THE STATE OF SOUTH CAROLINA
In the 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.

RESPONDENTS'
PETITION FOR REHEARING (PANEL)
AND PETITION FOR REHEARING EN BANC

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

Pursuant to Rules 219, 221, and 240 of the South Carolina Appellate Court Rules, Respondents 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, respectfully move this Court for rehearing in the instant matter en banc, or in the alternative, by the panel. Respondents maintain the instant case involves a question of exceptional importance with regard to both the law of premises liability in South Carolina and the burden of the non-moving party pursuant to Rule 56, SCRCP. Respondents additionally aver that rehearing en banc is necessary to secure or maintain uniformity of its prior decisions regarding similar disputes. The opinion of this Court, which reversed the decision of the Circuit Court, and is the catalyst for this petition, was filed on September 14, 2016. See Exhibit A.

FACTS/PROCEDURAL BACKGROUND

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

> 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**.

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

(R. 36-37) (emphasis added).

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

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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 be considered by this Court due to his affidavit not establishing any expertise on his part concerning competency to render opinions concerning human 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.

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

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

- 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.

- 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.

- 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.

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 premised upon alleged violation

of ANSI 117.1, which was breached by 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, inter alia, Appellant could not prove the existence of a colorable duty of care premised upon alleged violation of ANSI 117.1, which was breached by Respondents. See Exhibit B.

In the order denying Appellant's Rule 59(e), SCRCP, motion to alter or amend, the Circuit Court specifically noted that Campbell was "the only human factors expert that has provided competent sworn testimony containing an opinion in the instant case." (R. 5).

Subsequent to the Circuit Court's denial of Appellant's Rule 59(e), SCRCP, motion to alter or amend,[3] Appellant served and filed her notice of appeal of the Circuit Court's judgments in the instant case.

Appellant appealed to this tribunal. Following briefing, a motion to strike by Respondents, and argument, in a two-paragraph opinion, this Court elected to reverse and remand the Circuit Court. See Exhibit A.

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[3] See Exhibit C.

LAW/ANALYSIS

In its disposition of the case at bar, the Circuit Court held that: (1) the premises safety standard that was actually pled, which was alleged to have been violated (International Property Maintenance Code), did not apply; and (2) ANSI 117.1 also did not apply as a governing standard. Because the determination that Appellant failed to establish an applicable standard governing Respondent's duty owed to her, the Circuit Court did not address whether any alleged breach of duty proximately caused Appellant's injuries and damages.

On appeal, this Court reversed the Circuit Court, finding Appellant presented evidence the ramp deviated from industry standards, as articulate in Appellant's expert Ruston Hunt's report and by Respondents' expert's own admission.

However, respectfully, this Court erred in reversing the Circuit Court's order granting summary judgment in favor of Respondents. Respondents aver: (1) Appellant failed to articulate a recognized standard of care breached by Respondent; (2) the Court inadvertently considered inadmissible hearsay evidence; and (3) Respondents' expert provided the only competent sworn

testimony establishing any alleged breach of duty was negligible, and did not proximately cause Appellant's injuries and damages.

I. Duty of Care Requires Articulation of a Recognized Standard

Respondents' motion for summary judgment was not premised solely on the argument that Respondents did not owe a duty to Plaintiff, but rather Respondents maintain 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.

Indeed, in its opinion, this Court cited Elledge v. Richland/Lexington Sch. Dist. Five, 352 S.C. 179, 186, 573 S.E.2d 789, 793 (2002) for the proposition that, "the general rule is that evidence of industry safety standards is relevant to establishing the standard of care in a negligence case." Opinion at 2. However, notwithstanding the above-stated rule, Appellant has failed to establish any cognizable standard applicable in this case.

In her Amended Complaint, Appellant pled an alleged violation of the International Property Maintenance Code. (Am. Compl. ¶ 17). However, 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). "Permissive Codes" may be used as needed by a local jurisdiction, but the codes must first be adopted by ordinance before enforcement can begin. See http://www.llr.state.sc.us/pol/bcc/index.asp?file =GENERAL_CodesInEffect.htm (last visited January 2, 2015). However, Respondents are unaware of the International Property Maintenance Code, which is a permissive 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 no such duty exists.

Moreover, the only reputable/admissible testimony regarding applicable standards was provided by Respondents' expert, Alan. O. Campbell, who testified at his deposition that ANSI 117.1, "Accessible and Useable Buildings and Facilities," was inapplicable to Appellant, a non-

disabled person[4] at the time of the fall. (R. 107). See also Wisner v. United States, 154 F.R.D. 39 (N.D.N.Y. 1994) (magistrate judge adopting defendant's argument that plaintiff—not suffering from a disability—could not benefit from the ANSI standards advanced in support of her claim).

Furthermore, Appellant has not shown that a cognizable standard existed under the 2006 International Building Code. Section 101.2 of the 2006 International Building Code demonstrates the code does not apply to existing structures unless alterations are performed. Moreover, the 2006 International Building Code is not recognized as mandatory for purposes of enforcement in South Carolina. See

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[4] 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 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.

http://www.llr.state.sc.us/pol/bcc/index.asp?file=GENERAL_CodesInEffect.htm. (last visited January 5, 2015) (stating the last version of the International Building Code Considered "mandatory for new construction is the 2003 version of the code).

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 and the date of the incident involving Appellant. Indeed, Respondents' Rule 30(b)(6) deponent testified that to the best of his knowledge, the subject ramp is original, and was installed the same month of construction of the building in June 1999. (R. 431). He further testified that no alterations were done to the subject ramp since the original installation. (R. 432-33).

Regardless, South Carolina has not adopted the 2006 International Building Code as mandatory for purposes of enforcement. Accordingly, Respondents assert the 2006 International Building Code does not govern disposition of the instant dispute and Appellant cannot rely on the standards set forth in the code for establishing a standard of care owed to her.

Therefore, because the International Property Maintenance Code is permissive and not mandatory in South Carolina, ANSI standards do not

apply to Appellant because she is not a protected class in which the standards would apply, and the 2006 International Building Code cannot apply to the subject ramp, Appellant has failed to demonstrate a cognizable standard applicable to a duty owed by Respondent. Accordingly, the Court erred in ruling Appellant presented a scintilla of evidence to create a genuine issue of fact that Respondent breached an applicable standard of care.

II. Expert Report Did Not Satisfy Rule 56, SCRCP

A reading of this Court's opinion yields an understanding that reversal was premised in large part—if not completely–upon the unsworn report of Appellant's purported biomechanics expert, Ruston Hunt:

> Jackson's expert, Ruston Hunt, stated the cross-slope at the point where Jackson stepped exceeded the limit recommended by the Federal Highway Administration by more than 200%. Thus, even without consideration of American National Standards Institute (ANSI) A117.1, Jackson presented evidence the ramp deviated from industry standards.

Opinion at 2.

Respondents respectfully maintain the Court overlooked or misapprehended the admissibility of the purported statements of Hunt for purposes of reversal and remand.

Respondents moved for summary judgment on 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 component 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. The Circuit Court did not reach the matter of proximate cause.

In her briefing, Appellant sought this Court's consideration of Hunt's supposed statements via a written report submitted in supplemental briefing in opposition to summary judgment, as it related to both duty and proximate cause. In reading the Court's subsequent opinion, it seems clear the Court accepted Appellant's invitation and relied upon the same in arriving at a decision. Respectfully, this reliance was error.

As an initial matter, Respondents note they objected to the injection of Hunt's purported statements into the appeal via a motion to strike filed with this Court following Appellant's filing and serving of her initial reply brief,

which included arguments centered on Hunt's purported statements. See Exhibit D. This motion was denied by the single duty judge.

In her Final Brief, Appellant relied on portions of Hunt's, report in an attempt to establish a scintilla of evidence that the subject ramp deviated from industry standards. Specifically, Appellant asserted, in relying on Hunt's report, that the cross-slope of the ramp exceeds the limit recommended by the Federal Highway Administration and, therefore, was a violation of industry standards.

Initially, however, Respondents note Appellant never pled or otherwise noted in her Amended Complaint that liability was premised upon the alleged violation of standards supposedly enunciated by Federal Highway Administration. Respondents aver the failure to articulate these standards in the pleadings as a basis for demonstrating duty and breach at the summary judgment opposition stage precludes Appellant from now relying upon the same.

Moreover, there is no sworn testimony provided by Hunt in which the Court can consider in establishing the standard at the summary judgment stage. See Rule 56(e), SCRCP ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest

upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."); see also Hall v. Fedor, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) ("Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence."); Rule 802, SCRE ("hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute."); Hall, 349 S.C. at 175, 561 S.E.2d at 657 (holding "materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence").

Appellant has attempted to introduce unsworn expert testimony in the form of Hunt's report in an effort to present a scintilla of evidence to defeat Respondent's summary judgment motion. However, Hunt's report is hearsay testimony and, therefore, is inadmissible and must not be considered by the Court. See Rule 802, SCRE; Hall, 349 S.C. at 175, 561 S.E.2d at 657.

