ORAL ARGUMENT – 01/05/05
03-0848
HICKS V. RICE FOOD MARKET

ALEXANDER: I'm here on a case which is here not only because of the dissents, but it's here because it's important to the jurisprudence of this state. One of the things that that this court must decide is, where do we draw the line as to when expert testimony is necessary?

If it is that we require expert testimony in every case aren't we then closing the courts to people with relatively minor claims? Ms. Hicks had a relatively minor claim. She has an un-operated ruptured disc. She received it in the Rice Food Market when a 3-1/2 foot sign that hung over Sees candy which was placed at a kiosk in the center of the store.

BRISTER: How far was it overhead?

ALEXANDER: It was - nobody actually measured it. From the pictures it appears to be about 9-10 feet. There was a kiosk, the sign was attached to the front of the kiosk.

BRISTER: If we velcroed the sort of Damocles over the spot where you are standing, I assume you would agree with me that would be both 1) dangerous; and 2) unreasonable. Correct?

ALEXANDER: That would have been my...

BRISTER: If we velcroed a feather on the other hand right over you, I assume you would agree with me that is neither 1) unreasonable, because velcro would be expected to hold up a feather; and 2) even if it didn't, not dangerous. A sheet of paper same thing. Neither unreasonable to expect velcro would hold it nor dangerous? Now this is a 3 lb. sign made out of plastic. I assume our rules weigh more than 3 lbs. Why would we, a 3 lb sign that fell 3 feet, why would you know or have reason to know 1) it's unreasonable that velcro wouldn't hold it up; and 2) if it didn't, it would be dangerous? Not just you might get thumped. It would be dangerous.

ALEXANDER: First let me get into what really we're talking about is velcro. Velcro serves a very useful purpose, but weight bearing is not one. And weight bearing over extended time is certainly not one. Nowhere is it suggested that velcro is to bear any weight at any time, and especially for a length of time. What's worse about this sign is, velcro - one...

BRISTER: So I was wrong about the feather. Velcro won't hold up a feather. It's unreasonable to try to velcro a feather to the wall. Surely it will hold up some weight.

ALEXANDER: Certainly it could have held up a cloth sign that weighed very little. But what happened in this case and what is anticipated by the people who manufactured this sign. They put screw holes in each end of the sign, which Rice Food Market ___ ignored. And left it there with

velcro knowing full well, if you will read the testimony of Mr. Belsheim on page 106 of the record, Rice knew fell well two things about velcro: 1) one is it's not designed to hold up weight at all; and 2) it does not give away evenly. This lady probably wouldn't have been hurt if both ends of the sign had given away at the same time. What happened was, the sign gave way and like a pendulum swung into her neck...

MEDINA: Can you address the issue on constructive notice and actual notice as it was written in the opinion of the lower court?

ALEXANDER: I can't address it any better than Mr. Belsheim addressed it. But the seminal case is Corbin v. Safeway. In Corbin this court will well remember is a grape case. Safeway built a rack to display grapes so as to be attracted to customers and the rack was slanted towards the aisle. They did not put a mat beneath it. They did not put any of ___ to keep grapes from falling into the aisle.

MEDINA: Isn't this different than a grape case where perhaps a customer could have knocked a grape on the ground and therefore this store didn't necessarily have notice of that grape?

ALEXANDER: They are all different, but this court said in Corbin, an occupier is considered to have constructed knowledge of any previous defects or dangerous conditions that a reasonably, careful inspection should reveal. The court goes further to say, the standard of conduct required a premises owner toward his invitee is the ordinary care that a reasonably prudent person would exercise under all the pertinent circumstances, not on whether a specific set of circumstances would occur.

The reasoning and holding in Corbin was reaffirmed by this court in a later case in S.W.3d, that was the stair case. It's CMH Homes v. Daenen, 2000 case by this court. At page 101 in that opinion, the court specifically refused to reject the holding in Corbin, but said in CMH Homes, the stairs were safe when installed. But trucks kept backing into them and made them loose. That's entirely a different thing. Nothing ever touched this sign. The sign was installed without utilizing the screw holes. The sign was installed using solely velcro. The sign was installed knowing that it weighed in excess of 3 lbs. The sign was installed knowing that it was attached on either end, and that velcro does not give way evenly. The sign came swooping down on one end.

