THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2012-CP-43-00707

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.

FINAL BRIEF OF APPELLANT

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II. In addition to the common law duty of care owed to Mrs. Jackson, do industry standards help shed light on the standard of care reasonably to be expected from Outback?

III. Was summary judgment premature on whether Outback knew or should have known that the curb ramp posed an unreasonable risk of danger to invitees?

Statement of the Case

Mrs. Rebecca Jackson, the Plaintiff below and the Appellant here, filed a complaint on April 16, 2012, which was amended on June 7, 2012. Complaint; Amended Complaint. The amended complaint alleges that she is an invitee owed a duty of care, and that Outback created the hazard on its property when it knowingly permitted a rounded, uneven ramp to remain on the premises in a foreseeable pedestrian path. R. p. 36, ¶¶13, 15, 16. Mrs. Jackson further alleges that Outback had actual or constructive notice of the dangerous condition presented by the ramp. R. p. 36, ¶¶14,15,16. Additionally, Mrs. Jackson alleges the violation of industry standards as evidence of the breach of a duty of care owed to her. R. p. 37.

Defendants' Motion for Summary Judgment

On February 28, 2014 Outback filed a Motion for Summary Judgment indicating seven (7) bases to dispose of the Mrs. Jackson's case without the benefit of a trial by jury. R. pp. 281-83. The motion did not cite any case law or statutes in support of the motion. *Id.* On the evening of Friday, April 4, 2014, Outback sent its memorandum in support of the motion for summary judgment narrowing the bases of its motion to tell the trial court

that Mrs. Jackson's entire theory of liability is based on a violation of codes that do not apply. R. pp. 394-398.

Plaintiff's Motion to Compel

While Outback's Motion for Summary Judgment remained pending, Mrs. Jackson filed a Motion to Compel on March 24, 2014. R. p. 284-285. Via two (2) different sets of discovery requests Mrs. Jackson sought to discover the names and addresses of all Defendant employees present at the restaurant at the time of the her fall, as well as their job duties and actions during and afterwards. *See* R. p. 286-294.

Mrs. Jackson has also submitted six (6) sets of interrogatories, five (5) sets of requests for production and five (5) subpoenas. Outback has deposed both Mrs. Jackson and her husband, and Mrs. Jackson has deposed Messrs. Adams, Smith, and Alan Campbell, P.E., as well as Doctors Steichen and Lowder, and Tracy Hill, P.T. R. p. 297-308.

In response to these discovery requests, on April 3, 2014 and March 28, 2014, Defendants provided a list of seventeen (17) Outback employees working for Outback as of the date of Mrs. Jackson's fall. R. pp. 310-318. Since the employees were named days before the Outback's summary judgment hearing, Mrs. Jackson has not had an opportunity to depose any Outback employees - other than 30(b)(6) designee Managing Partner Rich Adams - to determine their knowledge of prior falls, complaints and/or suggestions from customers concerning the subject ramp where Mrs. Jackson fell.

Mrs. Jackson also sought to discover all standard operating procedures, manuals and training materials produced by Outback concerning maintenance and cleaning of the

outside of the premises, "to include public safety, outside walkways, ramps, handicap ramps and parking lots." R. p. 287. In response to this interrogatory, on March 28, 2014 Outback mailed a copy of its Employee Orientation Handbook to Mrs. Jackson. R. p. 311. However, page fifteen (15) of the Outback Employee Orientation Handbook references an employee training video that was not produced. Mrs. Jackson served a request for production specifically asking for the video on April 14, 2014. R. pp. 320-21.

Finally, Mrs. Jackson sought to discover incident reports generated by Outback but apparently maintained by their insurer, Wells Fargo. R. pp. 284-85. Incident reports are expected to reveal prior incidents of falls outside of the Outback.

Summary Judgment Hearing

At the hearing on Outback's Motion for Summary Judgment on April 7, 2014, Mrs. Jackson raised the matter of her outstanding Motion to Compel, and after brief discussion, the hearing turned towards the merits of Outback's Motion for Summary Judgment. R. p. 49-50.

Outback admits that it created the ramp alleged to have caused Mrs. Jackson's injury. R. p. 55, ll. 1-9. Despite this, Outback argued that the subject ramp is not dangerous as a matter of law. *Id.* at 12-17. To support this theory, Outback argued in the alternative: first, since Mrs. Jackson is not disabled, she lacks standing to use a violation of ANSI A117.1 to demonstrate negligence; alternatively, any deviation from ANSI A117.1 was negligible. R. pp. 55-56. Outback also argued that the ramp complies with the Standard Building Code, and that because neither the Standard Building Code nor ANSI A117.1 require curbs to be painted, the court should disregard any argument as to whether yellow

paint would have called more attention to the ramp. R. pp. 56-57.

In reply, Mrs. Jackson urged that as a person having undergone bilateral knee replacements, she chose to navigate through a wider space rather than between cars. R. p. 60, ll. 1-2. R. p. 69, ll. 2-8. However, as she walked she did not realize that the sidewalk transitioned to a ramp that was fifty five percent too steep on the top and seventeen percent too steep on the sides, referencing the ANSI A117.1 standard. R. p. 69, ll. 10-16.

