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Supreme Court of Texas.
Timpte Industries, Inc. and Timpte, Inc., Petitioners,
v.
Robert Gish and Pinnacol Assurance, Respondents.
No. 08-0043.

March 11, 2009.

Appearances:
Gary Bellair, Craig, Terrill, Hale & Grantham, L.L.P, Lubbock, TX, for petitioner.
James H. Wood, Amarillo, TX, for respondents.

Before:

Chief Justice Wallace B. Jefferson (not present for argument, but participating in decision after listening to recording); Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson and Don R. Willett, Justices.

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JUSTICE NATHAN L. HECHT: The Court is ready to hear argument from the Petitioners in 08-0043.
MARSHALL: May it please the Court, Mr. Bellair will present argument for the Petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF GARY BELLAIR ON BEHALF OF THE PETITIONER

ATTORNEY GARY BELLAIR: May it please the Court, Counsel. My name is Gary Bellair and my appearance today is on behalf of Timpte Industries. This is a design defect case. The case raises the question that this Court has addressed recently in other context and that question is this, whether the persons who are in the best position to guard against personal injuries should bear all risks of a failure to use their own common sense. If the judgment stands, then you and I and society must bear that cost. But if the Court reverses and renders, then individuals who fail to use their own common sense will bear those costs. Precedent of this Court and logic dictate the latter result. Simply stated, Timpte owed no duty in this case because the usage of the grain hopper in question was unreasonable as a matter of law. To help the Court understand why, I'd like to briefly discuss the facts and to do that, I'd like to refer you to the handouts we had this morning, to page 3.

JUSTICE HARRIET O'NEILL: Well, first of all, let me ask you why, products' liability contemplates some amount of foreseeable misuse and why wouldn't this fit under a foreseeable misuse?

ATTORNEY GARY BELLAIR: Your Honor, this is a case where the foreseeable misuse is a legal causation question and because it's a legal causation question, we don't have to get in the balancing question that you ordinarily encounter in a products' liability design defect case. This is case where the usage is such that as a matter of law, there's no basis for this being anything other than an unreasonable usage.

JUSTICE DALE WAINWRIGHT: What's a legal causation problem?

ATTORNEY GARY BELLAIR: Legal causation as I understand it is a doctrine that I have traced back to a decision by Justice Owen who talked at great length about there has to be a limit and the Court determines what the limit is as to whether a cause is, in fact, a legal cause.

JUSTICE DALE WAINWRIGHT: Are you talking about approximate cause or duty here? I thought you were talking about duty.

ATTORNEY GARY BELLAIR: Your Honor, the causation question, as that case talks about, drifts into the duty question at times and this is such a case where you don't have to reach the true causation issue because the causation issue is present in the duty question and that's where we can address it. Is there is no duty because of the causation issue that the Court has relied upon in the past and determined the presence or absence of a duty.

JUSTICE NATHAN L. HECHT: I was looking for some explanation of why the ladder is there. Is there some reason for that?

ATTORNEY GARY BELLAIR: Yes, Your Honor, the ladder is there because to help you understand, this trailer is kind of like a U-Haul trailer with one exception. It's got no top and it has no top on it because the purpose is to facilitate quick loading. As the trailer is going down the field next to the combine, the combine is able to dump grain into the top. The ladder and the platform that is there, that's visible on page 3 of my handout, facilitates drivers inspection of how the load is being dispersed in the trailer itself and how full they are and that enables them to determine when it's time to quit loading the vehicle up. And so that is there for the purpose of inspecting what's going into the trailer itself and it's not there for the purpose that it was used in this case and that was to provide access to a "catwalk."

JUSTICE DAVID M. MEDINA: Well how would somebody know that. I mean, you got a trailer, the ladder on it and it looks like it's climb up aboard and check out what's inside here. I mean, how would you know that?

ATTORNEY GARY BELLAIR: Your Honor, there are warnings provided on it and those warnings address the idea that people are always supposed to use a three-point stance whenever they're using any component of the access system.

JUSTICE DAVID M. MEDINA: What's a three-point stance? That reminds me of a lineman getting up ready to knock somebody out in a football game. What is that?

ATTORNEY GARY BELLAIR: A three-point stance in this context and out of the football context is that you always have two hands and a foot or two feet and a hand affixed to the trailer in some way when you're dealing with the trailer and when you're climbing on the ladder, that's how you're supposed to use the ladder. When you're standing on the platform that's there to inspect what's in the trailer, you have two feet on the platform and you have handholds that you're able to use

so you're always to maintain a three-point stance when you're using the equipment.

JUSTICE DON R. WILLETT: Where does that warning appear?

ATTORNEY GARY BELLAIR: Oh, that warning.

JUSTICE DON R. WILLETT: It's not; it's not in your photographs here.

ATTORNEY GARY BELLAIR: No, it's not in the photograph. No, Your Honor, that's correct. Although I do think that the warning is visible, but I can't read it, but it's invisible, it's visible, I should say, in between the bottom and the first rung of the ladder. You can see that there's warnings affixed there and that's one of the warnings there.

