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IN SUPREME COURT  
OF TEXAS

C 9343

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By [Signature] Deputy

STATE DEPARTMENT OF HIGHWAYS )

THE SUPREME OF TEXAS

VS. )

KENNETH HERSCHELL PAYNE )

\* \* \* \* \*  
\* TRANSCRIPTION OF HEARING \*  
\* \* \* \* \*

1 (Transcription of tape begins.)

2 MR. HILL: ... predawn darkness on  
3 the first frost of November 1984, walked out of the  
4 front door of his residence in Brazoria County, Texas,  
5 walked across his front yard out into a farm road that  
6 passes in front of his house, walked a short distance  
7 down the farm road right-of-way, took a right-hand turn,  
8 walked 22 feet down the slope off the right-of-way and  
9 walked into a 12-foot square box culvert owned and  
10 maintained by the State Department of Highways and  
11 Public Transportation and he was injured. His purpose  
12 in going to this location was he had noticed from  
13 earlier visits that deer were watering in the creek that  
14 drained into this culvert and he had set up a deer blind;  
15 he had gone down there in the dark, without the aid of  
16 artificial lighting, to wait on the deer. This was, I  
17 believe, the first day of deer hunting season.

18 To illustrate it, I'd like to draw just a  
19 quick sketch of the area so you can see the outline  
20 of what this looks like. Now, this is in Brazoria  
21 County, it's not far from the San Bernard River. The  
22 roadway to Mr. Payne's house is across the road from  
23 the culvert. It's an FM road. The San Bernard River is  
24 right here. This is a fill area which is abounded --  
25 where a little creek runs through; comes down like this

1 here and a creek runs off this way (indicating). There's  
2 a fence line here, and I believe a fence line right here  
3 that he had set up his deer blind. The box culvert  
4 drained this creek right here. The dimension from the  
5 traveled way of the road -- the traveled portion of the  
6 road, was 22 feet from the head wall of the culvert.  
7 This is his house, he walked out here, turned here and  
8 fell in. The culvert has been there for many, many  
9 years; drains that area, drains the whole area, and  
10 eventually leads to the San Bernard River.

11 UNIDENTIFIED GENTLEMAN: How many  
12 years had Mr. Payne been there?

13 MR. HILL: Mr. Payne had been there  
14 over two years. He had purchased the -- over two years  
15 before the accident. He had purchased the property some  
16 time prior to that and had made many visits out there.

17 The state's position in this case, it being a  
18 case brought under the Texas Tort Claims Act, the  
19 premise liability portion of it, is that the culvert  
20 does not constitute a special defect to increase the  
21 state's duty. The rationale for that is based on the  
22 language of the statute, Chapter 101 Civil Practice and  
23 Remedies Code, known as the Tort Claims Act, the  
24 specific sections are 022 and 060 -- .022, .060. And  
25 the prior opinion of the supreme court here, which I

1 believe is the -- it's left me. Eaton case, Harris  
2 County v. Eaton, and the language of the  
3 statute. The state's position here is that the first  
4 court of appeals in Houston erred in characterizing this  
5 as a special defect, and that the cause should be  
6 reversed and rendered for the petitioner, the State of  
7 Texas. The question arises; why is this not a special  
8 defect? All of the cases, save one, associate special  
9 defects with the roadway. Even though this is a portion  
10 of a roadway, it is 22 feet off the traveled portion and  
11 is not in such proximity to the traveled portion of the  
12 road to interfere with anyone using the traveled portion  
13 of the roadway. It's well clear of the roadway.

14 UNIDENTIFIED GENTLEMAN: Is it the  
15 state's position that this is a premises defect and not  
16 a specific defect?

17 MR. HILL: The state's position is  
18 this is not a special defect. If anything, it would be  
19 a premises defect giving rise to the duty of the state,  
20 that of a licensor to a licensee.

21 UNIDENTIFIED GENTLEMAN: And the  
22 resolution of that problem determines the outcome in  
23 this case?

24 MR. HILL: Yes, sir.

25 UNIDENTIFIED GENTLEMAN: So this is

1 a one-issue lawsuit?