Mrs. Jackson urged that the building code adopted in Sumter specifically incorporates ANSI A117.1 by reference. R. p. 71, ll. 18-22. And that the purpose of ANSI A117.1 is to make buildings accessible to and usable by people with not just an inability to walk, but those with difficulty walking, incoordination, reaching and manipulating difficulties. R. p. 72, ll. 1-8. The circuit court judge even responded, "That applies to everybody in this world." Mrs. Jackson further argued that the ramp should have been constructed in accordance with ANSI A117.1, a recognized standard modified over the years by professional engineers since the early 1900's for the benefit of the public. R. p. 25, ll. 14-24.

Referencing her expert's human factors report and showing photographs to the circuit court, Mrs. Jackson further urged that paint would have helped call the ramp to her attention. R. p. 70, ll. 2-5. R. p. 79, ll. 2-12. And unlike Outback's expert, Alan Campbell, both of her experts actually visited the scene, perceived the ramp first hand and measured the ramp without relying on a trainee engineer. R. p. 346-47. R. p. 100, ll. 10-21. R. p. 101, ll. 2-6.

At the conclusion of the hearing the circuit court granted Mrs. Jackson fifteen (15)

days to supplement her Memorandum in Opposition to the Defendants' Motion for Summary Judgment. In Mrs. Jackson's timely-filed Supplemental Memorandum of Law, Mrs. Jackson again raised prematurity of Outback's Motion for Summary Judgment. R. p. 335-336. In addressing the merits of Outback's Motion, Mrs. Jackson reiterated that she is an invitee owed a duty of care. *Id.* at pp. 337-38. Further, she pointed out that during oral argument, Outback conceded that it created the ramp at issue in the case. *Id.* at p. 338. And that because Outback created the condition alleged to be dangerous, Mrs. Jackson need not prove notice of the specific hazard that caused her injury. *Id.*

Circuit Court's Orders

On May 15, 2014 the parties received e-mail notification of the Court's decision to grant summary judgment in favor of Outback. On May 27, 2014 Mrs. Jackson submitted a Rule 56(f) affidavit with Exhibits along with a brief regarding the timeliness of the affidavit and exhibits. R. pp. 297-303. R. pp. 332-324. Outback objected to the timeliness of this affidavit. On May 28, 2014 the Clerk entered the Order Granting Summary Judgment. R. pp. 16-26. Thereafter, on June 9, 2014, Mrs. Jackson timely filed a motion to alter or amend the order granting summary judgment. R. pp. 275-280. As a result of that motion, Judge Young signed an Order Addressing Plaintiff's 59(e), *SCRCP* Motion. That Order was entered on August 4, 2014.

Mrs. Jackson served a Notice of Appeal on opposing counsel on August 26, 2014 and filed a Notice of Appeal on August 27, 2014. Finally, Mrs. Jackson requested and was granted an extension of thirty days to file her initial brief, making the time for filing and serving her initial brief and designation of matter due October 27, 2014.

STATEMENT OF THE FACTS

The facts in this case are not in dispute. Mrs. Jackson and her husband, both residents of Sumter County, went to Outback after church on Sunday, June 7, 2009. R. p. 16. At this time Mrs. Jackson was 65 years old had already undergone and recovered from bilateral knee replacements. R. pp. 11-14. Mr. Jackson, a retired and disabled veteran, had a handicap decal enabling them to park in a handicap space in front of the Outback, however, all of those spots were occupied at the time of their arrival to the Outback parking lot. R. p. 334. Therefore, Mrs. Jackson and her husband parked in one of the general customer parking spaces and walked through the parking lot to get to the restaurant. Mrs. Jackson recalls having visited this Outback Steakhouse just once before - a couple years before her fall. *Id.* As Mr. and Mrs. Jackson entered the Outback from the parking lot, they walked up the front, center ramp. R. p. 353.

Mr. and Mrs. Jackson enjoyed a nice meal that Sunday afternoon, when alcohol is not served at the restaurant. R. p. 334. As the couple departed the restaurant, the parking lot in front of the restaurant was full, and the entrance was crowded. Therefore, Mrs. Jackson exited the restaurant, turned left to get around the crowd, and started down the concrete sidewalk towards her car. *Id.* Seeing a larger space through which to navigate towards her car, Mrs. Jackson proceeded towards what she later determined to be a ramp. The sidewalk and the ramp are both the same color concrete. R. pp. 357-361. The ramp is available for use by any and all Outback customers even though it is commonly referred to as a "handicap ramp." R. p. 119, ll. 13-16. R. p. 124, ll. 15-20. R. p. 213, ll. 3-17. Mrs. Jackson alleges she did not notice the transition from sidewalk to the ramp, and did not

expect the change in elevation. R. p. 35, ¶10. As a result, after just a step or two onto the ramp, Mrs. Jackson started falling. R. p. 4. She reached out to her right, where there was a car, to try and break her fall, but she missed the car and landed on her left side. R. pp. 357-361. Mrs. Jackson alleges she was unable to get up on her own power after her fall. She alleges that she suffered three (3) broken ribs, immediate back pain, skinned hands, and a skinned knee. R. p. 35, ¶11. R. p. 334. R. p. 76, ll. 4-7. Mrs. Jackson further alleges has since undergone a regimen of medications and physical therapy, but when conservative treatments failed, she alleges she had no choice but to undergo back surgery. R. p. 35, ¶11. R. p. 334.

