THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SUMTER COUNTY
W. Jeffrey Young, Circuit Court Judge

Case No. 2012-CP-43-00707
Case No. 2014-001861

Rebecca Jackson, ... Appellant.

v.

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

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ATTORNEYS FOR RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Circuit Court Erred by Granting Summary Judgment to Respondents for the Reasons Stated Within the Subject Order?

II. Whether this Court Should Affirm the Grant of Summary Judgment to Respondents Upon the Additional Sustaining Ground of Absence of Competent Expert Testimony from Appellant Regarding Proximate Cause?

STATEMENT OF THE FACTS

The instant case is a premises liability matter involving alleged static defect and sounds in negligence. Appellant Rebecca Jackson appeals the grant of summary judgment rendered in favor of Respondents 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 by the Circuit Court.

Appellant maintains that on or about 1:30 p.m. on June 7, 2009, as she and her husband exited the Outback Steakhouse restaurant at 2840 Broad Street in Sumter, she was "unable to appreciate the change in elevation in the [exit] ramp[1] and tripped and fell to the ground." (R. 35). Appellant alleges Respondents, the owner and operator of the subject Outback Steakhouse, had actual or constructive notice of dangerous condition created by the curb access ramp and/or created the condition itself. (R. 36).

Appellant's dangerous condition theory was premised upon violation of code. Specifically, Appellant pled:

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[1] Also identified as a "handicap ramp" and "handicap access ramp[]" by Plaintiff in her Amended Complaint. <u>See, e.g.</u>, (R. 37).

17. The Defendants, acting together as agents and servants of one another, violated their duty to use reasonable care to protect the Plaintiff from hazardous conditions it created or knowingly permitted to exist on the premises and was careless, negligent and/or grossly negligent, wilfull and wanton in its acts and/or omissions at the time and place about mentioned in the following particulars:

. . . .

g. In failing to maintain the exterior of the property in compliance with the International Property Maintenance Code.

. . . .

j. In failing to take remedial measures to make the ramps come into compliance with the International Property Maintenance Code.

(R. 36-37).

The parties conducted extensive discovery, including Appellant deposing Respondent's premises liability and human factors expert,[2] Alan O.

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[2] Campbell is the only human factors expert that provided competent sworn testimony containing an opinion in the instant case. (R. 94, 197-98, 226, 228-29). Plaintiff's liability expert, Dr. Bryan Durig, provided an affidavit following the April 7, 2014, summary judgment argument (dated April 10, 2014), that contains some testimony that could be considered human factors/biomechanical in nature concerning sensory perception (see, e.g., (R. 369)); however, Dr. Durig's opinion concerning these matters should not to be considered by this Court due to his affidavit not establishing any expertise on his part concerning competency to render opinions concerning human

Campbell, PE, RRC, of Applied Building Sciences, Inc. At his deposition, Campbell rendered numerous opinions under oath, including:

- Appellant was not disabled or possessed a mobility disability (as defined by the Americans with Disabilities Act) at the time of the subject fall;[3]

- ANSI 117.1 is not applicable in the instant case as it pertains to Appellant;[4]

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factors/biomechanical science. See Rule 56(e), SCRCP ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated."); see also Logan v. Wachovia Bank, N.A., Op. No. 2009-UP-092 (S.C. Ct. App. filed May 7, 2009) (granting defendant's summary judgment on plaintiff's defamation cause of action due to plaintiff failing to appropriately comply with the requirements of Rule 56(e), SCRCP: "Under the South Carolina Rules of Civil Procedure, an affidavit supporting summary judgment must be made on personal knowledge, must be admissible, and must show the affiant's competency to testify."). Dr. Durig did not enunciate competency in his affidavit in any specific science or specialty, including human factors and biomechanics.

[3] (R. 107, 137, 139, 142).

