# COURT OF APPEALS
**SECOND DISTRICT OF TEXAS**
**FORT WORTH**

**NO. 02-17-00002-CV**

CITY OF ARLINGTON — APPELLANT

V.

S.C., T.C., INDIVIDUALLY AND AS NEXT FRIEND TO B.C., M.S., D.S., AND P.S. — APPELLEES

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FROM THE 48TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 048-278092-15

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## MEMORANDUM OPINION[1]

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We face a recurring issue whose contours remain murky even after several decades of judicial mulling: analyzing what constitutes a special defect for Texas Tort Claims Act purposes, this time a missized manhole cover that badly injured S.C. when she stepped on it and the cover rotated vertically, causing her to slip

[1]*See* Tex. R. App. P. 47.4.

straight down onto its upright edge. Though not challenging the cover's status as an ordinary premises defect, the City of Arlington appeals the denial of its partial-summary-judgment motion on S.C.'s special-defect claim. Despite this particular defect's close proximity to the roadway—mere inches, despite its integration into a stormwater-inlet top connected directly to the road's curb, and despite the danger it posed to people who might be doing nothing more unusual than stepping out of a car or up onto the curb from the street, precedent requires us to hold that the trial court should have granted the City's motion. We therefore reverse and render.

## Background

In early January 2015, S.C. and her family[2] were moving into a house in Arlington that her parents (the owners) had leased to them. S.C. parked her car at the curb in front of the house; the driveway was taken up by a U-Haul truck. As shown in the below photograph—which at the City's request S.C. illustrated during her deposition—S.C. got out of her car on the street side and started to walk up the driveway. After realizing that her car was unlocked, rather than go back into the street S.C. simply walked behind the mailbox and stepped onto the concrete stormwater-inlet cover, or top, that was basically an extension of the curb; S.C. intended to lock her car on the passenger

[2]To protect the identity of S.C.'s minor children and her minor stepchild, all of whom claim bystander injuries, we use initials for the plaintiffs–appellees and omit the home's physical address.

side.

Inches from the street was a manhole cover embedded in the stormwater-inlet top that extended from the curb into the yard and within the City's right-of-way. That cover lined up "exactly," in S.C.'s words, with her car's passenger-side door. Because the manhole cover was the wrong size for its opening, when S.C. stepped on it the cover rotated vertically, causing her right leg to plunge into the hole. Gravity then took the right side of her body down onto the leading edge of the manhole cover, and S.C. seriously injured her pubic bone and groin area as she was left straddling the now-perpendicular manhole cover. After S.C.'s husband and stepson lifted her out of the hole, S.C.'s mother drove her to the emergency room at Arlington Memorial Hospital, where S.C. remained hospitalized for four to six days.

The City's designated representative acknowledged in his deposition that the improperly sized manhole cover was a "hazard" and that the City "should have known" that the cover was undersized.

Alleging both a special defect and an ordinary premises defect in her live pleading, S.C. sued the City of Arlington under the Texas Tort Claims Act. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 101.021, 101.022 (West 2011). S.C.'s husband (T.C.), T.C.'s minor son B.C., and S.C.'s three minor children pleaded bystander injuries. The City moved for partial summary judgment only on the special-defect claim; the trial court denied the motion after a hearing, and this appeal followed.[3]

**Standard of Review**

A governmental entity such as the City of Arlington may challenge subject-matter jurisdiction by a variety of procedural vehicles, including by moving for summary judgment. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) ("The absence of subject-matter jurisdiction may be raised by a plea to the jurisdiction, as well as by other procedural vehicles, such as a motion for summary judgment."). Because subject-matter jurisdiction and related issues of governmental immunity are questions of law, they are appropriately decided on summary judgment. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217,

[3]Section 51.014(a)(8) of the civil practice and remedies code gives us jurisdiction over this interlocutory appeal. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8) (West Supp. 2016).