And the testimony of Mr. Belsheim is replete with his admission of knowledge of the inadequacy of the sign. Of course he didn't admit that he knew the sign would eventually come down like a pendulum on somebody. But he did know that it was inadequately installed.

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RESPONDENT

WHISTLER: Mr. Alexander opens interestingly with a reference to the need for expert testimony. There is a need for more in this case. This case is about a lack of evidence. There is a ___, there is a gap, there's stuff missing in order to make the case. And that's why the CA rightly reversed

the TC's judgment in this case.

BRISTER: What else would you need if it was a sword velcroed over the candy counter? Why would you need anything else?

WHISTLER: If it was a sword, which I think everyone would recognize as a weapon, as a dangerous instrumentality. We attach a different legal meaning to instruments like that. We don't have that in this case of course, but we have it as a Sun. And what this case has gotten to be about, we've been accused in the briefing of playing semantics, but it's all come down to how we are going to characterize the evidence that's in this case, or characterize what's missing from the case? There isn't a lot of disagreement about what little evidence is in this case. The sign was attached with velcro. The sign was apparently designed to use both velcro and screws, or velcro, or screws.

HECHT: You say apparently. Is that in the record? It wasn't clear in the brief.

WHISTLER: It is in the record.

HECHT: One or the other, or both?

WHISTLER: That isn't clear in the record. What's clear in the record is there is a provision on the material for velcro and that there are then holes there are presumably available to use for screws. So we know that that evidence is there.

HECHT: The petitioner's brief says the sign was equipped to be mounted with screws and velcro.

WHISTLER: Said and velcro. So it's equipped that way. We could even say - we don't know for sure because there was no evidence about the design or the intention of the design. But everyone agrees that the provision was made in the materials for screws or velcro. What happens though is the characterization of the way the installation was done is - both by petitioner and then by the dissenting justices in the court below, that that's improper. That's an improper installation. And then from improper we get this logical leap to dangerous, or even beyond that to unreasonably dangerous. What's unreasonable about that? What's dangerous about that? And what is the evidence that this was either unreasonable or dangerous from the moment of the inception of its use in this way, this application.

WAINWRIGHT: If the sign had been attached with scotch tape, would you be taking the same position?

WHISTLER: We would have some different circumstances there. We don't have any provisions in the materials, no evidence that the materials were designed to be installed with scotch tape. That that is a feasible way of installing the sign. And then certainly some different things would come into play as counsel has suggested in the briefing concerning common sense. What do

we know about the way scotch tape works?

WAINWRIGHT: Well if the sign is put up with scotch tape and it falls. Do you agree that the sign fell 9 or 10 feet. Is that in the record?

WHISTLER: I don't believe the record is clear in how far it fell. But it was an overhead sign. I don't believe it extended 10 feet above the plaintiff when she was struck.

WAINWRIGHT: Is there any indication on how far the sign fell?

WHISTLER: I think there is some indication, but I don't think it's clear. I can't put a number on it.

JEFFERSON: There are pictures in the record that show the kiosk and the location of the sign?

WHISTLER: There are.

BRISTER: I couldn't find any that showed the sign before it fell. Do you disagree that it was about 9 to 10 feet above?

WHISTLER: It does not seem to me, and I've looked at the record, and I don't think the pictures are clear. But that seems high.

BRISTER: If you want to catch kids as Mr. Alexander says, 10 feet might be a little high.

WHISTLER: Probably

WAINWRIGHT: Does the record give any indication of what that distance is even if it's unclear or disputed?

WHISTLER: I can't recall what that distance is, or whether it adequately explains what that is.

WAINWRIGHT: If the over 3 lb sign is held up with scotch tape and it falls, can the jury draw the conclusion from that along with an admission that a careful inspection would have revealed that it was attached - let's say by velcro not scotch tape, can the jury reach the conclusion that there was something dangerous about how the sign was affixed to the display from that evidence? Can the jury reasonably reach that conclusion?

WHISTLER: I think the jury can conclude that something happened. I think the jury can conclude that nobody intended for the sign to fall on people, and injure people. So something is clearly amiss. I think there's a gap though between that consideration and the standards this court

has put down for a premises case. Because the court has rejected strict liability for premises owners saying, just because an action happens, we don't hold the premises owner responsible. We require something more. And that's what's missing in this case. And that is, was it unreasonably dangerous from the moment that it was installed? That evidence is not in the record.