Yellow lines were painted in April of 2011 at the direction of Outback's managing partner to enhance the visibility of the curb. R. p. 436, ll. 18-25. An Outback patron repeatedly suggested that a warning be placed as to the presence of the curb, and the managing partner agreed to hire a painter due in part to the low cost of this suggestion. R. p. 436, ll. 15-24.

Mrs. Jackson hired Bryan Durig, a licensed professional engineer, to evaluate the built up curb ramp at issue in this case. With counsel for Outback present, Durig conducted an examination of the ramp and generated a report finding several deficiencies: first, at the time of Mrs. Jackson's fall, the ramp was not painted yellow to differentiate it from the adjoining sidewalk; second, the ramp did not provide a flat walking surface – the top of the ramp was and still is curved; third, the flared sides of the ramp extend into parking spaces, allowing cars to park on the sides of the ramp and obscure its presence in violation of ANSI A117.1; and finally, the top and sides of the ramp, are too steep according to ANSI A117.1.

R. pp. 363-365. R. pp. 367-369. ANSI A117.1 is a standard incorporated by reference through the Standard Building Code adopted by Sumter, and ANSI A117.1 specifically addresses the proper slope geometry of a built up curb ramp. R. p. 111, ll: 7-9. ANSI's broad mission is "[t]o assure the safety and health of consumers and the protection of the environment." R. pp. 214-216. ANSI's mission statement does not distinguish between able-bodied consumers and consumers with disabilities, as Campbell agrees. R. p. 216, ll. 7-13.

Mrs. Jackson's human factors expert, Ruston Hunt, also evaluated the ramp in the presence of counsel for Outback. He also observed that the ramp was not painted to differentiate it from the sidewalk, and that the topside of the ramp failed to provide a flat walking surface. R. pp. 378-387. Like Durig's, his measurements also indicate that it was over 50% too steep and out of compliance with ANSI A117.1 standards. *Id.*

Outback's engineer, Alan Campbell, concedes that ANSI is an industry standard. R. p. 128, ll. 7-18. R. pp. 143-44. Campbell also concedes that the ramp in question would have to have been constructed in accordance with ANSI A117.1.[1] R. pp. 128-29.

Campbell provides both human factors and engineering opinions in this case but admits he has not personally inspected or measured the ramp that is the subject of this case. R. p. 100, line 15 – p. 101, line 6. Instead, he delegated this responsibility to an Engineer In Training. *Id.* The same engineer in training also wrote the report for Outback, and

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1 There is some discrepancy as to whether the building code incorporates by reference the 1992 or the 1998 version of ANSI A117.1. But Campbell agrees that both versions of ANSI A117.1 are essentially identical with respect to the standards germane to this ramp. R. pp. 108-117.

Campbell's involvement consisted of reviewing, editing and signing the report. R. p. 105, ll. 7-23. Adopting the trainee's photographs and measurements, Campbell opines that while the ramp at issue does not meet ANSI A117.1 standards, the difference was negligible and imperceptible by Mrs. Jackson. R. p. 106, l. 20 – p. 107, line 2. Second, while the ramp extends into the parking spots in violation of ANSI A117.1 Mrs. Jackson has no standing to complain because she is not mobility impaired or a wheelchair user. R. p. 107, ll. 5-11. Third, he opines that ANSI A117.1 does not require the curb ramp to be marked, and the transition from sidewalk to ramp should have been visible from her field of view. R. p. 107, ll. 12-17. And finally, Campbell concludes that the more likely cause of Mrs. Jackson's fall was her choice of footwear, possible intoxication, eyesight, distractions, or drug use. R. p. 107, ll.18-22. R. pp. 371-74.

ARGUMENT

The standard of review for an order granting summary judgment is *de novo*. *Peterson v. W. Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999). Appellate courts apply the same standard used by the trial court when reviewing the grant of a motion for summary judgment. *Weston v. Kim's Dollar Store,* 399 S.C. 303, 307, 731 S.E.2d 864, 866 (2012). On appeal from an order granting summary judgment, the appellate court reviews all ambiguities, conclusions and inferences arising in and from the evidence in a light most favorable to the non-moving party below. *South Carolina Rules of Civil Procedure,* Rule 56(c); *Madison ex rel. Bryant v. Babcock Center, Inc.,* 371 S.C. 123, 134, 638 S.E.2d. 650, 654, (2006).