226 (Tex. 2004); *Wichita Cty. v. Bonnin*, 268 S.W.3d 811, 815 (Tex. App.—Fort Worth 2008, pet. denied) (citing *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999)). We review such matters—as well as the purely legal question of whether something is an ordinary premises defect or a special defect—de novo. *Tex. Dep't of Transp. v. York*, 284 S.W.3d 844, 847 (Tex. 2009).

**The Texas Tort Claims Act and Premises Liability:**
*Ordinary vs. special defects; proximity to a roadway; excavation covers*

The Texas Tort Claims Act has been described as providing a "limited waiver of sovereign immunity, allowing suits to be brought against governmental units only in certain, narrowly defined circumstances." *Tex. Dep't of Crim. Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001) (citing *Dallas Cty. MHMR v. Bossley*, 968 S.W.2d 339, 341 (Tex.) ("[T]he Legislature intended the waiver in the Act to be limited."), *cert. denied*, 525 U.S. 1017 (1998)). One of those narrow circumstances involves personal-injury claims arising from premises defects. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2) (stating that a "governmental unit" is liable for personal injury "caused by a condition or use of . . . real property" if Texas law would impose liability on a private person for the same condition or use).

The Act explicitly distinguishes between ordinary and special premises defects:

> (a) . . . [I]f a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises.

> (b) The limitation of duty in this section does not apply to the duty to warn of special defects such as excavations or obstructions on highways, roads, or streets . . . .

*Id.* § 101.022.

A mere licensee under section 101.022(a) must prove that the governmental unit had actual knowledge of a condition creating an unreasonable risk of harm and that the injured plaintiff lacked actual knowledge of the condition. *York*, 284 S.W.3d at 847 (citing *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992)). But if a special defect exists, a "more lenient" invitee standard applies. *Id.*; *see also City of Grapevine v. Roberts*, 946 S.W.2d 841, 843 (Tex. 1997) (stating that the invitee standard of care "requires the landowner to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a condition of the premises of which the owner is or reasonably should be aware").

***So what exactly* is *a "special defect"?***

The legislature never defined "special defects" except to liken them to "excavations or obstructions on highways, roads, or streets." Tex. Civ. Prac. & Rem. Code Ann. § 101.022(b). The supreme court long ago decided that "[u]nder the ejusdem generis rule, we are to construe 'special defect' to include those defects of the same kind or class" as excavations or obstructions. *Harris Cty. v. Eaton*, 573 S.W.2d 177, 179 (Tex. 1978). The supreme court has elaborated on that formulation over the years to include several helpful "characteristics" of a special defect, among them—

- the size of the condition;
- whether the condition unexpectedly and physically impairs an ordinary user's ability to travel on the road;
- whether the condition presents some unusual quality apart from the ordinary course of events; and
- whether the condition presents an unexpected and unusual danger.

*Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 116 (Tex. 2010) (citing *York*, 284 S.W.3d at 847). These judicial glosses aside, the only "express statutory requisite is that the defect be 'a condition of the same kind or class as an excavation or roadway obstruction.'" *City of Houston v. Joh*, 359 S.W.3d 895, 898 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (quoting *Denton Cty. v. Beynon*, 283 S.W.3d 329, 331 n.11, 332 n.15 (Tex. 2009)).

Things that have been found to be within the "excavation or obstruction" class and thus to qualify as special defects have included conditions as diverse as a traffic-signal base six inches off the roadway in a median and a culvert that was four feet away from a street's unmarked dead end. *See Andrews v. City of Dallas*, 580 S.W.2d 908, 909–11 (Tex. Civ. App.—Eastland 1979, no writ) (holding that concrete traffic-signal base twenty-six inches above street level and located in roadway median six inches from the roadway proper was a special defect); *City of Houston v. Jean*, 517 S.W.2d 596, 598–600 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.) (concluding that ditch four feet off the roadway at poorly lighted "T" intersection was a special defect).

