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Supreme Court of Texas.  
Tarrant County Limited Partnership and CB Richard Ellis, Inc.,  
Petitioners,  
v.  
Arthur Lee Moritz, Respondent.  
No. 04-0871.

October 17, 2006.

Appearances:

Steven K. Hayes, Attorney for General Electric, Richard McGary,  
Dallas, Texas, Attorney for Tarrant County Limited Partnership and CB  
Richard Ellis, Inc.

Frank G. Giunta, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice  
Harriet O'Neill, Justice David M. Medina, Justice Paul W. Green,  
Justice Nathan L. Hecht, Justice Dale Wainwright, Justice Phil Johnson  
and Justice Scott A. Brister

CONTENTS

ORAL ARGUMENT OF STEVEN K. HAYES ON BEHALF OF THE PETITIONER  
ORAL ARGUMENT OF FRANK G. GIUNTA ON BEHALF OF THE RESPONDENT  
REBUTTAL ARGUMENT OF STEVEN K. HAYES ON BEHALF OF PETITIONER

JUSTICE: Court is now ready to hear argument in 04-0871, General  
Electric Company versus Arthur Lee Moritz.

COURT ATTENDANT: May it please the Court. Mr. Hayes and Mr. McGary  
will present argument for the petitioners. Petitioners reserved six  
minutes for rebuttal. Mr. Hayes will open with the first nine minutes  
and Mr. Hayes will also present the rebuttal.

ORAL ARGUMENT OF STEVEN K. HAYES ON BEHALF OF THE PETITIONER

MR. HAYES: May it please the Court. Mr. Johnson, Mr. McGary. My  
name is Steven Hayes, I represent for the respondent, General Electric  
Company in this case. Mr. McGary represents the landlord defendants in  
this case, also a respondents. We have decided to structure our  
presentation to the court, around four questions, which the Supreme  
Court update distributed to the Appellate that advance Appellate  
similar on his fault so this case presented. I'll address the first  
three. The Court is peculiar to Mr. McGary's claim. The first three  
question that I'll present and I'll give a short condition if I  
accepted in this-- whether an employer can be liable to an independent  
contractor under a premises defect theory? When the existing defect is

open and obvious. Second question, will constitutes control over an independent contractor's activities in the-- and the employer independent contract-- context? And the third question is whether a plaintiffs' had claimed that their injuries arise out of both a negligent activity and a premises defect calls the reaction? Virtual condition with the fact, Mr. Moritz was the employee of an independent contractor that GE hired to deliver, conduit to it's customers. He was injured at the warehouse, GE warehouse, when he fell from a ramp. He was injured as he was constructing down below. It was hardly loaded on his truck. He fell from his strap which he pulling on and leaning back to which it belong, brought. And because he was standing on the ramp, he go back on it's under the paper below. He complains now ...

JUSTICE: Let's now take a guess.

MR. HAYES: Yes.

JUSTICE: You know, I'm, I'm having a little bit of the time. The time that visualizing this ramp expiration of briefing that wasn't unclear to me. Well, this is like a walk way ramp show.

MR. HAYES: This is a ramp and actually there are pictures in the ramp in the record between pages 373 and 378 on the record. How able for the courts replication and this is in the language motion for Summary judgment. The ramp is about his arms the courts breach. It's about 10 feet wide, aren't the characters took her about means side, it's about 4 inches height. The ramp is 4 feet half way in raftly. That's-- it's a few inches over there and then it goes down to ground level on the other hand. In the end that's help your-- this and the elevated in a batch directly into the opening to GE's warehouse. So that's, that's the begin.

JUSTICE: This is I took her, do you mean elevated curve or neither side of the ramp?

MR. HAYES: Yes, your Honor. It's about 4 inches tall. I don't know how why it corporate, is it's a sort wide brain curve.

JUSTICE: Mr. Moritz complains about the like of a railing on the ramp. This railing, the lack of the railing matter and obvious defect, it's apparent defect. He claims to us, it's not hint, it's not concealed. He was likely unaware of the lack of the railing, of subjectively he said that again it lose out and obvious says, "What's the dangerous associated with not having a rail on the ramp?" And he did even complained with GE on the past about not having a railway.

JUSTICE: Wasn't that up to him how the materials were unloaded?

MR. HAYES: The rails ...

JUSTICE: Or were at the point?

MR. HAYES: That particular day-- what we would do is we would distinguished between the loading of the materials and constructing down the materials. That particular day, that would probable replaces were he couldn't park the vehicle and loaded the cander his own vehicle. One is the ramp, were he did in fact park, the other was on the level of ground, beside the ramp. He travels that particular day to loaded at the top of the ramp. The loading of the vehicle by the way was complete, when his x been occurred. He testified to that, he plead that in his petition and he was on the process of second barely constructing down below. It's main effect that's really-- that the only factual assertion, excuse me, on the Supreme Court update that I would take the issue we have to propose the court subject for the Supreme Court updates and that he felt out loading the truck. The loading was over, the reason that makes the difference, is because the undisputed evidence is, once the load was in his trial. It was his responsibility, that's the testimony of Lee Moritz as GE employee. His responsibility

when, whether or how to construct down the loaded that form. Mr. Moritz also testified that he could have driven his truck before constructing the load down. Could have driven his truck off the ramp. The distance of about 43 and got along, load the ground before you strike it down the load. And it was his strap to form as well.