Indeed, Appellant had an opportunity to present to the trial court a sworn affidavit by Hunt pursuant to Rule 56(e), SCRCP, prior to the hearing. Hunt produced his report on April 2, 2014. (Exhibit E). Respondent's

motion was heard on April 7, 2014. The order granting summary judgment was signed on May 23, 2014, and filed on May 28, 2014. It was not until May 27, 2016 that Appellant filed a Rule 56(f), SCRCP, affidavit of Hunt. Arguably, at the very least, Appellant had a three day window ahead of the scheduled argument in which to produce an affidavit. Appellant's lack of timeliness in securing an affidavit now precludes her from relying on any unsworn statements contained in Hunt's report.

Moreover, the wholesale inclusion of Hunt's unsworn report violated the Appellate Court Rules regarding designation of the matter to be included in the record on appeal and the supporting case law.[5] South Carolina appellate courts may only consider those matters which are both in the record and which would be admissible in evidence.

Accordingly, Appellant's inclusion of the report, her citation to it in her appellate briefing, and the Court's apparent reliance upon it at disposition was improper. Therefore, Respondents respectfully request the Court reverse its holding via the instant petition and affirm the Circuit Court's grant of summary judgment in favor of Respondent.

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[5] Respondents also timely objected to consideration of this unsworn report at the summary judgment hearing. (Hr'g Tr. 19:8-24, Apr. 7, 2014).

III. Opinion Overlooks or Misapprehends Campbell's Testimony that Any Deviation from ANSI 117.1 Was Not a Proximate Cause of the Subject Accident

In their defense, Respondents retained Alan O. Campbell, PE, RRC, of Applied Building Sciences, Inc., a South Carolina-based premises liability and human factors expert. Campbell was disclosed as an expert and subsequently deposed. 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;[6]

- ANSI 117.1 is not applicable in the instant case as it pertains to Appellant;[7]

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

[7] (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 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?

- 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 fall.[8] Moreover, with regard to transition from curb to ramp, ANSI 117.1 does not include requirements for striping or markings on a curb ramp.[9]

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. **["]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.["]** 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); see also (R. 121, 167-68).

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

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

- 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.[10]

- 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.[11]

- 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.[12]

In its opinion, the Court stated, "Respondents' expert admitted the slope of the side flares exceeded code limits." Opinion at 2. However, Respondent's aver the Court overlooked the totality of Campbell's testimony. While Campbell testified that assuming, arguendo, the ANSI standards applied to Appellant, any deviation to **the slope was negligible and would not be perceptible by a pedestrian to the point of causing a fall**.

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

[11] (R. 205).

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

Appellant did not produce credible/admissible evidence[13] to the contrary to create a genuine issue of material fact.[14]

Accordingly, Respondent avers the Court, in failing to consider the totality of Campbell's testimony, erred in reversing the Circuit Court's Order granting summary judgment in favor of Respondents.

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[13] Insomuch as Appellant relies on Hunt's report in creating a genuine issue of material fact regarding any alleged violation of the ANSI standards, Respondent reasserts that it is improper for the Court to consider Hunt's report containing unsworn statements.

[14] Respondents acknowledge Appellant's expert Dr. Bryan Durig, provided affidavit following the April 7, 2014, summary judgment argument, which contains some testimony that could be considered human factors/biomechanical science. However, Respondent's aver Dr. Durig's opinion concerning these matters should not be considered by this Court, and arguable were not considered by the Court as Dr. Durig's opinion is never referenced in the Court's Opinion, due to his affidavit not establishing any expertise on his part concerning competency to render opinions concerning human factors/biomechanical science. See note 2 and the supporting citations contained therein.

CONCLUSION

Based on the aforementioned, Respondents respectfully request the Court grant Respondent's petition for rehearing and affirm the Circuit Court's order granting summary judgment.

Respectfully submitted

COLLINS & LACY, P.C.

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ATTORNEYS FOR RESPONDENTS

RESPONDENTS' PETITION FOR REHEARING (PANEL) AND PETITION FOR REHEARING EN BANC

Columbia, South Carolina
September 29, 2016

THE STATE OF SOUTH CAROLINA
In the 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.

PROOF OF SERVICE

Counsel for Respondents certifies that he has served Respondents' Petition for Rehearing (Panel) and Petition for Rehearing (En Banc) on all parties by depositing a copy of it in the United States Mail, postage prepaid, on September 29, 2016, addressed to the following attorneys of record:

Melissa Garcia Mosier, Esquire
L. Lisa McPherson, Esquire
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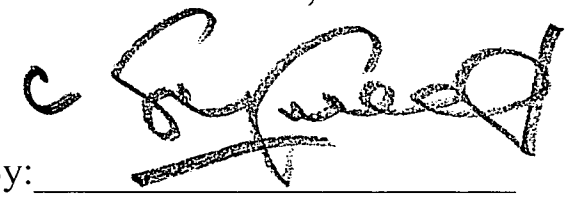
Respectfully submitted,

COLLINS & LACY, P.C.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

Appellate Case No. 2014-001861

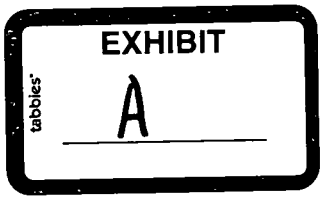
Appeal From Sumter County
W. Jeffrey Young, Circuit Court Judge

Unpublished Opinion No. 2016-UP-408
Heard May 4, 2016 – Filed September 14, 2016

REVERSED AND REMANDED

L. Lisa McPherson and Melissa Garcia Mosier, both of McWhirter Bellinger & Associates, PA, of Lexington, for Appellant.

Christian Stegmaier, Claude Townsend Prevost, III, Meghan Hazelwood Hall, and Kerri Brown Rupert, all of



Collins & Lacy, PC, of Columbia, for Respondents.

PER CURIAM: Rebecca Jackson appeals the trial court's grant of summary judgment in favor of 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.; and Private Restaurant Master Lessee, L.L.C. each d/b/a Outback Steakhouse (collectively Respondents) on her claim for negligence arising from her fall outside of the restaurant. We reverse and remand.

We agree with Jackson the trial court erred in holding Respondents did not owe her a duty of care. *See Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999) ("The court must determine, as a matter of law, whether the law recognizes a particular duty."); *Sims v. Giles*, 343 S.C. 708, 718, 541 S.E.2d 857, 863 (Ct. App. 2001) ("The owner of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty."); *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001) ("A merchant is not an insurer of the safety of his customer but owes only the duty of exercising ordinary care to keep the premises in reasonably safe condition."); *id.* ("To recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, the plaintiff must show either (1) that the injury was caused by a specific act of the respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it."); *Pringle v. SLR, Inc. of Summerton*, 382 S.C. 397, 404, 675 S.E.2d 783, 787 (Ct. App. 2009) ("The showing that a defendant created a condition that led to a plaintiff's injury is not, however, sufficient to survive a summary judgment motion unless there is evidence that in creating the condition, the defendant acted negligently."); *Elledge v. Richland/Lexington Sch. Dist. Five*, 352 S.C. 179, 186, 573 S.E.2d 789, 793 (2002) ("[T]he general rule is that evidence of industry safety standards is relevant to establishing the standard of care in a negligence case."); *id.* ("This kind of evidence is admitted not because it has 'the force of law,' but rather as 'illustrative evidence of safety practices or rules generally prevailing in the industry.'" (quoting *McComish v. DeSoi*, 200 A.2d 116, 121 (N.J. 1964))); *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."). Here, the parties agree Jackson was an invitee. Thus, Respondents owed her a duty to keep

the premises in a reasonably safe condition. Respondents' expert admitted the slope of the side flares exceeded code limits. In addition, the measurements at the top of the ramp showed the running slope exceeded the allowed slope of 12.5% for the general population. Jackson's expert, Ruston Hunt, stated the cross-slope at the point where Jackson stepped exceeded the limit recommended by the Federal Highway Administration by more than 200%. Thus, even without consideration of American National Standards Institute (ANSI) A117.1 Standards, Jackson presented evidence the ramp deviated from industry standards. Hunt noted a trip hazard existed "at the point at which the top of the curb ramp meets the sidewalk." He opined, "In Mrs. Jackson's situation, the unexpected step hazard, even if it was only one or two inches, would have been further exacerbated by the slope of the side of the ramp." We find Jackson presented at least a scintilla of evidence the curb ramp upon which she fell was a dangerous condition. Accordingly, we hold the trial court erred in granting Respondents summary judgment on Jackson's negligence claim.[1]

REVERSED AND REMANDED.

HUFF, KONDUROS, and GEATHERS, JJ., concur.

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[1]We decline to address Respondents' argument concerning proximate cause. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("It is within the appellate court's discretion whether to address any additional sustaining grounds."); *id.* ("An appellate court may not rely on Rule 220(c), SCACR, . . . when the court believes it would be unwise or unjust to do so in a particular case.").

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER) THIRD JUDICIAL CIRCUIT

Rebecca Jackson,) CIVIL ACTION NUMBER: 2012-CP-43-707

Plaintiff,)

vs.)