2 MR. HILL: That's correct. On this  
3 appeal, yes, Your Honor. The sole error that I allege  
4 on the court of appeals is that they characterized this  
5 as a special defect and that is not justified. It  
6 is in conflict with all the other special defect cases,  
7 including the recent ones out of the 14th district in  
8 Houston, and also its own decision the first, that being  
9 the Payne v. Galveston case, and I believe the  
10 Blankenship case; both Galveston Seawall cases. With  
11 this not being a special defect and given Mr. Payne's  
12 knowledge of the location, familiarity with the culvert,  
13 and also his election to go out here blinded by darkness  
14 -- and the record will also show that Mr. Payne just  
15 happened to be blind in one eye additionally -- his  
16 knowledge vitiates the state's duty to warn -- any duty  
17 of the state to warn of this condition, because he would  
18 have been no better off.

19 UNIDENTIFIED GENTLEMAN: Wouldn't  
20 that speak to contributory negligence more than anything  
21 else?

22 MR. HILL: That was the ruling of  
23 the court of appeals by holding this to be a special  
24 defect and they held that that would address  
25 contributory negligence. Our position is, though, that

1 these culverts are such a common feature of every  
 2 roadway, that it would be impossible and impractical to  
 3 place this sort of duty on the state to have illuminated  
 4 signs for every piece of drainage hardware throughout  
 5 the state. This is analogous to people driving on the  
 6 Galveston Seawall at night without their headlights  
 7 and then complaining that the state has not warned  
 8 them when they drive off the edge of the wall. It is  
 9 undisputed in the facts, in the statement of facts, that  
 10 there was at least one Type 3 Object Marker marking this  
 11 location called for by The Manual of Uniform Traffic  
 12 Control Devices. Mr. Payne testifies to this.

13 UNIDENTIFIED GENTLEMAN: A lot of  
 14 these culverts have covers on them, and I assume this  
 15 one did not.

16 MR. HILL: There's a -- no. This  
 17 was a -- it has a vertical face. It's a large 12-foot  
 18 square concrete thing that goes through this fill area.  
 19 When this road was first built, I believe back in the  
 20 '20's or '30's, they had to come in and fill it with  
 21 fill material, limestone and dirt to make the road  
 22 level, to make the grade level. The importance -- the  
 23 special defect cases and the reason that this is not a  
 24 special defect is that it in no way is in a place to  
 25 interfere with people that drive on the highway. All

1 the other special defect cases, the last supreme court  
2 case being Harris County v. Eaton I mentioned earlier,  
3 dealt with a large hole in the roadway that, at least  
4 under the facts, caused the car to turn over. The  
5 Chappell v. Dwyer case dealt with an arroyo that ran  
6 alongside the roadway, but the brush was -- had grown  
7 in a deceptive manner that made it appear like  
8 another roadway, which led a motorist off to drive  
9 operating their motor vehicle as they normally would to  
10 drive off in this area. The Jean case and the Freeman  
11 case of Harris County, I believe it's Houston v. Jean  
12 and City of Pasadena v. Freeman. Both of those cases  
13 dealt with ditches that were right at the end of the  
14 roadway where you have motorists traveling and they're  
15 not expecting this sort of thing; the road ends suddenly  
16 and off they go.

17 UNIDENTIFIED GENTLEMAN: I'm not  
18 criticizing your artistic ability, but it's awfully hard  
19 to tell -- is the slope immediately above the culvert and  
20 between the culvert and the roadway, is that a very  
21 steep slope or is that a gradual slope?

22 MR. HILL: It begins gradually here  
23 for about 10 feet. Actually, this is kind of roll  
24 here, but for about 10 feet of it, it's a gradual slope.  
25 Of course, it comes from the crown of the road and

1 drains, and then as it approaches the head wall, the  
 2 curvature becomes more steep. There is sufficient road  
 3 on the side of this, though, the 22 feet here before it  
 4 begins to flatten, before it begins to drop off, and  
 5 even at its steepest point would be approaching -- only  
 6 approaching a one-to-one slope, mostly a two-to-one  
 7 slope and flatter than that close to the road.

