

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

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Case No. 2012-CP-43-00707

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Rebecca Jackson,

Appellant,

v.

OSI Restaurant Partners,  
L.L.C., Outback Steakhouse  
of South Carolina, Inc.,  
Outback Steakhouse of  
Florida, L.L.C., Private  
Restaurant Properties, L.L.C.,  
Private Restaurant Master  
Lessee, L.L.C., each d/b/a  
Outback Steakhouse,

Respondents.

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FINAL REPLY BRIEF OF APPELLANT

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JUN 30 2015

SC Court of Appeals

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## ARGUMENT

### **I. Outback does not refute it owes a common law duty to exercise reasonable care to Mrs. Jackson, an invitee.**

Outback states that the Circuit Court granted summary judgment to Outback because Mrs. Jackson failed to demonstrate that the subject ramp was dangerous or defective. Final Brief of Resp., pp. 8-9, 11-12. This misstates the Circuit Court's Order. The Circuit Court granted summary judgment in Outback's favor finding that Outback did not owe a duty of care to Mrs. Jackson. The Court did not reach the issue of proximate cause. R. p. 10("This Court concurs with the Defendants' averments concerning lack of recognized duty and disposes of this case based on that argument. The Court need not reach Defendants' alternative argument pertaining to proximate cause."). The Circuit Court found that there was no duty of care owed to Mrs. Jackson and that was the only basis for granting summary judgment to Outback.

Outback openly conceded at the summary judgment hearing that it created the alleged dangerous condition - the built up curb ramp where Mrs. Jackson fell. R. p. 55, lines 1-11; R. p. 3.

Outback also conceded that Mrs. Jackson was its invitee at all times relevant to this case. R. p. 4 at n.6. A person owes an invitee the duty of exercising reasonable or ordinary care for her safety and is liable for any injury resulting from the breach of this duty. *Graham v. Whitaker*, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984). Unlike a licensee, an invitee enters the premises with the understood assurance of preparation and reasonable care for her protection and safety when she is on the property. *Landry v.*

*Plantation Prop. Owners Ass'n*, 317 S.C. 200, 203, 452 S.E.2d, 619, 621 (Ct. App. 1994). As a result, the circuit court erred when it held that Outback did not owe her a common law duty of care because a premises owner owes a common law duty of care to invitees to refrain from constructing an unmarked ramp the same color as the adjoining sidewalk. This argument was a central focus in Mrs. Jackson's Initial Brief.

Outback has failed to respond to or defend against this alleged legal error. As a result, this Court may reverse and remand this case without the need to address any further arguments, as the absence of a legal duty of care was the only ruling made by the circuit court.

**II. A duty of care was breached in this case because Outback constructed a steep ramp and failed to warn of its presence.**

One of Mrs. Jackson's experts, Bryan Durig, Ph.D., P.E., states that the 1998 edition of ANSI A117.1 standard was the applicable standard when the subject ramp was built in 1999. R. p. 367, ¶4. He also states that, based on his measurements of the ramp in comparison those with the ANSI standards that would have been used to construct the ramp, the ramp was too steep. R. pp. 367-68, ¶¶ 3-7. *Accord* R. p. 214, lines 4-9. In addition, Durig states that the ramp at issue should be torn down and replaced. R. pp. 368-69, ¶¶14,17, 28. *Accord* R. p. 148, line 6 – p. 149, line 1-2. Durig's role in this case is to educate the trier of fact on the applicable industry standards for proper construction of the ramp at issue in this case.

Outback singles out just one opinion in Durig's affidavit as defective because it does not meet the "most probably standard." In certain personal injury cases, medical expert testimony must meet the "most probably" standard for medical evidence of

causation. Even in those cases, in determining whether particular evidence meets this test it is not necessary that the expert actually use the words “most probably.” *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 701 S.E.2d 742 (2010); *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). However, Durig is not giving causation testimony here. He is making observations regarding the construction of the ramp and using his knowledge and training to compare the subject ramp with applicable industry standards.

Thus, when Durig stated that deviations from the ANSI standards used to build the ramp were “a contributing factor” in Mrs. Jackson’s fall, he was merely refusing to render an opinion on human factors – a subject matter beyond his experience and knowledge – and which was addressed by another of Mrs. Jackson’s experts, Ruston M. Hunt. *See* R. p. 368 ¶16. Therefore, Durig’s affidavit, based on his personal inspection and measurement of the ramp and as a professional engineer, is competent evidence that would help a jury decide whether the subject curb ramp was unreasonably dangerous.

Outback also challenges Durig’s qualifications to render any opinions in this case, but Bryan Durig is a licensed, professional engineer who has appeared before South Carolina courts as an expert witness many times. As stated in Paragraph One of his affidavit, Durig is not just a professional engineer, but he also holds a Ph. D. *See* R. p. 367, ¶1. Outback has not deposed Durig, but if it had, Durig would have been able to explain his qualifications and experience to render his opinions in this case as a licensed professional engineer. While Outback finds fault in Dr. Durig’s affidavit for not reading more like a résumé, it is well-settled that any defects in Durig’s education or experience go to the weight of his testimony and not its admissibility. *State v. Schumpert*, 312 S.C.