[4] (R. 107). Also, Campbell quotes directly from the ANSI 117.1 standards when challenged on his position that ANSI 117.1 does not apply when the claimant is non-disabled:

Mrs. Mosier: [W]e went over how ANSI A117.1 is titled ["][A]ccessible and [U]sable [B]uildings and [F]acilities,["] and you can verify that. I mean, I know you already know this, but just to be

- Assuming, arguendo, ANSI 117.1 is to be considered in the instant case, any deviation regarding slope in either the top of the subject ramp or at its flared sides is negligible and would not be perceptible by a pedestrian to the point of causing a

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	fair, it's right there (indicating), it's the cover. Now, the word ["]accessible["] in the title is not just for disabled people, it's for everyone, do you agree with that?
Mr. Campbell:	Let's look at that. If we look at page one, paragraph one, and 1.1, the purpose and application. 1.1's purpose. **<u>["]The specifications in this standard make buildings and facilities accessible to and useable by people with such disabilities as the inability to walk, difficulty walking, reliance on walking aides, blindness, visual impairment, deafness and hearing impairment, incoordination, reaching and manipulation, disabilities, lack of stamina, difficulty interpreting and reacting to sensory information and extremes of physical size based only upon adult dimensions.["]</u>** My understanding and we've adjusted over the years, i[s] that the purpose of this code is to address those individuals with various disabilities—
Mrs. Mosier:	Okay.
Mr. Campbell:	—and impairments whether it be a mobility impairment, sensor impairment, whatever it may be.

(R. 117-18) (emphasis added); <u>see also</u> (R. 121, 167-68).

fall.[5] Moreover, with regard to transition from curb to ramp, ANSI 117.1 does not include requirements for striping or markings on a curb ramp.[6]

- The subject curb access ramp was safe for the general non-disabled population and comports with the 1997 Standard Building Code as it relates to non-disabled persons such as Appellant.[7]

- The subject accident occurred immediately after Appellant stepped off the curb and onto the curb access ramp, which was within the applicable requirements of the Standard Building Code, the governing code as it pertains to Appellant. Appellant was not walking on the curb access ramp at the time of her fall.[8]

- The proximate cause of Appellant's fall was likely a result of her simply stumbling and failing to recover due to her choice of footwear, which were high heels with a thin strap.[9]

After a period of extended discovery, Respondents moved for summary judgment upon two grounds: (1) Appellant could not prove the existence of applicable/colorable/recognized duty of care, which was breached by

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[5] (R. 106-07, 160, 163).

[6] (R. 107, 130, 181-82).

[7] (R. 139-41, 142, 196).

[8] (R. 205).

[9] (R. 107, 226-29).

Respondents; and (2) the absence of competent expert testimony from Appellant regarding proximate cause.

Following oral argument and a review of the memoranda and other supporting documentation respectively submitted by the parties, the Circuit Court granted summary judgment to Respondents, holding Appellant could not prove the existence of a colorable duty of care, which was breached by Respondents.

Subsequent to the Circuit Court's denial of Appellant's Rule 59(e), SCRCP, motion to alter or amend, Appellant served and filed her notice of appeal of the Circuit Court's judgments in the instant case.

STATEMENT OF THE CASE

The instant case is a premises liability matter involving alleged static defect and sounds in negligence.

Appellant filed this action on April 16, 2012, in Sumter County, alleging she sustained injuries from a fall while exiting Respondents' Outback's Sumter location. Plaintiff alleges that due to an improperly sloped curb access ramp, she fell and injured her back, right buttock, right hip, left ribs, pelvis, and other body parts. (R. 29). She seeks both actual and punitive damages.

After a period of extended discovery, Respondents moved for summary judgment upon two grounds: (1) Appellant could not prove the existence of applicable/colorable/recognized duty of care, which was breached by Respondents; and (2) the absence of competent expert testimony from Appellant regarding proximate cause.

The Circuit Court heard summary judgment on April 7, 2013, in Sumter. Upon consideration of the parties' respective memoranda and supporting materials, as well as the parties' respective arguments, the Circuit Court granted summary judgment to Respondents in the instant case upon a

finding there was no recognized legal duty to Appellant, which was breached by Respondents.

The Court advised the parties of its decision to grant summary judgment by email on May 15, 2014, with instruction to counsel to Respondents to prepare a proposed order reflecting this disposition. Counsel did as instructed and drafted an order, which counsel submitted to chambers for review, edit, and execution. The final order, as reviewed and executed by the Circuit Court, was filed by the Sumter County Clerk of Court on May 28, 2014.