O'NEILL: Are you saying that evidence is lacking because of the manner of attachment? Is it because of the velcro or the way it's designed? It seems like we all are familiar with the properties of velcro and if we're all familiar with it, I don't understand why a jury couldn't find some evidence of constructive knowledge on Rice's part unless you're saying that it's the weight of the sign not being capable of injuring someone. I'm not sure I follow your argument.

WHISTLER: I would have to differ about the fact of what we know about velcro. There are some other considerations that go into a calculation of what the holding power of velcro is. The amount of velcro that was used, the position of the velcro on the object being held. And there is a range here as the court in its questioning has indicated. Does anybody think that a feather could not be held by velcro.

O'NEILL: But is there such a thing as a velcro expert?

WHISTLER: I would think I could find one.

BRISTER: Is it your contention that's what's lacking here, that there needs to be some expert testimony with respect to what velcro properties are?

WHISTLER: I don't think it even needs to be an expert. If we're talking about whether something is dangerous, there is lots of ways to prove a dangerous condition without getting an expert. There is no indication that the sign has fallen before. There is no indication that Rice Foods had tried velcro installations in any of its stores, and that it had failed miserably. There are lots of ways you can get to this issue of whether something is unreasonably dangerous in particular situations.

BRISTER: Using J. Wainwright's example of the scotch tape. Everybody knows what scotch tape does and how it works and so forth. And I would think that by now we would pretty much know the same kind of properties with respect to what Velcro does. Why wouldn't it be something that evidence being before a jury can sit there and listen and decide whether they think it's dangerous or not considering all the other evidence that's there and can make the determination? When Rice Foods put that sign up there they knew what they were doing. They knew what velcro would do or wouldn't do. Why would that be some evidence of _____? (coughing)

WHISTLER: I guess the analysis breaks down when we want to talk about the substance and leave aside the way in which a substance is being utilized. I can envision if I have enough scotch tape, I could make this sign permanent. So you can characterize a situation in a pejorative way and make it sound bad. And I think that the attempt here is to characterize the substance use in such a

way that it starts to sound bad. Everybody knows what velcro is. But I would contend there is no evidence in this case to suggest that there isn't a safe way, or that there aren't ways to use velcro that makes sense. Just looking at the sign itself, why did it have both velcro and screws.

O'NEILL: It strikes me though that your making a jury argument here. It's hard for me to say there's zero evidence upon which a jury could find constructive knowledge.

WHISTLER: I'm going to contend that there is no evidence because we've got some evidence from which reasonable people - and we've got justices who are dissenting, showing that even intelligent and trained people can differ about the inferences to be drawn from that piece of evidence. What we have is a sign, installed with velcro, and it apparently held and was doing fine for some time. It's not clear how long. But all we have from that is that at some point it fell.

WAINWRIGHT: But if reasonable people can disagree, then we have to rely on the jury's finding don't we? We can't overturn the jury verdict if that's the case.

WHISTLER: But the court has given itself permission to make judgments about the kind of inferences that can be made from a particular piece of evidence.

BRISTER: This court has disagreed numerous times as to whether reasonable jurors could reasonably disagree about things have we not?

WHISTLER: That's right. There is the question of the jury's purview but then the court has said, that there are...

WAINWRIGHT: I agree with that point. But your premise was reasonable jurors disagreed on these facts. If that's the case, then we can't overturn the jury verdict.

WHISTLER: I wasn't discussing the jury verdict. I was discussing the judges who were looking at this evidence and making a determination on what is a proper inference? And that's really what this appeal goes to, is that looking at this piece of evidence, the fact that velcro was used to install a sign. Can we infer from that that that's improper and therefore unreasonably dangerous?

MEDINA: Is there anything in the record that indicates a step was missed? As I read this it appears to me that something was gone. If so, why should an owner of a building have a free shot to injure an invitee?

WHISTLER: And that gets to the question I think the way we framed it, is the court willing to say that the law now is that, the failure to install a Sun at variance with its design is some evidence of an unreasonably dangerous condition. In this case we've got velcro and screws. The court asked if there is some evidence that a step was missed? Well petitioner is going to argue that the failure to utilize the screw holes when they are available is some evidence of an unreasonably dangerous condition. And that the failure to use everything available is going to be some evidence to get you

to a negligence case. And I'm going to suggest that that's a change in the law. Because we have never engaged in this inquiry into design features, or intent of the designers, or inspecting the material and saying did they follow direction.

