IN THE SUPREME COURT OF TEXAS

NO. 08-0016

DENTON COUNTY, TEXAS, PETITIONER,

v.

DIANNE BEYNON AND ROGER BEYNON, INDIVIDUALLY, ET AL., RESPONDENTS

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

JUSTICE WILLETT delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE BRISTER, JUSTICE GREEN, and JUSTICE JOHNSON joined.

JUSTICE O'NEILL filed a dissenting opinion, in which CHIEF JUSTICE JEFFERSON and JUSTICE MEDINA joined.

In this premise-liability case, we decide whether a seventeen-foot floodgate arm located approximately three feet off a two-lane rural roadway is a "special defect" under the Texas Tort Claims Act (TTCA). We hold the floodgate arm does not meet the TTCA's narrow definition of a special defect. Accordingly, we reverse the court of appeals' judgment and dismiss the case.

Rhiannon Beynon, a minor, was a backseat passenger in a car traveling at night along Old Alton Road—an unlit, undivided two-lane roadway in Denton County. When driver Mark Hilz noticed an oncoming vehicle approaching in the middle of the road with its bright lights on, he moved his car to the far right side of the road, which had a steep pavement edge drop-off. His right-

side tires then left the asphalt, dropping "around eight inches" off the edge and into some loose gravel and grass. The car briefly climbed back onto the road, but Hilz had lost control, and the car slid sideways into the grass where it was punctured by a seventeen-foot floodgate arm owned and maintained by Denton County.

The metal floodgate arm was unsecured and improperly pointed toward oncoming traffic,[1] with the tip of the arm about three feet from the edge of the roadway. The floodgate arm pierced the driver's side door and then entered the backseat area where it severely injured Rhiannon Beynon's leg before passing through the floorboard beneath her seat. Diane and Roger Beynon, individually and as Rhiannon's next friend, sued Denton County on premise-defect and special-defect theories of liability.

The trial court granted Denton County's plea to the jurisdiction on the premise-defect claim but not on the special-defect claim, prompting Denton County to challenge the latter ruling via interlocutory appeal.[2] The court of appeals affirmed the trial court's judgment, holding the floodgate arm to be "a condition that an ordinary user of the roadway would find unexpected and unusually dangerous."[3] Because the court of appeals' decision conflicts with our precedent as described below,

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[1] It was the normal practice of Denton County to secure the floodgate arm with a lock and chain and point it away from oncoming traffic. Denton County does not dispute that the floodgate arm was unsecured and facing the wrong direction. Rather, it contends that even in this position, the floodgate arm was not a special defect as a matter of law.

[2] *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8).

[3] 242 S.W.3d 169, 175.

we have jurisdiction to decide whether the County's plea should have been granted on the special-defect claim.[4]

The TTCA does not define "special defect" but likens it to "excavations or obstructions" that exist "on" the roadway surface.[5] The existence of a special defect is a question of law that we review de novo.[6] Where a special defect exists, the State owes the same duty to warn as a private landowner owes to an invitee,[7] one that requires the State "to use ordinary care to protect an invitee from a dangerous condition of which the owner is or reasonably should be aware."[8]

This Court has never squarely confronted whether a hazard located off the road can (or can never) constitute a special defect, though we did note in *Payne* that some courts of appeals have held certain off-road conditions to be special defects.[9] However, as *Payne* clarified, "[w]hether on a road or near one,"[10] conditions can be special defects like excavations or obstructions "only if they pose

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[4] TEX. GOV'T CODE §§ 22.001(a)(2), 22.225(c).

[5] TEX. CIV. PRAC. & REM. CODE § 101.022(b).

[6] *State Dep't of Highways & Pub. Transp. v. Kitchen*, 867 S.W.2d 784, 786 (Tex. 1993) (per curiam).

[7] *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992).

[8] *Id.*

[9] *Id.* at 238-39 n.3.

[10] *Id.* at 238 n.3.

a threat to the ordinary users of a particular roadway."[11] More specifically, a court cannot "classify as 'special' a defect that is not like an excavation or obstruction on a roadway."[12]

The floodgate arm that injured Rhiannon Beynon is not of the same kind or class as an excavation or obstruction, nor did it pose a threat to "ordinary users" in the manner that an excavation or obstruction blocking the road does. It thus falls outside the TTCA's narrow special-defect class as a matter of law. The Beynons contend the floodgate arm is an obstruction "[b]y definition and by its very nature" because "[i]ts sole intended purpose is to obstruct vehicular traffic." This would be true had the arm been set in the roadway in a closed position to block traffic, but here it was in a resting position roughly three feet off the roadway, albeit unsecured and facing the wrong direction. Even still, the arm did not "pose a threat to the ordinary users of [Old Alton Road],"[13] or prevent ordinary users from traveling on the road (as opposed to skidding off the road). Our cases rest on the objective expectations of an "ordinary user," and such a driver would not be expected to careen uncontrollably off the paved roadway and into the adjoining grass, as Hilz

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[11] *Id*. A 1999 per curiam opinion from this Court appeared to add a second element to the definition, stating "[a] special defect must be a condition of the same kind or class as an excavation or roadway obstruction *and* present 'an unexpected and unusual danger to ordinary users of roadways.'" *State v. Rodriguez*, 985 S.W.2d 83, 85 (Tex. 1999) (per curiam) (citation omitted) (emphasis added). The TTCA itself says nothing about "unexpected and unusual danger." That phrase first appeared in 1992 in *Payne*. In that case, we observed that excavations and obstructions "present an unexpected and unusual danger to ordinary users of roadways." *Payne*, 838 S.W.2d at 238. The TTCA mandates no second prong, nor does *Payne* engraft one; the statutory test is simply whether the condition is of the same class as an excavation or obstruction. We used "unexpected and unusual danger" in *Payne* to *describe* the class, not to *redefine* it. Nor does the case upon which *Payne* rests, *County of Harris v. Eaton*, 573 S.W.2d 177, 179 (Tex. 1978), mandate that the condition, besides being like an excavation or obstruction, also pose an unexpected and unusual danger to ordinary roadway users.