JUSTICE: So what do we do with Parker versus Highland Parcia?

MR. HAYES: Parker versus Highland Park this going to come and focused for me, I think, when I was listening at the oral arguments and the text offers as a period case. And about 12 minutes into the response oral argument. It's about ten minutes into Justice Brister reviewed to the asked of question about on circular hurricane blowing through even longer a heading time to fix a problem to ten point in a counter to get away. Seeing different view, Justice Hecht about two minutes later, a minute that it seem that a number of the problems that arise in a series of law seem to complement over of reading of Parker. I think that's in fact what's going on here what Mr. Moritz has approach. He does not take the issue and I'm getting to you. He does not take the issue with her argument in our brief that Shell versus Khan confirms that generally speaking, the duty of a-- an employer like us or a landlord are, are the premises are the same with regard to premises defect that is if you have a concealed defect, you have a duty to warn-- you have or a such reason to carried the product fix it. But you got to have the concealed defect purposes of Parker. Parker in fact, when I went back and regret it, it's a concealed defect test. What cause it? What was the defect that Mr. Parker trip on? It was the second step on that landing. That she appreciated? "no." Or the opinion reflects that she didn't even remember there was a second step player. Was it concealed? "Yes." She didn't see it, approve both in law, just I'm asking was doing everything, he could tried to eliminate the steps. But because of the in configuration with the Hamisters with the step that can figured it could eliminate that second step. And the landlord which you then is told gliding in the stairways. Stairway was dark, the landlord had controlled over that life to the exclusion of the tenants. And the leading his own retirement, he couldn't come on until a couple of excellent came on, you know, after Ms. Parker's accident that occur within, quite the hospital department for issues sounds. It looks like to me under the Shell Oil versus Khan articulation, you look at that situation and you say, "Is there a consideration?" "Yes, there is. What is it?" It's the second step on the run, it stop. What's the landowner's deed, a duty to have warn for an entries will offers to make safe. Did it warn? No, it did. Did they take a reasonable efforts to make the steps steady. "No, as a matter of fact it shot the lights off."

JUSTICE: And had those lights break or they could not be turned off?

MR. HAYES: I don't know Mr. Moritz, my argue that Ms. Parker had a warning, the only warning she had was from her sister who said, "Ruth be careful." That's no warning of that second step. That's just the general information that one sister against to another. That's all.

JUSTICE: Well, that would, well, that would work except that, Parker self says that he was opened enough, that's the whole reason observer. The holding of Parker was to do away with that idea.

MR. HAYES: It was because you need.

JUSTICE: Supposed you have been write a reason, that the court gives or eliminate the note duty group. The open and obvious group.

MR. HAYES: What the court says it's doing and the court says that it's going to be a problem with open and obvious and no duty because it

said, "It criticize the no duty rule as contributing to confusion in the area because the opindige of the no duty concept to a plaintiffs' burden to prove that the defendant owed a duty, creates confusion in a series of law." It didn't eliminate, the burden of plaintiff to prove the duty excess in the first place. They just say us, "If you had to do it once and then you have to do it again with the twist, that's more than hour to be doing."

JUSTICE: Can you tell-- you cite the the Osologate case. Can you tell what the state of the law is for contrary of this proceeding.

MR. HAYES: I cannot tell you Judge, other than what's in occurring I can't for the statement, I cannot. That if foreseeability which parties in the best position to avoid an injury, not only comes out in a duty context but also can come up with Parksman calls context, in a false graph as we do.

JUSTICE: That's what calls has raise at Court of Appeals, was it raise here?

MR. HAYES: I would have to go back then look at our briefs again. Be sure no more in the state that, that is not something I focused on here. I believe in our petitioner that review talk about false issue. At the Trial Court level, we talked about Fransine calls in terms of foreseeability that we proceeded that this person could used this-- more specifically can we see the person can used-- could used this graph and this wide dislocation. It strikes me in front of call guard in this relief. One hundred twenty done year-- a one hundred and twenty half that's not specifically addressed in different way.

JUSTICE: Presuming that you address it. The answer is no.

MR. HAYES: I would have to do agree that it brings us separate null manager, I'll talk about this.

JUSTICE: Your going to grer-- your going to talk about control.

MR. HAYES: I am-- I'm over my allotted time. In terms of control, once again we think that we can't do realize that the only control argued by Mr. Moritz in his brief in this case is the control of the location for not injury probationary activity that is the loading of the truck, that's it. He says, "The four places I could park to load, two have more taken up for that left, where that park in all level ground that controlled ramp part until low. The loading was over and that's clear. And it's clear that he was under controlled constructing down the load and GE didn't had any controlled over that. As a matter of fact Danny Moritz also testified in the record that he never had the opportunity to talk to Mr. Moritz about how he his truck down his load, whether you-- his truck those and obviously by innocence. Recently in Fifth Club versus Ramirez. This Court reconfirmed all the general test about what control is sufficient. And talk-- before we talk about that the General had to controlled the method in manner of the details of what independent contractor was doing to the point that the independent contractor is not control of Smith has made the warn. And then the injured, that the control handle right the injured producing activity. We think that the court and beside in this case by focusing on those elements. But if the court sees this as collapsing, the two activities loading construct. You point out that the only control which we-- he talks about is the control over the strand. Uncontrolled over the loading of ramp, control over the loading. And in Fifth Club versus Ramirez, the court send this before we reiterate all this standard test on the controlled. It said, "An employer can direct when and where" and independent contract that goes to work but an employer may become liable only if he controls the detects. This have strictly the only control he talks about his wife, that's it. And that's what can become

lay out [inaudible].