The old saying there is more than one way to skin a cat. And so traditionally what we've looked at is, what is actually the condition? was it unreasonably dangerous? And we're not allowed to show a cut to then go behind and start arguing about whether it was designed to do that. Because that opens up a whole other inquiry as to proper design, improper design, adequate design, and all of a sudden a premises case.

MEDINA: But then that takes you the manufacturer. I'm talking about the responsibility for an owner of a building has its employee install a sign and if there are instructions that say do A, B, and C, and the employee skips B.

WHISTLER: There is no evidence of that in this case. And there is no evidence that there were a particular set of instructions that weren't followed, that there was clear directions that were ignored. The evidence is that there was screw holes. The screw holes weren't utilized. There was velcro. The velcro was utilized.

WAINWRIGHT: Are you taking issue with - you've spent a lot of your time and argument talking about lack of evidence of an unreasonably dangerous condition. Are you taking issue that Rice Foods had either actual or constructive knowledge of the condition, whatever it was?

WHISTLER: Yes we are. Because the argument is, and for the sake of argument, for instance the dissenting Justices said, Let's assume that it was a dangerous condition.

WAINWRIGHT: Well put that assumption to the side. The way the CA cited the standard in CMH Homes is actual or constructive knowledge of some condition. The second prong was unreasonable risk of harm; the third prong is exercising reasonable care. But the first prong as cited by the CA is actual or constructive knowledge of some condition. Are you saying Rice Foods did not have either actual constructive knowledge of the condition by which the sign was hung? You're not making that assertion are you?

WHISTLER: I guess you're bringing to mind something I hadn't thought about. But that doesn't sound to me like a proper rendition of a standard. My understanding is actual or constructive notice of an unreasonably dangerous condition, not just some condition. So the proper consideration is does the premises owner...

HECHT: That's not entirely clear in the cases.

WAINWRIGHT: So you're position is Rice Foods had actual or constructive knowledge of the means by which the sign was hung, but not actual constructive knowledge that it was hung in an unreasonably dangerous fashion?

WHISTLER: I think that's fair. Because there is a logical gap then between the condition as it existed at the time of the incident, and the condition at the time it was installed. And there is no evidence in this record of what it was at the time it was installed, or whether there was any deterioration. I think Mr. Alexander suggested that nothing happened at the sign. Nobody touched the sign. I don't think the record is clear on that. And there's been an attempt to transfer the burden of proof to the defendant to show that the condition was unchanged from its inception. And this is a step, this is why CMH Homes is important, because CMH Homes relies heavily on this standard that you have actual notice of the creation of the condition if it's unreasonably dangerous at the moment that you created it. And that case is a situation where there was deteriorating condition. And interestingly this court assumed in that case that the premises owner knew that the steps and platform that were installed would deteriorate over time. And that's the strong assumption that they knew that things were going to go badly. But they said, no. The question and the relevant question then is, what was it like when they installed it? That's what gets you the actual notice. What did they actually have notice of? And in this case there is no evidence that Rice Foods had actual notice that there was an unreasonable and dangerous condition on the premises at the moment that was installed.

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REBUTTAL

ALEXANDER: One of the dangers of arguing a case you did not witness is that sometimes matters escape you. And I'm sure it's accidental. But nowhere, nowhere in this record is there any suggestion that either the manufacturer or Rice had any information that they could use either screws or velcro.

OWEN: Why would it come with velcro if it had screw holes?

ALEXANDER: It came with velcro to suggest the place that the top went.

OWEN: Why would you need velcro at all if you've got screw holes, because the screws are going - what's the point of velcro?

ALEXANDER: The screws were for either end. The sign was imposed upon a canvass kiosk. There was screw holes at each end. In the middle there was canvass. And the velcro strip was across the top. It appears to me, and I think it will appear to the court from looking at the pictures, that the velcro was to make the canvass stick to the sign rather than the sign sticking to the canvass. But nevertheless those pictures are there. I'm not here to make my jury argument again.