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,)

Defendants.)

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2014 MAY 28 PM 1:10
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

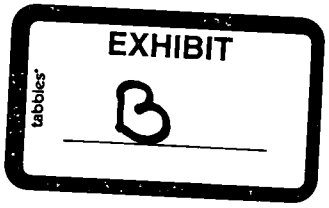
ORDER GRANTING SUMMARY JUDGMENT

CERTIFIED TRUE COPY
OF ORIGINAL FILED
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendants 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 moved this Honorable Court for an order granting them summary judgment in the above-referenced case. Based on a review and analysis of the pleadings, the parties' respective memoranda and supporting materials, as well as the parties' respective arguments to the Court on April 7, 2013, in Sumter, this Court grants summary judgment to Defendants in the instant case.

FACTS/PROCEDURAL BACKGROUND

The instant case is a premises liability matter involving alleged static defect and sounds in negligence. Plaintiff Rebecca Jackson maintains that on or about 1:30 p.m. on June 7, 2009, as she and her husband Wayne Jackson 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." {Amended Complaint, ¶ 11}. Plaintiff alleges Defendants, the owner and operator of the subject Outback Steakhouse, had actual or constructive notice of a dangerous condition created by the curb access ramp and/or created a dangerous condition. {Amended Complaint, ¶ 14 & 16}.

Review of the pleadings reveals Plaintiff's dangerous condition theory is premised primarily upon violation of industry standard. Specifically, Plaintiff pled:

> 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, willful 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.
>
> . . . .
>
> p. In failing to comply with applicable building, health, and/or safety codes or other industry standards applicable to handicap access ramps.

{Amended Complaint, ¶ 17}

[1] Also identified as a "handicap ramp" and "handicap access ramp[]" by Plaintiff in her Amended Complaint. See, e.g., Paragraph 17(k) & (p).

The parties have conducted extensive discovery, including Plaintiff deposing Defendant's premises liability and human factors expert,[2] Alan O. Campbell, PE, RRC, of Applied Building Sciences, Inc. At his deposition, Campbell rendered numerous opinions under oath, including:

- Plaintiff 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 Plaintiff, a non-disabled person;[4]

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[2] Campbell is the only human factors expert that has provided competent sworn testimony containing an opinion in the instant case. Deposition of Alan Campbell, p. 9, ll. 1-6; p. 112, ll. 19-25 - p. 113. ll. 1-14; p. 141, ll. 17-25 – p. 143, ll. 1-5; p. 143, ll. 16-25 – p. 144, ll. 1-4.

[3] Deposition of Alan Campbell, p. 22, ll. 5-11; p. 52, ll. 1-25; p. 54. ll. 1-21; p. 57, ll. 3-10.

[4] Id. at p. 22, ll. 5-11. Also, Campbell quoted 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 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. **["]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.["]** 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, sensory impairment, whatever it may be.

- Assuming, arguendo, ANSI 117.1 is to be considered in the instant case, from a human factors/biomechanical standpoint, any deviation in standard regarding slope in either the top of the subject ramp or at its flared sides is negligible and would not be perceptible by a non-disabled pedestrian to the point of causing a 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 Plaintiff.[7]

- The subject accident occurred immediately after Plaintiff 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 Plaintiff. Plaintiff was not walking on the curb access ramp at the time of her fall.[8]

- The proximate cause of Plaintiff'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 thin strap.[9]

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

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Id. at p. 32, ll. 25-p. 34, ll. 1-5 (emphasis added).

See also id. at p. 36, ll. 5-11; p. 81, ll. 25-p. 82, ll. 1-12.

[5] Id. at p. 21, ll. 20-25-p. 22, ll. 1-2; p. 75, ll. 1-25-p. 78, ll. 1-16.

[6] Id. at p. 22, ll. 5-11; p. 45, ll. 1-4; p. 96, ll. 20-25-p. 97, ll. 1-8.

[7] Id. at p. 54, ll. 8-25-p. 56, ll. 1-11; p. 57, ll. 7-10; p. 111, ll. 17-21.

[8] Id. at p. 120, ll. 9-17.

[9] Id. at p. 22, ll. 18-23; p. 141, ll. 17-25-p. 144, ll. 1-13.

> 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 defendant's 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 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

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

(1) a duty of care owed by defendant to plaintiff;

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

(3) resulting in damages to the plaintiff; and

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

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).

Further, to recover damages for injuries caused by an allegedly dangerous or defective condition on a defendant's premises, a plaintiff must show 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, Defendants' motion for summary judgment is based mainly on the argument that Plaintiff cannot prove elements one (existence of applicable/colorable/recognized duty of care) and two (breach). Specifically, Defendants maintain Plaintiff cannot satisfy the well-stated negligence analysis due to the fact that, inter alia, Plaintiff cannot demonstrate the subject curb access ramp was in fact "dangerous" or "defective" applying a recognized standard of care for the non-disabled population. Additionally, Defendants assert Plaintiff cannot

establish the condition of the subject ramp was the proximate cause of her fall and subsequent alleged injuries. 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.

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

A. International Property Maintenance Code Does Not Apply

Based on Plaintiff's allegations found within her pleadings, an 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 http://www.llr.state.sc.us/pol/bcc/index.asp?file=GENERAL_CodesInEffect.htm (last visited April 4, 2014) (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 ....").[10] In the instant case, the Court is 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 Plaintiff's express

[10] 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.

allegations found within her amended complaint concerning duty and breach based upon alleged violation of the International Property Maintenance Code, no such legally-mandated duty exists. Thus, summary judgment is warranted in the instant case as to these allegations.

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

In the alternative, while not specifically pled, Plaintiff developed a theory during the litigation of the case that Defendants' curb access ramp was constructed and maintained in violation of ANSI 117.1 and that this violation is a proximate cause of Plaintiff's alleged damages. This Court disagrees with Plaintiff's analysis concerning the applicability of ANSI 117.1 standards to Plaintiff, a non-disabled person at the time of the fall.[11]

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."

To the extent that Plaintiff relies on 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, the alleged violations of ANSI standards alone may not serve as

[11] Plaintiff had bilateral knee replacement surgery in 1992 and 2000. However, contrary to Plaintiff's arguments, having these procedures alone does not make Plaintiff disabled for purposes of this analysis. Plaintiff never testified in her deposition or elsewhere that the surgery alone rendered her disabled nor did she make any such representation in her complaint or to a pertinent third party such as the South Carolina Department of Motor Vehicles or the Social Security Administration. Nor has Plaintiff testified she possessed any difficulty interpreting and reacting to sensory information. Moreover, Plaintiff did not produce any affidavits or other sworn testimony or other documentation from a qualified expert demonstrating that she did in fact possess any mobility or sensory-related disability, as defined by the Americans with Disabilities Act, on the date of her fall at the Outback Steakhouse restaurant.

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 Plaintiff was disabled or possessed a disability (as defined by the Americans with Disabilities Act) at the time of the subject fall. Accordingly, even if violation of ANSI 117.1 can serve as a basis for a private cause of action in South Carolina, Plaintiff 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 Defendants.

This Court's holding concerning the lack of applicability of ANSI as a standard of care for non-disabled persons is supported by 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 asserted the plaintiff—not suffering from a disability–could not prosecute her claim based on the alleged violation of these standards. The magistrate judge adopted the defendant's argument, stating as follows:

> [R]ather than delve into the defendant'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., 29 Misc. 3d 1214(A), 918 N.Y.S.2d 399 (Sup. Ct. 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. Plaintiff, not being a member of the protected class, is unable to utilize the standards of ANSI for purposes of prosecuting her claim as a non-disabled person at the time of her fall.

CONCLUSION

A plaintiff prosecuting a negligence claim must demonstrate: (1) the defendants owed her a duty of care; (2) the defendants breached that duty by a negligent act or omission; and (3) she suffered damage as a proximate result of that breach. Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000).

First, the court must determine, as a matter of law, whether the law recognizes a particular duty. Moore v. Weinberg, 373 S.C. 209, 221, 644 S.E.2d 740, 746 (Ct. App. 2007). If there is no duty, the defendant is entitled to a judgment as a matter of law. Id. "Generally, duty is defined as the obligation to conform to a particular standard of conduct toward another."

Id. (citations omitted). A "standard" is "a model accepted as correct by custom, consent, or authority." Black's Law Dictionary 1412 (7th ed.1999). If the plaintiff fails to prove the defendants owed her a legal duty of care, she fails to prove actionable negligence. Doe v. Greenville County Sch. Dist., 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007); Nelson v. Piggly Wiggly Cent., Inc., 390 S.C. 382, 391, 701 S.E.2d 776, 780-81 (Ct. App. 2010).

In the case at bar, Plaintiff has failed to prove the existence of a legal duty of care to her premised upon the standards she pled (International Property Maintenance Code) and did not plead (ANSI). Plaintiff was not disabled at the time of the subject accident. The Court therefore finds ANSI 117.1 not applicable to the case at hand. The standards created by ANSI 117.1 exist to ensure accessibility for the disabled. While such standards necessarily take into account the safety of certain construction, the standards protect the disabled, and cannot be transformed into a sword for another not subject to its protection. Accordingly, summary judgment is warranted in the instant case.

