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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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

Unpublished Opinion No. 2016-UP-408 (Filed September 14, 2016)
Case No 2017-000025

Rebecca Jackson, ... Respondent.

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, ... Petitioners.

**APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI
(VOLUME I)**

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**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Unpublished Opinion No. 2016-UP-408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
Withdrawn, Substituted and Refiled December 7, 2016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. 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.

¹We 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.").

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

RECEIVED

SEP 29 2016
SC 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.

**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, SCRPC. 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] ramp¹ 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.

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;

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), SCRPC ("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), SCRPC: "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.

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 person⁴ 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

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, SCRCF

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), SCRPC, 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.

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

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.**

¹⁰ (R. 139-41, 142, 196).

¹¹ (R. 205).

¹² (R. 107, 226-29).

Appellant did not produce credible/admissible evidence¹³ 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.

¹³ Inasmuch 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

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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

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Rebecca Jackson, ... Appellant.

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each d/b/a Outback Steakhouse, ... Respondents.

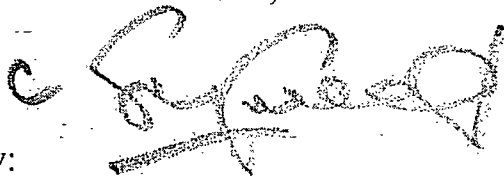
PROOF OF SERVICE

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:

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Counsel for Appellant

Respectfully submitted,

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ATTORNEYS FOR 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

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

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

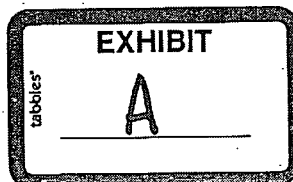
Appeal From Sumter County
W. Jeffrey Young, Circuit Court Judge

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.

¹We 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

COUNTY OF SUMTER

Rebecca Jackson,

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.

RECORDED

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JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

IN THE COURT OF COMMON PLEAS

THIRD JUDICIAL CIRCUIT

ACTION NUMBER: 2012-CP-43-707

ORDER GRANTING
SUMMARY JUDGMENT

RECEIVED

CERTIFIED TRUE COPY
OF ORIGINAL FILED

SEP 29 2016

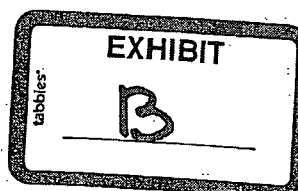
SC Court of Appeals

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] ramp¹ 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

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 ["[a]ccessible[" 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

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), SCRPC; 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. Ravoir, 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.ltr.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).

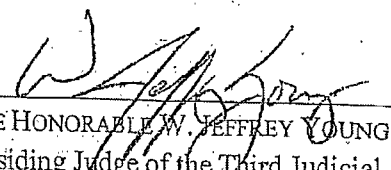
First, the court must determine, as a matter of law, whether the law recognizes a particular duty. Moore v. Weinberg, 373 S.C. 209, 221, 644 S.E.2d 740, 746 (Ct. App. 2007). If there is no duty, the defendant is entitled to a judgment as a matter of law. Id. “Generally, duty is defined as the obligation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

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Rebecca Jackson,

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.

RECORDED

2014 AUG -4 AM 10:36

JAMES C. CAMPBELL
CLERK OF COURT

SUMTER COUNTY ACTION NUMBER: 2012-CP-43-707

IN THE COURT OF COMMON PLEAS

THIRD JUDICIAL CIRCUIT

ORDER ADDRESSING
PLAINTIFF'S RULE 59(e), SCRCF
MOTION

RECEIVED

SEP 29 2016

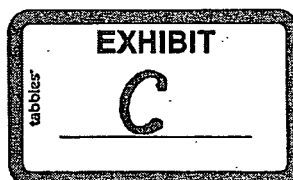
SC Court of Appeals

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), SCRCF 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), SCRCF 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,

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

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

³ See Plaintiff's Rule 59(e), SCRCF 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), SCRCR, 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] ramp⁷ 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:

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

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.