JUSTICE DAVID M. MEDINA: And what does the warning say?

ATTORNEY GARY BELLAIR: That warning, one of the things it says is to always maintain a three-point contact when you're on the access system.

JUSTICE DAVID M. MEDINA: And these are people in the field that are loading up grain and that surely doesn't require any special training.

ATTORNEY GARY BELLAIR: These are people who are experienced truck drivers and Mr. Gish himself was an experienced truck driver. He knew how to operate this particular type of trailer. It was not his first time to operate this type of trailer. He had lots of experience at it.

JUSTICE DAVID M. MEDINA: How would someone learn for a wind burst or wind that knocked and I guess in this case knocked him off the ladder.

ATTORNEY GARY BELLAIR: Your Honor, that's another example of common sense and for those of us who are from West Texas, we know that to get out when the winds are high, that are things we have to do common sense wise to assure our own personal safety. When you have a microburst, you're entirely correct that it's difficult to warn. Indeed, when they had the aircraft crash in Dallas a number of years, that was one of the problems is that they weren't able to predict that a wind would be capable of knocking an aircraft out of the sky. But this was a day when the winds were already high. Mr. Gish knew it when he got up on top of this trailer and that's the point I'd like to make to you at this time. If you look at page 2, this top rail that's kind of bisecting the page in half, is only 5.66" at its widest. The picture itself is the exact dimension and when I put my size D on top of it, there isn't very much space that isn't covered up and so you're, in effect, trying to conduct a field sobriety test. You might be sober at the time, but you're on a surface that is extruded aluminum and it is slippery and Mr. Gish knew that when he got up there.

JUSTICE DON R. WILLETT: Is it slanted or flat?

ATTORNEY GARY BELLAIR: It is slightly slanted by design and the reason is is that they want to prevent cross contamination of the products that are loaded into this thing and they do that by having a slight slant so in the event wheat or whatever if it happens to land on that rail, it will vibrate back into trailer and then be able to be discharged out the bottom as opposed to staying and contaminating another load. That would be important in a case like this because we weren't talking about hauling a grain product. We were actually talking about hauling a bulk fertilizer that we don't want contaminating grain in the future.

JUSTICE SCOTT A. BRISTER: What else is it used for? Grain, fertilizers?

ATTORNEY GARY BELLAIR: This is a trailer that's kind of a jack-of-all-trades in the agriculture community. It is used for grain indeed

when they're harvesting the wheat. They are able to just have the combine drive next to the trailer and just blow the harvested product right into the top and then it's able to be discharged quickly right out the bottom and that's why when you talk about starting to narrow the opening that you're trying to put product into, you're actually altering the feasibility of its usage. You're making it more difficult to load.

JUSTICE SCOTT A. BRISTER: He said he had to get up there to check the load- and Parker v. Highland Park, a case where an open and obvious defect, the stairs weren't lit, but there was no other way down so you had no choice. You had to go that way. What other choices did he have?

ATTORNEY GARY BELLAIR: Mr. Gish had plenty of choices.

JUSTICE SCOTT A. BRISTER: List them for me.

ATTORNEY GARY BELLAIR: One of the choices was that instead of using the trailer as a catwalk, which it was never intended to be used as, he could have gone to the Martin plant where he was trying to load the product and say, your equipment is not working right now. I need you to fix your equipment so that the chute can be lowered so that I can fill my load of fertilizer. That's one choice.

JUSTICE DAVID M. MEDINA: That's separate. That's a separate apparatus form this tank right?

ATTORNEY GARY BELLAIR: Yes, Your Honor. The apparatus that was causing the problem at the time was not the trailer at all. It was equipment at the plant where he was trying to load the bulk fertilizer.

JUSTICE DAVID M. MEDINA: Right.

ATTORNEY GARY BELLAIR: The second choice, I guess, would have been that he could have just not gotten the load from them and refused to go back to them because he had alerted them to this problem time and time again according to his testimony and so under those sort of circumstances, it might behoove him to go somewhere else to buy the fertilizer as opposed to going somewhere where he knows he's going to run into a problem.

JUSTICE SCOTT A. BRISTER: Did he sue the seller?

ATTORNEY GARY BELLAIR: Yes, Your Honor, he did.

JUSTICE SCOTT A. BRISTER: [inaudible]

ATTORNEY GARY BELLAIR: And we were severed out and that case proceeded on to a judgment that was a split decision if you will.

JUSTICE SCOTT A. BRISTER: Okay, is that part, the judgment part of the record or?

ATTORNEY GARY BELLAIR: No, Your Honor, that judgment is not in the record. There are.

JUSTICE SCOTT A. BRISTER: It's all right. I asked. [inaudible]

JUSTICE DAVID M. MEDINA: Wasn't the warning adequate here?

ATTORNEY GARY BELLAIR: I'm sorry.

JUSTICE DAVID M. MEDINA: I guess you would argue the warning should be adequate, why is that?

