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CMH HOMES V. DAENEN

ALEXANDER: This is an invitee premises liability case in which this court should reverse and render judgment that the plaintiff take nothing. That result is compelled as a matter of law because the plaintiff failed to carry his threshold burden of proof with the respect to the elements of duty. More particularly, the plaintiff failed to adduce evidence that either 1) that the defendant caused the instability in the steps that the plaintiffs say caused his injury; or 2) that the defendant actually knew that the steps in question had become unstable; or 3) that the steps had been unstable long enough to give the defendant a reasonable opportunity to discover that condition.

Now in the face of that absence of proof, what the plaintiff has effectively done is to shift the focus of inquiry. And what the plaintiff effectively argues is, that the dangerous condition here for purposes of the duty analysis, is not the instability that developed in the steps, but rather the steps themselves.

What the plaintiff argues is, is that based upon its experience with previous steps, that the defendant here knew or should have known that these steps would inevitably wear out or sustain damage at some time in the future.

Now there's three fundamental flaws without argument. The first one is, is that that argument asks us to assume that the steps upon which the plaintiff was injured were effectively of the same construction as the previous steps with which they had experience. And the evidence simply does not support that theory.

Number 2, the steps here if we focus on them as the dangerous condition, do not meet the exacting definition of "unreasonable risk of harm" for purposes of the duty analysis. And no. 3, if we go down the road of focusing on the steps as the purported dangerous condition, there is a total shortcoming in proof with respect to the breach elements of a premises liability claim.

ABBOTT: What evidence was there that the defendant knew that the steps would wear out or could wear out?

ALEXANDER: The evidence that the defendant knew that steps could wear out was that the defendant had previously placed other steps (what type of steps we don't know, the evidence is not there) on the premises and that over a period of time, and the only time frame we have in the record and it's on pages 96 and 97 of the record, is that over a period of perhaps 12-15 months the steps would begin to move at which time they would either be repaired or deposed of and replaced.

ABBOTT: And we don't know that those steps used in the past were the same as the steps at issue in this case?

ALEXANDER: That is correct. What we do know is the steps in this case, at least the best evidence we have of that, actually comes from the plaintiff's own supervisor and the plaintiff himself. And the description of the steps is that they were metal-framed and braced steps in which the only portion made of wood was the actual _____, where one places one's foot on the steps. We don't know because the record doesn't tell us what the previous steps were constructed of. The suggestion is that are wooden, but that's the gap.

ABBOTT: How long were the steps there before the incident?

ALEXANDER: That, too, we do not know.

ABBOTT: Is there any evidence in the record indicating whether or not the steps were damaged in any way by the plaintiff's truck backing up into the steps?

ALEXANDER: No. There is no evidence of that. What we have is an incident where there was no witnesses. We are obviously compelled by the standard of review to accept the plaintiff's testimony that these steps were unstable when he stepped on them. But we do not know how they became unstable. We do not know when they became unstable.

To assist with the argument I've prepared some oral argument exhibits. Under Tab 1 are the 4 elements of a premises liability case. And I think they are relatively uncontroversial. These are the same 4 elements that we see in *Corbin*, *Keech v. Kroeger*, *Walmart v. Gonzalez*, *Motel 6 v. Lopez*. The additions that I've made to it is some of the drawings out to the right. I suggest that the first two elements are duty elements and elements 3 and 4 are breach elements. Now this court has never expressly stated that in so many words, but that is the clear message that we get. For instance from *Motel 6 v. Lopez* case, which I have quoted at the bottom.

Now the reason that 3 and 4 are shaded is the point there is that unless you carry your threshold burden of proof with respect to the duty elements, which are questions of law, you don't even get to breach. And that's what *Motel 6 v. Lopez* makes clear.

HANKINSON: You've just said that the duty questions itself is a question of law. But the underlying pieces of it, whether or not there was actual or constructive notice, in fact could be fact issues, correct?

ALEXANDER: They can be fact issues. *Ketch v. Kroeger* is the case to look to on that. In other words, what you first have to do, the court as an initial matter determines whether the plaintiff has satisfied, gets over the threshold to the point where we can submit it to the jury.

HANKINSON: But we don't have any question that we have an invitee here and that this particular landowner owed the duty that the law requires to an invitee?

ALEXANDER: That is right.

HANKINSON: So our threshold legal question has been answered?

ALEXANDER: Let me back up and put it that way. We know that this is an invitee case. But what the court has consistently said in its opinions is in order to determine whether a duty has been triggered, you have to satisfy these first two elements. And the way that that's typically been done (if you turn to no. 2) is you have to demonstrate that the defendant had actual or constructive knowledge of the specific hazard that the caused the plaintiff's injury.

HANKINSON: And a defendant can come in and say, "I didn't know about this" and the plaintiff can put on proof that says, "I do." Assuming there is a hazard and a fact issue then arises on whether or not that there was notice.

ALEXANDER: Correct. In a case to look to on that, I think that the way to understand that is if you look at *Centex Realty*, 899 S.W.2d 195 at 197. That's a decision by this court. And the court says: The existence of duty is a question of law for the court to decide from the facts surrounding the occurrence in question. In other words, in making the threshold determination of duty, which is a question of law, you don't put on blinders and say I'm not going to look at the facts. You do look at the facts.

HANKINSON: And sometimes there are fact findings that have to be made before the determination could be made of whether the duty has arisen as you've laid out this.

ALEXANDER: Right. *Corbin* was a dispute issue of fact as to whether a mat was in place. But in our case and again if we look at no. 2 in the typical case, you have to have actual constructive knowledge of the specific hazard. And when we talk about specific hazard it's the puddle on the floor, it's not the leaky roof. It's the bent and the defective condition of the carts, it's not the carts themselves. In *Walmart v. Gonzalez* case, it's the maccaroni salad on the floor, not sale on the premises.

HANKINSON: Then I'm confused about how you started off your argument. You said that the plaintiff in this case was focusing on the instability in the steps not the steps themselves. And now I'm hearing contradiction in what you're saying that what we need to look to is the defect or alleged defect in the steps, and that's the instability.

ALEXANDER: If I suggested that the plaintiff is arguing that you focus on the instability, then I've misspoke. What I am saying is is that in the typical analysis, which this is, you do focus here on the instability in the steps, because that is the specific hazard. You asked whether there is actual or constructive knowledge of that. What they have essentially done, the plaintiff has done, is to argue - they are now trying to argue "no, no, no, we don't have to do that; we're not bound by *Walmart v. Gonzalez*; we do not have to show actual or constructive knowledge of the specific hazard because

our case is a *Corbin* case in which the steps themselves constitute the unreasonably dangerous condition. And what I'm suggesting to you is that this is not a *Corbin* case. This is not the exceptional case that gets us there.

HANKINSON: Well they also argue - they say that they are not relying on *Gonzalez* because *Gonzalez* is a constructive notice case and they are not concerned about constructive notice here. They are looking at actual notice the way I understand their brief.

ALEXANDER: Yes, but actual notice of what.

HANKINSON: And you said actual notice of the instability in the steps.

ALEXANDER: And there is no evidence. They are not saying that there is actual notice of the instability in the steps.

HANKINSON: They are not saying that there...

ALEXANDER: They are not saying that And let me explain that very carefully. They have no proof that the defendant here actually knew that the steps had become unstable. In this case, at this time. They have no proof that the defendant caused the steps to become unstable. They have no proof as to how long they were unstable. Under *Walmart v. Gonzalez* that concludes the inquiry.

HANKINSON: Respond to their argument specifically, and y'all are splitting some real fine hairs here, very fine hairs. As I understand they say that the defendant knew that the stairs could become unstable at any point in time and therefore they had stairs that created a hazard and that's what your client had actual notice of, which is the hazard. Stairs that you couldn't count on to stay stable. Now why doesn't in your outline doesn't that mean - I don't know if I split the hairs the right way. I would like to hear your response to that.

HANKINSON: Look to Tab 3. Tab 3 is the *Corbin* case. *Corbin* is the case that says they don't have to show how long this piece of food was on the floor. That's an anomaly. And the question becomes, Why is that? And the difference is because, and it's stated at the top, in the A typical case when we talk about the dangerous condition, it can be the manmade object or the mode of operation that gives rise to the specific hazard. If you fit. And the key here is the big IF. This case doesn't fit. Why? In order for that type of situation to arise, you have to look at the test, kind of the defining difference here is but for A's unreasonable risk of harm. The key case on that is a decision by CJ Calvert in *Sidenex*, which is cited here. And what you have to show if you're trying to squeeze yourself into a *Corbin* case is this manmade object itself is unreasonably dangerous. Now why was it unreasonably dangerous in *Corbin*? Because there was a showing that unless you had a protected mat in place, grapes were falling all the time. There was no opportunity whatsoever to reasonably police that. It was so frequent that periodic inspection could not reduce the risk of harm. And that's what they are trying to do. And you talk about it splitting hairs. It is very much a splitting hair's

case. It's a case that causes you to rub your head when you look at some of the case law because it's confusing. But that's what they are trying to do is to bring them self into a situation where they say, Based upon the previous experience with steps, manufactured type we don't know, this is a *Corbin* situation. And it's not.

GONZALEZ: With your remaining time can you just talk a minute about venue, why venue is not appropriate here in Montgomery county?

ALEXANDER: I really don't have much to add to what we've already stated in our brief. But it really boils down to this. In *Ford v. Miles* this court clearly articulated that the test for venue when you are relying upon an agent or representative, which they are here is, broad power to act on behalf of the corporation. Here fortunately the record with respect to venue is relatively short. We say that what the record demonstrates here is that the purported agent's power was actually circumscribed. It was limited. And that that individual did not have - far from having broad power to act on behalf of the corporation that that power was limited.

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RESPONDENT

POWERS: I would like to begin by following up on Justice Hankinson's question and focusing on what it is that we are claiming is the dangerous premises condition in this case. And I don't think it's splitting hairs at all.

We're claiming that the steps were improperly designed for the use to which they were put, and as you put it your honor, couldn't be counted on. They were going to become stable inevitably.

OWEN: Were they unreasonably dangerous when they were installed?

POWERS: Yes, we think they were unreasonably dangerous when they were installed.

OWEN: Because?

POWERS: Because they were using a setting where CMH knew there were heavy deliveries frequently used, and these were steps that are designed to be used in a temporary setting to get in and out of mobile homes before somebody puts a deck or a porch or something around their mobile home. It was like if Sears had a heavy loading dock and instead of having permanent steps that would last, they simply put up some temporary steps that they knew inevitably would become unstable and become unsafe.

OWEN: What was the evidence about these particular steps? How long did it take them to become unstable?

POWERS: The testimony from the supervisor Mr. Mason, and the two workers Mr. Flores and Mr. Gonzalez was it was their regular practice to just let the steps become unstable. They testified they knew when they became unstable, that they were dangerous...

OWEN: How long did it take for them to become unstable?

POWERS: Mr. Flores testified he replaced them about every 12-15 months. They also were placed in a position where they could get hit by trucks. In which case that would be more frequently and the trucks would make them become unstable. Sometimes trucks driven by Mr. Flores, sometimes trucks driven by people making deliveries.

GONZALEZ: If the steps were never hit by a truck would they still be unreasonably dangerous?

POWERS: Yes. Because they were flimsy. As Justice Hankinson put it, they couldn't be counted upon to bear these kinds of loads.

OWEN: What evidence was there that the particular steps that were there on the day of the injury were the "flimsy" steps that had to be replaced every 12-15 months in the past?

POWERS: Mr. Flores, Mr. Mason and Mr. Gonzalez testified about their regular practice. This is what they did. Now after the accident they replaced them by all metal steps. They haven't had any problems or instability and I think it's been 3-1/2 years between the accident and the trial. And their testimony was this is the way we did it.

Now I think it's a reasonable inference that when they testified, this is the way we did it, that that was a regular practice and that when they were referring to these steps would inevitably become unstable that that was the condition prior to this accident.

PHILLIPS: Why doesn't your standard make anybody that's open for business an insurer of all the equipment there unless they've bought the very finest piece of equipment?

POWERS: First the knowledge requirement means that they are not an insurer. The knowledge requirement by the way is to make sure that they have a chance to do something about it.

PHILLIPS: There are a lot of things in our society that wear out in 2 years, 5 years.

POWERS: That's correct. But the knowledge requirement they have to know about that or those that should have known about it. But then all they have to do is then take reasonable precautions. Every negligence case is like that. The only way to absolutely avoid injury, whether it's driving an automobile or building steps or premises liability in any negligence case, the only way

to absolutely avoid any injury, is perfection. That's not what the law requires. All the law requires is reasonable precautions, a reasonably safe step.

OWEN: That would include inspections, I take it? I mean you can discharge your duty in most premises cases by frequent inspections.

POWERS: That would be correct.

OWEN: What evidence was there that they didn't frequently inspect?

POWERS: They could discharge their - we can claim that they should have done a number of things that were unreasonable to have caused the accident. What we claim they did unreasonable is use shoddy steps.

PHILLIPS: Is the use of these kind of steps that can wear out 12-15 months or sooner if hit by a truck would that be enough regardless of what else they did? I mean if you use that, that's enough to establish liability?

POWERS: If they wanted to come in with evidence that their conduct was reasonable, they could try to convince the jury that using these steps with a certain frequency of inspections was reasonable. That goes to the breach issue. But certainly the jury was entitled to say that it was unreasonable to use these kinds of steps in the first place.

PHILLIPS: So if you're using these kind of steps that wear out once a year, then even if you have an every morning reinspection, every hour reinspection, you still say there's a jury issue, you could be found negligent?

POWERS: Yes, there would be a jury issue. If they inspect them every morning and the jury found that they were using reasonable care, then they wouldn't be liable.

PHILLIPS: But there's a fact issue there...

POWERS: There would be a fact issue there.

PHILLIPS: Using this product that's less than a product then that which could be conceived that would be better?

POWERS: If you look at *Resendes* for example where this court in a per curiam opinion rendered judgment for the defendant. If the plaintiff is saying it's just negligent to have a self service supermarket, at some point the claim of negligence is to put it bluntly ridiculous. And the court can say there's no evidence. We're not going to a let a jury say it is negligent to simply have a self service supermarket. And the court did that in *Resendes*.

But I don't think we're anywhere close to that case here. To say that you should use sturdy steps in a loading dock where there is constant use, heavy deliveries, refrigerators and things of that sort I think is not getting anywhere close to a claim where they are asked to be insured.

OWEN: Isn't it getting close to injecting product's liability in the premises law?

POWERS: Part of the requirement in a premises defect case is reasonable care to correct the defect. And the jury found that they did not use reasonable care.

OWEN: Again, I'm having a tough time here. You say they were not unreasonably dangerous when they were first installed and that for up to 12-15 months they weren't unreasonably dangerous.

POWERS: We say they were unreasonably dangerous when they were installed because they couldn't be counted on. Let's suppose that a movie theater, a mall or a sports arena puts tiles upon the ceiling and they knowingly use an adhesive that is the improper adhesive to put those tiles upon the ceiling either because of the heat conditions or the materials that are being use. And they know that. And they know, well this will hold for about 6 months, and then it's going to start getting weak. According to CMH they wouldn't have any duty to use the right tile until they knew that a particular piece of tile had become loose and was going to fall on someone. So that's not making them an insurer. It's making them use reasonable construction on those tiles.

ENOCH: Merely the observation that over time the steps that are constructed need to be replaced and the observation that by replacing them with full metal steps they haven't had to replace for a couple of years, does that satisfy the proof that - using your hypothet - the owner knew that the glue was not appropriate for what they were using it for. In this case is that proof that these steps were a defective design for the purposes for which they were used?

POWERS: I agree, there has to be proof more than it is the wrong glue. They have to either know or should know it's the wrong glue. Well the evidence certainly supports a finding here by the jury that given the fact that they knew the steps wore out, and they testified that they knew when the steps became wobbly, they were dangerous. They had information from which a reasonable premises owner should have concluded they were using flimsy, shoddy steps that couldn't be relied on.

PHILLIPS: Isn't part of the key here, the wearing out process? I mean if your tiles became loose and they were visible for a week that they were going to fall, they gradually sunk down and then they fell after they were weak but that was visible, that that might not be unreasonable. You just have to have at least once a week inspected and look up at the tiles and see if they were loose. And here similarly on these ladders if they get wobbly for a period of time before they actually become unstable, isn't that a different situation than if this step appears to be in perfect working order one minute and the next minute you're crashing through?

POWERS: Absolutely. That's a different issue and the jury would be entitled to find under those circumstances that what they did was reasonable.

PHILLIPS: I'm not really talking about being entitled to a jury trial, which you might win. I'm talking about what reaches the threshold to get to the jury.

POWERS: If this court is going to look at the individual facts of each case to determine whether something is reasonable or not, whether the practice of shoddy steps with inspection is reasonable or should they have had better steps in the first place, the practice of using the right kind of adhesive for the tile in the first place or instead of doing that using an inspection, if the court is going to review every premises liability case - every tort case - to determine whether the particular choice by the defendant was reasonable, then every case is going to be reviewable.

I think one of the most important things that this court has said about duty, and that's really what this case is about, the court should reverse only if there's no duty.

OWEN: Don't we have jurisprudence in premises law, that even if you know that there's unreasonably dangerous condition on your property, you can satisfy your duty by either warning or frequent inspections to make sure no one is injured?

POWERS: Absolutely. But whether the duty has been satisfied under the individual facts of the case is the breach issue. It's not the duty issue. The duty is to do what's reasonable.