IT IS ORDERED that summary judgment be granted to Defendants.

AND IT IS SO ORDERED.

THE HONORABLE W. JEFFREY YOUNG
Presiding Judge of the Third Judicial Circuit

Sumter, South Carolina
May 23, 2014

RECORDED
2014 AUG -5 AM 10: 36
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, SC

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER)	THIRD JUDICIAL CIRCUIT
Rebecca Jackson,)	CIVIL ACTION NUMBER: 2012-CP-43-707
Plaintiff,)	
vs.)	**ORDER ADDRESSING PLAINTIFF'S RULE 59(e), SCRCP MOTION**
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,)	
Defendants.)	

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Sandra C. Dickerson
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendants 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 moved this Court for an order granting them summary judgment in the above-referenced case. Based on a review and analysis of the pleadings, the parties' respective memoranda and supporting materials, as well as the parties' respective arguments to the Court on April 7, 2013, in Sumter, this Court granted summary judgment to Defendants in the instant case.

The Court advised the parties of its decision to grant summary judgment by email on May 15, 2014, with instruction to counsel to Defendants 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.[1] This Order, as reviewed and executed by this 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 Plaintiff Rebecca Jackson filed a Rule 56(f) affidavit and an accompanying brief in support of the desired relief. Defendants' 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.[2]

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

- Plaintiff maintains the grant of summary judgment was premature. Specifically, Plaintiff avers that full discovery had not yet come to a conclusion and that summary judgment should not have been granted due to Plaintiff continuing to, inter alia, investigate the identities of Outback Steakhouse employees specifically on duty at the time of Plaintiff'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, Plaintiff 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";[3]

- As an alternative argument, Plaintiff asserts that because the curb access ramp at issue was a condition created by Defendant or Defendant's agents, Plaintiff need not prove specific alleged hazards created by the ramp. In other words,

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[1] Counsel to Plaintiff Rebecca Jackson was included in this communication with the Court.

[2] Due to Plaintiff's timely Rule 59, SCRCP motion, this Court need not address the issue of timeliness of Plaintiff's Rule 56(f) filing.

[3] See Plaintiff's Rule 59(e), SCRCP motion at 2-4 & 5.

the condition—which Plaintiff avers was "dangerous"–was created by Defendant and therefore Plaintiff need not demonstrate notice or knowledge of specific hazard that allegedly caused Plaintiff's injury;[4] and

- Plaintiff is also aggrieved by the absence of any express reference in the May 28, 2014, Order granting summary judgment to Plaintiff's legal status as an invitee while on the subject property.[5]

This Court rules that this case was ripe for summary judgment on April 7, 2014, due to the fact that Defendant's pursuit of relief is premised solely on the absence of recognized legal duty to Plaintiff. 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. See, e.g., Nelson v. Piggly Wiggly Central, Inc., 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010) (affirming grant of summary judgment to retailer where it was found to owe no duty to protect daughter from injury incurred when grandmother's automobile accelerated, crossed wheelstop, and pinned daughter against store wall; recognizing whether a duty exists in a negligence action is a question of law to be determined by the court; summary judgment warranted where there is an absence of a recognized legal duty even where genuine issues of material fact exist).

Further, in response to Plaintiff's "creation of the condition argument," this Court notes that by their own admission at argument in this case, Defendants acknowledge they or their agents installed the subject ramp. Accordingly, this Court adopts this admission as finding of fact for purposes of its analysis. Irrespective of this determination, the fact that Defendants or their agents installed the ramp at issue does not affect the issue of recognized legal duty in the negligence analysis. That is because—as previously held by this Court in its May 28, 2014,

[4] Id. at 4 & 5.

[5] Id. at 5.

Order–Plaintiff cannot demonstrate the subject curb access ramp was in fact "dangerous" or "defective" applying a recognized standard of care for the non-disabled population.

For purposes of clarity, the Court outlines its disposition in this case below, which includes the revision sought by Plaintiff regarding her status as invitee.[6] As evinced within this order addressing Plaintiff's Rule 59(e), SCRCP, motion, notwithstanding the alteration/amendment to the original order concerning the insertion of Plaintiff's legal status while on at the Outback Steakhouse, the ruling concerning summary judgment does not change. For the reasons stated herein, summary judgment is warranted to Defendant in the case sub judice.

FACTS/PROCEDURAL BACKGROUND

The instant case is a premises liability matter involving alleged static defect and sounds in negligence. Plaintiff Rebecca Jackson maintains that on or about 1:30 p.m. on June 7, 2009, as she and her husband Wayne Jackson exited the Outback Steakhouse restaurant at 2840 Broad Street in Sumter, she was "unable to appreciate the change in elevation in the [exit] ramp[7] and tripped and fell to the ground." {Amended Complaint, ¶ 11}. Plaintiff—an invitee of the Outback Steakhouse–alleges Defendants, the owner and operator of the restaurant, had actual or constructive notice of a dangerous condition created by the curb access ramp and/or created a dangerous condition. {Amended Complaint, ¶ 14 & 16}.

Review of the pleadings reveals Plaintiff's dangerous condition theory is premised primarily upon violation of industry standard. Specifically, Plaintiff pled:

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[6] Defendants acknowledge Plaintiff was an invitee of the Outback Steakhouse during visit on June 7, 2009.

[7] Also identified as a "handicap ramp" and "handicap access ramp[]" by Plaintiff in her Amended Complaint. See, e.g., Paragraph 17(k) & (p).

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, willful 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.

. . . .

p. In failing to comply with applicable building, health, and/or safety codes or other industry standards applicable to handicap access ramps.

{Amended Complaint, ¶ 17}

The parties have conducted extensive discovery, including Plaintiff deposing Defendant's premises liability and human factors expert,[8] Alan O. Campbell, PE, RRC, of Applied Building Sciences, Inc. At his deposition, Campbell rendered numerous opinions under oath, including:

- Plaintiff was not disabled or possessed a mobility disability (as defined by the Americans with Disabilities Act) at the time of the subject fall;[9]
- ANSI 117.1 is not applicable in the instant case as it pertains to Plaintiff, a non-disabled person;[10]

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[8] Campbell is the only human factors expert that has provided competent sworn testimony containing an opinion in the instant case. Deposition of Alan Campbell, p. 9, ll. 1-6; p. 112, ll. 19-25 - p. 113. ll. 1-14; p. 141, ll. 17-25 – p. 143, ll. 1-5; p. 143, ll. 16-25 – p. 144, ll. 1-4.

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- Assuming, arguendo, ANSI 117.1 is to be considered in the instant case, from a human factors/biomechanical standpoint, any deviation in standard regarding slope in either the top of the subject ramp or at its flared sides is negligible and would not be perceptible by a non-disabled pedestrian to the point of causing a fall.[11] Moreover, with regard to transition from curb to ramp, ANSI 117.1 does not include requirements for striping or markings on a curb ramp.[12]

- 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 Plaintiff.[13]

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 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. **["]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.["]** 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, sensory impairment, whatever it may be.

Id. at p. 32, ll. 25-p. 34, ll. 1-5 (emphasis added).

See also id. at p. 36, ll. 5-11; p. 81, ll. 25-p. 82, ll. 1-12.

[11] Id. at p. 21, ll. 20-25-p. 22, ll. 1-2; p. 75, ll. 1-25-p. 78, ll. 1-16.

[12] Id. at p. 22, ll. 5-11; p. 45, ll. 1-4; p. 96, ll. 20-25-p. 97, ll. 1-8.

[13] Id. at p. 54, ll. 8-25-p. 56, ll. 1-11; p. 57, ll. 7-10; p. 111, ll. 17-21.

- The subject accident occurred immediately after Plaintiff 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 Plaintiff. Plaintiff was not walking on the curb access ramp at the time of her fall.[14]

- The proximate cause of Plaintiff'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 thin strap.[15]

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 defendant's motion for summary judgment, the plaintiff cannot defeat the motion by relying upon the mere

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[14] Id. at p. 120, ll. 9-17.

[15] Id. at p. 22, ll. 18-23; p. 141, ll. 17-25-p. 144, ll. 1-13.

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 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

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

(1) a duty of care owed by defendant to plaintiff;

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

(3) resulting in damages to the plaintiff; and

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

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).

Further, to recover damages for injuries caused by an allegedly dangerous or defective condition on a defendant's premises, a plaintiff must show 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).

With regard to cases sounding in negligence, a business property owner owes a heightened duty of care to an invitee, such as Plaintiff in this case. However, that duty does not rise to the level of strict liability.

> "The owner of property owes to an invitee . . . the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty. [citation omitted] The landowner has a duty to warn an invitee only

of latent or hidden dangers of which the landowner has knowledge or should have knowledge."

Sims v. Giles, 343 S.C. 708, 718, 541 S.E.2d 857, 863 (Ct. App. 2001)

In the case sub judice, Defendants' motion for summary judgment is based mainly on the argument that Plaintiff cannot prove elements one (existence of applicable/colorable/recognized duty of care) and two (breach). There has been no allegation that the ramp was hidden, but instead the allegation is that Plaintiff was unable to appreciate the difference in elevation going down the ramp, thereby rendering it "dangerous" or "defective". Specifically, Defendants maintain Plaintiff cannot satisfy the well-stated negligence analysis due to the fact that, inter alia, Plaintiff cannot demonstrate the subject curb access ramp was in fact "dangerous" or "defective" applying a recognized standard of care for the non-disabled population. Additionally, Defendants assert Plaintiff cannot establish the condition of the subject ramp was the proximate cause of her fall and subsequent alleged injuries. 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.

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

A. International Property Maintenance Code Does Not Apply

Based on Plaintiff's allegations found within her pleadings, an 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

http://www.llr.state.sc.us/pol/bcc/index.asp?file=GENERAL_CodesInEffect.htm (last visited April 4, 2014) (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 ....").[16] In the instant case, the Court is 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 Plaintiff's express allegations found within her amended complaint concerning duty and breach based upon alleged violation of the International Property Maintenance Code, no such legally-mandated duty exists. Thus, summary judgment is warranted in the instant case as to these allegations.

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

In the alternative, while not specifically pled, Plaintiff developed a theory during the litigation of the case that Defendants' curb access ramp was constructed and maintained in violation of ANSI 117.1 and that this violation is a proximate cause of Plaintiff's alleged damages. This Court disagrees with Plaintiff's analysis concerning the applicability of ANSI 117.1 standards to Plaintiff, a non-disabled person at the time of the fall.[17]

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[16] 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.

[17] Plaintiff had bilateral knee replacement surgery in 1992 and 2000. However, contrary to Plaintiff's arguments, having these procedures alone does not make Plaintiff disabled for purposes of this analysis. Plaintiff never testified in her deposition or elsewhere that the surgery alone rendered her disabled nor did she make any such representation in her complaint or to a pertinent third party such as the South Carolina Department of Motor Vehicles or the Social Security Administration. Nor has Plaintiff testified she possessed any difficulty interpreting and

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."

To the extent that Plaintiff relies on 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, the 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 Plaintiff was disabled or possessed a disability (as defined by the Americans with Disabilities Act) at the time of the subject fall. Accordingly, even if violation of ANSI 117.1 can serve as a basis for a private cause of action in South Carolina, Plaintiff 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 Defendants.

This Court's holding concerning the lack of applicability of ANSI as a standard of care for non-disabled persons is supported by 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

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reacting to sensory information. Moreover, Plaintiff did not produce any affidavits or other sworn testimony or other documentation from a qualified expert demonstrating that she did in fact possess any mobility or sensory-related disability, as defined by the Americans with Disabilities Act, on the date of her fall at the Outback Steakhouse restaurant.

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 asserted the plaintiff—not suffering from a disability–could not prosecute her claim based on the alleged violation of these standards. The magistrate judge adopted the defendant's argument, stating as follows:

> [R]ather than delve into the defendant'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., 29 Misc. 3d 1214(A), 918 N.Y.S.2d 399 (Sup. Ct. 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. Plaintiff, not being a member of the protected class, is unable to utilize the

standards of ANSI for purposes of prosecuting her claim as a non-disabled person at the time of her fall.

CONCLUSION

A plaintiff prosecuting a negligence claim must demonstrate: (1) the defendants owed her a duty of care; (2) the defendants breached that duty by a negligent act or omission; and (3) she suffered damage as a proximate result of that breach. Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000).

First, the court must determine, as a matter of law, whether the law recognizes a particular duty. Moore v. Weinberg, 373 S.C. 209, 221, 644 S.E.2d 740, 746 (Ct. App. 2007). If there is no duty, the defendant is entitled to a judgment as a matter of law. Id. "Generally, duty is defined as the obligation to conform to a particular standard of conduct toward another." Id. (citations omitted). A "standard" is "a model accepted as correct by custom, consent, or authority." Black's Law Dictionary 1412 (7th ed.1999). If the plaintiff fails to prove the defendants owed her a legal duty of care, she fails to prove actionable negligence. Doe v. Greenville County Sch. Dist., 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007); Nelson v. Piggly Wiggly Cent., Inc., 390 S.C. 382, 391, 701 S.E.2d 776, 780-81 (Ct. App. 2010).

In the case at bar, Plaintiff has failed to prove the existence of a legal duty of care to her premised upon the standards she pled (International Property Maintenance Code) and did not plead (ANSI). Plaintiff was not disabled at the time of the subject accident. The Court therefore finds ANSI 117.1 not applicable to the case at hand. The standards created by ANSI 117.1 exist to ensure accessibility for the disabled. While such standards necessarily take into account the safety of certain construction, the standards protect the disabled, and cannot be transformed into a sword for another not subject to its protection. Accordingly, summary judgment is warranted in the instant case.

IT IS ORDERED that the Court's May 28, 2014, grant of summary judgment to Defendants stands as originally directed, as amended by this Order.

AND IT IS SO ORDERED.

THE HONORABLE W. JEFFREY YOUNG
Presiding Judge of the Third Judicial Circuit

Sumter, South Carolina
28 July, 2014

RECEIVED
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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the 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.

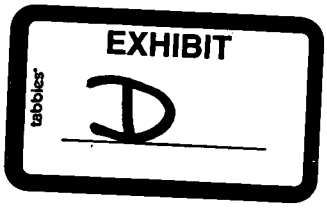
v.

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.

RESPONDENTS' MOTION TO STRIKE

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

Pursuant to Rule 209(b) and Rule 210(c), SCACR, Respondents respectfully move this Court for an order, striking from Appellant's Initial



Reply Brief (and Record on Appeal where applicable) certain matters and arguments presented by Appellant as improper argument and irrelevant to the matter on appeal.

In the Initial Reply Brief of Appellant, Appellant attempts to offer potential testimony which was not included in the Record on Appeal, and arguments on matters not relevant to the appeal:

- Appellant seeks this Court's consideration of potential testimony of Appellant's expert, Bryan Durig, had Durig been deposed by Respondents.

- Appellant makes improper arguments relating to matters of proximate cause, which were not the basis for disposition by the Circuit Court, and further seeks to offer inadmissible hearsay.

I. Appellant Seeks This Court's Consideration of Potential Testimony of Appellant's Expert, Bryan Durig, Had Durig Been Deposed By Respondents

Respondents move to strike those portions of the Initial Reply Brief of Appellant that relate to Appellant's engineering expert Bryan Durig, and any potential testimony by Durig at deposition or otherwise. In the Initial Reply Brief of Appellant, Appellant opines to what Appellant's expert Bryan Durig, **would have** testified to had he been deposed by Respondents. (Init. Reply Br. of App. at 3-4). Such envisaged statements do not qualify as actual witness

testimony, nor does it qualify as testimony in the Record on Appeal, because this testimony has never been elicited. Rule 210(c), SCAR; see also Associates Discount Corp. v. Hiers, 248 S.C. 430, 150 S.E.2d 611 (1966); Norris v. Ferre, 315 S.C. 179, 432 S.E.2d 491 (Ct. App. 1993) (record may not be supplemented with matters not presented to trial judge). Any contemplated testimony that Appellant references in relation to Durig is improper. A trial court does not rule on an issue based on what someone *may* say about it. Durig's proposed or anticipated testimony was not presented to the Circuit Court, nor was it given any consideration by the Circuit Court in granting Summary Judgment on behalf of the Respondents. Furthermore, matters not presented to the Circuit Court will not be given substantive consideration on appeal. Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999). Rather, the court is obligated to rule only on issues that are properly presented and supported by admissible evidence.

An attorney's unsworn statement as to what a witness may testify to at some unknown time in the future carries no weight whatsoever. It is certainly not sufficient to raise an issue for appeal. Therefore, Respondents respectfully request all arguments related to Durig's potential testimony, had

he been deposed by Respondents, be stricken from Appellant's Initial Reply Brief.

II. Appellant Makes Improper Arguments Relating to Matters of Proximate Cause, Which Were Not the Basis for Disposition By the Circuit Court and Further Seeks to Offer Inadmissible Hearsay

Respondents moved for summary judgment on 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 component expert testimony from Appellant regarding proximate cause. See Jackson v. Outback Steakhouse of Florida, No. 2012-CP-43-0707 (May 18, 2014) (order granting summary judgment on duty issue only). 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 the Respondents, holding Appellant could not prove the existence of a colorable duty of care, which was breached by Respondents. See Id. The Circuit Court did not reach the matter of proximate cause.