By filing dated May 27, 2014, which was after the Court's announcement of its disposition on May 15, 2014, but before entry of the Order on May 28, 2014, counsel for Appellant filed a Rule 56(f), SCRCP, affidavit and an accompanying brief in support of the desired relief. Respondents' counsel objected to the filing of the Rule 56(f) affidavit after both the April 7, 2014 argument in the case and the May 15, 2014 announcement of disposition. Thereafter, on June 9, 2014, Plaintiff timely filed a Rule 59(e), SCRCP, motion to alter or amend, which is essentially

premised upon the same grounds as enunciated within her Rule 56(f) affidavit and memorandum.[10]

In her Rule 59(e), SCRCP, motion, Appellant sought relief based upon the following grounds:

- Appellant asserted the grant of summary judgment was premature. Specifically, Appellant averred that full discovery had not yet come to a conclusion and that summary judgment should not have been granted due to Appellant continuing to, inter alia, investigate the identities of Outback Steakhouse employees specifically on duty at the time of Appellant's purported fall on June 7, 2009, pursue obtaining a copy of an Outback employee orientation video, and pursue copies of incident reports from other premises-related events at the subject restaurant. As well, Appellant represented she sought to take the depositions of additional Outback employees concerning their possession of any knowledge concerning similar falls on the subject "built up curb ramp";[11]

- As an alternative argument, Appellant asserted that because the curb access ramp at issue was a condition created by Respondents or Respondents' agents, Appellant need not prove specific alleged hazards created by the ramp. In other words, the condition—which Appellant averred was "dangerous"–was created by Respondents and therefore Appellant need not demonstrate notice or knowledge of specific hazard that allegedly caused Appellant's injury.[12]

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[10] Due to Appellant's timely Rule 59, SCRCP motion, the Circuit Court did not address the issue of timeliness of Appellant's Rule 56(f) filing.

[11] (R. 276-78).

[12] (R. 277-78).

In response, the Circuit Court ruled this case was ripe for summary judgment on April 7, 2014, due to the fact that Respondents' pursuit of relief was premised largely on the absence of recognized legal duty to Appellant. Citing Nelson v. Piggly Wiggly Central, Inc., 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010), the Circuit Court held the degree of discovery conducted to the point of argument had afforded the parties the ability to fully argue the salient points of the existence of duty and breach in this matter.

Further, in response to Appellant's "creation of the condition argument," the Circuit Court noted that by their own admission at argument in this case, Respondents acknowledged they or their agents installed the subject ramp. Accordingly, the Circuit Court adopted this admission as finding of fact for purposes of its analysis. Irrespective of this determination, the fact that Respondents or their agents installed the ramp at issue did not affect the issue of recognized legal duty in the negligence analysis. That is because—as previously held by the Circuit Court in its May 28, 2014 order granting summary judgment to Respondents–Appellant could not demonstrate the subject curb access ramp was in fact "dangerous" or

"defective" applying a recognized standard of care for the non-disabled population.

As evinced within the Circuit Court's order addressing Appellant's Rule 59(e), SCRCP, motion, the ruling concerning summary judgment did not change. Accordingly, the Circuit Court held summary judgment was warranted to Respondents in the case sub judice.

This appeal follows.

STANDARD OF REVIEW

In Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001), aff'd, 354 S.C. 161, 580 S.E.2d 440 (2003), our Court of Appeals articulated the proper standard of review concerning summary judgment in a premises liability case:

> Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); see also Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998) (a trial court should grant motion for summary judgment when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as matter of law). In determining whether any triable issue of fact exists so as to preclude summary judgment, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).

Id. at 200-01, 544 S.E.2d at 41; see also Glenn v. School Dist. No. Five of Anderson County, 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988) (stating during a review of a grant of summary judgment on appeal, the appellate court's focus is driven by its reading of the complaint).