OWEN: I'm trying to square up our cases. We've got some cases on ice machines. For example, premises owners that have ice machines know that it's going to happen eventually that somebody is going to spill ice on the floor when they are dispensing it or walk down the aisles spilling a drink. But we don't hold them liable because they have an ice machine on their premises that they know is going to at some point distribute ice or somebody will distribute ice on the floor. We only hold them liable when they know that the ice is there. Are you saying that there is no fact question -

where is the evidence that Rice knew that the velcro sign or 3-1/2 lbs. would fall, or had any chance of falling?

ALEXANDER: The knowledge of the witness Belsheim as to the qualities of velcro. Witness Belsheim was the one in charge. Others in similar position were in charge. And the general knowledge of velcro. My opposition suggests that every single case - are we suggesting that in each one we need to trot a group of experts to say, oh yes, I studied velcro all my life. I've been to Indonesia where they make it. I know all about velcro, and I'm going to tell you, jurors, about velcro Why do lawyers and judges impose upon us the judgment of hired experts. And if we carry that to a conclusion, the list of experts available in the phonebook is liable to exceed the list of lawyers available who can get you lots of money if you just call them up.

The point is, that Rice knew that velcro was not the best way to hang the sign. Nobody has suggested that this court has ever said in any opinion, anywhere, that the business is entitled to one free bite at the business invitee. Sure if we can prove it that this very sign had fallen before and they put it right back up the same way, we might even have a case of gross negligence. In fact they did not put it back up the same way. The evidence is replete with the fact that when they put it back up they used the screws rather they felt they were needed or not.

Now I can't get into long arguments about the effects of duct tape, the effects of scotch tape. I suppose if you wrap something with enough duct tape, you couldn't pull it loose with a team of mules. I don't know that. I've never tried that. And I don't know of any experts in the field. The best experts I know in this field are my own children.

There are matters of common knowledge about velcro. And these are matters that this court should refuse to require either that we prove that Rice Food Market had already swatted one, and therefore they shouldn't swat another. That's not the burden. All we need to prove and all we did prove and all we established for the jury was, that this was not a good way to put up a sign. That it created a danger. CMH tells us, Corbin tells us that we don't have to prove that they knew of the specific danger.

This court has before it a situation where in spite of the suggestion that the instructions were either/or velcro or screws. No. No. No. The screw holes were there to be used and nobody can escape the conclusion that velcro might be a way...

BRISTER: So if you have 4 hole screws in a sign and you use 3, then that's unreasonably dangerous?

ALEXANDER: A great lawyer once told me that once you have driven 3 nails into the coffin, never try to drive the 4th. You will dog ear it every time. So I can't really answer that.

BRISTER: Whether you use all the nail holes or not depends on how many there are. It depends on the circumstances. Whether you use the nail holes verses the velcro kind of depends on how heavy

the sign is, where you are going to hang it and things like that does it not. So the question is, what is there about this case that will allow a jury to say you should have known it was unreasonable and dangerous to velcro a 3-1/2 lb. sign up?

ALEXANDER: I urge you to study the pictures. This was a pre-designed kiosk. The design was set. The location of the sign was shown. The structure was there to which to screw the ends. The middle was a canvass top. That's where the velcro was. Whether the velcro was there to hold the canvass to the sign or the sign to the canvass well we don't know.

WAINWRIGHT: It sounds like you're saying there is no direct testimony that the manner in which this sign was hung is unreasonably dangerous. But if the jury verdict on that point is to be upheld, it's based upon an inference from the evidence. Is that...

ALEXANDER: The question is should we allow them to draw inferences? But if the court will read the testimony of Mr. Belsheim, he admitted for all practical purposes that it was unreasonably dangerous. He just didn't know what the exact dangers were.

WAINWRIGHT: Respondent takes issue with the way you framed his testimony. They say he admitted that Rice knew the way it was hung, and that it was attached by velcro, and they hadn't inspected it in some time. But they say he didn't admit that it was unreasonably dangerous.

ALEXANDER: He may not have said those words. But he admitted that - well I really don't want - I happen to be an eyewitness to the event. I know what he said. And I urge the court to read what he said.

WAINWRIGHT: Do you think what he said is tantamount to saying it was unreasonably dangerous?

ALEXANDER: It would raise the inference for the jury then to determine that it was unreasonably dangerous. He didn't say it of course. But from what he did say, and what he did admit, the jury was _____ the inference that they did. And certainly the CA was not. They did not sit as jurors.

ALEXANDER: