

DISSENT and Opinion Filed November 19, 2021



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-21-00099-CV

**CITY OF IRVING, TEXAS, Appellant
V.
EDWIN MUNIZ, Appellees**

**On Appeal from the County Court at Law No. 5
Dallas County, Texas
Trial Court Cause No. CC-18-07034-E**

DISSENTING OPINION

Opinion by Justice Schenck

Because the alleged defect here is an ordinary premises defect and the City of Irving discharged any duty it had in connection with same by providing warning signs, fencing and barricades around the excavation and the detour roadway, I would reverse the trial court's order denying the City's plea to the jurisdiction and dismiss Edwin Muniz's claim for want of subject-matter jurisdiction. Because the majority affirms the order denying the City's plea and concludes the alleged defect was a

special defect, for which immunity has been waived under the Texas Tort Claims Act, I respectfully dissent.¹

I recognize that this Court has concluded that a condition may be a special defect without actually being on the roadway if it is close enough to present a threat to the ordinary users of the road. *Tex. Dep't of Transp. v. Dorman*, No. 05-97-00531-CV, 1999 WL 374167, at *3 (Tex. App.—Dallas June 10, 1999, pet. denied). But, here, we are dealing with a portion of a road being taken out of commission for a construction project with the road actually moved to accommodate same.² Cities routinely repair roads and install sewer and water mains, which may require the excavation of what was, at one time, a navigable portion of the roadway. Under those circumstances, as here, it will be necessary to re-route traffic and change the path of the road. Once traffic is re-routed, I would conclude that the excavated area around which traffic is diverted, is no long a part of the roadway for purposes of determining whether the defect is special or ordinary.

I believe the Texas Supreme Court's decision in *State v. Rodriguez*, involving a collision and injury when a driver failed to heed a sharp turn on the detour route, is controlling and binding here. 985 S.W.2d 83 (Tex. 1999). In that case, the supreme court concluded that the detour was neither an excavation or obstruction,

¹ Under the majority's view, all construction zones will be considered special defects. If the legislature had intended this it would have included construction sites in the statute along with excavations and obstructions on the roadway.

² The detour was a temporary roadway. *Rodriguez*, 985 S.W.2d at 86.

nor a similar condition presenting an unexpected and unusual danger to ordinary users of the roadway, and as such was not a special defect as a matter of law. *Id.* at 86. As *Rodriguez* demonstrates, the manner of injury, here driving into the excavation, is irrelevant to the determination of the nature of the defect. Simply because someone drives into an excavation, does not automatically cause the defect to be deemed a special defect. *See Peterson v. City of Fort Worth*, 966 S.W.2d 773, 776 (Tex. App.—Fort Worth 1998, no writ).

Moreover, the excavation was not on a roadway at the time of Muniz's accident because it was no longer on a traveling surface intended as a public roadway. The only surface intended as a public roadway at that time, was the detour around the excavation. The ordinary user would have heeded the warnings and traversed on the route delineated. *Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 116–17 (Tex. 2010) (ordinary user would not have traveled beyond the barricade); *Denton Cty. v. Beynon*, 283 S.W.3d 329 (Tex. 2009); *City of Dallas v. Giraldo*, 262 S.W.3d 864, 872 (Tex. App.—Dallas 2008, no pet.) (bulldozer not a special defect because an ordinary driver, one not intoxicated, speeding and unable to drive in a single lane, would not have encountered same).

Here, the accident occurred because Muniz drove his vehicle at an excessive speed, after consuming alcohol, on a dark and rainy night, failed to follow the detour signs and drove his vehicle past signs and barricades, and through fencing. The detour here was neither an excavation or obstruction, nor a similar condition

presenting a danger to ordinary users of the roadway, and as such it was not a special defect as a matter of law. *Rodriguez*, 985 S.W.2d at 86.

To the extent the detour can be said to be an ordinary premises defect, Muniz had to show that the City failed to either (1) use ordinary care to warn those using the roadway of a condition that presented an unreasonable risk of harm of which the City was actually aware, or (2) make the condition reasonably safe. *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992). Here, the record establishes the City and its contractor detoured traffic around the excavation and warned of the roadway detour and excavation with signs, fencing and barricades. The City did not simply staple an 8 ½ inch by 11 inch piece of paper with a warning written in pencil inches before the excavation. Here, there were multiple safety devices that warned of the work being done and of the detour around the work. Thus, the City discharged its duty, and its decision with respect to warning devices was not a gross abuse of discretion.

Because the City did not waive its sovereign immunity, I would reverse the trial court's order denying the City's plea and dismiss Muniz's claims. Accordingly, I dissent.

/David J. Schenck/

DAVID J. SCHENCK
JUSTICE

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