Appellants Initial Reply Brief attempts to argue issues regarding proximate cause that were not reached by the Circuit Court below. Specifically, Appellant requests this Court to consider Russ Hunt's

testimony, Appellant's Human Factors engineer, as it relates to proximate cause. (Init. Reply Br. of App. at 7-9). Respondents move to strike the entirety of Appellant's Section III entitled "Outback's poor-constructed and unmarked ramp proximately caused Mrs. Jackson's fall" because these matters are irrelevant to the question involved in the appeal. Rule 209(b), SCACR; 15 S.C. Jur. Appeal and Error § 63 ("Matters irrelevant to the question involved in the appeal are also disallowed.") Respondents respectfully submit that these matters as presented by Appellant relating to proximate cause are not ripe for review by the South Carolina Court of Appeals because they were never reached by the Circuit Court. The Circuit Court granted Summary Judgment to Respondents because holding Appellant could not prove the existence of a colorable duty of care, which was breached by Respondents. Because the Circuit Court judge did not consider proximate cause in reaching his decision to grant summary judgment in favor of Respondents, Appellants arguments relating to proximate cause are improper.

Furthermore, Appellant's "Section III" relating to proximate cause is additionally improper because it seeks to offer an unsworn report as a basis for appeal. (Init. Reply Br. of App. at 8). Appellant cites to portions of Hunt's Report, however, Hunt has provided no sworn Affidavit, nor was Hunt

deposed. The wholesale inclusion of Hunt's unsworn report violates the Appellate Court Rules regarding designation of the matter to be included in the record on appeal, and the supporting case law.[1] South Carolina appellate courts may only consider those matters which are both in the Record and which would be admissible in evidence. Hall v. Fedor, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) ("Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence."). Appellants' expert's unsworn report is inadmissible hearsay. See Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute."); Hall, 349 S.C. at 175, 561 S.E.2d at 657 (holding "materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence").

In short, an attorney's unsworn statement as to what a witness may testify to at some unknown time in the future is not a basis for appeal. Furthermore, the Circuit Court judge did reach the issue of proximate cause

[1] Respondents also timely objected to consideration of this unsworn report at the Summary Judgment hearing. (Hr'g Tr. 19:8-24, Apr. 7, 2014).

in rendering his decision to grant summary judgment in favor of Respondents, and such unsupported and unsworn reports as relied upon by the Appellants would be inadmissible. Accordingly, because these matters relating to proximate cause were not reached in rendering summary judgment, and such unsworn reports regarding the same are inadmissible hearsay. Therefore, Respondents move to strike the aforementioned portions of Appellant's Initial Reply Brief on the grounds stated herein.

Respondents respectfully request all pending deadlines remain in abeyance while the instant motion is under review by this Court. Counsel for Respondents has consulted with counsel for Appellant, who consents to this request.

[SIGNATURE PAGE ATTACHED]

Respectfully submitted

COLLINS & LACY, P.C.

By: _____

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ATTORNEYS FOR RESPONDENTS

RESPONDENTS' MOTION TO STRIKE

Columbia, South Carolina
March 4, 2015

THE STATE OF SOUTH CAROLINA
In the 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.

PROOF OF SERVICE

Counsel for Respondents certifies that he has served Respondents' Motion to Strike on all parties by depositing a copy of it in the United States Mail, postage prepaid, on March 4, 2015, addressed to the following attorneys of record:

Melissa Garcia Mosier, Esquire
L. Lisa McPherson, Esquire
McWhirter, Bellinger & Associates, P.A.
119 East Main Street
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Counsel for Appellant

Respectfully submitted,

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PROOF OF SERVICE – ATTORNEYS FOR THE RESPONDENTS, 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

RM Hunt, Ltd.

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4/2/2014

Melissa G. Mosier
McWhirter, Bellinger & Associates, P.A.
119 East Main Street
Lexington, SC 29072

RE Jackson v OSI Restaurant Partners

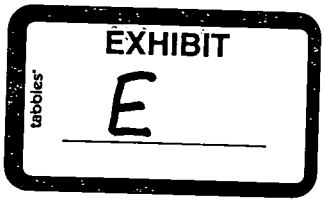
Dear Ms. Mosier:

You have asked me for an independent human factors engineering analysis of the issues surrounding an accident in which Mrs. Rebecca Jackson was injured while leaving an Outback Steakhouse located at 2480 Broad Street, Sumter, South Carolina on June 7, 2009.

This letter contains my report, including analysis and opinions, in the above referenced matter. These opinions are based on the information available to me at this time. If more information becomes available as discovery continues I reserve the right to amend or modify these opinions as appropriate.

Qualifications

I hold the BS and MS in Industrial Engineering and a PhD in Mechanical Engineering from the University of Illinois. After receiving my PhD in 1981 I took a position on the faculty at the Georgia Institute of Technology where I taught, among other things, Human Factors and Man-Machine Systems in the Department of Industrial and Systems Engineering. After leaving Georgia Tech I owned and operated Search Technology, Inc., a firm involved exclusively with applied research and development in Human Factors. Since 2003 I have been a faculty member at Southern Polytechnic State University where I am currently a Dean and teach Human Factors,



Engineering Analysis and Design, Statistics and a number of related courses at the undergraduate and graduate levels. I am also the owner and only employee of RM Hunt, Ltd.

In addition to research and teaching I have been involved, throughout my career, in product analysis and design with a particular emphasis on warnings and instructions. I have consulted on a wide variety of consumer and industrial products both inside and outside of litigation for more than 30 years.

Items Reviewed in Connection with this Case

1. Expert report of Applied Building Sciences, Inc., Bobby Funcik and Alan Campbell, 12/16/2013
2. Expert report from Summit Engineering, Bryan Durig, 10/2/2013
3. DHEC Patient Care Form, 6/7/09
4. ER Admission Record, 6/7/09
5. Deposition transcript of Rebecca Jackson, 7/10/2013
6. Deposition transcript of Wayne Jackson, 7/10/2013
7. Photographs taken immediately after the fall, 6/7/09
8. Photographs taken some time after the fall,
9. Photographs taken by Russ Hunt, 3/18/2014
10. ANSI A117.1 Accessible and Usable Building and Facilities
11. Slips, Trips, Missteps and Their Consequences, Bakken, G; Cohen, C.; Abele, J.; Hyde, A.; LaRue, C., 2007

Description of the Accident

On June 7, 2009, Mrs. Rebecca Jackson and her husband, Wayne Jackson had lunch at the Outback Steakhouse in Sumter, South Carolina. After eating they left the building from the main entrance and were proceeding to their car located in the northwest side of the parking lot. Upon leaving the building they proceeded on the sidewalk in a westerly direction to the point where there was a space approximately seven feet wide between two cars where they could move into

the parking lot. Unbeknownst to Mrs. Jackson there was an unmarked curb ramp in this space (Image 1). She miss stepped as she moved from the sidewalk onto the ramp. This caused her to lose her balance and she fell, down the ramp, into the parking lot. She sustained injuries to her ribs and back that ultimately required surgery and has left her incapacitated to this day.

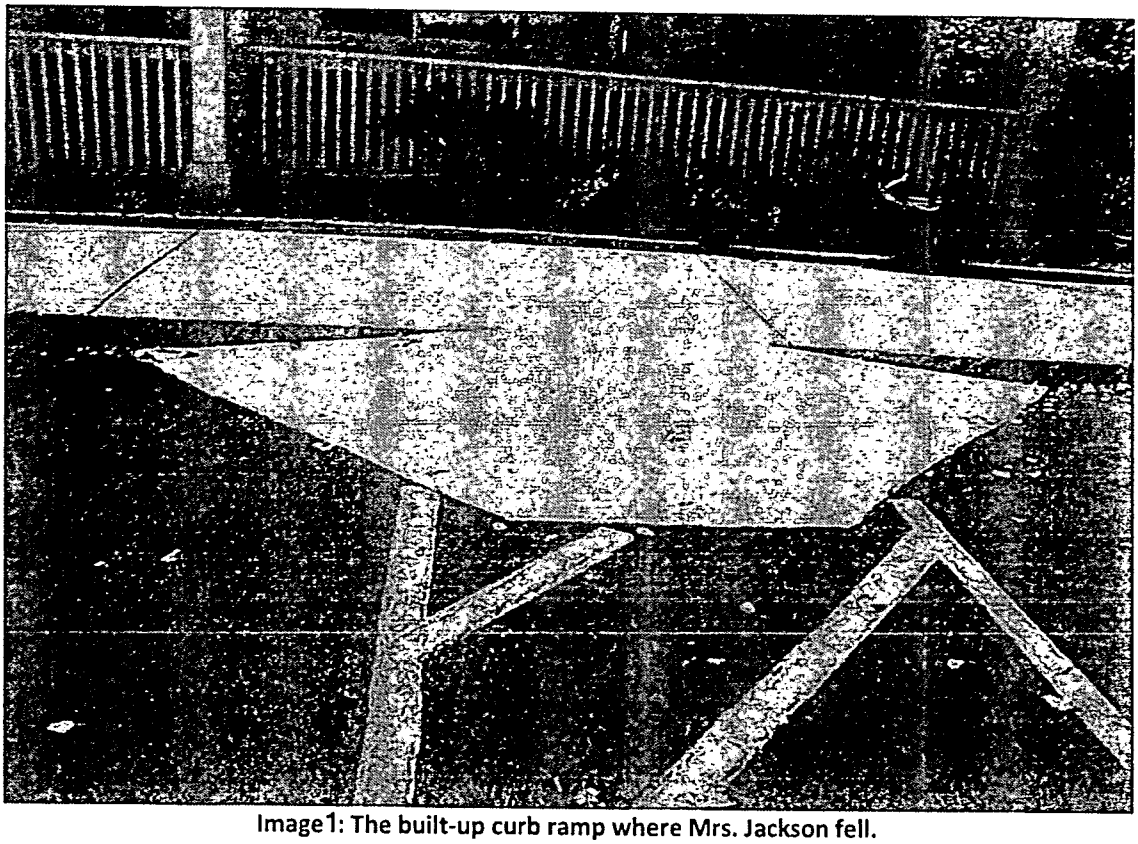


Image1: The built-up curb ramp where Mrs. Jackson fell.