JUSTICE: Thank you, Mr. Hayes. The court will hear from Mr. McGary.

MR. MCGARY: May it please the Court, Mr. Giunta, Mr. Hayes. My name is Richard McGary. At very limited time to addressed the court on the issue of that-- is the theory of my client. Mr. Hayes cannot address means the issue of control over the ramp, because that is the issue of your someone I adverse on. So why would skip time of that? If the court asking a questions, give me hundred time of a quite-- fill those questions on respond to that. Then he scores, my client is concerned, there the landlord of the property. As a matter of law, the landlord post no duty to have been a contract to the court pending, in a least it states. Their asking the establishment of exception in some kind, the burden upon of a status made an exception, rank rest upon Mr. Moritz.

JUSTICE: Mr. Moritz points out in his brief that the-- at least says that the common area includes, parking areas and the loading facilities and that it says, "All common areas is to describe to both. Shall at all times be subject to the exclusive control in management of the landlord."

MR. MCGARY: That is correct at least there's a fact of statement. The fact it matter was it was undisputed upon Mr. Moritz, his own testimony. The ramp is not a load. This is a ramp, it's a doctrine, it goes up to the dock, give a vehicle access inside the warehouse space. Where you can do whatever you need to do inside the warehouse space in the park. Mr. Moritz stated that it's specifically for the use of a affortive to go out of, to go out of the warehouse place down the level ground. Pick up what near to pick up and go back. There's also the SPF from the testimony of full expert, who testified similar. This is not a loading ramp, here go, it is not a loading facility. And aren't going to ...

JUSTICE: What kind, what kind of ramp is it?

MR. MCGARY: It's a vehicular access when have. Could you just designed to specifically to-- in a TSA standard, which wide is 10 feet wide, this why is not quite 4 feet tall, there's a-- before it's curve took her on either side.

JUSTICE: I'm, I'm somewhat confused about the ramp. And it's tightens the question to Justice Wainwright as to how would this ramp - - whoever controls it, whether it's a-- this type of ramp or some other ramp with or without a railing. How do it prevented this action?

MR. MCGARY: The ramp with the railing?

JUSTICE: Both under-- on the omit the strap broke. Seems to me that was approximate cause of this incident.

MR. MCGARY: Well, your Honor, approximate cause was not addressed by me in trial at all. And I begin with the story about that but I don't have time to begin to that. The issue about the, the railings and the issue in front of this Court is whether the lack of the railings is a dangerous consist-- condition, existing at the time were it's entered the property. Independent of the action of anyone else and was conceived. This was Brister, an opinion by the name of Cookies and again on the last Cookies opinion state while the handrails is not, it can see you'll danger. Again, as a landlord an owner will occupy. If I had a duty at all which we say we don't have a duty because we don't call the ramp. If I have a duty at all, it is huge to make it safe or to warn of conceal danger. This was not a conceal danger in English I performed.

JUSTICE: And how was his on the safe?

MR. MCGARY: I don't think it is. I mean if you take up why Brant. Nobody's alleging, there something wrong with construction of the ramp that there was home made it lack, it cause and tricks stumbled do anything more without the ramp. It's 10 feet wide, it's big enough to park 250 truck and I rosely exceeded my time. And I appreciate your questions, I hope I'm asking.

JUSTICE: Any further question? Thank you.

MR. MCGARY: Thank you, your Honor.

JUSTICE: The court is ready to hear argument from Ms. Tammy.

MS. TAMMY: May it please the Court. Mr. Giunta will present argument for the respondents.

ORAL ARGUMENT OF FRANK G. GIUNTA ON BEHALF OF THE RESPONDENT

MR. GIUNTA: May it please the Court, my name is Frank Giunta and may I have the privilege of representing Mr. Moritz, who was the injured person in this case. March 16, 1999, it was the day that change his life. This case is about an environment and a work environment that had two specifications. This questions regarding control, which I'd like to addressed. This particular ramp is 36 feet long, is approximately 10 feet wide at curve is actually 6 inches high, it's 1 foot wide. The testimony that curve was to prevent vehicles and fortlips from leaving that ramp an intendedly. This particular ramp, by virtue of the least and as paragraphs 9 and paragraphs 11, specifically give control to the landlord for that particular maintenance and all of the features that a landlord don't want to have in conjoining that particular ramp. When GE assume that least they had at least premises inside the demises of Wallece. Everything outside the demises Wallace was on the control of the landlord.

JUSTICE: What was the concealed defector?