[12] *Payne*, 838 S.W.2d at 239 n.3 (disapproving of cases "when the defect did not present a hazard to the ordinary users of a roadway").

[13] *Id*.

admitted when he stated that the "normal course of travel for [Old Alton Road] would be the asphalt pavement."

In any case, the arm was neither the condition that forced Hilz's car off the road initially nor the condition that caused the car to skid sideways and crash into the floodgate arm. The record is clear that Hilz completely lost control of the vehicle when he tried to navigate what he called a "fairly steep drop" along the road's edge and reenter the pavement. He testified that prior to the impact, he "didn't have any control of the car," that the car "was simply sliding sideways at a 45-degree angle" toward a clump of trees, and that the car came to rest in the trees after striking the floodgate arm.

The dissent stresses that few off-road conditions would qualify as special defects but "the particular circumstances presented in this case" qualify because the floodgate arm was unexpected and posed an unusual danger to ordinary travelers. First, the TTCA speaks of "special defects such as excavations or obstructions" that impede travel on the roadway. This condition was not of the same kind or class as those cited in the TTCA. Second, the TTCA does not posit an alternative basis for special-defect liability when a condition, while not an excavation or obstruction, is out of the ordinary.[14] We understand the dissent's sentiments but do not believe they track the statute or afford

[14] A per curiam decision from 1993, the year after *Payne* was decided, suggests that a special defect can be *any* condition that poses an unexpected and unusual danger, even if it is not an excavation or obstruction. *State Dep't of Highways & Pub. Transp. v. Kitchen*, 867 S.W.2d 784, 786 (Tex. 1993) (per curiam) ("Special defects are excavations or obstructions, or other conditions which 'present an unexpected and unusual danger to ordinary users or roadways.'") (quoting *Payne*'s description of how excavations and obstructions pose such hazards) (citations omitted). But waiving immunity for "other conditions," however uncommon, departs from the text's explicit focus on "excavations or obstructions."

much bright-line guidance, particularly in light of our focus on "ordinary users" and our requirement that immunity waivers be clear and unambiguous.[15]

The injuries sustained by Rhiannon Beynon are unquestionably tragic; however, it is the province of the Legislature, not the courts, to prescribe the parameters of premise- and special-defect claims.[16] The trade-offs inherent in governmental immunity are a uniquely legislative matter, and the Legislature has specifically limited special defects to conditions "such as excavations or obstructions on highways, roads, or streets."[17] Accordingly, we decline to expand the statutory definition beyond its terms.[18]

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[15] Besides the fact that a condition's unexpectedness is not a stand-alone basis for bringing a special-defect claim, such unexpectedness seems to matter little when a driver, as in this case, cannot steer the vehicle and is skidding uncontrollably. The dissent's approach also invites several follow-up questions—for example, who decides unexpectedness; is the test objective or subjective? Also, if this unsecured floodgate arm were positioned eight feet from the road's edge rather than three, would that extra sixty inches immunize the county? *See City of Dallas v. Giraldo*, 262 S.W.3d 864, 871-72 (Tex. App.—Dallas 2008, no pet.) (parked bulldozer eight to ten feet from the roadway edge is not a special defect). Or if the floodgate arm had been unsecured and pointed like this for years without incident—would that longstandingness cancel out any unexpectedness? We suspect the dissent would say it depends, that each case is different. True, each case has unique facts, but our decisions should aim for predictability that applies uniformly beyond the case at hand.

[16] *See Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 584 (Tex. 1996) ("we must look to the terms of the [TTCA] to determine the scope of its waiver"); *Giraldo*, 262 S.W.3d at 869 ("The *Legislature* has provided a limited waiver of immunity for . . . special defect claims under the Texas Tort Claims Act.") (emphasis added).

[17] TEX. CIV. PRAC. & REM. CODE § 101.022(b).

[18] The dissent asserts that our notion of an "'ordinary user' limits special defects to those that appear only within the lines between the shoulders of the road." __ S.W.3d __. While the TTCA by its terms speaks of "excavations or obstructions *on* highways, roads, or streets," TEX. CIV. PRAC. & REM. CODE § 101.022(b) (emphasis added), none of our previous cases grapples squarely with whether an off-road hazard can constitute a special defect, and we need not decide that issue today. Fact patterns obviously vary from case to case, but we are confident in holding that the complained-of condition in today's case—a floodgate arm located in a grassy area alongside a rural county road—does not constitute a special defect as a matter of law.

Because the floodgate arm was not a special defect, we grant the petition for review and without hearing oral argument,[19] reverse the court of appeals' judgment and dismiss the case.

Don R. Willett
Justice

OPINION DELIVERED: May 1, 2009

[19] TEX. R. APP. P. 59.1.