Our appellate courts have further stated that when a plaintiff is faced with a motion for summary judgment, the plaintiff cannot defeat the motion by relying upon the mere allegations of her complaint, but must disclose the facts the plaintiff intends to rely on by affidavit or other proof. Shupe v. Settle, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994); Dyer v. Moss, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985). A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment. Germann v. New York Life Ins. Co., 286 S.C. 34, 331 S.E.2d 385 (Ct. App. 1985). Where the plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the Circuit Court is required under Rule 56, SCRCP, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law. Humana Hosp.-Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991) (citing Garrett v. Reese, 262 S.C. 327, 329, 204 S.E.2d 432, 433 (1974)).

LAW/ANALYSIS

I. Premises Liability Premised Upon a Negligence-Based Theory in South Carolina

Appellant's premises liability claim sounds in negligence. In South Carolina, to establish a cause of action for negligence, the plaintiff must prove the following four elements:

(1) a duty of care owed by Respondent to Appellant;

(2) breach of that duty by a negligent act or omission;[13]

(3) resulting in damages to the Appellant; and

(4) damages proximately resulted from the breach of duty.

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[13] While the instant case is a premises liability case, which in some quarters of the Bar is seen as a routine or unremarkable type of dispute, Respondents nevertheless aver establishing the applicable standard of care governing the construction and maintenance of a curb access ramp in the commercial context is a matter outside the ken of the ordinary juror and requires expert opinion. See, e.g., Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 80, 735 S.E.2d 650, 659 (2012) ("In some design defect cases, expert testimony is required to make this showing because the claims are too complex to be within the ken of the ordinary lay juror.").

Respondents further maintain the same can be argued as it pertains to establishing the proximate cause of Appellant's purported fall due to the sciences of biomechanics and human factors being injected into the dispute. See, e.g., Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010) ("[E]xpert testimony is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge."). See infra Resp. Br. 25-28.

E.g., Fettler v. Gentner, 396 S.C. 461, 466-67, 722 S.E.2d 26, 29 (Ct. App. 2012) (quoting Thomasko v. Poole, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002)); see also Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000) (emphasis added).

Further, to recover damages for injuries caused by an allegedly dangerous or defective condition on a defendant landowner's premises, the plaintiff must demonstrate either:

> (1) the injury was caused by a specific act of the defendant landowner that created the dangerous condition; or
>
> (2) the defendant landowner had actual or constructive knowledge of the dangerous condition and failed to remedy it.

Anderson v. Racetrac Petroleum, Inc., 296 S.C. 204, 205, 371 S.E.2d 530, 531 (1988), cited in Pringle v. SLR, Inc. of Summerton, 382 S.C. 397, 404, 675 S.E.2d 783, 787 (Ct. App. 2009).

In the case sub judice, Respondents' motion for summary judgment was premised mainly on the argument that Appellant could not prove the existence of applicable/colorable/recognized duty of care, which was breached. Specifically, Respondents maintained Appellant could not satisfy the well-stated negligence analysis due to the fact that, inter alia, Appellant

could not demonstrate the subject curb access ramp was in fact "dangerous" or "defective" via recognized standards governing the dispute. Additionally, Respondents asserted Appellant could not establish the purported condition of the subject ramp was the proximate cause of her fall and subsequent alleged injuries.

The Circuit Court ultimately granted summary judgment upon the finding that Appellant had not demonstrated the existence of an applicable duty of care which was breached by Respondents. The Circuit Court did not reach the matter of proximate cause.

II. Application of Well-Established Premises Liability Law to the Instant Case

A. International Property Maintenance Code Does Not Apply

Based on Appellant's averments found within her pleadings, a primary issue extant in this dispute is whether the International Property Maintenance Code applies in the instant case as a basis for recovery. Stated succinctly, this particular code does not apply.