MR. GUINTA: The concealed defect your Honor, in this particular case was really relative to the people had been working on that particular ramp or walking on that particular ramp. This ramp was a [inaudible] leading into the warehouse, there was a garage door and vehicles creep assist it, for cause criticize it and also people would walk into. They would have a choice in using the ramp, it draws open or they could use the door adjacent to the right book, they step in into the office. What is concealed to one individual may not be concealed to another. In this particular case, the focus of the work activity was selected by GE, my client, when he arrived that day was told where to go. He was told where to park. Yes, there are 4 areas where he could load. This particular day though the loading dock to the right was-- did not had a ramp. Could had been loaded from the door that ...

JUSTICE: But that, that go we control are not concealed defect, right? As I understood the questions what as the concealed defect, your talking controlled are you not?

MR. GUINTA: Well, I'm addressing control but the concealment issue that was address or that the question presented from our position. Mr. Moritz in working on the truck and loading the truck at the direction of jeepney and the security load which was part of the controlled process and try to-- what he was supposed to do to secure the load. His focused is on the trial, his focused is on the load which is the job where he was paid to do. As he is focused on that the particular environment that he was told to work on. That particular ramp did not

have the railings in a ...

JUSTICE: And they-- didn't it cause that our thinking that are near to somewhere in our briefs. Didn't he testify that he-- if he hand in a troop, he thought that was all right. His on the side of the truck he thought that it would not be dangerous.

MR. GUINTA: The reason he did, he did testify that your Honor, the reason is he backs up on the, the loading ramp. That the, the angle of the, the ramps is approximately 30 degrees. So the back in is right at the opening, where the garage door is and the level service of the, of the warehouse floor. So all the loading in-- is, is from that area of, of the warehouse into the back of the truck. The securing of the load and the adjusting of the load can be from either side of the truck. So you'll be expose to the ramp on the either side of the vehicle, when you eager adjusting below or securing below. Now the actual apex of the triangle were highest criteria is exactly 4 1/2 feet. So the concealment is when your focused on that particular work environment and that's what your job is. Your own aware of the environment that could cause potential issues. The question became at over the railings prevent this particular injury.

JUSTICE: Well, let, let me be sure of this understand. I thought your position was it doesn't matter were there's concealed at all of the department when even if it is -

MR. GUINTA: That is my position.

JUSTICE: - even if it's-- those clear is that which it looks like [inaudible]. I mean it's obvious that there was no, no rail there and if you lost your foot in, you could fall off.

MR. GUINTA: That is true your your Honor.

JUSTICE: But your thinking when even our position exceed.

MR. GUINTA: I think we win because a Jury could considered his position and when he was told to do in the working environment, he was place to worked in versus what she-- he was doing. And that could be a consideration of-- is it open and obvious because you appreciated it, much as in that case with the open whole that didn't have a, a railing on it but you seems still the turn to be a defect or do you make that environment safe on a foreseeability basis? In this particular case to address the question of how does the railing prevent this injury because this bungee cord breaks because GE's says that was on proceiable. But on that particular date they did, the railings force for calling them, he goes up against the railing. He stops the railing, he stops the railing, I never meet my client and where never here. We made -

JUSTICE: We may break us back on the railing, you know, just other things could have happened to me as well.

MR. GUINTA: That is true your Honor, I couldn't say that he couldn't received an injury there. My full task is, is though the injuries would have been much less in falling up 4 1/2 feet, fracturing his elbows and breaking his thumb.

JUSTICE: We might be still be here.

MR. GUINTA: Possible. I'm acting to say that but my co-processes that the railing would have been prevented. There are six ramps in this particular warehouse complex on beach strip is to foreign work.

JUSTICE: Mr. Guinta the-- instead the Jury could have been consider to the extent to which your client appreciate, the danger, your did not. I could have made a call here. Isn't that the duty inquiry want for the court? The Jury?

MR. GUINTA: It is your Honor. I think the duty -

JUSTICE: Do you argued the duty of approximate calls?

MR. GUINTA: It is a matter of duty, your Honor as opposite question of the law. The custody based on the facts.

JUSTICE: But how do you get to a Jury on the duty issue?

MR. GUINTA: Because the duty issue ...

JUSTICE: If the facts are not disputed.

MR. GUINTA: Well, the facts are loaded with disputed your Honor, with regard to the, to the open and obvious issue and to the level of appreciation and obviously who controlled the shift. The duty is one of controlled and as determined by who had controlled over the work activities. The issue and my particular position is that the control by GE and that is selected the environment, he selected the location they corrected Mr. Moritz work of parking that particular day then he filed that directly. Typically he would be loading inside the warehouse. In that particular day, he was merchandise, blocking that particular entry with. So in, in ...

JUSTICE: I, I thought that the, maybe I'm wrong but I thought that the record in the recollection of breach that the-- he chose where to park that he will not -

MR. GUINTA: Not your Honor that's is ...

JUSTICE: - [inaudible] directive to the ramp.

MR. GUINTA: That is not -

JUSTICE: Is that not true?

MR. GUINTA: - my recollection of the, of the testimony and I'm in the 12 counsel. I did all of that position to know was there already a thing and the testimony of not in Moritz, the warehouse supervisor is that he would direct the individual to go now.