ATTORNEY GARY BELLAIR: That warning is there, I think, more to alert someone of a potential concealed danger and that's this, but if you're up there and climbing over the top and there is a warning that addresses that that, don't climb over the top and into the compartment, there's a risk that you're going to be buried in the fertilizer or whatever it is that's being loaded, buried and suffocated. And that's not an open and obvious risk and so that's something that the manufacturer wanted them to think about as far as climbing over the top. And so that warning is there to provide for safety. The warning about the three-point contact is there to provide for safety, but try.

JUSTICE DAVID M. MEDINA: Excuse me, I guess if that were to happen

and someone were to fall in into this grain or fertilizer and they suffocated, then I guess it would be argument that it was designed, a design defect because there wasn't a guard to prevent that from happening or some type of railing to prevent someone from falling in.

ATTORNEY GARY BELLAIR: Your Honor, that's the problem. If you start designing those type of guards, you're defeating the purpose of the trailer and that's to get product in with as little resistance as possible and so when you start putting guards up, when you start putting rails up by the side of the thing, you're actually making it more difficult to load the product. Indeed, if you, a combine has a fixed arm that you can't change the height of and so when you start trying to add protection for something that was never intended to be a catwalk, you're defeating the utility of the product itself and for that reason, the product, you know, ought never to have been used. Common sense tells us that you don't go 12 foot up in the air and try and use this to effect repairs to somebody else's broken equipment. This is the case where as I say, that is as open and obvious to anyone as the Parker case, but there was an alternative in this case. The driver had choices to make. He made bad choices, just as Mr. Moritz made choices on where to secure his load. He could have pulled down that ramp and been at ground level and he would not have sustained the injuries that he sustained. There are things that Mr. Gish could have done to assure that he didn't have to affect repairs to somebody else's equipment by trying to use this trailer as a catwalk that it was never designed to be used for. This is a case that if the Court will look at the record, the circumstances before the Court are such that if this case does not warrant a Summary Judgment then a product manufacturer will never be able to establish its right to a Summary Judgment in a defective design case. For that reason as well as all the reasons stated in our brief, we ask the Court to reverse and render.

JUSTICE DON R. WILLETT: Quick question, lolling on page two of your picture, the bisecting railing, it's slanted, not level. Is it coated with kind of a slick surface to facilitate stuff, kind of coasting off of it or is it?

ATTORNEY GARY BELLAIR: Your Honor, that surface is an extremely slick surface. It is extruded aluminum, which as the Court may recall from one of its recent arguments, that's kind of like the old Play Dough set where you force the Play Dough through and you got a product out at the other end, this process of manufacturing the aluminum that way makes a slick surface and it's even slicker when the grain actually gets up there and starts wearing on it. So it is, it is indeed a very slick surface and that's by design to ensure that there is no cross contamination.

JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Counsel. The Court's ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Wood will present argument for the Respondent.

ORAL ARGUMENT OF JAMES H. WOOD ON BEHALF OF THE RESPONDENT

ATTORNEY JAMES H. WOOD: Thank you, Your Honors. As mentioned, my name is James Wood and I represent the Respondent in this particular case, Robert Gish. Let me begin, if I could, by addressing some of the issues that were raised by my learned colleague. First, I think there's been a great jump ahead in the assumption that my colleague has made and that is that this was, in fact, foreseeable misuse. I think we've

taken a giant leap forward by somehow immediately making this assumption that somehow that what Mr. Gish does was misuse or was, in fact, any type of something that he did improper.

JUSTICE HARRIET O'NEILL: Well let's say it is foreseeable misuse.

ATTORNEY JAMES H. WOOD: All right.

JUSTICE HARRIET O'NEILL: Then you'd have to warn and why is the three-point warning not sufficient?

ATTORNEY JAMES H. WOOD: Well, the three-point warning, first off, Your Honors, I would submit and the Court of Appeals actually addressed this and actually quotes the record. I know some of you, I believe it was Justice Medina asked about what the warning says and the warning is, we respectfully submit, wholly inadequate. It says the warning in question says nothing about walking or using the hopper's edge. The warning only tells the user, a very small warning, only tells the user do not climb up on the edge and into the back of the trailer.

JUSTICE DAVID M. MEDINA: I'm going to use this exhibit or this handout I was given here on page 2. Do you know what the distance is from this rail to this railing, how far along this is?

ATTORNEY JAMES H. WOOD: No, sir, but it's, I can speculate, it's probably 10 feet.

JUSTICE DAVID M. MEDINA: And you got and then, I guess, the ladder would be here?

ATTORNEY JAMES H. WOOD: Yes, sir, and that is, that is shown in the picture right before, sir, or the picture right after.

JUSTICE DAVID M. MEDINA: Okay. You'd have the ladder and if someone were to get up on this rail, it looks like you'd have to negotiate this first crossbar and I don't know how you would do that and then you'd walk over it, put your hands here and that just seems to be dangerous by looking at it that I'm not going to get up there because I might slide in or fall off.

