IN THE SUPREME COURT OF TEXAS

NO. 05-0030

TXI OPERATIONS, L.P., PETITIONER,

v.

DAVID PERRY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

Argued January 26, 2006

JUSTICE GREEN delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE BRISTER, and JUSTICE JOHNSON joined.

JUSTICE HECHT filed a dissenting opinion, in which JUSTICE MEDINA and JUSTICE WILLETT joined.

Rural unpaved roads with potholes at the cattle guards are quite common in this state. In this case, an invitee truck driver drove through one of those potholes several times, claiming injury on one of his last trips, and sued the landowner for its failure to adequately warn of the danger. The premises owner does not challenge whether it had a duty to warn,[1] but claims instead that a fifteen miles-per-hour speed limit sign posted near the pothole was an adequate warning as a matter of law. We conclude that it was not. Accordingly, we affirm the judgment of the court of appeals.

I

TXI Operations, LP, owns and operates the Dolen Sand Pit and is responsible for maintaining an unpaved road that connects the pit to the highway. David Perry, a truck driver for Campbell

[1] TXI does not argue that the pothole did not constitute an unreasonably dangerous premises condition, or that the condition was open and obvious. *See Gen. Elec. Co. v. Moritz*, 257 S.W. 3d 211, 216 (Tex. 2008). Accordingly, for purposes of this opinion, we will assume there was a duty to warn.

Ready Mix, regularly drove back and forth on the road to load and transport materials in connection with his duties for Campbell. On one trip down the road, his vehicle struck a hole at a cattle guard. As a result, he was thrown into the roof of the truck's cab and injured. Perry had already driven the road at least four times that day without injury, and admitted he knew the hole was there. He was also aware of a fifteen miles-per-hour speed limit sign that TXI had posted near the hole. Perry nevertheless claimed that TXI was negligent in failing to warn him of the existence of a road condition that it knew was dangerous.

A jury found that Perry and TXI were both negligent and equally at fault. As a result, the trial court entered a judgment for Perry, reducing the jury's damage award by his percentage of fault. TXI appealed, claiming that posting the speed limit sign discharged its duty to warn Perry of the dangerous road condition. The court of appeals disagreed and affirmed the trial court's judgment. __ S.W.3d __. In this Court, TXI does not contest that it owed a duty to warn its invitees; it asserts only that the speed limit sign was an adequate warning of the dangerous road condition as a matter of law.[2]

II

Premises owners and occupiers owe a duty to keep their premises safe for invitees against known conditions that pose unreasonable risks of harm. *See, e.g.*, *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 99 (Tex. 2000). The duty is to "take whatever action is reasonably prudent under the circumstances to reduce or to eliminate the unreasonable risk from that condition." *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 295 (Tex. 1983). The existence of this duty is a question of

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[2] TXI presents the following single issue:

> Is a 15 mile per hour speed limit sign adequate warning when the evidence is Perry saw the speed limit sign, heeded the warning to slow down, saw and appreciated the danger of the condition in which he was injured by crossing the condition four times prior to sustaining an injury on the fifth crossing?

According to TXI, "submission of the issue of negligence (and any attendant damages) was error" because "TXI discharged its duty as a matter of law by posting a 15 mile per hour speed limit sign."

law for the court. *Moritz*, 257 S.W.3d at 217. When such a duty is owed, the premises owner or occupier must either adequately warn of the dangerous condition or make the condition reasonably safe. *See State v. Williams*, 940 S.W.2d 583, 584 (Tex. 1996) (per curiam). On appeal, it is undisputed that Perry was an invitee on TXI's premises, that TXI knew about the hole in the road, that the hole constituted a dangerous condition, and that TXI did not attempt to repair the hole. Perry also admits that he knew about the hole and had encountered it several times before his injury. But TXI does not attempt to argue that it owed no duty of care because of Perry's voluntary conduct or because the hole was obvious. Rather, TXI argues that its duty to Perry was discharged when it posted the speed limit sign.

In a premises liability case such as this, the defendant's negligence is determined by asking whether the defendant "exercise[d] reasonable care to reduce or to eliminate the risk" created by the premises defect. *Corbin*, 648 S.W.2d at 296; *see also Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 521 (Tex. 1978). Negligence is commonly a question of fact unless the evidence establishes a complete absence of negligence as a matter of law. Here, it does not. A "be careful" warning might be *some* evidence that the premises owner was not negligent, but it is not conclusive in a situation such as this where the posted speed-limit sign was only a general instruction; it neither informed the driver of road hazards generally, nor did it identify the particular hazard that TXI now says the sign was meant to warn against. *See State v. McBride*, 601 S.W.2d 552, 554, 556–57 (Tex. App.—Waco 1980, writ ref'd n.r.e.) (holding that an owner had not satisfied the duty to warn drivers of a slick and muddy road with a "'SLOW' sign and a '35 MPH' sign"). The inadequacy of the sign is supported by the evidence that Perry was following the sign's instruction at the time of his injury. Of course, an alternative to providing an adequate warning would have been for TXI to repair the pothole so as to make the condition reasonably safe as a matter of law. *See Williams*, 940 S.W.2d at 584. But the record does not reflect that TXI took this action.

The dissent takes issue with the notion that potholes in rural roads pose an unreasonable risk of harm to 18-wheel truck drivers because potholes are common, they are open and obvious, and no warning about them should even be necessary. But even the dissent concedes, as it must, that the duty issue is not before us. That being so, of course, we do not decide it. Instead, we must assume that a duty to warn exists. The dissent's view seems to be that because it concludes no warning should really be necessary, any warning is adequate. That view, of course, completely discounts the existence of duty. If a duty is owed, an adequate warning is required. We agree with the dissent that a speed limit sign does not necessarily mean the driver should expect the posted limit to be a safe speed under all circumstances. Regardless, the record reflects some evidence that the warning here was not adequate to warn of the pothole and that the pothole presented a risk even at a speed slower than the posted limit. As a result, the jury could have properly concluded that TXI's sign did not adequately warn Perry of the dangerous condition.

The judgment of the court of appeals is affirmed.

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Paul W. Green
Justice

OPINION DELIVERED: February 27, 2009