heavy burden to place on landowners. Furthermore, I do not think such a rule would cause landowners to shut down their businesses. It most certainly hasn't had that effect in northern states.[4]

I also feel compelled to note that the majority neglected to mention that the Eastland court limited its holding in *Surratt* to a landowner's parking lot: "We expressly limit our 'no duty' holding to the premises owner's/operator's parking lot. The question of the duty owed with respect to natural accumulations of frozen precipitation occurring on sidewalks, entryways, and *other areas intended for pedestrian traffic* is not before us." *Surratt*, 102 S.W.3d at 445 (emphasis added). The injury in this case did not occur in the law school's parking lot; it occurred on an area expressly intended for pedestrian traffic.

As for *M.O. Dental Lab*, the holding in that case concerned mud, not ice. The differences between mud and ice are obvious. For example, mud occurs all year round, in every part of Texas. Of course it would be a heavy burden to require landowners to take precautions against injuries from mud. Ice, on the other hand, is an infrequent weather condition in Texas. It is also much more dangerous than mud because it is often transparent and difficult for pedestrians to see (so-called "black ice" comes to mind).

Finally, I feel that summary judgment is inappropriate on this issue because we are dealing with a question of "reasonableness." "The determination of whether a particular condition poses an unreasonable risk of harm is generally fact specific." *Hall v. Sonic Drive-In of Angleton, Inc.*, 177 S.W.3d 636, 645 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Because such determinations are "fact-intensive inquiries," they are "well-suited for a jury's determination." *Reliable Consultants, Inc. v. Jaquez*, 25 S.W.3d 336, 342 (Tex. App.—Austin 2000, pet. denied).

Admittedly, there are some cases when courts have determined, as a matter of law, that a particular condition does not pose an unreasonable risk of harm. *See, e.g.*, *Brinson Ford, Inc. v. Alger*, 228 S.W.3d 161, 163 (Tex. 2007) (holding that a pedestrian ramp at a car dealership did not pose an unreasonable risk of harm because it "met applicable safety standards and was further outlined in yellow stripping that the dealership added, which is a common method used to indicate a change in elevation."); *Brookshire Grocery Co. v. Taylor*, 222 S.W.3d 406 (Tex. 2007) (holding that, while ice on the floor of a grocery store from a soft drink dispenser was an "unreasonably dangerous condition," the soft drink dispenser itself was not unreasonably dangerous). However, I do not believe this is such a case. There are too many genuine issues of material fact in this case. For example, we cannot tell from the record where exactly

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[4] For a comprehensive annotation of how northern states have dealt with this issue, *see* Jay Zitter, J.D., Annotation, *Liability of Owner, Operator, or Other Parties, for Personal Injuries Allegedly Resulting from Snow or Ice on Premises of Parking Lot*, 74 A.L.R. 5th 49 (1999).

Dixie slipped. Was it on the ramp itself while she was stepping off of it, or was it on the sidewalk as she was stepping on to that?

Furthermore, I think that while frozen precipitation might pose an unreasonable risk of harm in some parts of Texas (such as the city of Edinburgh, where ice storms are very infrequent), it might not pose an unreasonable risk of harm in other parts of Texas, such as the Panhandle. However, this and other fact issues are for the jury to resolve after a trial, not the court prior to trial.

Nevertheless, I would affirm the district court's judgment on jurisdictional grounds because I believe that Dixie's injuries, even if they resulted from a condition that posed an unreasonable risk of harm, were not caused by "a condition or use of tangible personal property."

When construing statutory immunity waivers under the Tort Claims Act, the supreme court has emphasized that the act "provides a limited waiver of sovereign immunity, allowing suits to be brought against governmental units only in certain, narrowly defined circumstances." *Texas Dep't of Crim. Justice v. Miller*, 51 S.W.3d at 587; *see also Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341-42, 41 Tex. Sup. Ct. J. 653 (Tex. 1998) (surveying legislative history of act to illustrate that "the waiver of immunity in the Tort Claims Act is not, and was not intended to be, complete"). Accordingly, we should narrowly interpret the provisions of the Act.

The Tort Claims Act and case law draws a distinction between claims involving the failure to use, or the nonuse of property, which do not waive sovereign immunity, from claims involving a "use" of tangible personal property that causes injury, which do effect a waiver. *Miller*, 51 S.W.3d at 587. A governmental unit does not "use" personal property merely by allowing someone else to use it and nothing more. *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244, 246 (Tex. 2004). Thus, in the absence of use by a governmental employee, a state entity is liable only if it provides property lacking an integral safety component that leads to the plaintiff's injuries. *Id*. at 247.

To state a claim for which immunity is waived, a plaintiff must allege that usage of the property itself actually caused the injury. *Miller*, 51 S.W.3d at 588; *Renteria v. Housing Auth. of the City of El Paso*, 96 S.W.3d 454, 458 (Tex. App.—El Paso 2002, pet. denied). The use must have proximately caused the injury; mere involvement of the property is insufficient. *Bossley*, 968 S.W.2d at 343. "Requiring only that a condition or use of property be involved would conflict with the Act's basic purpose of waiving immunity only to a limited degree." *Id*.

In this case, the portable ramp was undoubtedly "involved" with Dixie's injury. However, I am not convinced that the ramp was the proximate cause of Dixie's injury. The record reflects that Dixie slipped and fell while she was stepping off of the ramp and onto the sidewalk. Furthermore, there is no evidence that Dixie slipped because the ramp was missing an "integral safety component." True, the ramp lacked handrails, but there

is no evidence that the handrails would have prevented Dixie's fall. I think this is a case in which the ice itself caused the accident, and the ramp was only incidentally involved. The law school provided the ramp to the students, but did not "use" it in the way required by case law interpreting the Act's waiver of immunity. *See, e.g.*, *Nunez v. City of Sansom Park*, 197 S.W.3d 837, 841 (Tex. App.—Fort Worth 2006, no pet.).

Additionally, I believe that this case falls under the "emergency exception" to the Tort Claims Act, which provides that a governmental unit is not liable for a claim arising "from the action of an employee while responding to an emergency call or reacting to an emergency situation if the action is in compliance with the laws and ordinances applicable to emergency action, or in the absence of such a law or ordinance, if the action is not taken with conscious indifference or reckless disregard for the safety of others." Tex. Civ. Prac. & Rem. Code Ann. § 101.055(2) (West 2005).

The Texas Supreme Court has recently held that a flood can be an emergency situation under section 101.055(2). *See City of San Antonio v. Hartman*, 201 S.W.3d 667, 673 (Tex. 2006). Similarly, I think an ice storm qualifies as an emergency. In installing the ramp on the premises, Redbeard was simply responding to this emergency under directions from the law school and, despite his failure to install handrails on the ramp, I do not think he acted with "conscious indifference" or "reckless disregard" for the safety of others.

In conclusion, I agree with the majority's decision to affirm, but I disagree with its reasoning on both issues. For that reason, I respectfully concur only in the judgment.