Where the pleadings and evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, summary judgment must be denied, even if no opposing evidentiary matter is presented. *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999). Because summary judgment is such a drastic remedy, summary judgment should be cautiously invoked to ensure that no person will be improperly deprived of a trial of disputed factual issues. *Baughman v. American Tel. and Tel. Co.,* 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

I. The trial court erred in granting summary judgment because Outback owes Mrs. Jackson, an invitee, a duty of care to protect her from a hazardous condition it created.

The Outback owes a duty of care to Mrs. Jackson by virtue of her uncontroverted status as an invitee. Outback concedes that Mrs. Jackson was its invitee. 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). *Graham,* 282 S.C. at 398, 321 S.E.2d at 43.

To recover damages for injuries caused by a dangerous or defective condition on a restaurant's premises, a plaintiff must show either (1) that the injury was caused by a specific act of the defendants which created the dangerous condition; or (2) that the defendants had actual or constructive knowledge of the dangerous condition and failed to remedy it. *Anderson v. Racetrac Petroleum Inc.,* 296 S.C. 204, 371 S.E.2d 530 (1988).

a. Because Respondents admit creating the alleged danger posed by the built up curb ramp at issue, Mrs. Jackson need not prove that Outback knew of the specific hazards posed by the ramp.

Because Outback admits creating the built up curb ramp, this is a "created danger" case. R. p. 55, ll. 1-11. R. p. 3. The court below, however, improperly treated this case as a "foreign substance" case when it required her to show that Outback had actual or constructive knowledge of the specific hazard that caused her to fall.

Cook v. Food Lion, 328 S.C. 324, 491 S.E.2d 690 (Ct. App. 1997) shows the distinction between "created danger" and "foreign substance" cases. In that case a supermarket customer fell on a wrinkled floor mat near the store exit. *Id.* at 326, 491 S.E.2d at 691. At the trial of the case, the judge prevented Cook from presenting testimony of supermarket employees regarding the tendency of the floor

mats to wrinkle on occasions prior to Cook's fall, but the testimony was proffered to preserve the issue for appeal. *Id.* The trial judge directed a verdict in favor of the supermarket on the basis that Cook did not present any evidence that the supermarket had notice that the mats had become wrinkled on the particular day of her fall. *Id.* Cook appealed. *Id.* at 327, 491 S.E.2d at 691. This Court held that the trial judge erroneously treated the case as a foreign substance case instead of a created hazard case when it required Cook to prove that the supermarket had actual or constructive notice of a dangerous condition on the day of her fall. *Id.*

The analysis in *Cook* and readily translates to the present case. Cook fell on a floor mat that the supermarket admits placing on the floor for its customers. *Id.* As a result, this Court held it was not necessary to show that the supermarket employees knew that the floor mats were wrinkled just before her fall. *Id.* at 327, 491 S.E.2d at 691-92. In addition, this Court held that the trial court improperly excluded testimony of the tendency of the floor mats to wrinkle, which was directly relevant to the issue of whether a dangerous condition existed in the store. *Id.* citing *Henderson v. St. Francis Community Hosp.*, 303 S.C. 177, 399 S.E.2d 767 (1990); *Anderson v. Racetrac Petroleum, Inc.*, 296 S.C. 204, 371 S.E.2d 530 (1988).[2]

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2 *See also Baker v. Toys-R-Us, Inc.*, 133 F.3d 913 (1998) (applying South Carolina law). In that case, the district court held that routinely dislodged trim pieces from toy store displays were a created danger and not a foreign substance. *Id.* at 4. Therefore, despite the fact that the plaintiff did not show that the toy store had actual or constructive knowledge that a trim piece dislodged on the day of her fall, and even though plaintiff did not submit any evidence as to how the trim piece that injured her became dislodged, the jury was properly permitted to render a verdict based on the evidence. *Id.*

Turning to the facts of this case, 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, ll. 1-11. R. p. 3. Like the aggrieved appellant in *Cook*, Mrs. Jackson respectfully urges that the circuit court here has also treated this case as a foreign substance case instead of a creation case.

Rather than *Cook,* the circuit court judge relied on *Nelson v. Piggly Wiggly Central Inc, et al.,* 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010). Order Addressing Plaintiff's Rule 59(e), SCRCP Motion, p. 3. In Nelson, a woman accelerated her automobile over a wheel stop and accidentally pinned her granddaughter to the building. *Id.* Nelson alleged that the wheel stops were installed so close to the building that the store created a hazard. *Id.* at 387, 701 S.E.2d at 778. Nelson's expert found no building code violation in the parking lot, and was unaware of any industry standards governing parking lot design and construction for the applicable time period. *Id.* at 387-88, 701 S.E.2d 778.

The case at hand is distinguishable from *Nelson* for four reasons: first, Outback readily admits creating the alleged hazard (R. p. 55, ll. 1-11. R. p. 3); second, the construction and appearance of the ramp itself caused Mrs. Jackson to fall – not the acts of a another; third, in this fall case, there is a common law duty to inspect, warn and repair conditions that are either known or which should be known to Outback. The ramp at issue here is unsafe because fails to provide a flat walking surface, the sides of the ramp protrude into parking spaces, and the ramp is the same color as the sidewalk leading up to it, which Mrs. Jackson asserts is

unreasonably dangerous. A fourth way that this case is distinguishable from *Nelson* is that the ramp at issue here violates applicable industry standards according to Mrs. Jackson's expert, and even according to the Outback's expert, the ramp needs to be "addressed." R. p. 63, ll. 8-13. R. pp. 149-150.