South Carolina considers the International Property Maintenance Code only to be a "permissive code." Kauffman v. Park Place Hospitality Grp., CIV.A. 2:09-1399-MBS, 2011 WL 1335832 (D.S.C. Apr. 7, 2011) aff'd, 468

F. App'x 220 (4th Cir. 2012). See also South Carolina Building Codes Council, Building Codes in Effect for South Carolina (May 28, 2015), http://www.llr.state.sc.us/pol/bcc/index.asp?file=GENERAL_CodesInEffect.htm (citing S.C. Code Ann. § 6-9-60, as amended, which states "permissive codes" may be used as needed by a local jurisdiction, but the codes must first be adopted by ordinance before enforcement can begin. The permissive codes are the . . . 2003 International Property Maintenance Code . . . .").[14]

In the instant case, Respondents are unaware of the International Property Maintenance Code being adopted by ordinance as "mandatory" by either the City of Sumter or County of Sumter for purposes of enforcement. Accordingly, based on Appellant's express allegations found within her amended complaint concerning duty and breach based upon alleged violation of the International Property Maintenance Code, Respondents asseverate that

[14] In Kauffman, a South Carolina dispute in federal district court, a hotel guest brought a premises liability action against a Low Country hotel, alleging negligence related to injuries the guest sustained from a fall at a hotel. An issue in the case was whether the 2003 International Property Maintenance Code applied as a governing standard of care. As evinced within the decision, the district court held that it did not. The court granted summary judgment to the hotel based on this holding, as well as other reasons.

no such duty exists. Thus, summary judgment was warranted in the instant case.

B. ANSI Does Not Apply to the Appellant in the Case at Bar

The American National Standards Institute is a private non-profit organization that oversees the development of voluntary consensus standards for products, services, processes, systems, and personnel in the United States. The organization promulgates numerous standards in our society, including those found at ANSI 117.1, which is titled as "Accessible and Useable Buildings and Facilities." This Circuit Court disagreed with Appellant's analysis concerning the applicability of ANSI 117.1 standards to Appellant, a non-disabled person at the time of the fall.[15]

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[15] Respondents maintain "disability" and being "disabled" is a legal term of art and is not a status that can be unilaterally applied by a claimant seeking recovery.

Appellant had bilateral knee replacement surgery in 1992 and 2000. However, contrary to Appellant's arguments to both the Circuit Court and this tribunal, having these procedures alone did not make Appellant "disabled" for purposes of this analysis. Appellant never testified in her deposition or otherwise that the surgery alone rendered her "disabled" nor did she make any such representation in her complaint or a pertinent third party such as the South Carolina Department of Motor Vehicles or the Social Security Administration. Nor did Appellant testify that she possessed any difficulty interpreting and reacting to sensory information. Moreover, Appellant did not produce any affidavits or other sworn testimony or other

To the extent that Appellant relies upon ANSI 117.1 as a basis for recovery in her case, such pursuit lacks legal efficacy. Although it is true that ANSI 117.1, which relates to exterior accessible routes for people with physical disabilities, may have been adopted or referenced in various building codes, Respondents maintain that alleged violations of ANSI standards alone may not serve as predicates for a private cause of action in South Carolina. Cf. Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001), aff'd, 354 S.C. 161, 580 S.E.2d 440 (2003). Moreover, and perhaps most important to the analysis in the instant case, there is **no** competent evidence in the instant case that establishes Appellant was disabled or possessed a mobility disability (as defined by the Americans with Disabilities Act) at the time of the subject fall. Accordingly, even if ANSI 117.1 can serve as a basis for a private cause of action in South Carolina, Appellant is not a member of the class protected under this regulation and is thus precluded from employing the same as a basis for her prosecution against Respondents.

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documentation from a qualified expert demonstrating that she did in fact possess any "disability," as defined by the Americans with Disabilities Act, on the date of her fall at the Outback restaurant.

Respondents' argument concerning the lack of applicability of ANSI as a standard of care for non-disabled persons is supported by additional case law.

In Wisner v. United States, 154 F.R.D. 39 (N.D.N.Y. 1994), the plaintiff slipped and fell on a sidewalk constructed by the United States outside a post office building. The plaintiff contended, inter alia, the sidewalk was negligently designed and constructed by allowing too severe a slope to exist without the placement of handrails. In opposition to a motion for summary judgment, the plaintiff apparently submitted an expert report to the effect the sidewalk was installed at a slope greater than the standard recommended by the American National Standards Institute without the addition of handrails. The defendant argued the standards advanced by the plaintiff related to the "accessibility" of a building to disabled individuals, not to the safety of persons in general. Id. at 15-16. Thus, the defendant argued the plaintiff—not suffering from a disability–could not benefit from the standards advanced in support of her claim. The magistrate judge adopted the defendant's argument, stating as follows:

> [R]ather than delve into the Respondent's successes in meeting these standards, the court finds these standards not applicable to the case at hand. **The standards exist to ensure accessibility**

for the handicapped. While such standards necessarily take into account the safety of certain construction, the standards protect the handicapped, and cannot be transformed into a sword for another not subject to its protection.