JUSTICE: On this particular day?

MR. GUINTA: On this particular day it just-- let me back up. Mr. Moritz had worked for GE for sometime, he was there before the trial. So when he would arrived that particular morning to give his work assignments, he would typically drive into that warehouse if it was open. On this particular day he did not because he was merchandise there.

JUSTICE: Right, so everyday it's going to be different, right?

MR. GUINTA: It potentially did a sure.

JUSTICE: So in this particular day, it begins, I remember what the briefs says that he couldn't remember anybody directing into any particular place. I'm my correct on that?

MR. GUINTA: He may had testified to that your Honor but the testimony, the GE people is that whatever the work activities that were going on that particular day. Not just with Mr. Moritz so other people that were picking up materials. They were all the materials that were being delivered depending on what the particular work they was. On this particular day the ramp was by GE's own admission, the easier place to load the vehicle that there was a common that Mr. Moritz could have gone to the parking lot and than that. Well, that's unpractical because the forcart would have to come down from the warehouse down the ramp, loading to the parking lot, it would have to be people caring things down and was just typically an impossible.

JUSTICE: Did he do-- did he-- that the merchandises that were talking about here, they can't do it. Would that displays down on the doctor hand and to load under this truck upon his own or to somebody that the facility helping with that or had of that ...

MR. GUINTA: The letter, GE personnel, the warehouse personnel would load the materials and I think Mr. Moritz would held would load it into the back of the trial. In this particular day- there was-- can do it which extended out the fact that he pick up, I think it was 10



foot long and that, that is on the 8 feet long and there was blier and then other materials embutted been loaded on. So this materials have been drawn from the inventory by various GE personnel either place at that back of the pick up to be loaded in by GE or Mr. Moritz.

JUSTICE: Okay so what's again on the truck, then the GE had no further responsibility?

MR. GUINTA: Well, that's an issue. Mr. Moritz preferred to secure his on the load. That the load would have to be secured before you typically would removed the vehicle.

JUSTICE: Well, he preferred to do it on his owned. Than he obvious he was not being corrected by anybody had loaded.

MR. GUINTA: Well, specifically the direction of securing the load had it been the precise wording that he have responsibility to make sure that the load was secured and safe on the vehicle for transport. Typically all the loading, all securing will be done while the vehicle stationary at the time it's being loaded because it's just been practical to move it to another location to do that. Your loading at there, you made in another person to assist, in this particular case Mr. Moritz chose to used an additional bungee cord to assist and, and securing the load that was for graded he wanted to do it and GE like it because none of his materials where typically damage when they were delivered. He was requested to, to be there glory person and he contended to be there clever person until March 16, 1999 we can know under work. But I think that the issue of the environment or the controlling environment is very specific with regard to this two particular defendants.

JUSTICE: Why shouldn't the rule of law in a case like this be-- that if the defect is opened and obvious there is no defect if it's open and obvious.

MR. GUINTA: Because what is open and obvious, please the room for a lot of conjunction and what maybe open and obvious to one individual walking of that particular ramp and in work environment maybe different from another.

JUSTICE: Well, to read a reasonable prudent persons standard. Sure ...

MR. GUINTA: I, I think the reason between the persons standard with the person ...

JUSTICE: And, and the function matter is that we going to run to society assuming your vice going to act like gradually approved person. We're going to run society at a level for the biggest idiot to protect them from doing idiotic things. Not that your, not directed to your client but I mean if that's not the standard and in fact do you have to make all premises safe or reckless people, don't you?

MR. GUINTA: I would think that the duty in which is the law as I understand it that it should make the premises reasonable safe for reasonable imprudent people doing reasonable prudent things.

JUSTICE: But in facts, it was just a reasonable standard then don't reasonable prudent people always, always avoid open and obvious dangerous.

MR. GUINTA: In certain circumstances they would, it depends on the environment that they are in. In my particular case this situation was Mr. Moritz was working at an area that he was told to work that focused on his truck, focus on the activities with the loading and the focus of securing the load. The remaining part of the environment is, is-- can be a potential danger and there foreseeability of someone falling off. If Mr. Moritz fell off while he was loading a box, would that make this case be any different? If he was falling of while checking the air in

his tire. Would that make the case any different? I mean I see ras ...

JUSTICE: To make it's the-- will any different if they just step of the ground, excellent may of, of the, the warehouse holds.

MR. GUINTA: Well, there was testimony that one individual did do that and it possible could be anyone asserts that.

JUSTICE: Do, do you think after Parker, I just want you to view this, after Parker do you think it's possible for the occupier or owner of the premises to get some of that.

MR. GUINTA: Yes, I do.

JUSTICE: How?

MR. GUINTA: I believe that any other facts in circumstances that the ireful argument, it say that there are circumstances that are so obvious to the situation and the work environment that he was appreciated by this particular individual. Whatever he was doing or she possible could be something that someone would absolutely no. I think the testimony ...

JUSTICE: What if, if, if one persons at, at looks like your always going to get square of that because your plaintiffs' is going to say exactly what you just said which was, "Well, I didn't step off because I want to kill myself, I'm wasn't looking, I-- obviously but they should had have a rail or something or do present.

