

FALL 2012 NEWSLETTER

PREMISES LIABILITY UPDATE

By Gerald B. Lotzer

***City of Denton v. Rachel Paper*, 371 S.W. 3d 193 (Tex. App.--Ft. Worth 2011), rev'd by *City of Denton v. Paper*, No. 11-0596, 2012 Tex. Lexis 640 (Tex. Aug. 17, 2012).**

The City of Denton Waste Water Department excavated a section of Willowwood Street to install a sewer tap and during the installation, the City erected barricades warning of the construction. Upon completing the work, the City repacked the excavated cut-out and removed the barricades. Rachel Paper, who lives on Willowwood, was riding her bicycle in the street approximately a week later and the bike's front wheel encountered a sunken area in the roadway, pitching her over the handlebars. She landed on her chin and broke several teeth. The depression or hole that allegedly caused the accident was in the area where the City had installed the sewer tap. Paper brought suit claiming the City was negligent in creating, failing to repair, and failing to warn of the street's "dangerous condition" causing her accident and injuries. The City filed summary judgment after the discovery period arguing that the street's condition was not a "special defect" but rather an "ordinary premises defect" of which Paper was aware and the City was not. The trial court denied the City's Traditional and No-Evidence Summary Judgments and concluded that the condition was a "special defect" which meant that the City would owe Paper the same duty of care as that owed an invitee.

The City pursued an interlocutory appeal on the basis that the Texas Tort Claims Act generally limits the duty of a governmental unit regarding a premises defect to the duty owed to a licensee on private property. TEX. CIV. PRAC. & REM. CODE, Subsection 101.022(a). When the premises liability claim involves a special defect, the government's duty is not so limited and imposes the duty as to an invitee, which is a higher duty of care. TEX. CIV. PRAC. & REM. CODE, Subsection 101.022(b). The Texas Tort Claims Act does not define the term "special defects" except to state that they include "excavations or obstructions on highways, roads, or streets".

The principal question was whether a depression or sunken area in a roadway, a few inches deep, constitutes an ordinary "premises defect" or a "special defect" within the meaning of the Texas Tort Claims Act. TEX. CIV. PRAC. & REM. CODE, Subsection 101.022(a)-(b).

The Court of Appeals held that the sunken area in the road was a "special defect" because it "wasn't in the same kind of class as excavation or obstruction or posed an unexpected and unusual danger in ordinary users (bicyclist) on the roadway." The sunken area did not physically impair the bicyclist's ability to travel and could have been avoided. They determined that the "premises defect" here is of the same class as an excavation or obstruction and that there was no evidence that the City had actual knowledge of this hazard before the accident and accordingly reversed the Court of Appeals judgment and dismissed the case.