OWEN: There was no breach of duty simply by putting the condition on the premises as I understand our case law as long as you conduct inspections or more.

POWERS: Well in *Corbin* the condition was the design and the defendant wasn't able to come on and say: Well inspections are enough. Now they could make that argument to the jury.

OWEN: Weren't the facts though that inspections would not have made it safe because the grapes fell off so frequently?

POWERS: They could have had somebody standing by the grape stand. What the argument was, was inspections were unreasonable. And the jury was entitled to say that.

ENOCH: You refer to the shoddy steps again. It does sound to me a bit like product's liability. They put something out there on the premises that it's the position of the plaintiff that the design was flawed. It seems to me that there has - if that's going to be the position, then the landowner either had to know or should have known about the design flaw and the threshold proof for the plaintiff would be that the design was flawed. They would have to prove that it was flawed, not that it wore out, not that it got wobbly after time, not that it had to be replaced periodically because of use, but that putting wood risers on metal frames in a dock situation like this is somehow

fundamentally an unreasonably dangerous condition. What does it take to do that?

POWERS: When the proof is that the employees of CMH testified they knew this happened every time, or happened because trucks hit them, they knew it happened and they testified that unstable steps were an unreasonable danger on the premises.

OWEN: Didn't they also testify about wooden steps? I thought the petitioner made a big point in his brief at least that the only testimony about prior steps were that they were wooden, not that they were metal frame with woods, but that they were wooden.

POWERS: The prior testimony is that this was what we did before the accident. And I think it's a reasonable inference from that testimony from which the jury could conclude that that was the condition in place before the accident.

OWEN: Did they talk about wood steps or not?

POWERS: Well there was a lot of confusion as to whether steps were wood and metal or wood only. But the testimony of CMH's own witnesses did not distinguish at all between we did it this way on some kinds of steps and did it another way on some other kind of steps. It was generally, here's what we did before the accident. This is our practice. And I think it is a reasonable inference to infer that that was the situation in place...

OWEN: Was there any direct evidence that the steps prior to these steps were wood only steps?

POWERS: No. But there was evidence that whether there were wood only or wood and metal steps, that they became unstable.

I would like to come back to the way in a premises liability case or in a negligent case at all, the way the duty rule ought to work here...

HECHT: What would be your position in that regard if the evidence were, as it is here, that these steps became unstable after a period of time, 12-15 months, let's say for up to 15 months, and they had been installed a week before. That was the evidence. Then what would you have to show to have actual notice?

POWERS: Well they would still would know that these were a bad kind of steps to use in this setting.

HECHT: So that would be enough?

POWERS: That would be enough that the steps are unreasonably dangerous. I'm not sure

there would be proximate cause under those circumstances because the injury that happened was different than the one that we would expect to happen. So I don't think there would be liability there, but not because there is no duty or no defect but rather because there's no proximate cause.

OWENS: How do we know the steps were installed the week before in this case?

POWERS: We don't know one way or the other, but they have not challenged the proximate cause finding on appeal.

OWENS: Why does that take it out of duty into proximate cause? Let's assume that it happened exactly the way it happened here: the plaintiff got out of the truck and when he stepped on the steps that had been put in the week before, but nonetheless they were unstable and he was injured. Now what makes that different from your case?

POWERS: Well as I took Justice Hecht's question that the reason these steps are dangerous is they are shoddy and you can't count on them to last. And if the injury wasn't caused by the fact that they didn't last it might be a different kind of injury.

OWENS: If we don't know how long they had been here now, how do we know that that was - I mean...

POWERS: The jury was properly instructed on proximate cause. The jury made a finding that there was proximate cause here and it has never been challenged on appeal. I would like to come prepared to answer the elements of the cause of action, but they have never appealed the proximate cause finding. What I am saying is in response to Justice Hecht, just because there is negligence or a premises defect doesn't automatically mean there's going to be liability. There are other elements of the cause of action.

HECHT: But it does mean that you have proven notice if you prove that the landowner knew that the steps eventually at some point could not be counted on?

POWERS: Right. Just like if somebody uses a wooden deck outside of a restaurant. They know they are supposed to use treated wood. If they don't use treated wood it's dangerous. It's going to rot.

HECHT: It seems to me if that's the case, then you really ought to use concrete steps out there?

POWERS: That would be one element. It turned out in this case all metal steps would have solved the problem. So they had an easier way than using all concrete steps.

BAKER: That sounds like a reasonable alternative design, which gets it back into the

product's theory.

POWERS: But that's always a negligence. You're claiming the person should have done something different. That's always going to be a claim of negligence.