ATTORNEY JAMES H. WOOD: It's the way, Your Honors, and I think that your point is for you saying that that may be dangerous, I think also raises two issues. One, Texas is a comparative fault state and so whether Mr. Gish was, in fact, negligent in this case or whether Mr. Gish acted unreasonably in this case, would certainly be a jury question that the jury could decide as to his negligence and that's a question that the Defense can raise and certainly make at the trial for this case. But in West Texas, and I think Justice Johnson certainly has this experience as well, it is not unusual to have drivers climbing up on top of these grain trucks.

JUSTICE DAVID M. MEDINA: Well I realize when you're in a field doing work and you're pressed for time, you'd probably take more risks than you normally would if you're sitting here looking at a picture.

ATTORNEY JAMES H. WOOD: And, Your Honors, I also think in these handouts, I think it's very important for the Court to look at what also what our experts said too. If you look here, the evidence has been developed and it is in the record with the Court that the Timpte manufacturer testified that these two top rungs are not necessary. In other words, he testified that the rungs are for feet and these rails here are for hands. So there would be no reason to have these two top rungs in place for someone to look into the back of the trailer.

JUSTICE DAVID M. MEDINA: What's the purpose for this side rail here?

ATTORNEY JAMES H. WOOD: Sir?

JUSTICE DAVID M. MEDINA: What's the purpose for the side rail on the side of?

ATTORNEY JAMES H. WOOD: That would be where you could stand over

and look into the trailer, Justice, and that's my point exactly. This little, this little platform here is where the person would stand if they're wanting to look into the back of the trailer to see how the grain or, in this case or in this case, fertilizer was being loaded. So what you would do is climb up and move over here if you wanted to look into that, but why would you need rungs, which, again, according to Timpte's manufacturer for feet, if, in fact, you're not wanting or making it permissible for the person to climb up on top.

JUSTICE SCOTT A. BRISTER: Well, two reasons. One because my hand might slip off the side and you want to grab something in the middle and you to grab and there's nothing there and so then if you had had something in the middle there to grab, I could have grabbed it. Number two because every ladder ever created in human history has rungs all the way to the top even though they say don't use the top two.

ATTORNEY JAMES H. WOOD: Don't stand.

JUSTICE SCOTT A. BRISTER: And that's, so your position is they're just all defective because even because you can't build a ladder that says don't stand on the top and have a top on it because if you have a top, people are supposed to ignore the warning, it says don't stand on the top.

ATTORNEY JAMES H. WOOD: Well I would respectfully say in this case, Your Honor, it's different because this ladder's bolted to the trailer. This isn't a ladder that's on a three-point tripod-type system. I mean, this is a ladder with a handholds are absolutely bolted in to that so.

JUSTICE SCOTT A. BRISTER: I understand it's not exactly like all ladders, but the argument's exactly the same because every ladder says don't use the top two and you're saying if the top two are there, then a warning saying don't use them is no good. They just, it's just defective and they shouldn't be there at all.

ATTORNEY JAMES H. WOOD: Well I don't know if a warning that says there.

JUSTICE SCOTT A. BRISTER: Why do we have warnings?

ATTORNEY JAMES H. WOOD: Well, Your Honor.

JUSTICE SCOTT A. BRISTER: What's the point? The point.

ATTORNEY JAMES H. WOOD: There is no warning in this case. I mean, that's the issue. Maybe a warning that says don't use the top two rungs of the ladder might have been sufficient in this case and that warning might have been heeded, but there is no warning.

JUSTICE DAVID M. MEDINA: How about a warning that said "warning, no warnings ahead?" Just referring to a brilliantly written dissent last month by Justice Hecht.

JUSTICE SCOTT A. BRISTER: Do you agree with opposing Counsel that he did have some choices, some alternatives?

ATTORNEY JAMES H. WOOD: Absolutely not and, Your Honor, that's absolutely not developed in this record at all.

JUSTICE SCOTT A. BRISTER: Tell me why he had to do this. He had to walk on top.

ATTORNEY JAMES H. WOOD: Well, Your Honor, the actual evidence in the case is that he had complained previously and that he had been told by the owner of the facility that this was his problem. This was his trailer. He needed to get the trailer loaded.

JUSTICE PAUL W. GREEN: That sounds like Moritz doesn't it?

ATTORNEY JAMES H. WOOD: Sir?

JUSTICE PAUL W. GREEN: Doesn't that sound just like the Moritz case?

ATTORNEY JAMES H. WOOD: Well it goes on at that point. I mean, he

not only can't use the trailer to do it, but there is nothing else he can do if he's going to actually, in fact, load the trailer and I think it misinterprets the real world. I mean.

JUSTICE PAUL W. GREEN: We discussed a little while ago about the people get up there and they do things. They're in a hurry. Well obviously Mr. Moritz loaded his truck on this ramp without guardrails because he was in a hurry. He didn't have to do that. He could have driven down, down on a level ground and finished loading his truck, but he was in a hurry and did it and this Court, of course, it was, I wasn't.

JUSTICE SCOTT A. BRISTER: Not unanimous.

JUSTICE PAUL W. GREEN: It wasn't unanimous, but the Court held that he was as a matter of law, that he was, because he opened an obvious condition that he loses. Well why wouldn't the same thing apply here?

ATTORNEY JAMES H. WOOD: Your Honor, first we don't think that it is an open and obvious condition. If you look at the record in this case, the.

JUSTICE PAUL W. GREEN: You don't think it's obvious, an obvious danger to go standing on top of an unguarded trailer like this?

ATTORNEY JAMES H. WOOD: No, not under these, I mean it's a routine practice that happens in this particular area [inaudible].

JUSTICE PHIL JOHNSON: Does that mean it's not dangerous to, that somebody doesn't recognize the danger of falling off the side of the top of the trailer because everybody does it?

ATTORNEY JAMES H. WOOD: No, but I think it goes to whether or not, what his appreciation would be. In other words, the record he had climbed on top of this trailer before and he had not ever had a problem with being, any problem with stability on it before. So, I mean, I think it goes back to what his state of mind was at that particular time.

JUSTICE DAVID M. MEDINA: Had he been on the trailer before under these conditions when the wind, there were micro wind bursts and don't you have to consider all of that when you talk about his experience?

ATTORNEY JAMES H. WOOD: Yes, sir, Your Honor, and I think the evidence that this was and the record specifically talks about a micro burst. There is no evidence to suggest that it was, the wind was blowing when he, as he climbed up top of the trailer and I think it's fairly common that we'll see gusts of wind in that part of the State where you may have a relatively mild wind and then all of a sudden you can have a burst or a blow of wind at that particular time.

JUSTICE DAVID M. MEDINA: So what is the evidence, excuse me, Justice Johnson, what is the evidence to support the deposition that this case doesn't get defeated by motion of Summary Judgment. What's your scintilla of evidence?

ATTORNEY JAMES H. WOOD: Well, Your Honor, first of.

JUSTICE DAVID M. MEDINA: The alternative design.

ATTORNEY JAMES H. WOOD: I appreciate that question because that goes all the way back to the beginning of what I think we're talking about. In a product's liability case, as I understand it, we have to show three things. One, we have to show there's a safer alternative design. Two, we have to show that that design would have prevented the accident or significantly reduced the risk of injury without substantially impairing the product's utility and then we have to show that it was technologically and economically feasible at the time it left the manufacturer. We believe we've done that. We have an expert who's from Texas A&M University. He's a Ph.D. from A&M in engineering.

He also is a Board-certified safety professional and he has testified that there were two significant safer alternative designs that would not have affected the utility of the trailer. First, we've talked and I won't spend much time, just simply removing the top two rungs on this. We've talked about that. But, secondly, and I think this is very important and we do see this on trailers. This is a common event on many different types of trailers is simply to have guardrails and the way the guardrails work, they don't impair the utility of the trailer at all. They're on the side of the trailer. You simply lift those up and then the worker is able to maintain three-point contact.

JUSTICE HARRIET O'NEILL: But then doesn't that encourage people then to come on top of the trailer. If you're going to put guardrails up, doesn't it say come on up?

ATTORNEY JAMES H. WOOD: I think the evidence is that oftentimes and I think Timpte knows this, is workers have to be up on the sides. You know, that is what really our point is in this case. It is something. There are times where the worker has to get up on the side of the trailer. In this case, it was to use the downspout. In other cases, it may be to knock loose wet product. It's not an uncommon practice. I'm not going to say it's necessary to tell Your Honors that it's common, but it's not an uncommon practice.

JUSTICE DAVID M. MEDINA: Excuse me, are the trailer, is there a trailer similar to the one that A&M engineer expert testified about. Are there trailers like that used in the field?

ATTORNEY JAMES H. WOOD: Yes, sir. They are not. I'm not saying they are necessarily. I don't know that he talks about grain trailers in his reports, but there are absolutely trailers that are used and I can't remember if it's in this record or in the other record, but there's actually photographs and pictures of trailers where you use the guardrail system.

JUSTICE DAVID M. MEDINA: And what's the industry standard to do this type of work? Are there more trailers like the one we have here or are there more trailers like the one that the A&M engineer demonstrated?

ATTORNEY JAMES H. WOOD: Well I think it's up to the customer preference. What Timpte's representative actually testified to and I think this goes to utility as well, the Timpte representative actually testified that the company routinely changed the trailer's design "every day" based on customer requests. So I think a fair reading of that would be certainly that if the customer requested that these types of guardrails be applied, these foldable guardrails be applied, which is what our expert talks about, then I think that that would have been done.

JUSTICE SCOTT A. BRISTER: Your position is it's a necessity.

ATTORNEY JAMES H. WOOD: Sir.

JUSTICE SCOTT A. BRISTER: Your position is it's a necessity to get on top of the trailer?

ATTORNEY JAMES H. WOOD: Well, my position is that in certain circumstances, it may be necessary. I don't know that in every single circumstance it is an absolute necessity.

JUSTICE SCOTT A. BRISTER: But I mean for design defect, I mean, you're, you know, your argument is they should have foreseen that people were going to have to do this and they say they didn't. They thought people would be foolish to do it. So why is it, give me a little background of grain loading, why it's a necessity sometimes to climb up on the edge?

ATTORNEY JAMES H. WOOD: Okay, first off, Your Honor, I would

submit that's going to be a fact question in the case and so whether that's been proved as a matter of law, I don't think that has been proved as a matter of law, but one of the necessities would be in this very type of situation. What happens is this was a fertilizer plant and the fertilizer comes out of a spout. There's a downspout and exactly the way this spout works in this case is there's a rope that is tied or attached to the building. You know it's actually got a latch and you wrap the rope around it and so the way the downspout is typically lowered is you would unhook the rope around the latch and then the downspout should lower sufficiently low enough into the back of the trailer that the product is not going to blow out when it's actually loaded in. It's going to stay in the product. Well, in this particular case, the downspout was corroded. I mean, it was, as it gets old and used, basically you mixed water with fertilizer from time to time and you get a downspout that gets crusty and it won't lower and so that's exactly what you had happen in this case.

JUSTICE SCOTT A. BRISTER: So he was climbing up to pull on it?

ATTORNEY JAMES H. WOOD: Exactly.

JUSTICE SCOTT A. BRISTER: Pull it down?

ATTORNEY JAMES H. WOOD: Yes, sir. In other words, what he did in the case and the record develops is, he came to the plant. He backed the trailer under. He did. He went over, it wasn't like he just said well I'm going to run up here and climb up on top of this trailer. He went over to the latch and tried to lower the trailer the way, I mean he tried to lower the downspout. The downspout didn't lower.

JUSTICE SCOTT A. BRISTER: It sounds to me like a great case for design defect in the downspout. That's where the problem was. If the downspout had worked fine, there wouldn't, he wouldn't have had to be up on the rail.

ATTORNEY JAMES H. WOOD: That's true. That's true and I.

JUSTICE SCOTT A. BRISTER: I'm concerned about Justice O'Neill's question and example I used last month that everybody, I'm told, that's fallen over the edge in Grand Canyon has fallen over a place where there are rails because when they are no rails, people don't get anywhere close to the edge of the Grand Canyon. But when there are rails, people want to go and look, you know, (unintelligible) stick their heads because that's the way we all are and isn't it true if you make it so there's nonskid up there, the fact is you're going to have a lot more people walking up there and probably a lot more people injured.

ATTORNEY JAMES H. WOOD: Well, I mean, I just think that's going to be a fact question that's going to have to be developed. I mean, it's not what we have in the record in this case that more people would be injured if, in fact, they did that.

JUSTICE SCOTT A. BRISTER: We won't know until we mandate it, but I mean that's, that's, you know, what we would, in effect, do if your suit's successful and it becomes mandatory and everybody has to do it and, you know, 20 years from now, we'll have the facts in, but.

ATTORNEY JAMES H. WOOD: Well, Your Honor, I respectfully submit that's really not the case in this particular situation. I think the standard that we're dealing with is Summary Judgment and as I understand the standard for a Summary Judgment, it is whether reasonable minds can differ as to whether or not this was a design defect. And I think the evidence is pretty strong that they can. I mean, the Amarillo Court of Appeals presumably is made up of Justices who are reasonable and they have looked at the very same facts here and they have concluded that reasonable minds can differ as to whether or

not there was a design defect.

JUSTICE SCOTT A. BRISTER: Of course, we have that fight all the time. Let me ask you to address the issue of preservation. You say they waived, their Summary Judgment didn't raise this issue?

ATTORNEY JAMES H. WOOD: Yes, Your Honor, I think that is. The issue that was actually raised is design defect and there is nothing in there, if you look at their actual motion for Summary Judgment, the one that was actually filed in the District Court itself, the actual language used is whether or not there was a design defect and whether or not, whether Gish has presented evidence of a design defect, which is a producing cause of his personal injuries. So it's talking about the design itself. So the focus of what we did and certainly in response to our in the Summary Judgment was to develop that this was a design defect and we set forth the three elements of that.

JUSTICE SCOTT A. BRISTER: But I'm just wondering how the, I don't think we've had that many cases on the no-evidence motions and you do have to specify what elements there's no evidence of, but in a case like this where you know what they're talking about and it's clear from your response, which was if I recall several hundred pages long.

ATTORNEY JAMES H. WOOD: No sir.

JUSTICE SCOTT A. BRISTER: It's pretty long.

ATTORNEY JAMES H. WOOD: It was just this.

JUSTICE SCOTT A. BRISTER: With exhibits and.

ATTORNEY JAMES H. WOOD: Maybe so, I'm.

JUSTICE SCOTT A. BRISTER: Depositions and.

