



# CTH & G Quarterly

*A 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](http://www.cthglawfirm.com).*

## WELCOME TO THE SUMMER EDITION OF THE CTH & G QUARTERLY!

This quarterly newsletter discusses recent decisions by the Texas courts. Hopefully, the discussions will enable you to identify civil litigation trends that may impact your business.<sup>1</sup>

This issue of the *Quarterly* highlights three cases. We initially tout the decision rendered in *Timpte Industries, Inc. v. Gish*, 286 S.W.3d 306 (Tex. 2009), a case that culminated in a decision favorable to Craig, Terrill, Hale, and Grantham, LLP's client, Timpte Industries, Inc.<sup>2</sup> We also highlight *City of Corsicana v. Stewart*, 249 S.W.3d 412 (Tex. 2008), a premises defect case the notice a dangerous condition necessary to waive a city's sovereign immunity under the Texas Tort Claims Act. Last, we comment on *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008), which answered a certified question asking whether Texas public policy prohibited a liability insurer from indemnifying an award of punitive damages based on the gross negligence of its insured.

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<sup>1</sup>Previous editions of the *Quarterly* may be accessed on our website: [www.cthglawfirm.com](http://www.cthglawfirm.com).

<sup>2</sup>Robert (Bob) Craig and Leonard (Bud) Grossman represented Timpte in the trial court and Gary Bellair handled proceedings in the intermediate appellate and supreme court.

If we have overlooked a matter of particular interest to you, please inform us! We also invite your comments and suggestions for improving our publication. Please forward any suggestions you may have to [merwin@cthglawfirm.com](mailto:merwin@cthglawfirm.com).

### FINDING NO DEFECT OF PRODUCT DESIGN OR THE NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT.

*Timpte Industries, Inc. v. Gish*,  
286 S.W.3d 306 (Tex. 2009).

Robert Gish, an experienced trucker, brought suit after falling from the top-rail of a grain-hopper trailer designed by Timpte Industries. The suit alleged the trailer was unreasonably dangerous because of its defective design. The trial court granted a no-evidence summary judgment in Timpte's favor, but the court of appeals reversed. The supreme court reversed and reinstated the judgment of the trial court; holding (1) Timpte's motion afforded fair notice of its grounds for summary judgment; and (2) no evidence showed the design defects alleged by Gish rendered the trailer unreasonably dangerous.

Gish was loading fertilizer into an open-top, grain-hopper trailer that Timpte designed and manufactured when he encountered problems with a downspout attached to the fertilizer plant. To facilitate repairing the downspout, Gish climbed atop the trailer. While Gish was on the obviously narrow and slippery top rail of the trailer, a gust of wind caused him to fall.

Gish sustained serious injuries, which his lawsuit attributed to design defects that made the trailer unreasonably dangerous. Essentially, Gish complained that design defects failed to prevent him from

climbing atop the trailer and once atop, failed to protect him from the risk of falling. Specifically, Gish alleged two design defects made the trailer unreasonably dangerous: (1) the top two rungs of ladders mounted on the trailer allowed unnecessary access to the top of the trailer, and (2) the top rail of the trailer was too narrow and slippery.

In response to Gish's claims, Timpte filed a no-evidence motion for summary judgment. Among the grounds challenged was the existence of the evidence necessary to show that its trailer was either unreasonably dangerous or the producing cause of Gish's injury. The trial court granted the summary judgment. The appellate court affirmed on all but one ground — holding "reasonable factfinders could disagree as to whether the trailer's design was both unreasonably dangerous and a cause of Gish's fall."

Both parties raised an issue in proceedings before the Texas Supreme Court. Gish raised a procedural issue which contended the trial court erred in rendering its judgment because Timpte's motion for summary judgment presented no ground questioning the existence of evidence of a defect rendering the product unreasonably dangerous; whereas Timpte questioned the existence of evidence of a design defect that posed an unreasonable danger.

In addressing Gish's contention, the court applied the "fair notice" pleading requirements of Texas Rules of Civil Procedure 45(b) and 47(a). Application began with the court's determination that Timpte's motion "unambiguously set out ... Timpte's belief that there was no evidence that its trailer was either unreasonably dangerous or the producing cause of Gish's injury." The court cautioned that such a motion may be insufficient to give fair notice in a case involving complicated design-defect issues, but rejected Gish's contention because the record revealed no confusion; Gish's thorough response indicated his understanding of Timpte's motion. Absent evidence of any confusion, the court concluded that Timpte's motion "was not the type of 'conclusory motion' ... barred by Rule 166a(i)."

Turning from the procedural issue to the merits, the court noted a determination of whether a design defect renders a product unreasonably dangerous necessitates a risk-utility analysis of the following factors: (1) the utility of the product to the user and to the public as a whole weighed against the gravity

and likelihood of injury from its use; (2) the availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive; (3) the manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its costs; (4) the user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; and (5) the expectations of the ordinary consumer. The court further noted the obviousness of a claimed defect is "an important" and potentially decisive consideration in determining whether a product is unreasonably dangerous, but obviousness is not ordinarily determinative because risk-utility analysis encourages manufacturers to reach an optimum level of safety in designing their products.