502, 435 S.E.2d 859 (1993). Outback has not deposed Bryan Durig and attacks his credentials based solely on his affidavit and previous report. The circuit court did not rule on Bryan Durig's credentials to render opinions in this case and was not asked to rule on his credentials.

From the outset Mrs. Jackson has alleged that not only is the ramp too steep, but that Outback's failure to warn of the presence of the ramp posed a hazard, rendering the ramp unreasonably dangerous. R. pp. 36-37, ¶17. At the summary judgment hearing Mrs. Jackson introduced photographs showing that the ramp at issue was the same color as the sidewalk leading up to it, and that cars partially covered up the ramp. R. p. 79, lines 2-12; R. pp. 357-361.

Adams, the managing partner of Outback and its 30(b)(6) designee, testified that he had the yellow lines painted because a loyal customer repeatedly suggested that Outback place some kind of warning as to the presence of the curb. R. p. 436, lines 15-24. Thus, at least one other customer notified Outback that she believed that the ramp needed to be differentiated from the curb. There may be more customers who complained, but Mrs. Jackson has not been allowed the opportunity to explore that possibility.

- a. *The circuit court prematurely granted summary judgment because Mrs. Jackson is entitled to explore prior incidents of falls or injuries involving the subject ramp to prove that Outback knew or should have known that the ramp was dangerous.*

Mrs. Jackson desires further discovery on three different areas of inquiry so that she can show that the subject ramp was unreasonably dangerous: (1) Outback's own

policies and procedures as set forth in their training video for employees; (2) the identification and deposition of Outback employees, specifically those employees working on the date of Mrs. Jackson's fall; (3) any and all incident reports for falls occurring outside the Outback before the date of Mrs. Jackson's fall. Each is discussed in turn.

Internal policies and self-imposed rules are often admissible as relevant on the issue of failure to exercise due care in a negligence case. *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 31-32, 410 S.E.2d 21, 24 (Ct. App. 1991). Just four days before the hearing on Defendants' Motion for Summary Judgment, and in response to Plaintiff's Motion to Compel, Defendants mailed a copy of the Outback Employee Orientation Handbook to Plaintiff's counsel. However, page fifteen of the Outback Employee Orientation Handbook references an employee training video that was not produced. As a result, Counsel for Mrs. Jackson served a request for production specifically asking for the video on April 14, 2014. R. pp. 320-21.

Mrs. Jackson expects Outback's training video to contain policies, procedures and rules for its employees to follow that may not completely overlap with the contents of the employee handbook, therefore the training video is both relevant and probative in determining whether Outback observed its own internal policies for safe operation as set forth by its own training materials.

Turning to the second area where further inquiry is desirable, Mrs. Jackson sought to discover the identities of Outback employees present at the restaurant at the time of Mrs. Jackson's fall to take their depositions. R. pp. 284-96. Outback operates by and through employees, therefore testimony of its employees would be helpful to establish actual and

constructive notice of the hazards posed by the ramp. *Cook v. Food Lion, Inc.*, 328 S.C. 324, 491 S.E.2d 690 (Ct. App. 1997).

Also provided just four days before the hearing on Outback's Motion for Summary Judgment, and in response to Mrs. Jackson's Motion to Compel, Outback provided the names of seventeen people employed with Outback as of the date of Mrs. Jackson's fall. Outback was unable to identify which of the Outback employees actually worked on the date of Mrs. Jackson's fall, as requested. As a result, Mrs. Jackson has not had an opportunity to question any of these employees to determine their knowledge of prior falls or the identities of Outback employees present at the restaurant at the time of her fall, as well as their job duties and actions during and after her fall.

Because Outback has yet to identify which of its seventeen total employees actually worked on the date of Mrs. Jackson's fall, she has not had the opportunity to ask if any employees working on the date of Mrs. Jackson's fall interviewed her before or after her fall, saw her fall, provided any assistance to her, or overheard any admissions or statements.

The depositions of Outback employees would also be helpful to determine if any of the employees suggested changes or revisions to the curb ramps outside the premises, or if any of the employees themselves filed any injury claims which they claim to be a result of the built up curb ramp. Further, not all claims are reported to insurers but may have been reported internally to management. Since employees working with customers on a daily basis have even more exposure to customers than managers like Rich Adams, testimony of Outback employees is desirable. Adams remembered one customer who repeatedly suggested painting the curb, but there may be other customers who complained that Mrs. Jackson has yet to discover.

Finally, at this time Outback has not provided copies of incident reports leading up to Mrs. Jackson's fall. Mrs. Jackson asserts that these are highly probative and, as they are kept by the Outback's insurer, Wells Fargo, they should be readily attainable by Outback. The incident reports are expected to shed light on the extent of notice to the Outback of the dangerous condition of the built up curb ramp, the fact that the ramp was painted after Mrs. Jackson's fall, as well as Outback's indifference to remedy or repair the ramp at issue at an earlier time.

