



CTH & G Quarterly

A quarterly newsletter presented by the law firm of Craig, Terrill, Hale & Grantham L.L.P., P. O. Box 1979, Lubbock, Texas 79408 or 1500 Broadway, Suite 400, Lubbock, Texas 79401 (806) 744-3232 telephone, (806) 744-2211 facsimile, www.cthglawfirm.com.

WELCOME TO THE WINTER EDITION OF THE C T H & G QUARTERLY!

Happy Holidays from Craig, Terrill, Hale, and Grantham L.L.P.! As we close 2008 and bring to an end our Tenth Volume of the *CTHG Quarterly*, we take this opportunity to express our appreciation to you, our readers, for your continued support and to offer you our best wishes for a healthy and prosperous 2009.

In this issue of the *Quarterly*, we spotlight recent decisions concerning medical liability claims, personal injury litigation, products liability, and wind energy. If we have overlooked an area that may be of particular interest to you, please inform us! We are always interested in receiving your comments and suggestions for how we might improve our publication to make it of greater value to you. Please forward any suggestions you may have to merwin@cthclawfirm.com. Previous editions of the *Quarterly* may be accessed on our website: www.cthglawfirm.com. We look forward to hearing from you and providing you with timely updates to assist you in the up-coming new year.

SUPREME COURT ANNOUNCES NEW RULES FOR TEXAS REGARDING DUTY TO INDEMNIFY SELLERS OF DEFECTIVE PRODUCTS AND LEFT THE DOOR OPEN FOR A DUTY TO INDEMNIFY CREATED BY A

SHOWING A PARTY IS AN “APPARENT MANUFACTURER.”

SSP Partners et al. v. Gladstrong Investments (USA) Corporation, 2008 Tex. LEXIS 997 (Tex. 2008 Nov. 14, 2008).

In 2001, a child died, and his other two siblings were injured, in a residential fire that was allegedly caused by a defective lighter sold at a Circle K store. The parents of the children brought a products liability action against SSP Partners, Inc., and Gladstrong Investments (USA) Corporation on a theory that the fire was started by a WAX-brand disposable butane lighter with a defective child resistant mechanism. The lighter was sold by SSP and designed, manufactured, and marketed by Gladstrong USA. SSP then sued Metro Novelties, the supplier of the lighter, for indemnity. SSP and Metro both sued Gladstrong USA for indemnity. Gladstrong USA settled with the plaintiffs. Subsequent to settlement, the trial court granted Gladstrong USA’s summary judgment motions against SSP and Metro.

At trial, the jury returned a favorable finding for the plaintiffs and the trial court rendered judgement against SSP and Metro. SSP and Metro filed and appeal arguing that under Texas common law, Gladstrong USA is obligated to indemnify SSP and Metro under the theory of “apparent manufacturer,” thus precluding the summary judgment favoring Gladstrong USA. The court of appeals found merit in SSP and Metro’s argument and reversed in part the trial court’s summary judgment favoring Gladstrong USA, affirmed in part, and remanded the cause to the trial court. This issue was appealed to the Texas Supreme Court.

Holding: The Texas Supreme Court first looked at the statutory indemnification provisions contained in Chapter 82 of the Texas Civil Practice and Remedies Code. That chapter requires a manufacturer to indemnify an innocent seller against losses arising out of a products liability action. Section 82.002(a) imposes that obligation *only* on manufacturers, not on other sellers. Thus, the court concluded that Gladstrong USA was not a manufacturer for the purposes of statutory indemnity. The court then turned to SSP's argument that even if Gladstrong USA was not the actual manufacturer of the WAX-brand lighters, it is liable for indemnity under the common law theory of "apparent manufacturer." On that specific issue, the court held that SSP is not entitled to common law indemnity without proof Gladstrong USA was responsible for the defective condition of the WAX lighters. SSP did not establish such responsibility as a matter of law, but Gladstrong USA did not move for summary judgment for want of such evidence. As a result, the court remanded to the trial court for further consideration of the issue.

A TIMELY SERVED DEFICIENT EXPERT REPORT ON CAUSATION WAS CURED BY SERVING A REPORT AUTHORED BY A PHYSICIAN AFTER THE 120 DAY DEADLINE PRESCRIBED IN TEX. CIV. PRAC. & REM. CODE § 74.

In re Shondra Buster, Personal Representative of the Estate of James Brewer, 248 S.W.3d 171 (Tex. 2008).

This is a health care liability claim against a nursing home, and is governed by the Texas Medical Liability Act found at Chapter 74 of the Tex. Civ. Prac. & Rem. Code. Chapter 74 requires that in all cases against a healthcare provider, the claimant shall furnish an expert report and curriculum vitae from a physician to offer an opinion regarding causation within 120 days of the date the suit was filed. The statute further provides that only a physician is qualified to render an expert opinions on causation.

Brewer brought this claim against Oak Manor Nursing Home, alleging negligent care and treatment of James Brewer, deceased, while he was a patient at Oak Manor. This suit was filed on November 23, 2005, and an expert report was timely served, but was signed by a nurse, not a doctor, as required by

the statute. Oak Manor filed a Motion to Dismiss on the basis that Plaintiff failed to file an expert report from a physician as required in Chapter 74. The trial court denied Oak Manor's motion to dismiss and granted Brewer a thirty-day extension to file a report from a physician as to causation. A supplemental report signed by a doctor was filed by Plaintiff. Oak Manor sought mandamus relief in the court of appeals. The court of appeals granted Oak Manor relief, holding that the court erred by allowing the supplemental report from a different expert. This appeal followed.