8 (Inaudible)

9 UNIDENTIFIED GENTLEMAN: ... case,  
 10 did Mr. Payne slip on the slope or did he just step  
 11 over --

12 MR. HILL: He walked straight off  
 13 it.

14 UNIDENTIFIED SPEAKER: Walked off.

15 MR. HILL: He did not slip down,  
 16 stumble, roll and fall. He hurled off into space with  
 17 his rifle in one hand. He was headed for this very  
 18 area. He had just misjudged where it was. Because his  
 19 deer blind was right there, he was deliberately going  
 20 into this area and he was deliberately going at dark.  
 21 What the strategies of deer hunting without a flashlight  
 22 are, I don't know, but he was trying to get to this very  
 23 area. He wasn't a random pedestrian out here in the  
 24 middle of the countryside that was trapped by the  
 25 situation; he knew it was there and he knew he had to



1 be careful for it. And he saw the object marker that  
2 was there. His complaint was that one of two object  
3 markers was down. That was the nature of his complaint.

4 The other cases dealing with special defects  
5 deal with clearly holes in the road, things that at  
6 least the cases have interpreted [sic] the legislative  
7 intent to be something -- to be an unexpected hazard  
8 to motorists using the road, which are -- I think is  
9 reasonable. The state believes that's reasonable.  
10 if you have a huge pothole in the road, you have  
11 floodwaters across the road, you have muddy conditions  
12 in a construction area across the road that present a  
13 hazard out there where people are driving -- supposed  
14 to be driving, then that -- the lesser duty on the  
15 part of the state, at least as far as to warn goes,  
16 as far as its duty to warn of the special defects  
17 of which it has knowledge or should have knowledge,  
18 is not unreasonable.

19 This case is quite comparable, I believe,  
20 to the Galveston Seawall case where, I believe it  
21 was Justice O'Connor's concurring opinion in  
22 Blankenship, visited about the association with  
23 the roadway and the fact that even though part --  
24 there's a roadway that goes on the Galveston Seawall,  
25 the roadway portion is separated from the edge of the

1 wall by -- I've forgotten exactly the dimensions, I  
2 believe that it was a smaller distance than illustrated  
3 here.

4 UNIDENTIFIED SPEAKER: Do you take  
5 the position that to be a special defect it has to be in  
6 the roadway?

7 MR. HILL: It has to be in the  
8 roadway, yes, Your Honor, or in close proximity thereto  
9 to interfere with the use of the roadway.

10 UNIDENTIFIED SPEAKER: What's  
11 close proximity? I'm not --

12 MR. HILL: Close enough to be  
13 reasonably -- at least under the, I believe the Jezek --  
14 it's the Jezek v. City of Midland case articulates the  
15 rule of close proximity, whereby it's kind of a  
16 subjective standard that says if it's reasonably  
17 foreseeable that the defect is close enough to interfere  
18 with those persons using the travelway.

19 UNIDENTIFIED SPEAKER: Was this on  
20 the right-of-way, this defect -- the alledged defect?

21 MR. HILL: The culvert is on the  
22 right-of-way, yes, sir. It's within the right-of-way  
23 dimensions.

24 UNIDENTIFIED SPEAKER: And where  
25 he fell, of course, was in the right-of-way?

1 MR. HILL: That's correct.

2 UNIDENTIFIED SPEAKER: State  
3 property.

4 MR. HILL: That's correct. The  
5 state property would run to the fence line, which is  
6 just down the stream here just, oh, 10 feet. I believe,  
7 there's probably a 30-foot right-of-way out there.

8 If this is not a special defect, if the court  
9 holds and upholds the previous decisions that  
10 characterize special defects and limits them to  
11 something in the roadway that does pose an unreasonable  
12 hazard to motorists using the roadway, it vitiates the  
13 state's duty to warn Mr. Payne of this circumstance  
14 and acts as a bar to his recovery and would cause call  
15 for rendering this decision in favor of the state.  
16 There's no question he knew it was there, he was  
17 headed exactly for that area.

18 I don't have anything.

19 UNIDENTIFIED SPEAKER: Thank you,  
20 Counsel. Your argument now for the Respondent.

21 UNIDENTIFIED SPEAKER: May it  
22 please the court, Your Honors, Mr. John L. Pierce, II,  
23 from Navasota will present the argument for Respondents.