In sum, Outback owes Mrs. Jackson a duty of care because it created the danger. So this Court should reverse and remand for further discovery to determine the reasonableness of safety precautions taken by the Outback to protect invitees.

II. Mrs. Jackson created genuine issues of material fact as to whether Outback violated industry standards.

The standard of care in a given case may be established by industry standards. *Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006).* Evidence of industry standards is relevant to establishing the standard of care in a negligence case. *Ellege v. Richland/Lexington School District,* 352 S.C. 179, 573 S.E.2d 789 (2002).

In this case, Mrs. Jackson's expert engineer, Bryan Durig, referenced ANSI A117.1 to evaluate the built up curb ramp at issue in this case. R. pp. 363-369. R. p. 128, ll. 7-18. R. p. 138, ll. 6-9. As Durig's report states and Campbell agrees, ANSI A117.1 is an industry standard that specifically addresses the proper slope geometry of a built up curb ramp. R. p. 128, ll. 7-18. R. p. 144, ll. 17-24. There is no dispute among the experts that the Standard Building Code applies in this case, and that the Standard Building Code adopts ANSI A117.1 by reference. R. p. 111, ll. 7-9. *See also* 363-365. R. pp. 371-74. R. p. 126, ll. 3-25.

ANSI's mission statement is "To assure the safety and health of consumers and the protection of the environment." R. pp. 214-216. ANSI's mission statement does not distinguish between able-bodied consumers and consumers with disabilities, as Campbell agrees. R. p. 216, ll. 7-12. The "Purpose" of ANSI A117.1 to ensure safe access to those with difficulty walking, reliance on walking aids, incoordination, lack of stamina, difficulty interpreting and reaching to sensory information, and other problems. R. p. 117, line 25 – p. 119, line 5. R. pp. 368-69, ¶¶23, 24. Therefore, it stands to reason that elderly or impaired customers who may not be able to walk with ease would rather make the transition from parking lot to sidewalk by using a ramp instead of stepping up a curb and that ANSI A117.1 helps those people.

ANSI A117.1 Section 4.7.5 provides that "curb ramps ***located where pedestrians must walk*** across the ramp shall have flared sides." (emphasis supplied). R. p. 114, ll. 8-22. R. p. 119, ll. 13-16. The plain language contemplates that pedestrians will walk on the top of, or what is referred to as the "running slope" of the ramp. R. p. 119, ll. 13-16. As set forth in Durig's affidavit, the slope at the top of the ramp at issue here is over two times the slope allowed by the ANSI A117.1 standard. R. p. 368, ¶¶9-16. The ramp also extends into vehicle parking spaces, and was partially obstructed by parked vheicles in violation of the ANSI A117.1 standard, and there is a change in elevation of half an inch between the sidewalk and the ramp which is another violation of ANSI A117.1. R. p. 368 ¶15.

As a result, Durig opines that the ramp at issue is defective and should be removed and installed properly to conform to ANSI A117.1. R. p. 368 ¶13.

Outback's engineer, Alan Campbell, agrees that pedestrians commonly walk on ramps. R. p. 119, line 13 – p. 120, line 5. R. p. 124, line 15 – p. 125, line 2. Campbell agrees that the ramp where Appellant fell is not a "handicap ramp," *per se,* but is, instead, a "built up curb ramp" that is available for use by all pedestrians. R. p. 119, ll. 13-16. R. p. 124, ll. 11-18. When specifically asked whether it is foreseeable that Mrs. Jackson would use one of the ramps in front of Outback, Campbell agreed, and stated that "I think it's entirely foreseeable she would have likely used one of the ramps." R. p. 175, ll. 19-21. R. p. 194, ll. 13-16.

Not only is it foreseeable that Mrs. Jackson would use one of Outback's ramps, but according to Outback's expert it is also foreseeable that she could get hurt using one of the ramps. R. p. 175, ll. 19-21. R. p. 149, line 7- p. 150, line 6. As a professional engineer who swears an oath to protect the public, Campbell admitted that he would recommend addressing the ramps because they pose a liability to the Outback and everyone using the ramps at that location. R. p. 148, line 6 – p. 149, line 2. More directly, Campbell admits that the ramp's current condition could cause someone to fall. R. p. 149, line 7 - p. 150, line 6.

Thus, the Outback's own professional engineer and human factors expert agrees that the ramp poses a safety hazard, and he actually believes that the ramp at issue in this case needs to be modified. *Id.* This is likely so because in

constructing the ramp at issue in this case, we can safely assume that the ramp specifications would have been designed to comply with ANSI A117.1. R. p. 214, ll.7-19. In addition, he agrees that the steeper the ramp is the more likely it is to pitch someone forward. R. p. 205, ll. 18-21. In sum, because the ramp at issue was more likely than not created with the specific intent to come into compliance with ANSI A117.1, Mrs. Jackson urges that it is fair to apprise its safety by the same standard.