⁹ Deposition of Alan Campbell, p. 22, ll. 5-11; p. 52, ll. 1-25; p. 54, ll. 1-21; p. 57, ll. 3-10.

¹⁰ 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:

- 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 ["[a]ccessible[" 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); Verineer 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

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. Ravoir, 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.html (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

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

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

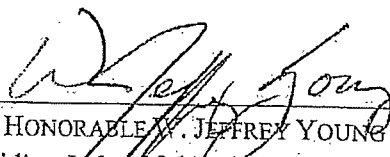
A plaintiff prosecuting a negligence claim must demonstrate: (1) the defendants owed her a duty of care; (2) the defendants breached that duty by a negligent act or omission; and (3) she suffered damage as a proximate result of that breach. Bloom v. Ravoir, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000).

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

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

MAR 04 2015

SC Court of Appeals

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

RECEIVED

SEP 29 2016

SC Court of Appeals

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

Rebecca Jackson, ... Appellant.

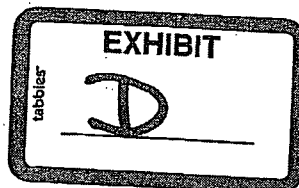
v.

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).

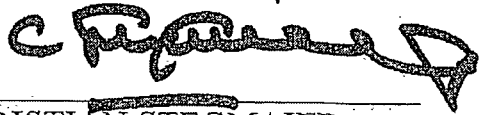
in rendering his decision to grant summary judgment in favor of Respondents, and such unsupported and unsworn reports as relied upon by the Appellants would be inadmissible. Accordingly, because these matters relating to proximate cause were not reached in rendering summary judgment, and such unsworn 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

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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

RECEIVED

MAR 04 2015

APPEAL FROM SUMTER COUNTY **SC Court of Appeals**
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:

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L. Lisa McPherson, Esquire
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4/2/2014

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SEP 29 2016

SC Court of Appeals

RE Jackson v. OSI Restaurant Partners

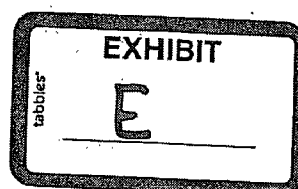
Dear Ms. Mosier:

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,



Hunt | 1

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.