24 MR. PIERCE: May it please the  
25 court, Mr. Hill. In November of 1984, the Plaintiff,

1 Kenneth Payne, the Respondent in this court, going deer  
2 hunting in the predawn almost light, with a car  
3 approaching him with his headlights on, went to this  
4 area admittedly built and maintained, controlled and  
5 known of by the State of Texas. He stepped off the end  
6 of a culvert; so really, the culvert's not the problem  
7 here, it's the fall at the end of it. A 12-foot apron  
8 at the edge of this culvert which was owned, maintained  
9 and controlled by the State of Texas. Furthermore, the  
10 State of Texas had for some time known of the serious  
11 erosion problem between the culvert and Mr. Payne's  
12 house which was some 100-some-odd yards from this area.  
13 So even though Mr. Payne knew this culvert was there, so  
14 did the state, and the state had allowed unquestionably  
15 an excess overgrowth of vegetation to obscure this  
16 culvert to correct this erosion problem. They put up  
17 the delineators for the warning purpose as they  
18 recognized and characterized this situation without the  
19 deposition testimony of Robert Payne, no relation to the  
20 plaintiff, who's the assistant superintendent of the  
21 state, that they put up these delineators to warn of  
22 this condition. One or more of those delineators had  
23 either become obscured because of the overgrowth of  
24 vegetation which is right at the mouth of this culvert  
25 which obscured this 12-foot dropoff; off of which

1 Mr. Payne fell when he misjudged the delineators. Not  
2 knowing one or more had been slumped off or obscured, he  
3 misjudged where this culvert was; walked off the edge of  
4 it, fell 12 feet and broke his knees, a very serious  
5 injury.

6 UNIDENTIFIED SPEAKER: Do I  
7 understand that Mr. Payne is also handicapped visually?

8 MR. PIERCE: No, sir. There was  
9 testimony that he was partially blind in one eye, but  
10 during the trial he was able to read the clock at the  
11 back of the courtroom with that eye, covering the other  
12 eye, as I recall. He had some visual deficiency, but  
13 that --

14 UNIDENTIFIED SPEAKER: That didn't  
15 contribute to this?

16 MR. PIERCE: No, sir. No way  
17 contributed to his fall. It was the -- as the court of  
18 appeals held, it was the overgrowth of vegetation that  
19 obscured, which is contrary and distinguishable from the  
20 Blankenship case and the Payne v. City of Galveston  
21 cases, which were, the courts mentioned, unobscured;  
22 open and obvious. Furthermore, this case was really  
23 tried as a general charge case. The objection of the  
24 state in this case in the appellate court and the court  
25 of appeals, was that issues were not submitted on,

1 number one, whether or not a dangerous condition was  
2 submitted. That was their first point. And implicitly  
3 in there, then it goes into the special defect.

4           However, whether a special defect is a question  
5 of fact or a question of law, it was decided by the jury  
6 in this case, a general charge was submitted with ample  
7 instruction defining special defect, defining the duty,  
8 defining dangerous condition and a general charge as  
9 dictated by our rules, adlineous to this court and  
10 adlineous v. Montez, is a method this case was presented  
11 to the jury. The jury had ample instruction and fact  
12 to determine in this case, which as a matter of law,  
13 because there was no controversy in the facts, the  
14 facts were undisputed.

15           The state characterized this situation as a  
16 hazard. This court, in the 1945 case of City of Fort  
17 Worth v. Lee, held that where a 14-year-old child had  
18 run off the end of a road off of a bluff, they called  
19 that an excavation. This court, in Harris County v.  
20 Eaton, has said by using the principle of yustengeris  
21 that the excavation or obstruction is by way of example  
22 and it does not limit the class. Certainly close  
23 proximity allows us -- this was in close proximity to  
24 the roadway, but the State of Texas owned -- has  
25 admitted at least 30 feet out there. There's no

1 question, no controversy that they had the duty and  
2 accepted the responsibility to maintain this. Also,  
3 they allowed this excess growth of vegetation admittedly  
4 to correct this erosion problem that had become created  
5 and from which they had known about for many times. The  
6 state had a duty, the state created this condition which  
7 contributed to this man's injuries. They created this  
8 condition by allowing the overgrowth of vegetation and  
9 allowing this man to -- although he knew the general  
10 vicinity of this dropoff, he did not appreciate where it  
11 was at that time at that day, because the warnings put up  
12 had been changed, had fallen off.