MR. GUINTA: Well, -

JUSTICE: The NERP sense that then looks like you, you got to call.

MR. GUINTA: Well, when you think of it fundamentally and you said, "What's open and obvious?" It's like saying, you know, "What's good quality? I can hold like and defined but I don't want to see it."

JUSTICE: Well, that was pornography. Haven't [inaudible] those pornography. Well, open and obvious is been around for a hundred of years.

MR. GUINTA: It certainly has.

JUSTICE: So -

MR. GUINTA: And I'm not miskidding to that.

JUSTICE: - and the question is whether Parker was right. Is it different that Parker-- does Parker had no choice. I mean your fellow had a choice according to Mr. Hayes of were he stop and pull down this rail.

MR. GUINTA: I, I dispute that he had choice. Mr. Moritz was on that premises because he was told to be there and invited to be there, to deliver GE's products. Once he gets on that premises, he is told what to do, where to do things. I do not have the approach of being in this room and arguing for this Court. I check in this lady says, "Do you know where to sit?", I said, "No." She said, "You sit over here. I sit over here. So the choices relative to the circumstances.

JUSTICE: But do they instruct him is to pay his ploies, they instructed may been-- instructed them on what to pick up and where the load but they didn't sought to construct him on how to secure the load in his own truck.

MR. GUINTA: That is, that is true and most arsons, do that things. I mean the GE is asking this Court to do is to stratify the particular work activities, they say, some is in control and some is not. I don't know how you do that as a general policy if the General Electric counsel is being asked to advice their warehouse people, what do we tell our people.

JUSTICE: Would have been an open and, you know, if it's a reasonable person and open and obvious can we did-- we decide this a common law of a court what duty is when may adopt one more rule from little low ladies has been there in laws said that apartment house and

another rule for working men that her moving heavy equipment in and out of warehouse. I mean you can't-- obviously a loading dock can't have a rail on it. Because when you can't loads the ...

MR. GUINTA: I, I take issue to that. There are 6 loading docks in a particular complex. Two of them have grievance. There are expert testimony ...

JUSTICE: I mean but I'm talking-- just one without a ramp, if you just have a loading doctor, garage door, all at devil loading doctors is you back up to it, load stop trade off truck to get the rail there, you can't do it.

MR. GUINTA: That particular-- this particular garage facilities had two loaded docks; one, with the ramp, one without. When an 18 wheeler or about that, about tail truck with back off. The height of the truck floor that would be level with the warehouse floor. That would be one way to do.

JUSTICE: You-- and you wouldn't want a rail of that because-- then you couldn't do that.

MR. GUINTA: Well, there would be a practical over rail of that particular on ...

JUSTICE: Fine, and-- but somebody without a rail, there's somebody who's going to be looking of your way and fall off somewhere in the country, off that bring up and so with your theory is, every time they do we just let the Jury decide.

MR. GUINTA: I'm somewhat confused, are you talking about the actual ramp location? -

JUSTICE: No.

MR. GUINTA: - or the next.

JUSTICE: One with, one without a rail.

MR. GUINTA: Okay.

JUSTICE: Because your, your rules is going to apply whether this a ramp or not.

MR. GUINTA: My rule would apply in this particular case.

JUSTICE: I mean it's-- whether if there's no ramp, open and obvious that no rail versus there's a ramp open and obvious is a bit-- going to be the same rule for both of them. There either going to be an open and obvious or not. I know one of them, where there's no ramp you back a big truck up and loaded straight off from the warehouse, you can't have a rail.

MR. GUINTA: In practicality it wouldn't have a permanent leave affix to her. However, I brought too many of this warehouses were they have an according gate. And they pull the cross so it, which is true for feed high. So that people wouldn't in her inevitably waffle, the Appellate back and your going to used it. I see that all the time and I don't now about this particular warehouse have already been to at once.

JUSTICE: Remind me this-- how's your require ro-- rail on this.

MR. GUINTA: Actually it doesn't, it's over 60. He did not, he did not ...

JUSTICE: So the answer is no?

MR. GUINTA: Yes, sir it is.

JUSTICE: You quit's testified that the-- he didn't like to load on the ramp because of safety problems. As simply specific subject concerned about the ramp and he said following at of it. How do you get to a Jury even if the open and obvious standard is subjective when your client has said, "I know the danger and the risk of loading on the ramp and constructing on the ramp.

MR. GUINTA: He was probable absent to testified.

JUSTICE: Incredible honest.

MR. GUINTA: Incredible honest.

JUSTICE: As it goes to simply honest.

MR. GUINTA: His a rare ...

JUSTICE: To be confirm.

MR. GUINTA: He did, he did testify to that. He, he appreciated that in the circumstances says, "You know, if I could-- if you told me to load here, to load somewhere else like where to do something else. Maybe, in that particular day he said, "We going to hit you loaded, you going to hit this dock to do the contractors sight. We got four of the talks here, they got to get loaded. And he did. His he done it before? Yes. Is he loaded on that dock fourth? Yes. Did they warn him? Yes. He was for double warning, because he took care of there goods and make sure that they got there safely.

JUSTICE: And let, let me be sure I understand. We got off on control there, would you think can went further his activities were controlled or not?