Analysis

The ramp upon which Mrs. Jackson fell is a built-up curb ramp. Such ramps are often referred to as handicap ramps or wheelchair ramps but, in configurations such as this, almost everyone entering or exiting must use one of three curb ramps that lead to the sidewalk in front of the restaurant. Each ramp has a marked walkway leading into the parking lot as can be seen on the subject ramp in Image 2. On days in which the restaurant is crowded, as was the case the day Mrs. Jackson fell, these ramps are the only access to the restaurant.

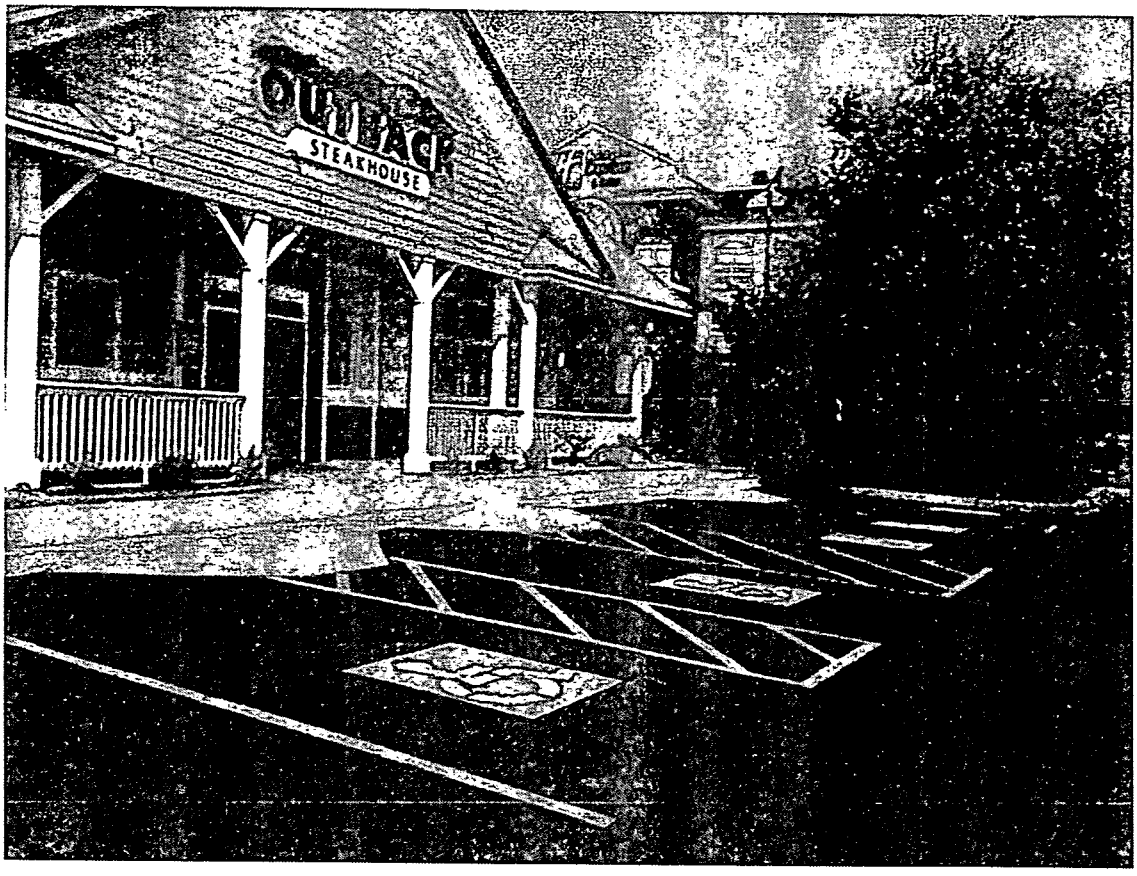


Image 2: Three ramps leading to the restaurant

Ramp Measurements

The Accessible and Usable Building and Facilities standard, ANSI A117.1, defines limits on the running slope, side slope and cross slope of curb ramps. The curb ramp maximum running slope is expressed as 1:12 ratio of rise to run. This can also be expressed as a slope of 8.33% or an angle of 4.78°. The side slope of a curb ramp is not to exceed a rise to run ratio of 1:10 which equals a slope of 10% or an angle of 5.73°. The cross-slope is not to exceed a maximum of 1:50 which equals a 2% or an angle of 1.15°.

The image shown here below, Image 3, is taken from the Americans with Disabilities Act web site (ADA.Gov). In addition to indicating the two significant measurements discussed above it shows what a well formed built-up curb ramp should look like.

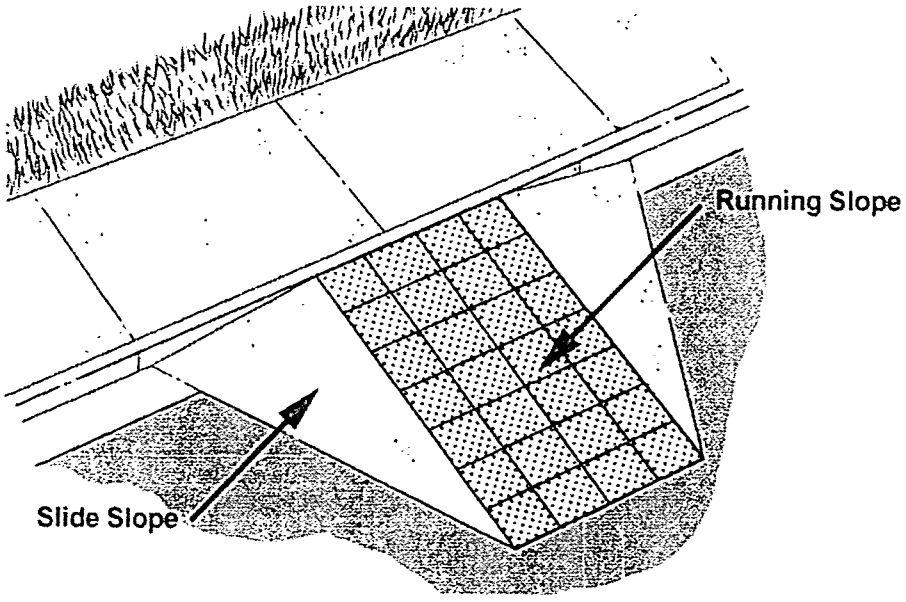


Image 3: Built-up curb ramp from ADA.Gov

	ANSI A117.1	ABS*	Summit	R.M. Hunt
Running Slope - Top	4.78°	7.7°	7.4° – 8.2°	8.0°
Running Slope - Bottom	4.78°	6.2°	5.2°	5.0°
Side Slope - Top	5.73°	6.2° - 6.7°	6.8°	6.7°

*ABS reported all slope measurements in percentage or rise/run. These were converted to degrees for ease of comparison to the Summit Engineering measurements and my own that were recorded in degrees.

First, it should be noted that all sets of measurements establish that the ramp exceeds ANSI maximum values for running and side slopes. Second, the measurements taken by three different individuals are not as similar as one might expect. This is due to lack the uniformity in the geometry of the ramp itself. The ramp should have a flat surface that maintains the same slope for its entire length. Likewise, the sides should be flat and maintain the same slope down their lengths. However, it can be seen from the measurements in the table that the slope measured depends on where it is measured. This curb ramp, in addition to being too steep on both the running and side slopes, is not uniformly built and the surface is uneven and somewhat rounded. Image 4, of the subject ramp, shows the somewhat rounded nature of the ramp with no discernible edge between the running slope and side slopes.