13 In Harris County v. Eaton, this court said  
14 that when the light, even in a licensor/licensee  
15 situation, when the licensor has knowledge, and in  
16 other cases say when they create it, they're deemed  
17 to have knowledge, so the state had knowledge in  
18 this case, and even where in a licensee case --  
19 licensor/licensee case, the state still had a duty to  
20 warn this person.

21 But in any event, this case was tried as a  
22 special defect, everybody recognized it as a special  
23 defect, and it was determined because there was no  
24 controversy of the facts. The facts are the state's  
25 own admission; hazard. We had duty of the warn. We

1 allowed the overgrowth of vegetation. It was a question  
2 of this man's contrib [sic] in confronting that situation,  
3 as Highland Park v. Park case, in the abolition of the  
4 no-duty rule in premises cases. But this is a case  
5 where the state created this hazard and it certainly was  
6 an unusual, as Webster defines special, situation. It  
7 was a 12-foot dropoff.

8 And I would contend that the state has a  
9 duty not only on the roadway, but to those that may  
10 be traveling down the shoulder -- those that may have  
11 a flat tire, may have to pull off and see this  
12 overgrowth of vegetation and not know at the end of it  
13 there's 12 feet -- a 12-foot dropoff, which would cause  
14 serious problems.

15 UNIDENTIFIED SPEAKER: Where would  
16 you draw the line? This was 22 feet from the roadway.  
17 Where would you draw the line? What if it had been 50  
18 feet or 100 feet from the roadway? Would that still be  
19 a special defect hazardous to motorists?

20 MR. PIERCE: It could be, Your  
21 Honor. It depends on the facts of the case. The facts  
22 of this case -- there wasn't a severe falloff there.  
23 This wasn't any cliff. This was a dropoff down to the  
24 edge of this box culvert.

25 UNIDENTIFIED SPEAKER: That's 22



1 feet from the roadway.

2 MR. PIERCE: 22 feet.

3 UNIDENTIFIED SPEAKER: If the  
4 roadway -- if the motoring public stays on the road, how  
5 would that hazard 22 feet away endanger or in any  
6 hazard of this defect 22 feet from the roadway?

7 MR. PIERCE: In my brief, I  
8 mentioned those riding the horse. You know, if a trail  
9 ride comes down here, they're going to use the shoulder,  
10 and if they see these bushes, they're not going to know  
11 that there's a 12-foot dropoff.

12 UNIDENTIFIED SPEAKER: They're not  
13 going to ride into the bushes either, without knowing.  
14 You don't drive into bushes without knowing what's in  
15 them, do you?

16 MR. PIERCE: No, sir. But it  
17 depends -- well, you might. You know. In this man's  
18 case, he was leaving the roadway, he was walking down  
19 the shoulder, not the roadway. He left the shoulder  
20 portion to go to a point, and he walked through the  
21 bushes, as it being necessary to get to that point. The  
22 bushes obscured the 12-foot dropoff. Certainly he  
23 didn't intend to walk off of that. What is in close  
24 proximity, Your Honor?

25 UNIDENTIFIED SPEAKER: It wouldn't

1 make any difference if the bushes, to your theory, if  
2 the bushes had not obscured. It would still be a  
3 special defect, even if it weren't obscured.

4 MR. PIERCE: Of course, I take the  
5 position -- I'm not arguing the Payne v. The City of  
6 Galveston case, but I agree with the dissent in that  
7 case. Where there is totally open and obvious, not a  
8 bush, not any obstruction. And the court held as a  
9 matter of law -- and that's why I say in this case, that  
10 the trial court was correct and the appellate court was  
11 correct in holding this thing as a matter of law as the  
12 appellate court said, but I think it was really  
13 established as really a matter of fact. All the  
14 instructions -- requisite instructions were given, and  
15 the -- but back to special defect, in that situation,  
16 the court held because it was open and obvious, which  
17 I thought had been dealt with before, that the Seawall  
18 was not a special defect. But still we've got the Harris  
19 County -- the City of -- Harris County v. Dowlearn, where  
20 a panel fell off the wall of the courthouse, and the court  
21 held that to be a special defect. By extending Harris  
22 County v. Eaton in the yustengeris, I think a special  
23 defect is anything that's unusual, different. In this  
24 instance, a hazard.

25 UNIDENTIFIED SPEAKER: No matter

1       how far from the road?