MR. GUINTA: As to the the landowner, I do. Yes.

JUSTICE: But not as to GE, right?

MR. GUINTA: As to GE I believe that there is a control issue that they controlled his work activity that cannot be separated or segregated to take justice the loading is one face and securing is another or driving up is another.

JUSTICE: If GE did not controlled, did not have the requisite controlled that we're talking about. Then your position is that you can't prevail against to you.

MR. GUINTA: Probably not unless I could showed detail control and my position is that GE is incorrect and trying to slice the work activity and they select-- throw on this that no control on that. And, and as a practicum matter I don't know how you apply that as a general policy.

JUSTICE: Except what you look, what your thinking prevail against the landowner, whether there's patrol or not?

MR. GUINTA: Well, I do-- I think I have to established control on the landowner. And I think I do that then it's clear from the list. Paragraphs 9 and paragraphs 11, clearly get the landowner control. If GE wanted to do something to that ramp. Without telling the landowner, Mr. Paul the manager, I assure you CB Richard Ellis would be a GE storer and say, "What are you doing to our ramp?" For sure they will do that and that was to the argument gave to the trial court. GE said they don't have control all over the ramp, landlords has been have to control the ramp. I said somebody's got controlled the ramp. Just look back to ...

JUSTICE: It looks like we were talking control, your talking GE's control over the work activities. Landowners control over the premises?

MR. GUINTA: Yes, your Honor.

JUSTICE: Okay, so we're talking peculiar, separate the notes to that.

MR. GUINTA: I am separating from negligent activity to the premises of that.

JUSTICE: GE has control over the work activity, you lose if theirs no control. Landowner is to control over the premises, construction, the, the rails, you lose again a stand if there's no control over that. But your not stand the landowner to control the work activity?

MR. GUINTA: I do not control them to say that so out of 6.

JUSTICE: Based on the testimony of your client that are read, you, you acknowledge that he appreciated danger, correct?

MR. GUINTA: I'm saying that he had notice that there was no

railings there in a situation we had department that particular day ...

JUSTICE: Rephrase of you. You acknowledge that he understood that this is safety concern with that he could pull off over the ramp.

MR. GUINTA: They guess is like who they testified.

JUSTICE: But you think in this case that doesn't cause you a, a major problem because of the circumstances because he was focused on loading at Paul.

MR. GUINTA: Exactly, you have to look at the totality of what this circumstances was. In this particular case, on this particular ramp, loading on this particular materials that I think his, his, his focus on that work activity and what he was doing in his job and when he was asked to do of, of focuses on that part of it and the fact that the environment may have other issues that could post a potential injury and there could be other things that could have done of. That the parking brake could have failed.

JUSTICE: Does he, does he appreciation of this danger requite to the assumption of the risk that goes with the danger?

MR. GUINTA: I think while assumption risk has been abrogated course. I, I think in listening to my client and knowing him and what the work environment was in his testimony, I think the Jury would clearly understand, when you look at our model, the ramp clearly understand what the circumstances was. And I can think of hundreds of situations were environments are that could be potential issues that you appreciate, you know what your doing. I mean you could do the obvious that saying, "I will ride again an airplane for that to Dallas and some to get up the airplane. Could you foresee that? Sure. Are you not going to fly? No, I'm going to do what I have to do. So I think in this particular case you need to focus on the totality of the circumstances that Mr. Moritz was in and understand that, that particular work activity was directed by GE from the moment he step on of the premises to what era.

JUSTICE: Any further questions? Thank you Mr. Guinta.

JUSTICE: Mr. Hayes, if this should happened in the guard. Would it be exactly a Parker.

REBUTTAL ARGUMENT OF STEVEN K. HAYES ON BEHALF OF PETITIONER

MR. HAYES: We're assuming that my client or the landowner wanted to stay with the control over the lining situation.

JUSTICE: Right.

MR. HAYES: To know that those once again, Mr. Moritz, if there's an objective-- objectively the railing will not cover that subjective re-planned in Mr. Moritz files a subjectively appreciate select the railing and the danger associate would have been and also announce that appreciation do not quarrel to.

JUSTICE: You said the difference is will Mrs. Parker did not know of the problem with the staff. Mr. Moritz knew that this was going to be a problems.

MR. HAYES: Yes.

JUSTICE: Would it make any difference, do you think, if the trial courts order a long ways -

MR. HAYES: A hundred fee.

JUSTICE: - hundred fee.

MR. HAYES: I'm scared [inaudible] to be forfeit is a hundred fee

which it's a real, joy to watch me claimed a letter going to file a little bit. But the danger is there, the magnitude of the danger. He said that he appreciated the danger who fall and ...

JUSTICE: Of course, on the other hand, a recall being told at the ground cannon did nobody's ever fall on off the edge. Where there is no railing, the only place that people follow over the age is were there's railing because I feel safe in going up to the rail and hanging over the rail. And so in some point our faith in measures encourage people to pull on the this rails but they wouldn't risk it.

MR. HAYES: [inaudible] over the rails.

JUSTICE: The rails.

MR. HAYES: But there's a holds summaries on view that needs analysis but I'll pretend to be ...

