IN THE SUPREME COURT OF TEXAS

NO. 09-0061

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
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

PER CURIAM

JUSTICE LEHRMANN did not participate in the decision.

Jason Bonnin worked at Joe's Crab Shack, a restaurant located on the grounds of Texas State University–San Marcos. On the evening of April 21, 2005, Jason and a group of fellow employees celebrated a colleague's final day at work by jumping from the deck at Joe's Crab Shack into the San Marcos River. After his second jump, Jason was sucked into the undertow and became trapped in the caverns beneath the restaurant, where he drowned. Jason's parents sued the University, alleging that repairs made to the dam in 1998 created an "unreasonably dangerous condition," and that the University was negligent in failing to block access to the caverns.

The trial court denied the University's plea to the jurisdiction. The court of appeals reversed in part, holding that the Bonnins failed to establish a waiver of sovereign immunity for their claims

of negligent use and defective condition of property, to the extent the claims challenged discretionary repairs made to the waterway by the University. ___S.W.3d___. Because those pleadings "affirmatively negate[d] the existence of jurisdiction," the court held that the Bonnins need not be allowed an opportunity to amend. *Id.* at___. On the other hand, the court of appeals held that the Bonnins' premises defect claim under the recreational use statute, TEX. CIV. PRAC. & REM. CODE § 75.002, "unrelated to the repairs of the waterway," did not affirmatively demonstrate incurable jurisdictional defects, and remanded the case to allow the Bonnins to amend their pleadings. *Id*. at___.

The court of appeals looked to *State v. Shumake*, 199 S.W.3d 279 (Tex. 2006), in concluding that the Bonnins raised a potential premises defect claim. *Id*. at___. After the court of appeals issued its opinion, we decided *City of Waco v. Kirwan*, 298 S.W.3d 618, 620 (Tex. 2009), which clarified the duty owed "to recreational users to warn or protect [them] against the danger of a naturally occurring condition or otherwise refrain from gross negligence with respect to the condition."

Accordingly, without hearing oral argument, we grant the petition for review without reference to the merits, vacate the court of appeals' judgment, and remand the case to that court for reconsideration in light of our decision in *Kirwan*. TEX. R. APP. P. 59.1, 60.2(f).

OPINION DELIVERED: June 25, 2010