Where the engineers diverge in opinion is this: Durig opines that the deviations from ANSI A117.1 standards render the ramp at issue defective and hazardous, and thus a contributing factor of Mrs. Jackson's fall. But Campbell opines that violation of the standards set forth in ANSI A117.1 did not contribute to Mrs. Jackson's fall, instead stating that many other factors are the more probable cause of her fall: Mrs. Jackson's choice of footwear, possible intoxication, eyesight, distractions, or drug use. R. p. 107, ll. 18-22. Alan Campbell's report dated December 16, 2013. This all creates a jury issue.

Further, Campbell refuses to admit that a sixty-five year old woman with bilateral knee replacements and who wears glasses to help her see can rely on ANSI A117.1 despite its broad scope and mission statement. *See* R. p. 118, line 10 - p. 119, l. 1. However, because ANSI A117.1's purpose is to provide access for customers with sensory deficits and mere difficulty walking, a formal finding of disability or mobility impairment is not a condition precedent for ANSI A117.1 applicability here. *Id.*

Also, from the outset Mrs. Jackson has alleged that the lack of yellow paint to warn of the transition from sidewalk to ramp poses a hazard. R. pp. 36-37, ¶17. Citing her experts' reports, Mrs. Jackson argues that painting the ramp provides a reasonable, inexpensive warning to her and others of the presence of the ramp. R. p. 48, ll. 2-10. R. pp. 363-374. Adams, the managing partner of Outback, testified on Outbacks' behalf and stated that he had the yellow lines painted in April of 2011 "to pronounce the curb a little bit more to where it was easier to see coming up to the restaurant." R. p. 435, ll. 18-25. Further, the painting was completed as a result of the repeated suggestion of an Outback patron. R. p. 436, ll. 15-24.

A genuine issue of material fact also exists as evidenced by the fact that Campbell, who has never seen or measured the Outback ramp, summarily dismisses Mrs. Jackson's claim that the lack of paint contributed to her inability to see the ramp. R. p. 100, ll. 10-21. R. p. 101, ll. 2-6. R. p. 107, ll. 12-17. In addition, Campbell's testimony conflicts with Outback's 30(b)(6) witness, who admits that the curb was painted after Mrs. Jackson's fall in an effort to enhance the visibility of the curb. R. p. 109, ll. 18-25. Instead, according to Campbell, the transition from sidewalk to ramp would have been visible from Mrs. Jackson's field of view. R. p. 107, ll. 12-17. R. pp. 371-74.

In contrast, Russ Hunt, Mrs. Jackson's Human Factors engineer, who has traveled to the scene, notes the absence of a requirement to mark the curb does not mean that the transition is conspicuous. R. pp. 386-87. Moreover, "[t]he fact that it 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.* Finally, and in conclusion, Hunt opines that the configuration of the parking spaces right next to the subject curb ramp allowed cars to block Mrs. Jackson's view of the curb ramp, thus making it more difficult for her to recognize that the ramp was there in the first place. *Id.* In combination, the lack of markings on the ramp made it difficult for her to perceive the beginning of the ramp in the first place. *Id.*

In conclusion, in light of the experts' competing testimony, there are genuine issues of material fact as to whether the subject ramp presents an unreasonably dangerous condition.

III. Mrs. Jackson has submitted ample evidence showing a genuine issue of material fact exists for trial, but if not, she has not been given ample opportunity to discover facts to show that the curb ramp was dangerous.

Lastly, merchants owe their business invitees a duty to inspect and remedy dangers of which is either knew or should have known. *Graham v. Whitaker,* 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984). For example, in *Anderson v. Racetrac Petroleum, Inc.,* 296 S.C. 204, 371 S.E.2d 530 (1988), the plaintiff was injured by a metal strip sticking out from the bottom of the store's counter. Anderson claimed that the store either knew or should have known of the dangerous condition. *Id.* at 205, 296 S.E.2d at 531. The store claimed contributory negligence since Anderson was barefoot at the time of her injury. *Id.* After the conclusion of discovery, the store moved for summary judgment. *Id.* At the

summary judgment hearing, Anderson presented an affidavit stating that upon visiting the defendant store eleven months after her injury, she photographed the metal strip appearing in the same manner as it did on the date of her injury. *Id.* The store offered evidence that the cashier and store manager were both on duty at the time of Anderson's injury, and that they "did not recall" a metal strip protruding into the aisle, and that if it had been there they would have seen it. *Id.* The cashier and store manager also testified that since Anderson was barefoot, they could not determine whether her foot became injured inside the store or outside the store, and that she assumed the risk of injury by walking barefoot. *Id.*

After considering the evidence and construing all reasonable inferences in a light most favorable to Anderson, the nonmoving party below, the South Carolina Supreme Court held that the store's summary judgment motion should have been denied. *Id.* at 206, 296 S.E.2d at 532. The Court held that the photographs and Anderson's affidavit were sufficient to create a genuine issue of material fact. *Id.* citing *Tom Jenkins Realty, Inc., v. Hilton,* 278 S.C. 624, 300 S.E.2d 594 (1983).