BAKER: It seems clear then that you agree obviously with what the CA says that the *Gonzalez* case doesn't apply here?

POWERS: Because the *Gonzalez* case is a different fact pattern for the same reason that *Corbin* is a different fact pattern. *Gonzalez*, the question was about that particular piece of maccaroni salad. And the purpose of the knowledge requirement, is so the defendant can do something about it. They can't do something about it until they know that particular piece of maccaroni salad is on the ground. On the other hand, if the claim that we're making is they should have had different steps, then the notice requirement ought to go to: Did they have notice that these were shoddy steps and could they have done something about it? And the proof here clearly shows that.

HECHT: Well the argument in *Gonzalez* also was that you shouldn't serve maccaroni in a store because you know that it's going to get dribbled in the aisles.

POWERS: The *Ron Hell* case by the way, that is the holding in the *Ron Hell* case.

OWEN: We rejected that argument though in *Gonzalez*.

POWERS: I don't think there was any proof in *Gonzalez* unlike *Corbin*. There wasn't any proof but the practice they were using was actually negligent. In evaluating these cases, I think we do need to distinguish between the duty issue and the breach issue. What the jury can decide and what the court ought to decide.

One of the most important things this court has said about duty was in Justice Hecht's dissenting opinion in *Reed*. And that is, duty rules ought not be tickets for this day and train only. If they are, every single breach case whether it's a premises case or a negligence case is going to be a duty case that this court's going to have to review.

I understand we're on the other side in *Reed*. We thought that principle helped us in *Reed* rather than helped Kirby. But it's a crucial principle about the way duty works. It's the principle that we endorse in our case book. It's the one in the judge and jury article. And it's the one I think that you quite properly endorsed in your dissenting opinion in *Reed*. This court ought not be simply looking at the facts of individual cases. Was inspection good enough here, or was cement steps good enough here? Was this tile adhesive good enough under these circumstances? That would turn every breach question into an ad hoc determination of duty.

OWEN: Under your theory, we're going to turn every premises case into: Did you use adequate building materials case?

POWERS: If the question is, Did you use adequate building materials? What's wrong with that? Why not make the people that put tiles upon the ceilings and the people that build decks use reasonable building materials.

ENOCH: You use the comment going back to the tile in the ceiling when they knew they had improper glue, but it seems to me under any type of structure on the premises, there is always a choice between a very expensive item that takes less maintenance, less repair, less replacement and a cheaper item that requires more maintenance, more repair. It seems to me that the landowner runs the problem of taking on some liability for a defective premises without any notice that particular items needs to be replaced or is in repair simply because they bought an item that will have to be replaced or repaired at some point in time in the future. Whether they do create a routine maintenance program or an inspection program because they know it will wear out or need to be maintained more often, even if they have that in place it seems to me the duty rule there though creates a fact issue under every circumstance. As long as I could come forward and show there's a different product that would have lasted longer than this product does, I have now met the threshold of the duty obligation because they were aware that this would wear out.

POWERS: Every time there's a duty, then the question is going to be under the duty to act reasonably: Did the defendant act reasonably? And that's going to be inherent in every negligence case. Duty can't do all of the work. It's an important concept, but it ought to be broad cataphorical rules. It ought not be as Justice Hecht has properly indicated a ticket for this day and train only. If the question is whether the particular response to a known danger, and they've got that here, whether the response that they made be it inspection or better steps or better tiles or wood treated decking that's going to be suffered by the weather, whether they've made reasonable responses to it is the breach question. And if that becomes the duty question every jury determination in every negligence case of whether somebody acted reasonably under the circumstances is always going to be: You should have behaved differently than you did. That's going to end up being a duty question if these duty rules are tickets for this day and train only. What we should have to prove to show the duty is to show that they knew about the danger of this condition, and the testimony shows that. They knew as Justice Hankinson put it: these were shoddy, flimsy steps. They knew that. We're not making them an insurer. They knew that they were dangerous because they were shoddy and flimsy.

PHILLIPS: Getting back to Justice Hecht's question. Accepting everything you've said, if these steps were in there the first week of installation, would there be a fact issue for the jury?

POWERS: In this case, just to clarify the hypothetical from this particular case, one of the dangers is where these steps were placed. They were placed where trucks had to back up over them routinely and could hit them and make them come unstable.

BAKER: But there's no evidence that this happened before your client?

POWERS: That's correct. There's no evidence as to why these particular steps became unstable. One of the two.