Id. at 17 (emphasis added); see also Miller v. New York City Hous. Auth., 918 N.Y.S.2d 399 (N.Y. App. Div. 2010) ("Although it is true that ANSI 117.1–1986, relating to exterior accessible routes for people with physical disabilities, may have been adopted in section 27–292.4 of the Building Code, the court observes that ANSI standards may not serve as predicates for General Municipal Law x 205(e) liability, as they are not 'statutes, ordinances or regulations'" (Rosabella v. Metropolitan Tr. Auth., 23 AD3d 365, 366 [2005]). Moreover, even if ANSI 117.1–1986 did apply, **Plaintiff is not a member of the class protected under the law, and the court has already held in its Prior Order that Admin. Code x 27–292.4 is inapplicable to Plaintiff.** (emphasis added))

The logic of, inter alia, the magistrate judge in Wisner has equal application to the facts of the instant case. Appellant, not being a member of the protected class, should not be able to utilize the standards of ANSI for purposes of prosecuting her claim.

C. 2006 International Building Code Does Not Apply in the Instant Case

To the extent Appellant relies upon the 2006 International Building Code as a basis for relief, Respondents assert Appellant is in error. Respondents maintain the 2006 International Building Code does not apply because the subject ramp was an existing structure that was not altered during the time between its original installation in 1999[16] and the date of the incident involving Appellant.[17] Section 101.2 of the 2006 International Building

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[16] See Sumter County Plat Book 99 at p. 322; see also (R. 431).

[17] In his deposition as the Rule 30(b)(6) deponent for Defendants, managing partner Rich Adams was asked whether the curb access ramp installation to the location. He answered in the affirmative:

> Mrs. McPherson: Do you know when these ramps were put in, and when I say "these ramps," I'm talking about the three ramps from the front parking lot up onto the sidewalk.
>
> Mr. Adams: To the best of my knowledge, they are originals, so I'm guessing the same month [of construction of the building, June 1999], but those are the original ramps.

(R. 431).

When asked if there had been any alteration (in size or shape) to the subject ramps since their original installation, Adams answered in the negative:

Code demonstrates the 2006 International Building Code does not apply to existing structures unless alterations are performed. Further, the 2006 International Building Code is not recognized as mandatory for purposes of enforcement in South Carolina. See also South Carolina Building Codes Council, Building Codes in Effect for South Carolina (May 28, 2015), http://www.llr.state.sc.us/pol/bcc/index.asp?file=GENERAL_CodesInEffect.htm (stating the last version of the International Building Code considered "mandatory" for new construction is the 2003 version of the code).[18] Accordingly, Respondents assert the 2006 International Building Code does not govern disposition of the instant dispute.

Mrs. McPherson:	Are you aware of any work that was done to [the ramps] once y'all opened doors for business in June of 1999 until the time you came in September of '07.
Mr. Adams:	No, ma'am.

(R. 432-33).

Adams further testified that nothing structurally had been done to the subject ramp during his tenure as managing partner at the location. (R. 433).

[18] See (R. 427-29), supra.

III. Absence of Evidence Demonstrating Violation of Any Recognized Standard Was Proximate Cause of Plaintiff's Fall

Respondents raised two grounds in support of the grant of summary judgment: (1) absence of colorable duty of law, which was breached; and (2) absence of evidence demonstrating proximate cause. The Circuit Court granted summary judgment as to the duty issue; therefore, Respondents prevailed. Although the Circuit Court did not reach the proximate cause issue in its order, Respondents are not precluded from raising this argument as an additional sustaining ground: "The appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record." Rule 220(c), SCACR; see also I'On v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (holding a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court"). Thus, this Court can, at its discretion, review Respondents' proximate cause argument, and if it finds it is proper and fair to do so, rely on the additional argument to affirm the Circuit Court's judgment. See id.