JUSTICE: As for but you should does a require a rail.

MR. HAYES: That appear from missegeral that you want from the record. I did-- I'll turn the Board to interest. I did want to make to assures just pointing ramp the back door for petition with that brief, because regulation was brought up page 11 of our petition, page 20 of our brief, then we talk about his knowledge and appreciation of the danger, the lack assurance of danger appreciate, single to have it one

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JUSTICE: Would it ...

MR. HAYES: - I tell you, I tell you twice ...

JUSTICE: This gentlemen, this gentlemen was verdantly honest in his testimony. What if he testified, he did not appreciate that the ...

MR. HAYES: If he didn't appreciate that doesn't change the objective to single out things of. Is it just apparently no one would clear.

JUSTICE: Well, it seems to make up more like Parker that was his testimony.

MR. HAYES: If it was one Parker. If he, if he testified, "No, I wasn't aware, I didn't know about it, I don't see it." You know, it wasn't there to mad, does make it closer to Parker, I think.

JUSTICE: Well, the -

MR. HAYES: It couldn't then be ...

JUSTICE: - it can be done of, of someone testified. This might completely honest like this gentlemen was and to the different facts and he obviously -- maybe when I hear.

MR. HAYES: Well, I still say, "Well, it's closer to Parker, it's still not Parker." Because in Parker, I don't think you can get away form the fact if-- when I read Parker and he pointed before talking about darkness. When I look at the counsel involvement case in Court Martin Rob. In along time ago in Johnson rob to represent, attended to pulling on the breach cause of fears someway unto [inaudible].

JUSTICE: Well, they won't sue this -

MR. HAYES: Even say ...

JUSTICE: Do you think [inaudible].

MR. HAYES: I can say that out.

JUSTICE: [inaudible]

MR. HAYES: That I, I got the impression that the argument was that the darkness would be defect. If darkness wasn't could defect, darkness would want the conditions that made with defect, concealed. It was concealed, it was subjected to be concealed. That she didn't know about it, means she didn't know about it, she didn't remember and that is one point to court of trial. Might-- but it's still objectively concealed when we got toward the stair.

JUSTICE: Should to be a different rule for park with the houses,

workplaces.

MR. HAYES: I don't know, I'm sure your with does in a coordinate. It shouldn't been with the response or in instance the studies had have been done. But what we do know here is though Mr. Moritz was at that facility every back for a year. He would be just familiar with this that loading ramp as, my guess is Judge Medina anticify form with the stair with the last on department or they will you.

JUSTICE: You know, if I can't-- can we trust the jurors to apply the different standards to a low ladies apartments for the this guy's working?

MR. HAYES: I don't know if they follow with that but I think you got afraid to do in first. And the duty requires, they can see again.

JUSTICE: In this case when your so far, did the court tell me that's a matter of law? You have to turn with the oppose and to get to the duty on this particular analysis you have to out the concealed defect and they now catch up. And, and there's no reason to go back to the standard for review, you know, we have regulation of the issues and the jury at the time they present a one after, were they are concealed enough. I think that's here objectively it was not the suit. This third question I was in front to address that redemption to Supreme Court, I'd like to hand with you-- can you plea a negligent where to be in, in the premises defect, they lose towards the lose to it due they don't have time. I think I submit to you exclusive when you look at the test but here you don't have a premises defect to Ellis so this is not the case to say that, that you can't -

MR. HAYES: Part of mutually exclusive that you only have one defendant because this, this, this position in this-- say you-- assuming GE start with this claim in negligent activity. They only assumes the landlord is claiming, the premises defect so what is the difficulty with his position.

JUSTICE: What else?

MR. HAYES: With his, with his position this case as to the landowner.

JUSTICE: This is to have one because he does only like through one calls the actions towards us.

MR. HAYES: With regard to GE ...

JUSTICE: Although said, he just said in his oral argument just only, you know, that as to GE who's claiming the control.

MR. HAYES: Yes.

JUSTICE: That has to be alleging to the activity, right?

MR. HAYES: Yes, it is ...

JUSTICE: He is only claiming premises against the landowners.

MR. HAYES: Yes, but he's also claiming premises defect against GE.

JUSTICE: Okay, with this, with this now taking those positions. What is the problem with DNA will take those position in one lawsuit against separate opinions?

MR. HAYES: You give me sometime to tell the lawsuit of this warn. A very short would be invest -

JUSTICE: You should ...

MR. HAYES: - two about thing.

JUSTICE: To gets his very brief.

MR. HAYES: Yes, it [inaudible].

JUSTICE: It might be the response.

MR. HAYES: [inaudible] the library to two Ellis studies and everybody in the world has been buying me, just one attracted one else do. And she comes up, one of them says, "Cannot pled this cause of action" one of the two else says that you can pleaded but it will be

dismiss on one of the subject matter jurisdiction, conversation ended. You can pleaded but the question I think is, can you plead a viable cause of action. I mean you can put the two enemies in the same pleading but does it get beyond to that and I guess that's what I'm having the court don't see it. If you put the pled towards on the stand immersion, for summary judgment under the same that is, I don't think that I knew that because -

2006 WL 6005724 (Tex.)