

# IN THE SUPREME COURT OF TEXAS

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No. 08-0016  
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DENTON COUNTY, TEXAS, PETITIONER,

v.

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

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ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS  
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JUSTICE O'NEILL, joined by CHIEF JUSTICE JEFFERSON and JUSTICE MEDINA, dissenting.

It is hard to imagine anything more dangerous than a seventeen-foot metal pole pointing like a spear in the direction of oncoming traffic. The Court doesn't appear to disagree. It concludes, however, that ordinary users of the roadway are not expected to veer off the asphalt pavement, so anything they might encounter if they do cannot be a special defect. I would agree with the Court if the particular hazard were farther from the road than the metal pole that impaled the plaintiff's vehicle here. But departing a mere three feet from the road to avoid a collision is not out of the ordinary, and the floodgate arm's close proximity to the road's edge posed a threat that normal users of the road would not expect. Because the Court concludes otherwise, I respectfully dissent.

Rhiannon Beynon was a passenger in the backseat of a vehicle driven by Mark Hilz. While driving on Old Alton Road in Denton County, Hilz observed an oncoming vehicle with its brights on driving down the center of the road. To avoid the oncoming car, Hilz steered his vehicle toward the edge of the road. As Hilz moved his car over, the right tires left the pavement and dropped about eight inches onto the unpaved, unimproved shoulder. Hilz quickly turned his wheels to the left and returned to the road briefly. But in his attempt to correct the path of the car, he lost control. Hilz turned the car left and then tried to correct by turning to the right. When he turned back to the right, the front wheels left the road and the car's undercarriage caught the edge of the pavement. The vehicle began to slide along the road at a forty-five degree angle with its rear wheels still on the pavement. While the car slid along the pavement, a floodgate arm punctured the driver's door. In its proper position the floodgate arm, a seventeen-foot metal pole attached to a base buried in the ground, would have been facing away from traffic and secured in place. However, the arm was unsecured and improperly pointing toward oncoming traffic when Hilz's car collided with it three feet from the pavement. The arm penetrated the driver's door, pierced Rhiannon's leg, and exited through the floorboard. The car stopped its slide at the base of the floodgate. Hilz did not see the floodgate arm or realize that the car had collided with it until he heard Rhiannon's screams. Rhiannon's injuries resulted in amputation of her leg below the knee.

The Court does not dispute that the floodgate arm was in the wrong position, that the floodgate arm impaled the vehicle<sup>1</sup>, or that its open position was unexpected and dangerous. The

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<sup>1</sup> The Court summarily concludes that the floodgate arm "is not of the same kind or class as an excavation or obstruction . . . ." It is hard to envision a more significant obstruction than a

Court concludes, however, that because Hilz veered three feet from the asphalt, he was no longer an ordinary user of the road and Denton County's plea to the jurisdiction should have been granted. I disagree.

Special defects are “defects of the same kind or class as ‘excavations or obstructions on highways, roads, or streets’ that present an ‘unexpected and unusual danger to ordinary users of roadways.’” *City of Dallas v. Reed*, 258 S.W.3d 620, 622 (Tex. 2008) (citation omitted). To be a special defect, the condition must also “unexpectedly and physically impair a car’s ability to travel on the road.” *State v. Rodriguez*, 985 S.W.2d 83, 85 (Tex. 1999). A special defect need not occur on the surface of a road, but “[w]hether on a road or near one, . . . conditions can be [special defects] only if they pose a threat to the ordinary users of a particular roadway.” *State Dep’t of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 238 n.3 (Tex. 1992).

The Court concludes the floodgate arm is not a special defect because it was not blocking the road and the objective expectations of an “ordinary user” would not include veering off the road and onto the grass. But “ordinary users” of roads sometimes stray outside the lines, else there would be no need for shoulders. In my view, vehicle operators do not cease to be ordinary users every time they veer onto a shoulder. As the court of appeals observed, normal users of the road nearly always drive on the paved surface, yet “it is certainly not inconceivable that a normal user of the road might

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seventeen-foot metal pole piercing a vehicle’s door and floorboard. Moreover, as we have noted, “The examples in the statute are not exclusive, and courts are to construe ‘special defects’ to include defects of the same kind or class as the ones expressly mentioned in the statute.” *City of Grapevine v. Roberts*, 946 S.W.2d 841, 843 (Tex. 1997). In my view, a metal pole that pierced a vehicle, preventing it from traveling farther down the road, is similar enough to an obstruction to fall within the statute’s ambit.

pull off or leave the edge of the road onto the unimproved shoulder for one reason or another, either intentionally or accidentally.” 242 S.W.3d at 174. In the ordinary course of driving, hazards like road debris, livestock, or other drivers who don’t respect their lanes are often encountered that require prudent drivers to take advantage of the shoulder, whether improved or unimproved. The Court’s conclusion that a driver was no longer an ordinary user because two of his tires left the roadway as the result of his efforts to escape a head-on collision is inconsistent with what objectively reasonable drivers do every day.

The Court recognizes that the test for determining the expectations of an ordinary user is an objective one. Yet it fails to conduct an objective analysis, citing only Hilz’s statement that “the ‘normal course of travel for [Old Alton Road] would be the asphalt pavement.’” Hilz’s testimony merely states the obvious: users of the road normally drive on the paved surface. That doesn’t mean veering three feet from the asphalt to avoid a collision, with two wheels still on the road, places a driver beyond the normal course of travel. The Court’s concept of “ordinary user” limits special defects to those that appear only within the lines between the shoulders of the road, contrary to our acknowledgment in *Payne* that a number of courts have recognized that “conditions threatening normal users of a road may be special defects even though they do not occur on the surface of a road.” 838 S.W.2d at 238 n.3 (citations omitted); *see, e.g., Harris County v. Ciccio ex rel. Ciccio*, 125 S.W.3d 749, 754–55 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (holding that a culvert yards beyond the road’s end where a “right-turn only” lane directed traffic is a special defect); *see also Tex. Dep’t of Transp. v. Dorman*, No. 05-97-00531-CV, 1999 WL 374167 at \*2–4 (Tex.

App.—Dallas June 10, 1999, pet. denied); *Morse v. State*, 905 S.W.2d 470, 474–76 (Tex. App.—Beaumont 1995, writ denied).

Not all off-road objects a driver might encounter in the ordinary course of travel qualify as special defects; to the contrary, few do. Obstructions like road signs, construction equipment in marked construction zones, and properly secured floodgate arms are not unexpected and do not pose an unusual danger to ordinary travelers. See *City of Dallas v. Giraldo*, 262 S.W.3d 864, 871 (Tex. App.—Dallas 2008, no pet.) (holding that a bulldozer parked eight to ten feet off the edge of the road is “not of the same kind or class as the excavations or obstructions the statute contemplates” and “did not pose a threat to the ordinary users of the roadway”); *Harris County v. Smoker*, 934 S.W.2d 714, 719 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (“[A] longstanding, routine, or permanent condition is not a special defect.”). But an unsecured floodgate arm pointing directly at oncoming traffic a mere three feet from the road’s edge is out of the ordinary, unexpected, and extremely dangerous to ordinary users of the roadway.

Under the particular circumstances presented in this case, I consider the floodgate arm a special defect and would affirm the court of appeals’ judgment. Because the Court does not, I respectfully dissent.

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Harriet O’Neill  
Justice

**OPINION DELIVERED:** May 1, 2009