The court concluded the obvious nature of the defects alleged by Gish was important but not determinative. Finding the slight risk of injury from the ladder "stems only from the risk that a user will ignore both Timpte's warnings and open and obvious dangers," the court held the inclusion of the top two rungs of the ladder was not a design defect that rendered the trailer unreasonably dangerous. The court similarly concluded the risk-utility factors favored Timpte because the risk of falling while trying to balance on a narrow strip of extruded aluminum nearly ten feet above the ground is an obvious risk that is within the ordinary knowledge common to the community; and the top-rail alterations proposed by Gish would decrease the safety and utility of the trailer while increasing its cost. Accordingly, the court reversed the appellate court's judgment for want of evidence of design defects rendering the trailer unreasonably dangerous in light of its use and purpose.

**EVIDENCE OF ACTUAL NOTICE OF A DANGEROUS CONDITION WAS REQUIRED TO WAIVE A GOVERNMENTAL ENTITIES' SOVEREIGN IMMUNITY UNDER THE TEXAS TORT CLAIMS ACT.**

*City of Corsicana v. Stewart*,  
249 S.W.3d 412 (Tex. 2008).

Patrick Stewart Sr. and Sentria Whitfield sued the city of Corsicana for a premise defect after their two children, Patrick and Brooke, drowned when Patrick Sr.'s car was swept away during a flood.

The trial court rejected Stewart's argument that the City had actual knowledge of the dangerous condition which would waive the City's sovereign immunity under the Texas Tort Claims Act. On appeal, a divided court reversed and remanded the case finding that the City's actual knowledge could be inferred from circumstantial evidence.

The Texas Supreme Court reviewed the case to determine whether a fact issue existed as to the City's actual knowledge of the dangerous condition at the time of the accident. The court distinguished its finding in *City of San Antonio v. Rodriguez* that circumstantial evidence may establish actual knowledge when it "either directly or by reasonable inference" supports that conclusion. Stewart's evidence established the City was aware of inclement weather in certain areas on the night of the accident, that the specific crossing where the accident occurred was prone to flooding during heavy rains, and that the City was actually aware of dangerous conditions after the accident occurred. The court held that such evidence was not sufficient to raise a fact question as to whether the City had actual knowledge that a dangerous condition was present at the time and place where the accident occurred nor did it provide grounds for a reasonable inference of such knowledge.

In concluding that Stewart failed to establish that the City had actual knowledge of the dangerous condition at the time of the accident as mandated by the Legislature in Tex. Civ. Prac. & Rem. Code § 101.022, the court dismissed Stewart's claim for lack of jurisdiction.

#### **INSURANCE EXPRESSLY COVERED EXEMPLARY DAMAGES IN WORKERS' COMPENSATION/ EMPLOYER'S LIABILITY SITUATIONS.**

*Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008).

Roy Edward Bennet's survivors sued Stephens Martin Paving for gross negligence after Roy died as a result of injuries caused by a brooming machine accident. Bennett sought only exemplary damages as their claim for actual damages was barred after receiving workers' compensation benefits based upon Stephens's workers' compensation and employer's liability insurance policy, issued by Fairfield Insurance Company.

Fairfield sought a declaratory judgment in district court against Stephens and Bennett stating that Fairfield had no duty to defend or indemnify Stephens in regards to exemplary damages. The district court denied Fairfield's motion for summary judgment and Fairfield appealed to the Fifth Circuit Court of Appeals.

On certified question to the Texas Supreme Court, the fifth circuit asked whether Texas public policy prevents an insured from seeking indemnity from a liability insurance provider for a judgment awarding punitive damages due to the insured's gross negligence.

In determining Texas public policy, the court looked to Texas statutes which prohibited the coverage of exemplary damages. The court noted selected circumstance in which the Legislature has expressly prohibited recovery for exemplary damages including medical professional liability insurance and risk management and excess insurance pools for various public entities.

The court then turned to the statutory scheme and insurance regulation applicable to the Texas Workers' Compensation Act. Under Tex. Lab. Code § 408.001 regarding exemplary damages, an employer is protected from liability for an employee's injuries or death during the scope of employment, except those claims resulting from an employer's intentional or grossly negligent acts. However, the Texas Department of Insurance has the authority to prescribe all standard policy forms, rules, and regulations. The court found that the TDI's approval of the dual scheme under the workers' compensation act for workers' compensation insurance and employers' liability insurance revealed an intent to provide additional insurance coverage for an employer's gross negligence. It held that the Legislature's express intent is that Texas public policy does not prohibit insurance coverage for claims of gross negligence in the context of workers' compensation coverage.

In dicta, the court discussed other relevant public policy considerations in determining coverage of exemplary damages. It noted that the majority of states (25) that have considered whether public policy prohibits coverage of exemplary damages resulting from gross negligence have determined that it does not. The court examined the tension between Texas' general policy favoring the freedom of contract and the important public policy considerations supporting

the purpose of exemplary damages in punishing the wrongdoer.

In concluding that Texas public policy does not prohibit coverage of exemplary damages resulting from gross negligence in workers' compensation claims, the court cautioned that in the absence of a clear legislative intent to allow or prohibit such coverage, its opinion should not be read as a broad proclamation of public policy.

Writing in a concurring opinion, Justice Hecht discussed at length the changing public policy considerations surrounding insurance coverage in our society. In doing so, Justice Hecht evaluated the purpose of exemplary damages in punishing the wrongdoer, the evolution of legislative restrictions on insurance coverage, the standard policy forms authorized by the Commissioner of Insurance, Texas case law addressing relevant public policy considerations in varying contexts, and finally, applicable case law from other jurisdictions. Justice Hecht concluded that in the present case, public policy does not prohibit coverage for exemplary damages. He continued by setting forth important considerations relevant to determining coverage for exemplary damages in other insurance contexts.

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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.