As pertinent here, several cases have tacitly accepted that a defective cover over a hole satisfies the excavation "class or kind" test; the plaintiffs in those cases lost, though, because the particular condition was too far from the roadway for ordinary users to encounter it—not because the condition was thought categorically dissimilar to an excavation or obstruction. *See Duenes v. City of Littlefield*, No. 07-05-0420-CV, 2007 WL 270415, at *2 (Tex. App.—Amarillo Jan. 31, 2007, no pet.) (mem. op.) (finding no special defect because normal roadway users would not typically encounter an unsecured meter-box lid that was "approximately seventeen and a half feet from the residential street and only a few feet from a fence in front of the residence"); *Madern v. City of Pasadena*, No. 01-05-00337-CV, 2006 WL 560183, at *3 (Tex. App.—Houston [1st Dist.] Mar. 9, 2006, pet. denied) (mem. op.) (concluding that defectively covered manhole located more than five feet off the road was not a special defect because "vehicular passengers and other normal users of the roadway were unlikely to encounter it. Only a pedestrian whose destination required him to leave the proximity of the road was ever likely to walk on the manhole."); *Bishop v. City of Big Spring*, 915 S.W.2d 566, 571 (Tex. App.—Eastland 1995, no writ) (holding that defective water-meter-box cover located between mailbox and fence in front of plaintiff's sister's house was not a special defect because an ordinary user "would not normally travel closer to the house than the mailbox and would not encounter the [defectively covered] hole").

Overall, then, a fundamental criterion for a special defect is that the excavation- or obstruction-like condition be, if not in the roadway itself, at least awfully close—near enough for the ordinary roadway user to encounter it.

***Horseshoes and hand grenades: how close is close enough?***

One of the supreme court's more recent decisions dealing with both the proximity issue and the ordinary roadway user's expectations is *Beynon*, 283 S.W.3d 329. There, the plaintiff lost because the supreme court thought that an ordinary user would be unlikely to depart from the roadway (even to avoid a possible accident) and then encounter an unsecured floodgate arm whose tip was three feet off the roadway and pointing the wrong direction, costing the plaintiff her leg below the knee when it impaled the car in which she was riding. *See id.* at 332–33, 333–34 (O'Neill, J., dissenting). As the court put it, an ordinary driver "would not be expected to careen uncontrollably off the paved roadway and into the adjoining grass." *Id.* at 332.

The supreme court noted as a related matter that it has "never squarely confronted whether a hazard located off the road can (or can never) constitute a special defect," while simultaneously acknowledging that it "did note in *Payne* that some courts of appeals have held certain off-road conditions to be special defects." *Id.* at 331 (citing *Payne*, 838 S.W.2d at 238–39 n.3). The court went on to observe that, "as *Payne* clarified, '[w]hether on a road or near one,' conditions can be special defects like excavations or obstructions 'only if they pose a threat to the ordinary users of a particular roadway.'" *Id.* (quoting *Payne*, 838 S.W.2d at

238 n.3); *see also City of El Paso v. Chacon*, 148 S.W.3d 417, 422 (Tex. App.—El Paso 2004, pet. denied) ("A defect need not occur upon the road surface itself to constitute a special defect 'if it is close enough to present a threat to the normal users of a road.'" (quoting *Morse v. State*, 905 S.W.2d 470, 474–75 (Tex. App.—Beaumont 1995, writ denied))); *Mogayzel v. Tex. Dept. of Transp*., 66 S.W.3d 459, 466 (Tex. App.—Fort Worth 2001, pet. denied) (same).

In turn, achieving ordinary-user status requires that someone be on or in close proximity to a roadway, doing the normal things that one might expect to do on or near a roadway, whether in some sort of vehicle or on foot. *Cf., e.g.*, *Duenes*, 2007 WL 270415, at *2 (unsecured meter-box lid too far from roadway); *Madern*, 2006 WL 560183, at *3 (defectively covered manhole too far from roadway); *Bishop*, 915 S.W.2d at 571 (defective water-meter-box cover too far from roadway).