The grant of summary judgment was erroneous on this additional basis and Mrs. Jackson requests an opportunity to conduct further discovery to illuminate the extent to which Outback knew or should have known that the curb ramp posed an unreasonable risk of harm to its invitees.

**III. Outback's poorly-constructed and unmarked ramp proximately caused Mrs. Jackson's fall.**

Russ Hunt, Mrs. Jackson's Human Factors engineer, points out that the absence of a requirement to paint or mark the curb does not mean that the transition is conspicuous. R. pp. 386-87. Moreover, "[t]he fact that [the curb] is visible to one who is looking for it does not mean that the transition will be seen by the unsuspecting pedestrian who is typically looking forward, for navigation purposes and not for foot placement." *Id.*

It is important to warn about the presence of the ramp because even Outback's own expert agrees that someone could foreseeably be hurt using the ramps outside of Outback. R. p. 175, lines 19-21; R. p. 149 line 7-p. 150 line 6. And even Outback's own expert agrees that "the purpose of paint on curbs is to provide a visual cue." R. p. 182,

lines 11-12. Had Mrs. Jackson known of the presence of the ramp, particularly one with such a steep decline, she could have taken precaution to proceed down the ramp. R. p. 386. Therefore, a jury could reasonably find that Outback should have done more, and sooner, to call attention to the presence of the ramp, and that the failure to do so violates a common law duty of care owed to Mrs. Jackson.

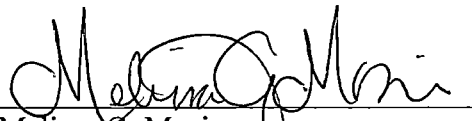
Outback argues that Mrs. Jackson has failed to show that a violation of industry standards proximately caused Mrs. Jackson's fall. However, Outback fails to address Ruston M. Hunt's human factors report. R. pp. 378-87. Hunt holds two degrees in industrial engineering and a Ph.D. in mechanical engineering. R. p. 378. He is currently a Dean and teaches a course called "Human Factors, Engineering Analysis and Design" at Southern Polytechnic State University. R. pp. 378-79. Again, unlike Campbell, Hunt visited and measured the ramp at issue in this case. R. pp. 379, 381. Hunt provides six (6) opinions to a reasonable degree of engineering certainty, but his main point is this: "Mrs. Jackson did not see that she was about to descend a steeper than expected slope ... There is clear evidence that the curb ramp at issue was not constructed according to generally accepted standards and this is, more likely than not, what caused Mrs. Jackson to fall." R. p. 386.

Hunt's report speaks directly to proximate cause and is at odds with Campbell's report, therefore a genuine issue of material fact exists for trial and the grant of summary judgment was improper.

**CONCLUSION**

For any one of the foregoing reasons, Mrs. Jackson respectfully requests that this Court reverse the summary judgment and remand for a trial on the merits.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Melissa G. Mosier", written over a horizontal line.

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June 30, 2015

THE STATE OF SOUTH CAROLINA  
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SC Court of Appeals

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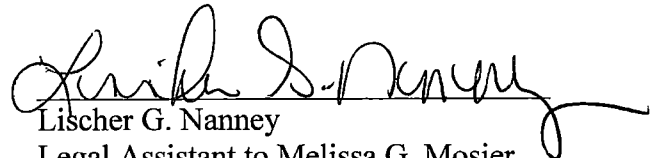
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Outback Steakhouse of Florida, L.L.C., Private Restaurant Properties, L.L.C.,  
Private Restaurant Master Lessee, L.L.C. each d/b/a Outback Steakhouse,

Respondents.

Appellant Case No.: 2014-001861

PROOF OF SERVICE

I certify that on June 30, 2015, I have served the Final Reply Brief of Appellant by mailing the same to the attorneys of Record, Christian Stegmaier, Claude T. Prevost, III, and Kerri Ruptert of the law firm of Collins & Lacy, P.O. Box 12487, Columbia, SC 29211.



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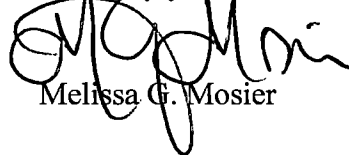
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Private Restaurant Properties, L.L.C.  
Private Restaurant Master Lessee, L.L.C.  
each d\b\ a Outback Steakhouse

Appellate Case No. 2014-001861

Dear Ms. Kitchings:

Enclosed you will find fifteen copies and one unbound copy of the Final Reply Brief of Appellant. In addition you will find six copies and one original of Appellant's Motion to File Appellant's Reply Brief out of Time, along with the twenty five dollar filing fee. Finally, I have also enclosed Proof of Service of both the Motion and Final Reply Brief upon counsel for the Respondents. If you have any questions, please do not hesitate to call.

Sincerely yours,



Melissa G. Mosier

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