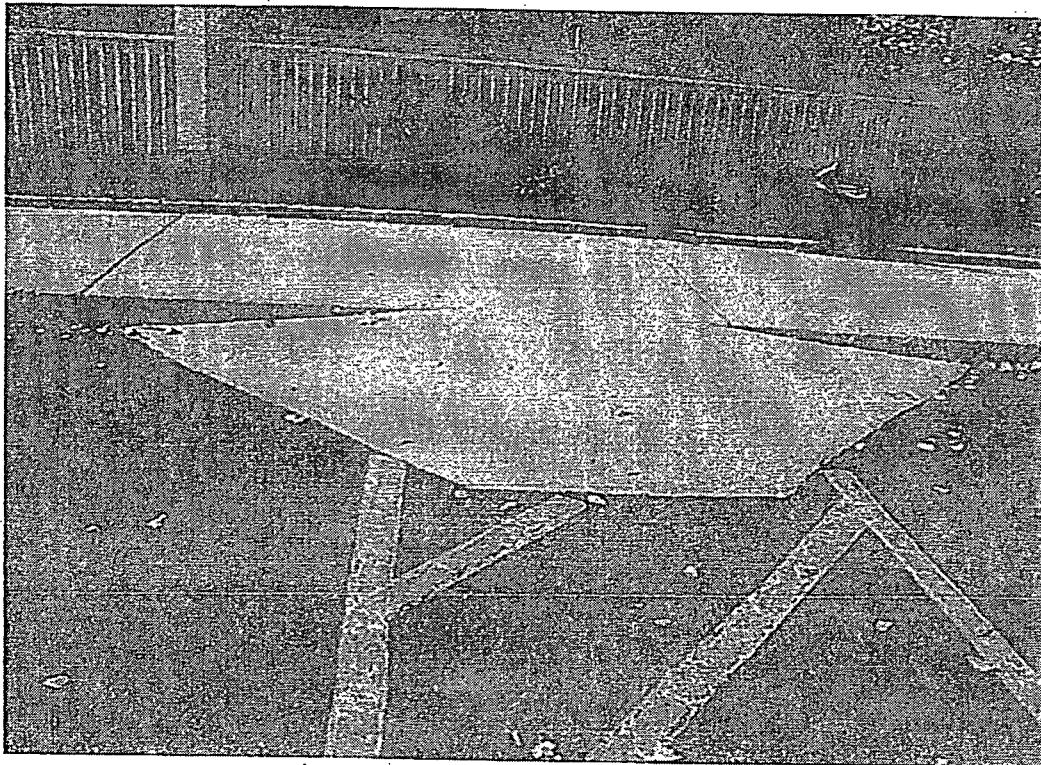


Image 1: The built-up curb ramp where Mrs. Jackson fell.

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.

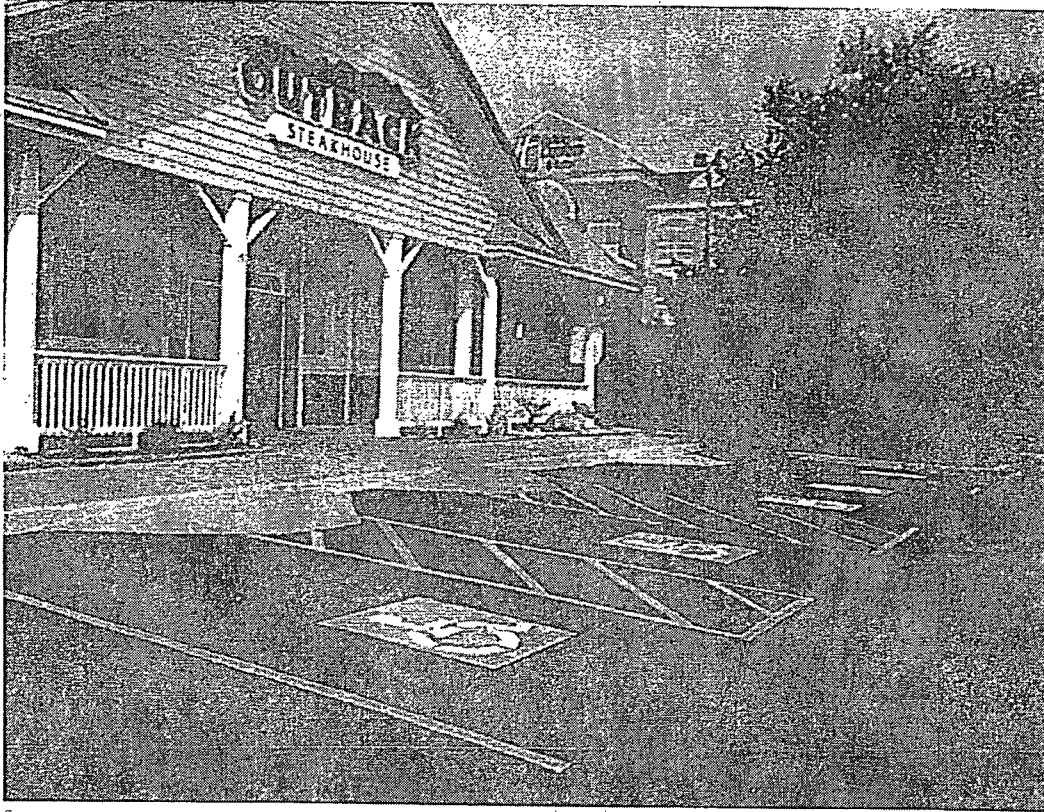


Image 2: Three ramps leading to the restaurant

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.