BAKER: But isn't that a factor that the CA relied heavily on in reaching its decision in this case?

POWERS: I believe the CA relied heavily on the fact that this was a bad design just like in *Corbin*.

BAKER: Well you say appellants knew that on a daily or perhaps hourly basis trucks would back up on the steps creating a potential for damage to same.

POWERS: There are two ways these steps did become unstable. One is, they couldn't take the loads over a period of time, just like the tile falling or the rotted wood deck. The other is, they were placed in a situation where the trucks would come and might hit them. I agree, we don't which of those ...

BAKER: Then would it be a correct statement: You can't rely on that possibility as a reason to give constructive notice vis a vis your clients injury at a particular time can you, because that's the outside fortuitous event that the CA says makes these cases...

POWERS: I think that's exactly like *Corbin*. Because the way the grape display was designed increased unreasonably the risk that people were going to fall without knowing that grape was on the floor. The way these steps were designed and where they were placed increased the risk unreasonably that people were going to get hurt on these steps either because they were going to get hit by the truck, or they were going to be flimsy and wear out over time. I think it's exactly like *Corbin*, and that's what the CA was relying on.

O'NEILL: But was there expert testimony that these steps were inappropriate for their intended use?

POWERS: No.

O'NEILL: So it was just employees saying that the steps could become unstable?

POWERS: Not they could, but did. And they knew it was dangerous when they became unstable.

O'NEILL: I understand there was no evidence to show that the steps that were in use when the plaintiff stepped off were the same as the ones that had become unstable?

POWERS: I think that's a reasonable inference. They testified, This is what we did before.

O'NEILL: You want us to infer that the same steps were used?

POWERS: I think it's a - whatever steps were used they were the kind that became wobbly. None of the testimony made any distinction. I think that's like saying, Well you said your practice was to use this bad adhesive, but we don't know exactly what adhesive you used on that particular piece of tile. I think that's a fair inference.

O'NEILL: Can you summarize for me the evidence to indicate that these steps were inappropriate for their intended use, that would be employees' testimony that different steps had become unstable in the past?

POWERS: The steps that were used prior to the accident. Our practice was, and this is the supervisor and the two employees Mr. Mason Flores and Gonzalez testified, Here's what we did. We used these temporary steps, we didn't secure them to the building or put them on a concrete pad or do anything else, we used these temporary steps and our practice was if they get hit by trucks they would become unstable, we throw them out. They would wear out they would become unstable and we would throw them out. CMH clearly knew that these steps became dangerous. And what they are trying to say just like the tile is, or just like in *Corbin*: We don't have any duty to do anything about that until we know that that has been established.

O'NEILL: That's a very appealing argument if it were tried that way. I have the feeling it wasn't tried that way if there is not evidence that these particular steps as designed were not fit for the purpose for which they were used and, therefore, there was a dangerous condition. Whether they were anchored or not was there testimony that this type should have been for this type of load?

POWERS: It was a reasonable inference that steps that won't last under the load and steps that will get hit are improperly designed. I think that's a reasonable inference. The questions is, Were we required to come forward with expert testimony on that? They could have objected to that at the trial. I don't think so by the way. I think that's something within the purview of lay people. I think if a lay person went down to Sears and saw trucks making heavy deliveries of washing machines and using these little temporaries, I think lay people would say, That's going to be dangerous. So I don't think it is necessary for expert testimony. But they never objected to us not having expert testimony. They never raised that on appeal.

O'NEILL: I'm not necessarily just saying expert testimony. I'm talking about more specific testimony about the nature of these steps verses other steps using similar situations that would indicate these are _____.

POWERS: There is testimony in the record that after this accident they have used all

metals steps, and over a 3-1/2 period about a month after the accident and the trial the steps had not become unstable. The witnesses said the new steps don't become unstable. I think that comparison shows it's reasonable to use the metal steps.

Now whether concrete steps or fastening them to the building to make them secure, or put them on a concrete pad or something of that sort, there are other ways maybe that they could have been reasonable. I think a jury could clearly infer there was a...

PHILLIPS: We can't go into these others because we may have some *Caterpillar v. Sears* problems about whether that sets up its own set of problems: they have to be moved frequently and it's 150 lbs to move and that's going to create back injuries. We can't really think about anything other than perhaps the metal steps that they used as a subsequent change.

POWERS: We did argue - the testimony was they didn't secure them to the building, that they didn't put them on a concrete pad, they didn't use permanent steps. I think that's a reasonable...

PHILLIPS: And there's testimony in there that that would have been a reasonable alternative design _____ many countervailing problems?

POWERS: I think that's a fair inference that the jury can take from the fact that they've used flimsy steps. It's the same way if somebody walked down to Sears and saw these steps on the loading dock. I think that's a reasonable inference a jury can draw.

OWEN: But somebody testified had they secured into the building or had they put them on a concrete pad, they would not have been unstable?

POWERS: Nobody said that. I would like to come back to *Shears* and answer your question. We agree that the evidence has to support the duty rule. If the no duty rule obviates all of the factual questions, then there's no fact question to review. And in *Shears*, the duty rule was for multi-purpose machinery there was a general duty rule, not for a ticket for this day and train only, or if there's something that's open and obvious to the ordinary consumer it doesn't have to be warned against. Those are general no-duty rules. Our position is not that there ought not be such no duty rules. But they ought to make sense and they ought to be supported by the evidence. This no-duty rule that they've got in their hand-out isn't supported by the cases. There's no case that's ever said that's the duty rule. It doesn't make sense given the notice requirement. The notice requirement is so people have a chance to do something to make the thing safer. They knew these were dangerous. They could have done something. We're not making them an insurer in that regard.

So duty rules are an important part of this court's jurisprudence to control what juries can do. But they ought not to be tickets for this day and train only. Because otherwise this court is going to review every jury determination on what was reasonable under the circumstances.

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REBUTTAL

ALEXANDER: I would like to make three points on rebuttal. First, let's start with the shoddy steps. They have made clear that what they are saying is that these steps were unreasonably dangerous from inception, that they were shoddy steps. What steps were these? These were the same kind of steps that the plaintiff's own company sold to consumers. Where is the evidence that these steps, which were metal, and the only part that was wood were of the same construction as the previous steps. You asked at multiple times - it was never answered. There is no evidence of that at all. That's a complete gap in their theory.

Point two, and this is really the critical one. They say this case is *Corbin*. Read *Corbin*. This is not *Corbin*. Their argument would transform virtually every premises liability case into a *Corbin* case. Example: Justice Hecht talked about actual notice. Their argument goes like this. And let's take *Walmart v. Gonzalez*. Is is foreseeable on some level that if you sell food on your premises, that some of them will end up on the floor occasionally? Answer: Yes. If food is on the floor, is that a dangerous condition? Yes. _____ they say, you have actual notice of an unreasonably dangerous condition on your premises? No. That is not what *Corbin* says. And that's the distinction. What is it about *Corbin* that made it unique? It was that in that case no amount of inspections...

PHILLIPS: What's your evidence of reasonable inspection here?

ALEXANDER: Let me go back to the typical case. What we have of a reasonable inspection is, is that over a course of time - 12-15 months - that these steps were monitored and used once or twice a day. That's the evidence that was done with respect to inspection.

PHILLIPS: How old were these steps here?

ALEXANDER: We don't know. But getting back to the point of in the typical premises liability case, what is to incur is sure things fall on the floor, but we come through and we find them. Now does that eliminate all risks? No. Is there a risk? No. And I think a case to look to on this is *Camp*, 257 S.W.2d 413, 415. It's a decision by Justice Pope. He has a series of quotes there. Dangerous is relative and a person of ordinary care may incur some hazards. They go on from there.

This is what happened in *Corbin*. In *Corbin* we did shift back to a situation where the man-made object, the mode of operation was itself unreasonably dangerous. Why? Because no amount of inspection could reduce the risk of harm. Things were falling off and they used that term so frequently that no amount of inspection could reasonably find it.

O'NEILL: Why don't we have that here if because of the way the steps were put up to the building at any time a truck could hit them and cause them to come unstable. Why is that not

analogous?

ALEXANDER: Because what we have there is, again a potentiality that they are going to become unstable. But if you look at the *Siednick* definition, and this is extremely important, the test is not might become unstable or inevitably become unstable. The test is probability of injury. And the experience out here, and this is one of the things that CJ Calvert looked at in the *Siednick(?)*, he says, You look at were there prior accidents there? And once again we have to come back to actual or constructive knowledge. What had been the actual experience? Well the actual experience here had been, We use steps over time, and this is what happens in the real world, as manmade objects do they would either wear out or be damaged. And if they were, we fixed them or got rid of them. And there had been no accidents.

The third point is breach. We do argue that there is no evidence of breach. In *Corbin*, the breach was, there wasn't a mat. Here they say, Well they didn't attach them to the walls, they didn't have the thing underneath. But there is no showing that any of those things would have made a difference.