ATTORNEY JAMES H. WOOD: Oh, the response to the Summary Judgment.

JUSTICE SCOTT A. BRISTER: Right.

ATTORNEY JAMES H. WOOD: Yes, sir. Yes, sir. I thought you meant the response of this Court. Yes.

JUSTICE SCOTT A. BRISTER: So it certainly doesn't look like a case where you didn't know what the Summary Judgment was about. What do we do with the rule when the rule says you need to specify the element. If you don't specify the element, but it's clear from the response you knew what the element, what the fight was about. I mean, this is not that complicated a case. It's the ladder and the skids or nonskid surface. Do we disregard the rule? Do we.

ATTORNEY JAMES H. WOOD: No, sir, Your Honor, I think, I don't think that there was knowledge on the part, on our side of that. I mean basically the way I'm looking at this issue, their argument now becomes Gish's conduct. If you think about it, I respectfully submit that the Petitioner has now shifted their argument in the Court of Appeals and in the Supreme Court to focus now on Gish's conduct. Was did Gish do something that was unreasonable? Was this foreseeable misuse? That was not raised in the Trial Court at all and so the Trial Court didn't have that. What was raised in the Trial Court was whether or not there was a design defect, the three elements that I listed before. And we think that those elements we overcame that certainly in the Summary Judgment. But now, the focus has now shifted completely over to Gish's conduct and that or the thrust of the focus has now shifted over to Gish's conduct. That this was foreseeable misuse and that Gish was the one responsible. But, Your Honor, I also want to make this point because I think it's so critical in this particular case is that we all, we do have comparative thought and unless we're going to just simply say, I mean, all of, it seems like all of the arguments and points that are being raised today are almost jury arguments. They're almost evidence that's going to have to be presented to the jury.

JUSTICE HARRIET O'NEILL: Could you go over for me one more time

how you would distinguish this from Moritz?

ATTORNEY JAMES H. WOOD: Well, Your Honor, I think the difference is, my understanding one is was is Moritz was, unless I'm misreading the case, was an employment case if I'm not mistaken on that. I think it, I may be, but the main distinguishing point I would make is, if my understanding is correct is, that again we go to comparative thought. I know in Skiles and in.

JUSTICE HARRIET O'NEILL: That view did not prevail.

ATTORNEY JAMES H. WOOD: Then, I mean I still think it's a different view because we're talking about products liability. I mean in a products liability case, it's set up by statute. The Legislature has abolished.

JUSTICE SCOTT A. BRISTER: No, Moritz was you don't have to warn a guy that there's no handrails when he's used it for a year and a half and knows there's no hand railings and that looks kind of like this. You don't have to warn a guy that sides are not nonskid surface when it's his truck and he knows they're nonskid surface.

ATTORNEY JAMES H. WOOD: Well the warnings though are not, this is no, this is purely a design defect theory that we're up here on. There's not a warning theory that's been in front of the Court.

JUSTICE DALE WAINWRIGHT: Let me ask before your time, well the time has run out, but with the Senior Justice's permission go over a little bit here.

ATTORNEY JAMES H. WOOD: Yes, sir.

JUSTICE DALE WAINWRIGHT: You say the safer alternative design testimony from your expert was to add handrails on top of the truck and take the two top rungs off the ladder.

ATTORNEY JAMES H. WOOD: Either/or. Yes, sir.

JUSTICE DALE WAINWRIGHT: Either/or. Well you've said it's necessary on occasion for the driver to get up on top of the truck. Take two top rungs off the ladder, doesn't that make it dangerous to get on top of the truck if it's necessary that some time for the driver to get up there?

ATTORNEY JAMES H. WOOD: Well I think that would.

JUSTICE DALE WAINWRIGHT: That would create a different problem, a different case where we have an unreasonably dangerous access method alleged?

ATTORNEY JAMES H. WOOD: It could and I mean that argument you could say touched both ways as it establishes knowledge as to Timpte and it might also establish knowledge as to Mr. Gish, but I respectfully submit, Your Honor, that if that were the case, then what it would do is, for example, in this particular case is to force Martin Resources at that point to have to provide some type of access system. In other words, if the driver can't.

JUSTICE DALE WAINWRIGHT: Well that cuts against your expert's recommendation to take the two top rungs off the ladder then.

ATTORNEY JAMES H. WOOD: No, sir, if I said that, I misspoke. What I'm saying is the way you would prevent somebody or make it more difficult for somebody to get on top is to remove the top two rungs. So if you're not inviting them on top of the trailer, then you would remove the top two rungs. On the other hand.

JUSTICE DALE WAINWRIGHT: But you also said it is necessary on occasion for the driver to get up there, but your expert, one of his recommendations was to take the method of access to the top off, take that away, the two top rungs of the ladder, which means if it's necessary for the driver to get up there, he's going to have to get up there in some manner that's not going to be as convenient as climbing

the ladder because the two top rungs are going to removed according to your expert.

ATTORNEY JAMES H. WOOD: Yes, sir, and that, I think what that would benefit is this. If there is no access really to the top of the trailer, then at that point, it is going to make it much more likely that the seller of the product is going to have to do something to allow the driver to have access and you would do that by a catwalk system. You would do because it is going to be necessary from time to time for drivers, I submit, and I think we see that, to be on top of the trailer, but if there's access, then the driver. For example, Martin can expect the driver, Martin Resources can expect the driver to get up there and fix the problem. On the other hand, if there is no access to it, then the alternative is going to be for Martin or someone like Martin to have a catwalk or a platform type system that would allow the driver to do the same thing.

JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Counsel.

ATTORNEY JAMES H. WOOD: Thank you.

REBUTTAL ARGUMENT OF GARY BELLAIR ON BEHALF OF PETITIONER

ATTORNEY GARY BELLAIR: Interestingly enough, issues on expert testified that he saw no reasonable need to be on top of his trailer and that's why he's advocating that you take off those two rungs and indeed it was his advocation that says the rungs weren't necessary. It wasn't Mr. Thompson who was the representative from Timpte. Talking about guardrails. Look at the Affidavit put in as Summary Judgment evidence. It doesn't talk about guardrails. It talks about the manufacturer could get creative. He could fashion some sort of handholds based on his creativity. There's not been an offer of a reasonable alternative. The expert did point to two other types of trailers. They don't have the same utility. One of them was a tanker truck, which as the Court may be aware, has a very small round opening where drivers actually have to climb up on top and get their head right by the opening to see what's going on in the tanker truck. We don't have a small opening. We have a large opening to facilitate quick loading. That's why tanker trucks have catwalks and that's why this truck doesn't need a catwalk.

JUSTICE SCOTT A. BRISTER: And did you, your Motion for Summary Judgment could have been a little more specific, the no evidence part.

ATTORNEY GARY BELLAIR: Your Honor, I was not the author and so I'll take no pride of ownership in that particular motion. I will, however, say that the Motion was sufficient enough to convey its intent and there were special exceptions and those special exceptions were disposed of in the Court's Order and they were not attacked on appeal with respect to the design defect claim.

JUSTICE SCOTT A. BRISTER: And disposed of, you mean denied?

ATTORNEY GARY BELLAIR: Correct.

JUSTICE SCOTT A. BRISTER: And the Trial Judge denied it because.

ATTORNEY GARY BELLAIR: He knew that they knew what everybody was talking about. We were all on the same page at the Trial Court level.

JUSTICE SCOTT A. BRISTER: But that, what's in the Motion would not be enough if the argument was the whole truck was defective and we don't have any idea what part. I mean you couldn't just file a no-evidence Summary Judgment saying there's no evidence design defect.

ATTORNEY GARY BELLAIR: I wouldn't be here today if that's the status of the case. I'd like to point the Court's attention to the last

attachment to my handout this morning and in that case you'll see that we're talking about products restatement the third, section 2 and that section is actually addressing some of the issues that are here today and, indeed, example number 20, if memory serves me right, talks about a chair that has side rails where a college student was trying to access a top shelf of a bookshelf to get a book and he climbed up those side rails and fell, injuring himself. That's exactly what we're talking about in this case. The student has put himself at risk. Mr. Gish has put himself at risk. The authors of the restatement tell us that the misuse such as reaching for the top shelf from the top rung of a chair is so unreasonable that it entails a risk that need not be designed against.

JUSTICE DAVID M. MEDINA: That's a little different though. I mean, you have a chair that's not attached to a wall or a bookshelf and if someone brings a chair and tries to stand on it. Here if you have a ladder that's attached to a, the trailer. It's part of the entire assembly.

ATTORNEY GARY BELLAIR: Your Honor, I didn't make myself clear. What I'm trying to talk about at this point in time is the 5.66" catwalk that's a lot closer to being a tightrope than it is a catwalk. That's why I'd like to.

JUSTICE PHIL JOHNSON: Excuse me, you're talking about the one on the front of the picture here, the 5.66 catwalk.

ATTORNEY GARY BELLAIR: No, Your Honor, that's a platform that they actually have and I believe that the dimension on that is 12 inches. That's an actual platform where they can stand. When I'm referring to the catwalk, I'm referring to exhibit on page 2 where it's the top rail of the side wall of this U-Haul that has no top. That's what's only 5.66 inches. That's where Mr. Gish was standing when he fell trying to access somebody else's broken equipment and to add to your Grand Canyon with a personal experience, in my prior life, I was an electrical contractor. A general contractor brought me up on top of a five-story building and he did it before the guardrails were in place and he asked me, see how close you get to the end and I was about 4-1/2 feet from the edge. When they put the guardrails up the next week, I was right there looking over the side of the building. For all the reasons stated, we ask the Court to reverse and render judgment against Mr. Gish. Thank you.

JUSTICE NATHAN L. HECHT: Thank you, Counsel. Concludes the arguments in the first case and we will take a brief recess.

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