The three cases just cited, involving improperly covered holes, are of a piece with others holding that even open and uncovered "excavations" are not special defects if they are too far off the roadway for ordinary users to encounter them. *See, e.g.*, *Payne*, 838 S.W.2d at 239 (concluding that "normal users" of the roadway were "unlikely" to encounter a culvert that was perpendicular to the road and ended in a drop-off 22 feet away from the road, which was where plaintiff fell as he was walking into a field toward a deer blind); *Purvis v. City of Dallas*, No. 05-00-01062-CV, 2001 WL 717839, *2–4 (Tex. App.—Dallas June 27, 2001, no pet.) (not designated for publication) (holding that open manhole in grassy area

between sidewalk and parking lot toward which plaintiff was walking, away from the roadway, was not a special defect because normal roadway user would not encounter the manhole); *Martinez v. City of Lubbock*, 993 S.W.2d 882, 885 (Tex. App.—Amarillo 1999, pet. denied) (holding that uncovered hole that once contained a water meter was not a special defect because it was located on worn dirt path two to five feet inside vacant lot and away from the curb); *cf. Harris Cty. v. Smoker*, 934 S.W.2d 714, 719 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (holding that uncovered storm sewer extending from curb partially into roadway, and located where a pedestrian would normally walk along a street without a sidewalk, was a special defect).

***Is a defective covering rightly considered excavation-like?***

Despite the implication from other courts that a defectively covered hole would fall within the "excavation" class if only it were close enough to a roadway, three years after our sister court decided *Bishop* we held that a broken steel plate over part of a shallow drainage channel running beneath a city sidewalk was not a special defect. *Peterson v. City of Fort Worth*, 966 S.W.2d 773, 774, 776 (Tex. App.—Fort Worth 1998, no pet.). There, we rejected the plaintiff's invitation to "bootstrap an otherwise basic premise defect, the cracked steel plate, with the deliberately created, permanent, and otherwise nondefective channel in order to find that the entire condition as a whole amounts to an excavation special defect." *Id.* at 776. Elaborating, we noted that the "real defect at issue" was the

broken plate, "not the channel," which was itself "permanent in nature and not of some unusual or unexpected character." *Id.*

The El Paso court later cited *Peterson* in analyzing whether an uncovered hole, in which a utility pole or traffic-control device had once been installed, was a special defect; a pedestrian had fallen into this unmarked hole in a city sidewalk that, explicitly unlike *Peterson*, was not "a defect in a covering." *Chacon*, 148 S.W.3d at 425 (citing *Peterson*, 966 S.W.2d at 776). On its way to holding that the sidewalk hole in *Chacon* was in fact a special defect, the El Paso court discussed three cases, starting with *Peterson*:

> The first involved a hole created by a break in a steel plate that covered a shallow drainage channel traversing the entire width of a downtown sidewalk. The sidewalk measured eleven feet, and a ten[-]inch portion of the steel plate was broken. Peterson claimed that the defect amounted to an excavation. The court found that the defect was ordinary because (1) the real defect was the broken plate, not the channel; (2) the channel itself was permanent in nature, not unusual or unexpected; and (3) the hole was small.

Id. at 423–24 (citations omitted).

We have not located any case since *Peterson* that needed to delve into or decide whether the cover-versus-hole distinction is analytically necessary,[4] nor have we had occasion to revisit whether *Peterson*'s distinction between an open excavation and a defectively *covered* excavation is or should be a bright-line test for special-defect purposes. Even though the manhole cover here certainly

[4]The *Chacon* court did not opine on *Peterson*'s analysis, although the decision hints at agreement.

seems to meet the proximity test and, on the day of S.C.'s accident, was a danger certainly to hypothetical ordinary users,[5] our precedent and the supreme court's clear direction to construe the Act narrowly require us to hold that the manhole cover was not a special defect. We sustain the City's sole issue.

## Conclusion

Having sustained the City's sole issue, we reverse the trial court's order denying the City's summary-judgment motion and render judgment dismissing the plaintiffs'/appellees' special-defect claim against the City for lack of subject-matter jurisdiction.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: LIVINGSTON, C.J.; GABRIEL and KERR, JJ.

GABRIEL, J., concurs without opinion.

DELIVERED: September 7, 2017

[5]We need not decide whether the path S.C. took in encountering the manhole cover (that is, walking behind the mailbox and back toward her car) removed her from ordinary-user status.