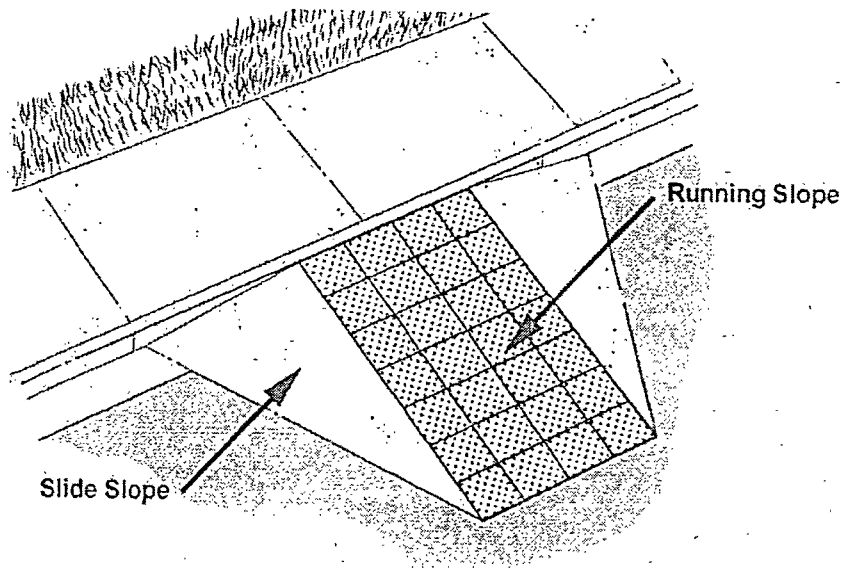


Image 3: Built-up curb ramp from ADA.Gov

	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.

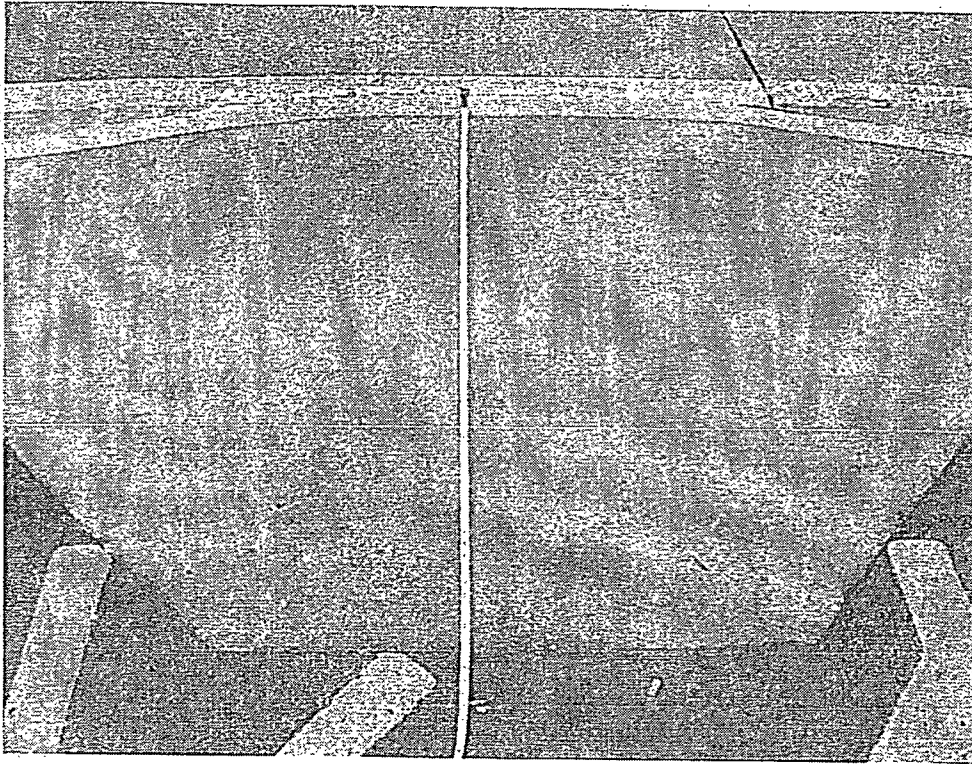


Figure 4: Subject curb ramp

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.