2                       MR. PIERCE: Well, getting off the  
3 point here, but even not up on the roadway. Even in this  
4 courthouse. If something unusual -- defect as in the  
5 Harris County case, where the wall fell off the  
6 courthouse -- part of the courthouse and injured  
7 somebody, they held that to be an unusual situation or a  
8 special defect. A light pole, in one other case, that was  
9 adjacent to the road that fell over and killed someone,  
10 held a special defect.

11                      UNIDENTIFIED SPEAKER: Justice  
12 Mauzy asked earlier if the issue of special defect is  
13 determinative. Do you agree that it is? If this is not  
14 a special defect, then you cannot prevail in the case.

15                      MR. PIERCE: No, sir. I disagree.  
16 I think I would prevail in this case irrespective of  
17 whether it's a special defect or not. Because even if  
18 it's a premises defect, under the instructions in my  
19 case, and under the facts and the uncontroverted  
20 evidence, the Plaintiff wins in any circumstance. But  
21 this case was submitted on the issue of general charge  
22 and we have evolved into special defect, which this  
23 court has (inaudible).

24                      UNIDENTIFIED SPEAKER: Am I to  
25 understand that it's your contention that the culvert

1       itself is not the special defect, it's the combination  
2       of the culvert and the bushes there that make it a  
3       special defect?

4                       MR. PIERCE:  Yes, Your Honor.  Well,  
5       it's the entire --

6                       UNIDENTIFIED SPEAKER:  If there  
7       had been no brush there, if it had been cleared, would  
8       that not have been any different?  Or are you contending  
9       that because there was brush there that obscured the  
10      existence of the culvert that that becomes a special  
11      defect?

12                      MR. PIERCE:  The combination of the  
13      circumstances, Your Honor.  This erosion problem was  
14      probably the biggest problem out there.  This caused the  
15      delineators to be slumped off.  This is the condition  
16      the state was trying to correct and had known about it  
17      well in advance of November of 1984.

18                      UNIDENTIFIED SPEAKER:  But if they  
19      had corrected the erosion problem, that wouldn't have  
20      made any difference as far as the brush in the culvert  
21      was concerned, would it?

22                      MR. PIERCE:  Your Honor, to answer  
23      that question, in my opinion, irrespective of whether or  
24      not there had been any erosion or whether or not there  
25      had been -- the excavation, as in the Lee case, this

1 court described the bluff. The excavation, the cavity,  
2 the hole, the dropoff should be warned about. In the  
3 instance, in this case, the state knew about it. They  
4 created it. They knew about it. They therefore, have  
5 the duty to warn even a licensee. But on the special  
6 defect, whether or not --

7 UNIDENTIFIED SPEAKER: But your  
8 client knew about it. He had been there many times. He  
9 had constructed the blind out there.

10 MR. PIERCE: Yes, sir.

11 UNIDENTIFIED SPEAKER: He knew  
12 exactly where it was, he knew exactly where the culvert  
13 was.

14 MR. PIERCE: Yes, sir.

15 UNIDENTIFIED SPEAKER: He  
16 proceeded to go there in the dark and made a mistake.  
17 Doesn't that make the situation different?

18 MR. PIERCE: Yes, sir. It has to  
19 do, you know, we're considering now his contributory  
20 negligence. And in this case an issue was submitted to  
21 the jury, and he was found to be 40 percent  
22 contributorily negligent, and the state was found to be  
23 60 percent. I think that's how that issue is handled.

24 UNIDENTIFIED SPEAKER: Are you  
25 saying that whenever there is erosion or overgrowth of

1       vegetation, that the state has a duty to warn?

2                       MR. PIERCE:  Or correct, yes, sir.  
3       Well, under the Tort Claims Act, not every case.  They  
4       may be a licensor in which if they didn't create it, as  
5       they talked about in the Blankenship and in the Payne  
6       case, who's the possessor and who had the right, you  
7       know.  The other cases say that the state created it.  I  
8       read that to say they did the -- they made the state  
9       responsible to warn, if they create it and have  
10      knowledge.  You come back to the licensor/licensee  
11      scenario as to what duty to warn it creates.

12                      UNIDENTIFIED SPEAKER:  Texas is an  
13      awfully large state and there's an awful lot of erosion  
14      along highways.