Applying the above principles, assuming, arguendo, the standards that Appellant asserts govern in the case actually do (in whole or in part), our law

is clear that violation of statute or regulation (or in this case, standard) is not conclusive of liability. See, e.g., Whitlaw v. Kroger Co., 306 S.C. 51, 410 S.E.2d 251 (1991); Ralph King Anderson, Jr., South Carolina Requests to Charge-Civil, 2002, § 6-2. A plaintiff must still show the violation was the proximate cause of the injury. Id. In other words, to recover damages, the plaintiff must prove a causal connection between the defendant's purported negligence and the plaintiff's injury.

In the instant case, Appellant maintained that Respondents' curb access ramp was constructed and maintained in violation of, inter alia, ANSI 117.1. Appellant elicited expert testimony stating the same, which is clear recognition by Appellant that matters concerning construction and maintenance of curb access ramps in the commercial context is outside the ken of the ordinary juror. The sciences of human factors and biomechanics and establishing whether deviation from a standard for a walking surface would cause a non-disabled person to fall is another subject matter necessitating expert witness testimony.[19] See, e.g., Holland v. Morbark, Inc., 407 S.C. 227, 754 S.E.2d 714 (Ct. App. 2014).

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[19] See footnotes 2 & 15 , supra.

In the case at bar, Respondents' liability expert, Alan O. Campbell, an expert in, inter alia, human factors and biomechanics provided testimony in his deposition, stating, assuming, arguendo, ANSI 117.1 is to be considered in the instant case, any deviation in standard regarding slope in either the top of the subject ramp or at its flared sides was negligible and would not be perceptible by a non-disabled pedestrian to the point of causing a fall.[20] Appellant, however, did not elicit competent sworn testimony from any expert stating differently. While Dr. Durig's affidavit testimony reveals an averment that "[t]he deviations from the ANSI A117.1 standard requirements make the subject curb ramp a defective and hazardous walkway and is considered a contributing factor Ms. Jackson's fall," Dr. Durig's affidavit is defective on its face due to it lacking any testimony demonstrating his competency to render opinions concerning, inter alia, human factors/biomechanical science. See Rule 56(e), SCRCP ("Supporting and opposing affidavits . . . shall show affirmatively that the affiant is competent to testify to the matters stated."); cf. 27 S.C. Jur. Medical & Health Professionals § 34 ("Expert testimony relied upon to establish proximate

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[20] (R. 106-07, 160, 163).

cause must include a statement of professional opinion that the injuries complained of most probably resulted from the alleged negligence of the defendant. This so called 'most probable' rule is needed because of the highly technical nature of malpractice actions." (footnotes omitted)).

The absence of competent contra expert testimony concerning whether violation of standard being the proximate cause of Plaintiff's alleged fall precludes Appellant from escaping from disposition at the summary judgment stage. Thus, summary judgment was warranted upon the additional sustaining ground that there was an absence of a qualified opinion illustrating a tenable causal connection between Respondents' purported negligence and Appellants' injury.

CONCLUSION

For the foregoing reasons, Respondents aver Appellant has not satisfied the negligence analysis in this static defect premises liability suit. Based on this failure of proof, Respondents respectfully request this Court affirm the previous grant of summary judgment in their favor in instant case.

Respectfully submitted,

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June 9, 2015

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LLC, PRIVATE RESTAURANT PROPERTIES, LLC, PRIVATE RESTAURANT MASTER LESSEE, LLC, EACH D/B/A OUTBACK STEAKHOUSE

Columbia, South Carolina
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APPEAL FROM SUMTER COUNTY
W. Jeffrey Young, Circuit Court Judge

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Case No. 2014-001861

Rebecca Jackson, ... Appellant.

v.

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

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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Respectfully submitted,

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PROOF OF SERVICE

Counsel for Respondents certifies that he has served Respondents' Final Brief on all parties by depositing a copy of it in the United States Mail, postage prepaid, on June 9, 2015, addressed to the following attorneys of record:

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