Holding: A report by an unqualified expert will sometimes reflect a good-faith effort sufficient to justify a 30-day extension. Because the statute provides that a court "may" grant one 30-day extension, the court enjoys discretion as to whether to grant or refuse an extension sought by a Plaintiff. Chapter 74 provides that 'any requirement' of the section can be fulfilled by serving reports of separate experts. Because a claimant may cure a deficiency by serving a report from a new expert, a Chapter 74 report authored solely by a nurse was merely a deficient report that may be cured by serving an expert report from a physician after the 120-day deadline.

THE EXEMPTION FROM LIABILITY PROVISIONS CONTAINED IN CHAPTER 95 OF THE TEXAS CIVIL PRACTICE AND REMEDIES CODE DID NOT EXTEND TO GENERAL, INDEPENDENT, OR SUB-CONTRACTORS.

Painter v. Momentum Energy Corp., 2008 Tex. App. LEXIS 8727 (Tex. App.–El Paso Nov. 20, 2008).

Jesse Perkins and Dusty Painter were employees of Robinson Drilling of Texas, Ltd. ("Robinson") when Perkins was killed and Painter paralyzed after having been struck by a rotating head that fell from the top of a blowout preventer during disassembly of a drilling rig. Robinson, was hired by Momentum Energy Corporation ("Momentum"), the operator. Momentum hired Xact Technologies, Inc. ("Xact") to provide a contract representative to oversee the operation. Painter and Perkins brought suit against Momentum and Xact, based on premises liability.

Momentum and Xact both filed traditional and no-evidence motions for summary judgment arguing they were exempted from liability under Chapter 95 of the Texas Civil Practice and Remedies Code.

Under Chapter 95, a property owner is not liable for personal injury, death, or property damage to a contractor or subcontractor who constructs, repairs, renovates, or modifies an improvement to real property, including personal injury, death, or property damage arising from the failure to provide a safe workplace unless: (1) the property owner exercises or retains some control over the manner in which the work is performed; and (2) the property owner had actual knowledge of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn. The trial court granted both Momentum's and Xact's Motions for Summary Judgment without stating the grounds for doing so. An appeal followed.

Holding: On appeal, Painter and Perkins argued that although Chapter 95 may apply to their claims, Xact is not entitled to exemption from liability because they are a subcontractor and not a property owner as required by Chapter 95. Section 95.003, which deals with exemption from liability for acts of independent contractors, only refers to a property owner, and not to contractors, subcontractors, or any other persons or entities. The court of appeals held that while Section 95.003 had been expanded to include property owners' agents who oversee their properties, general or independent contractors were not entitled to the protections of Chapter 95. The court of appeals upheld the granting of Xact's Motion for Summary Judgment on other grounds. As for Momentum, the court of appeals upheld their Motion for Summary Judgment because they had ownership in the mineral interest in property; thus, they were a "property owner" entitled to the protections of Chapter 95.

IN AN ACTION BROUGHT BY LANDOWNERS AGAINST A WIND ENERGY COMPANY BASED ON THE VISUAL IMPACT OF WIND TURBINES, A TEXAS COURT FOUND THAT WIND TURBINES ARE NOT, AS A MATTER OF LAW, A NUISANCE.

Rankin v. FPL Energy, LLC, 2008 Tex. App. LEXIS 6398 (Tex. App.—Eastland Aug. 21, 2008).

One of the first pieces of litigation in the wind energy arena in Texas involved a dispute between adjoining landowners in Taylor County in 2005. In that case, homeowners near a wind farm sued the wind developer and neighboring landowners regarding wind energy leases which were entered into by and between the landowners and FPL Energy, LLC ("FPL"). The Plaintiff, Dale Rankin,

eventually dropped the adjoining landowner and maintained the lawsuit only against the wind energy company FPL.

Rankin and others sued FPL under public and private nuisance theories for injunctive relief, because of FPL's construction and operation of the wind farm. Rankin claimed that the wind farms permanently and significantly diminished the scenic beauty of the surrounding land, thereby reducing the enjoyment of their land. Some of the plaintiffs also alleged the negative emotional response of the plaintiffs to the loss of their view due to the presence of wind turbines substantially interferes with the use and enjoyment of the plaintiffs' land. FPL filed a partial summary judgment motion against these claims. The trial court granted FPL's motion as it related to the 'visual impact' of the farm but allowed the case to move forward to trial for all other nuisance actions. The jury found for FPL on the remaining issues and the trial court entered a take-nothing judgment.

Holding: The court of appeals reviewed the evidence and found that a nuisance action typically involves an invasion of another's property by light, sound, odor, or foreign substance; and that the nuisance must be of a real and substantial character, not merely aesthetical taste. The court went on to say that since the wind farm was a lawful action, the plaintiffs would have to show that it constituted a 'nuisance-in-fact' cause of action. Yet, no Texas authority has specifically given a 'nuisance-in-fact' cause of action based on fear, apprehension, or other emotional reaction, resulting from the lawful operation of a company, to proceed through the courts. The court acknowledged that on rare occasions a lawful business could be considered a nuisance if it is abnormal and out of place in its surroundings; however, the nuisance in these cases typically arises due to an invasion on the plaintiff's property by flooding or odors. As a result, the court ultimately determined that, because Texas law does not provide a nuisance cause of action for aesthetical impact, the trial court did not err by granting FPL's partial summary judgment on the 'visual' claims.



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The *CTH&G Quarterly* reviews recent decisions by the Texas courts and current trends in civil litigation. It should not be construed as legal advice or opinion and is not a substitute for the advice of counsel.

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