15                      MR. PIERCE:  But, Your Honor, then  
16      if the state knows it, you know, we've got a lot of  
17      state employees, a lot of highway folks.  If the state  
18      knows of it, and if they created it, they've got the duty  
19      to protect the public, if it's erosion or if it's a  
20      dropoff, a 12-foot dropoff at the end of a culvert and  
21      it's in a place where it can cause injury.  Now, the  
22      circumstances of each case --

23                      UNIDENTIFIED SPEAKER:  Counsel,  
24      let me be sure I understand what you're saying about  
25      there.  The erosion had nothing to do with the culvert

1 or the brush. The erosion was at a different place, but  
2 the erosion took down the sign, the little reflective  
3 sign, that would have been notice to anyone driving  
4 along there that they shouldn't drive off the edge of  
5 the highway; is that right?

6 MR. PIERCE: Yes, Your Honor. If  
7 you may permit me --

8 UNIDENTIFIED SPEAKER: Is that  
9 what the erosion did?

10 MR. PIERCE: The erosion area was  
11 here. There was a delineator in this area, but other  
12 delineators that had been placed initially had slumped  
13 off, had fallen off.

14 UNIDENTIFIED SPEAKER: But between  
15 his house and the culvert, the delineator was still  
16 there?

17 MR. PIERCE: There was a delineator.

18 UNIDENTIFIED SPEAKER: Well, how  
19 many had there been?

20 MR. PIERCE: There had been, I  
21 think, at least two. There had been two or more  
22 delineators.

23 UNIDENTIFIED SPEAKER: But that  
24 goes only to the issue of warning, and you already knew  
25 about it.

1 MR. PIERCE: Yes, sir. He knew that  
2 there was a culvert. He knew that there was a culvert  
3 out there and at the end of it there was a dropoff. He  
4 misjudged it because of the lack of warning. And again,  
5 that goes to his contrib and it goes to the, you know --

6 UNIDENTIFIED SPEAKER: But the one  
7 that was between him and his house -- between his house  
8 and the culvert was still standing.

9 MR. PIERCE: Right, Your Honor. He  
10 anticipated that was the one at the end of the culvert.  
11 He had already passed it and he was free to go to his  
12 blind. He misjudged by that single delineator,  
13 misplaced the culvert. That's the whole thing that  
14 caused his injury. And that goes to the accuracy of the  
15 warning and it goes into a general negligence case. In  
16 this case, I think, special defect brings us into ordinary  
17 negligence, and I would think because of other reasons  
18 we come into an ordinary negligence case. I submitted  
19 this case on a broad form submission and then when it was  
20 taken up on that point, I became somewhat concerned  
21 about that submission, but the course of appeals said we  
22 have had adequate instructions, we told them everything  
23 they needed to know, and that enabled them to find, in  
24 this case, that the state was negligent -- under these  
25 circumstances that the state was negligent.



1 UNIDENTIFIED SPEAKER: Anything  
2 further? Thank you, Counsel. Is there rebuttal?

3 MR HILL: May it please the court,  
4 there are some brief rebuttal. Mr. Pierce mentioned the  
5 Dowlearn case. That case was specifically and by name, I  
6 believe, ignored in Blankenship, that dealt with the sole  
7 legal precedent of being a non-roadway associated defect,  
8 that being the loose partition, I believe, in the Harris  
9 County Courthouse that fell on an unfortunate woman.  
10 The interesting -- there is some language in Dowlearn I  
11 liked and cited to the court of appeals, though, that  
12 said even if it's a special defect, the state has a duty  
13 to warn those who do not otherwise know of the problem,  
14 and I cited it for that proposition.

15 The other case that he mentioned to try to  
16 draw an analogy on this, I believe, was City of Austin v.  
17 Cooksey, which dealt with a falling light stand and  
18 which, as he noted, did fall in the roadway. Actually,  
19 it fell on a bulldozer, but it fell on an operator that  
20 was known to be operating in that area, I think that  
21 does no violence at all to the concept of special defect.

22 Mr. Payne has a problem in this case due to  
23 the fact, though, he knew about this area, because  
24 under a premises defect or a special defect, the state's  
25 duty is to warn, and my assertion is that there is no

1 duty to warn, there is nothing gained by warning those  
2 with knowledge already. The --

3 UNIDENTIFIED SPEAKER: But if it's  
4 a special defect, and if Mr. Payne knew of its existence,  
5 then the state's only duty is not to injure willfully or  
6 through gross negligence.