Also, in *Henderson v. St. Francis Community Hosp., et al.,* 303 S.C. 177, 399 S.E.2d 767 (1990), Henderson visited a friend at the hospital. As she walked through the hospital parking lot to her car, she stepped on a pile of sweet gum balls and fell. *Id.* at 768, 399 S.E.2d at 178-79. Sirrine designed the parking lot and the sweet gum trees were later planted around the parking lot. *Id.* at 768, 399 S.E.2d at 179. Years later, another company was hired to design an addition to

the parking lot, and a representative of the company recommended removing the sweet gum trees because of the amount of debris they produce. *Id.* The hospital refused to remove the sweet gum trees and a stairway was built in close proximity to the trees. *Id.* At trial, Henderson received a jury verdict, but the trial court granted the defendants' motion for a judgment notwithstanding the verdict (JNOV) on the grounds that the evidence failed to support the jury's verdict. *Id.* at 178, 399 S.E.2d at 768.

In its review of the record, the South Carolina Supreme Court pointed out the expert testimony that the sweet gum balls are hard, round, and take years to deteriorate. *Id.* That despite advice to remove the sweet gum trees, the hospital built a stairway near them. *Id.* Further, that testimony from hospital employees revealed the absence of a routine sweeping or cleaning program or scheduled for the sweet gum balls to be routinely cared for. *Id.* Therefore, the Court held, the jury might have reasonably inferred that the hospital was negligent in failing to provide a reasonably safe walking path due to its failure to remove the trees or implementing an adequate maintenance program when it had actual and constructive knowledge of the dangerous condition created by the sweet gum trees. *Id.* at 181, 399 S.E.2d at 769.

Turning the present case, Mrs. Jackson introduced photographs at the summary judgment hearing showing the ramp at issue. R. p. 79, ll. 2-12. R. pp. 353-361. The photographs handed to the circuit court judge showed cars on top of the ramp thus obscuring its presence, and also show a rounded walking surface

on top of the ramp. The only condition that has changed with respect to the ramps at issue is the bright yellow paint applied after Appellant's fall. R. p. 76, line 17 - p. 77, line 15. R. p. 376. R. p. 435, ll. 13-25. This repair was performed at the suggestion of a customer desiring some kind of warning as to the presence of the curb. R. p. 436, ll. 15-24. Adams, the managing partner of Outback, testified on Outbacks' behalf and stated that he had the yellow lines painted in April of 2011 "to pronounce the curb a little bit more to where it was easier to see coming up to the restaurant." R. p. 435, ll. 18-25.

Along those lines Mrs. Jackson provided the circuit court with a report from her human factors expert, stating that the failure to paint the curb safety yellow likely contributed to Mrs. Jackson's stated inability to perceive the ramp. R. pp. 378-387. To the contrary, Campbell, who has never actually visited the ramp in question nor measured the angles of the ramp himself, opines that many other factors are the more probable cause of her fall: Mrs. Jackson's choice of footwear, possible intoxication, eyesight, distractions, or drug use. R. pp. 371-74. R. p. 107, ll. 18-22.

Mrs. Jackson's evidence by itself creates factual issues on what Outback knew or should have known. Mrs. Jackson is also entitled to further explore Outback's knowledge. Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Doe v. Batson,* 345 S.C. 316, 548 S.E.2d 854 (2001). In addition, the movant must also show that further inquiry into the facts is not desirable to clarify the application of

the law. *Evening Post Pub. Co. v. Berkley County School Dist.,* 392 S.C. 76, 79, 708 S.E.2d 745, 747 (2011). In other words, if the parties agree on the facts but disagree on the conclusions or inferences to be drawn from the facts, summary judgment is inappropriate, and should not be granted. *Koester v. Carolina Rental Center, Inc.,* 313 S.C. 490, 443 S.E.2d 392 (1994).

a. Further discovery is likely to uncover additional relevant information.

Mrs. Jackson is not engaged in a "fishing expedition." *Baughman v. Am. Tel. & Tel. Co.,* 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991). Of particular interest to the merits are three different areas of inquiry: (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.

The standard of care may be established by referencing the common law, statutes, regulations, industry standards, and the defendant's own policies and procedures. *Madison ex rel. Bryant v. Babcock Center, Inc., 371* S.C. 123, 140, 638 S.E.2d 650, 659 (2006). Turning to the first area where further inquiry is desirable, Mrs. Jackson sought to discover all standard operating procedures, manuals and training materials produced by the Outback concerning maintenance and cleaning of the outside of the premises, "to include public safety, outside walkways, ramps, handicap ramps and parking lots." R. pp. 284-85.