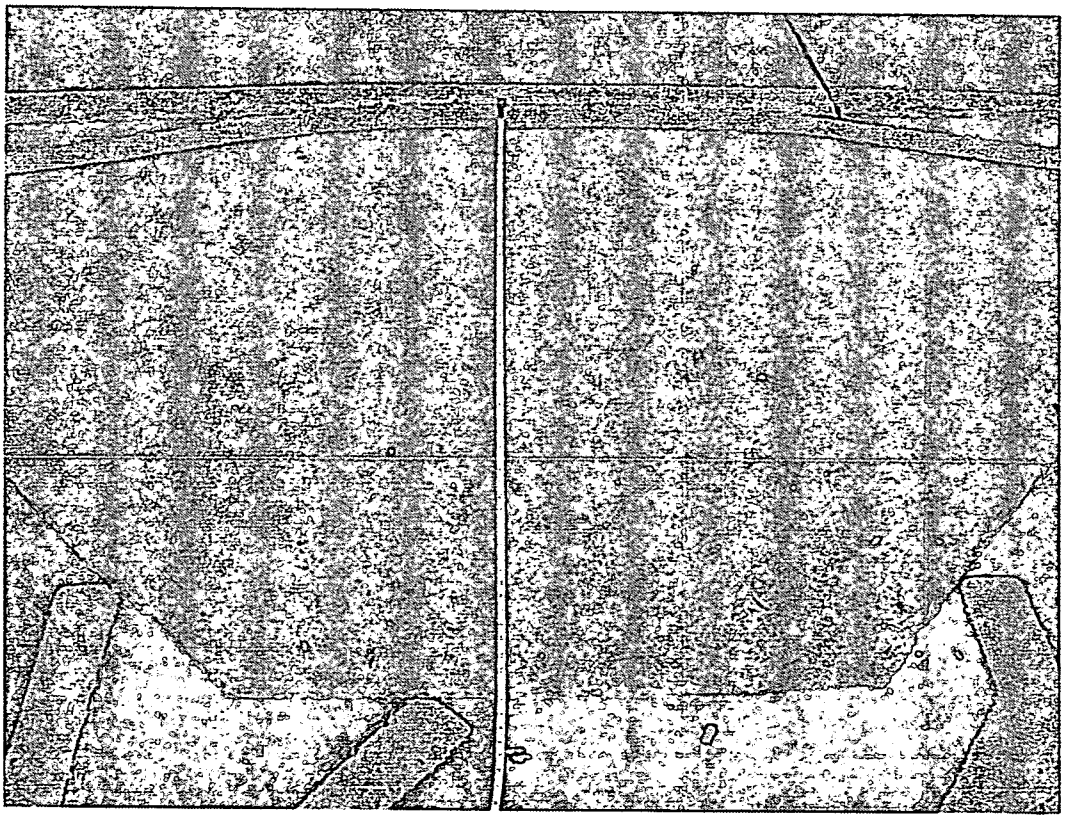


Figure 4: Subject curb ramp

The ADA.Gov web site provides the following guidance with respect to built-up curb ramp design.

- A built-up curb ramp typically consists of asphalt or concrete that is poured and shaped into a ramp that runs at a 90-degree angle away from an intact curb down to the roadway.
- Built-up curb ramps cannot project into the path of cars. The "path of cars" includes anywhere cars are allowed to drive, including roadways, parking lot driveways, parking spaces, and access aisles.
- Built-up curb ramps should have flared sides with a slope of 10 percent or less or have edge protection and handrails on the sides.

The photograph in Image 5 shows that layout of the parking spaces on either side of the curb ramp where Mrs. Jackson fell require cars to park on the sides of the ramp. This causes two problems for pedestrians such as Mrs. Jackson. First, as can be seen in Image 3, the car on the right blocks her view of the curb ramp. Second, it obstructs access to the ramp.

Image 5 shows there are no handrails on the built-up curb where Mrs. Jackson fell. There is also no visual contrast between the sidewalk and the slope of the ramp. Although the curb has since been painted with bright yellow paint.

Image 5: Photo showing cars parked on curb ramp.

Cross-Slope

As Mrs. Jackson stepped onto the side of the ramp she was not traveling in the direction parallel to the running slope. Therefore, relative to her path the slope of the ramp would have been a cross-slope. ADA and FHWA limit the maximum cross-slope to 1:50 or 2%. The cross-slope at the point where Mrs. Jackson stepped would have exceeded this maximum by more than 200%.

Dynamics of a Misstep

The figure on the next page, Image 6, from Bakken [2007] shows how an unexpected foot fall on a lower surface can cause the victim's body to pitch forward in an uncontrolled manner. In Mrs. Jackson's situation, the unexpected step hazard, even if it was only one to two inches, would have been further exacerbated by the slope of the side of the ramp.

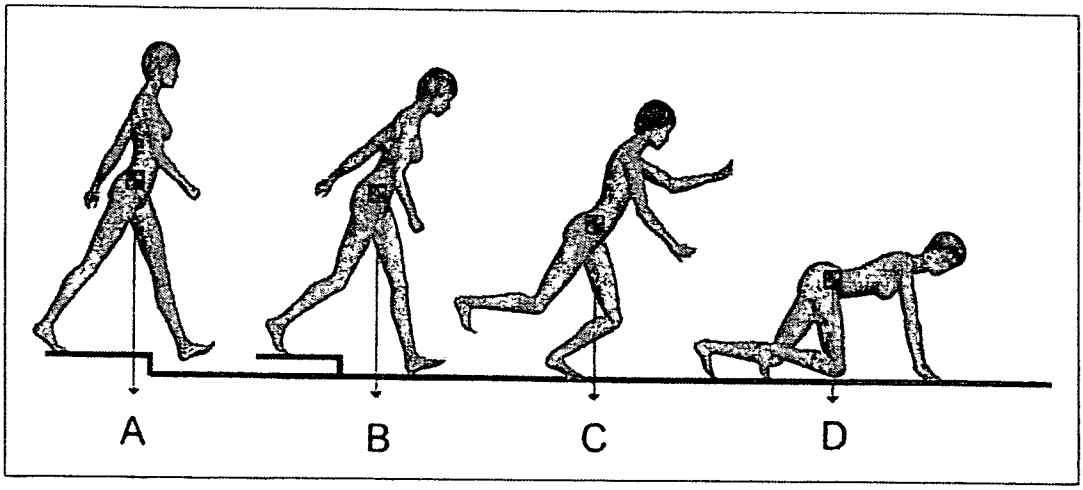


Figure 2.14 A typical misstep. (a) The victim has just encountered the misstepping hazard, which in this case is represented by an unexpected lower elevation in the walking surface. (b) The unexpected foot fall on a lower level walking surface causes the victim's body to pitch forward in an uncontrolled manner. The forward inertia of the victim's body exacerbates the forward pitching causing the CG to shift forward. (c) The CG continues forward and ultimately travels beyond the leading foot, which causes instability of the victim. (d) The victim falls forward and impacts the walking surface.

Figure 6: Dynamics of a misstep

Defendants' experts have made the following four points in their report:

1. Although the built-up curb ramp did not meet the standards, the difference was "negligible and would not be perceptible by a pedestrian."
2. The ANSI A117.1 standard does not allow built-up curb ramps to extend into parking areas but, this should not apply to Mrs. Jackson since she was not "mobility impaired or a wheelchair user."
3. ANSI A117.1 does not require markings on a curb ramp and "the transition from sidewalk to ramp would have been visible within her field of view."
4. The cause of Mrs. Jackson's fall was "likely a result of her simply stumbling and failing to recover due to her choice of footwear."

Regarding the first point, using the defendants' expert's measurements, the running slope at the top of the ramp is 55% above the maximum slope allowed by standards. The side slope is 17% beyond the maximum slope allowed by the standard. Finally, Mrs. Jackson unknowingly encountered a cross-slope that was more than 200% of the maximum allowable slope. These are

not negligible differences. Building codes recognize that irregularities in walking surfaces as small has one-half inch in height can cause trip hazards for pedestrians. Pedestrians must be able to count on uniform walkways.

Regarding the second point, standards such as ANSI A117.1 have been created to accommodate persons of all ability and impairment in mind. The standard does not change simply because Mrs. Jackson was not in a wheelchair. Furthermore, standards such as this create normal expectations for able-bodied pedestrians. Even without any impairment, Mrs. Jackson has used ramps such as this on many occasions and has an expectation that all ramps will meet these standards.

Regarding the third point, the fact that the standard does not require markings does not mean the transition from sidewalk to ramp was conspicuous. The 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 down for foot placement. The purpose of such markings is to call attention to a potential hazard. This point is at the crux of this matter; Mrs. Jackson did not see that she was about to descend a steeper than expected slope.

Regarding the fourth point, there is no evidence that Mrs. Jackson simply stumbled because of her shoes or fell for any of the other reasons experts suggests such as the use of drugs or alcohol. There is, however, 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.

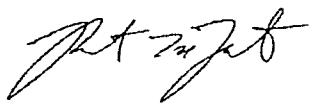
Opinions

1. The slope of the curb ramp did not meet ANSI standard A117.1.
2. The slope of the sides of the curb ramp did not meet ANSI standard A117.1.
3. The configuration of the parking spaces adjacent to the curb ramp allowed cars to be parked on the curb ramp obstructing access to the ramp.
4. The configuration of the parking spaces adjacent to the subject curb ramp allowed cars to block the view of the curb ramp making it difficult for pedestrians to recognize the presence of the ramp.

5. The lack of markings on the curb made it difficult for pedestrians to discern the beginning of the ramp.
6. There is a trip hazard at the point at which the top of the curb ramp meets the sidewalk.

I hold these opinions to be true to a reasonable degree of engineering certainty. These opinions are based on the information available to me at this time. If more information becomes available as discovery continues I reserve the right to amend or modify these opinions as appropriate.

Sincerely,



Ruston M. Hunt, Ph.D.