7 MR. HILL: That's correct, Your  
8 Honor.

9 UNIDENTIFIED SPEAKER: Does the  
10 fact issue remain in the case whether the state was  
11 grossly negligent?

12 MR HILL: If it were asserted -- I'm  
13 sorry, Justice. I don't quite understand that.

14 UNIDENTIFIED SPEAKER: Well, if  
15 you're right about special defect --

16 MR. HILL: Yes, sir.

17 UNIDENTIFIED SPEAKER: -- as a matter  
18 of law, and if Mr. Payne knew undisputedly of the  
19 existence of the culvert, then there remains a question  
20 yet whether the state injured Mr. Payne through gross  
21 negligence. Is that true?

22 MR. HILL: That would -- had it been  
23 alleged -- had it been pled, that would go outside  
24 under *Tennison v. State*, I believe, that is outside the  
25 licensor/licensee special defect situation, gross

1 negligence.

2 UNIDENTIFIED SPEAKER: Your answer --  
3 your reason why that a new trial would not be required in  
4 those circumstances is that it was not pleaded in this  
5 case?

6 MR. HILL: Well, in response to that  
7 specific question as my response, the reason it would  
8 render though, is as the court of appeals, the first  
9 court of appeals held, it's not a special defect. He's  
10 barred, if it is -- due to his knowledge, because the  
11 state's duty to warn is vitiated completely. In spite  
12 of the fact that the state did warn, as Mr. Pierce has  
13 just told you. There was a culvert -- there was a  
14 object marker there which he caused to lean.

15 UNIDENTIFIED SPEAKER: How many  
16 reflection lights were up there?

17 MR. HILL: The Type 3 Object Marker  
18 that was indisputably there, is a Franklin Rod that  
19 stands about this high (indicating), a metal pole with  
20 three reflector -- three, I believe, yellow reflector  
21 buttons on it which car headlights will pick up.

22 UNIDENTIFIED SPEAKER: Okay. And  
23 that's what you call a delineator?

24 MR. HILL: No. That's what he calls  
25 a delineator. The correct term is a Type 3 Object

1 Marker.

2 UNIDENTIFIED SPEAKER: Okay. And  
3 how many of those object markers were placed around this  
4 culvert?

5 MR. HILL: At the time of the  
6 accident, there is indisputably one standing. There may  
7 have been two standing.

8 UNIDENTIFIED SPEAKER: How long  
9 had they been there?

10 MR. HILL: They had been there for  
11 some time. I can't tell you exactly how long they had.  
12 Initially, there was one at the head wall of the culvert.  
13 As this -- some of this soil moved forward, it leaned  
14 forward and another one was posted here and here  
15 (indicating). There were two at one time. Mr. Payne  
16 asserts that one was gone. That was a dispute, but he  
17 does not argue or does not dispute the fact that there  
18 certainly was at least one standing.

19 UNIDENTIFIED SPEAKER: How many  
20 were there supposed to have been?

21 MR. HILL: The Manual of Uniform  
22 Traffic Control Devices makes it a discretionary  
23 decision with the state to put only one if they choose.

24 UNIDENTIFIED SPEAKER: Did you-all  
25 use any visual aids?

1 MR. HILL: In the trial?

2 UNIDENTIFIED SPEAKER: Yes. This  
3 is the only one we've seen today.

4 MR. HILL: I drew one similar to  
5 that on the chalkboard for the jury and there were  
6 photographs in the record of this case that were taken  
7 the following spring. There were no photographs  
8 introduced into evidence that looked absolutely anything  
9 what this looked like in the frost on the date he was  
10 injured. There was evidence that the area was mowed on  
11 November 5th, that a mowing cycle went through the area,  
12 so the (inaudible) was also disputed.

13 UNIDENTIFIED SPEAKER: Further  
14 questions?

15 MR. HILL: Thank you.

16 UNIDENTIFIED SPEAKER: Case is  
17 submitted on the briefs and if there are no arguments,  
18 we'll take a brief recess.

19 (Transcription of tape concluded.)

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