Four days before the hearing on Defendants' Motion for Summary Judgment, and in response to Plaintiff's Motion to Compel, Defendants responded to this interrogatory by mailing a copy of the Outback Employee Orientation Handbook to Plaintiff's counsel. However, page fifteen (15) 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. p. 320-21.

Outback's training video is expected 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 expectations 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. Plaintiff's Motion to Compel with attachments. Because entities operate by and through employees, testimony of employees is often used to help establish actual and constructive notice of hazards. *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 (17) 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 (17) 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.

Other than the 30(b)(6) deposition of Managing Partner Rich Adams, Mrs. Jackson has not deposed any Outback employees to determine their knowledge, if any, of prior falls or complaints and/or suggestions from customers concerning the subject ramp. The depositions of Outback employees are also probative 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. Outback employees can help establish facts, corroborate stories, and

possibly verify Mrs. Jackson's recollection of the events surrounding her fall. An Outback employee could help verify whether Mrs. Jackson appeared unsteady on her feet, uncomfortable in her choice of footwear, inattentive or walking briskly, as Outback suggests in its Answer and as Campbell also stated throughout his deposition.

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 probative and, as they are kept by the Outback's insurer, Wells Fargo, 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 the indifference to remedy or repair the ramp at issue at an earlier time.

The grant of summary judgment was improvidently granted on this additional basis because the expected testimony of Outback employees as well as the incident reports are directly relevant to the issue of whether the built up curb ramp was an unreasonably hazardous condition.

b. Since Mrs. Jackson has not been dilatory in the pursuit of discovery in this case, and is not solely responsible for the delay in obtaining desired information, the grant of summary judgment was premature.

In *Doe ex rel. Doe v. Batson,* 345 S.C. 316, 548 S.E.2d 854 (2001), the South Carolina Supreme Court held that the trial court abused its discretion in granting summary judgment before the plaintiff had a full and fair opportunity to

complete discovery, where plaintiff was not dilatory in pursuing discovery, depositions were scheduled the for the week following the hearing, and, even though delay was not attributable solely to the defendant, it was not solely attributable to the plaintiff.

In that case, John Doe brought a class action suit on behalf of his minor sons and other boys who alleged abuse by a youth minister at a church, Donald. *Id.* at 318, 548 S.E.2d 854, 855 (2001). Doe alleged that Batson's mother, who lived with Donald, either knew or should have known of her son's proclivities, failed to warn of those proclivities, and but for Batson's failure to warn, the children were abused. *Id.* The trial court granted the motion for summary judgment, ruling that since Batson had no legal duty to supervise or control her adult son, she therefore owed no duty to third parties to warn them of his propensities, which in any event she has denied any knowledge of. This Court reversed, finding the grant of summary judgment premature. *Id.*

The South Carolina Supreme Court agreed. Doe opposed the motion for summary judgment as premature because depositions were scheduled to be heard the week following the hearing, and more depositions were still needed to fully develop the facts and theory of the case, generally. *Id.* at 322, 548 S.E.2d at 857. By the time the motion for summary judgment was heard, the case had been pending for more than three (3) years, however, due to the complexity of the case, and the fact that Doe had not been dilatory in pursuing discovery, the Court specifically pronounced that "Doe should have been permitted to complete

discovery." *Id.* Thus, in Doe, despite the fact that the case was pending for more than three (3) years and even though the motion for summary judgment was premised on the lack of a legal duty, the case was remanded to the trial court to continue with discovery.

Turning to this case, Mrs. Jackson not only served discovery requests with her complaint, but she has actively engaged in discovery throughout the case in the form of written discovery, depositions, and subpoenas. With regard to written discovery alone, Mrs. Jackson has submitted six (6) sets of interrogatories, five (5) sets of requests for production in this case and five (5) subpoenas. R. pp. 297-308. It should be noted that the 30(b)(6) deposition had to be cancelled twice at Outback's request. R. pp. 305-08. The deposition of Charles Smith also had to be rescheduled at the request of Outback once. *Id.*

Mrs. Jackson took the 30(b)(6) deposition of the Outback designee, Charles Smith, Alan Campbell, and video depositions of her back surgeon, Dr. Steichen, and family doctor, Dr. Clayton Lowder, and Tracy Hill, P.T. By the time of the summary judgment hearing, Outback attempted to purge itself of overdue discovery, however, incident reports were still not made available to Mrs. Jackson and the training video was also outstanding. Further, because seventeen (17) Outback employees were named for the first time four (4) days before the summary judgment hearing, Mrs. Jackson has not had an opportunity to depose those witnesses.

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.

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.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief complies with Rule 211(b), *SCACR*.

June 4, 2015

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2012-CP-43-707

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.

Appellant Case No.: 2014-001861

PROOF OF SERVICE

I certify that on June 18, 2015, I have served the Revised Final Brief of the Appellant, Rebecca Jackson, by mailing the same to the attorneys of Record, Christian Stegmaier, Claude T. Prevost, II, and Kerri A. Rupert, of the law firm of Collins & Lacy, P.O. Box 12487, Columbia, SC 29211.

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