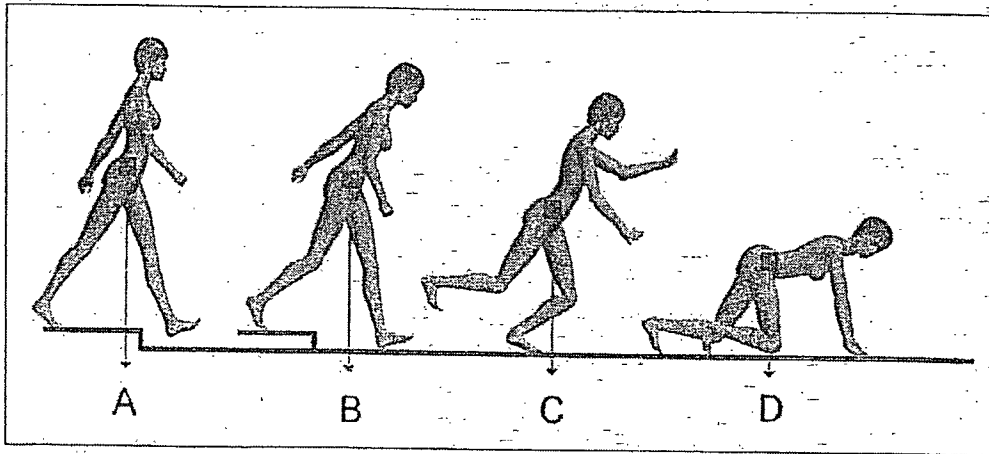


Figure 2.14 A typical misstep. (a) The victim has just encountered the misstepping hazard, which in this case is represented by an unexpected lower elevation in the walking surface. (b) The unexpected foot fall on a lower level walking surface causes the victim's body to pitch forward in an uncontrolled 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

Hunt | 8

not negligible differences. Building codes recognize that irregularities in walking surfaces as small as 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 suggest 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.

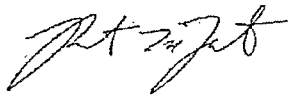
Opinions

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,

A handwritten signature in dark ink, appearing to read 'Ruston M. Hunt', with a stylized, cursive script.

Ruston M. Hunt, Ph.D.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**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

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.

¹We 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.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2012-CP-43-00707

RECEIVED
JUN 18 2015
SC Court of Appeals

Rebecca Jackson,

Appellant,

v.

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

Respondents.

FINAL BRIEF OF APPELLANT

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Statement of Issues on Appeal

- I. Does Outback owe Mrs. Jackson, an invitee, a duty of care to protect her against a danger that Outback created when it put a rounded, uneven and unpainted curb ramp in its parking lot?
- II. In addition to the common law duty of care owed to Mrs. Jackson, do industry standards help shed light on the standard of care reasonably to be expected from Outback?
- III. Was summary judgment premature on whether Outback knew or should have known that the curb ramp posed an unreasonable risk of danger to invitees?

Statement of the Case

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

Defendants' Motion for Summary Judgment

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

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

Plaintiff's Motion to Compel

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

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

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

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

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

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

Summary Judgment Hearing

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

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

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

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

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

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

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

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

Circuit Court's Orders

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

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

STATEMENT OF THE FACTS

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

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

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

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

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

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

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

Outback's engineer, Alan Campbell, concedes that ANSI is an industry standard. R. p. 128, ll. 7-18. R. pp. 143-44. Campbell also concedes that the ramp in question would have to have been constructed in accordance with ANSI A117.1.¹ R. pp. 128-29.

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

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

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

ARGUMENT

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

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

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

The Outback owes a duty of care to Mrs. Jackson by virtue of her uncontroverted status as an invitee. Outback concedes that Mrs. Jackson was its invitee. R. p. 4 at n.6. A person owes an invitee the duty of exercising reasonable

or ordinary care for her safety and is liable for any injury resulting from the breach of this duty. *Graham v. Whitaker*, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984). *Graham*, 282 S.C. at 398, 321 S.E.2d at 43.

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

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

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

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

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

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

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

Turning to the facts of this case, Outback openly conceded at the summary judgment hearing that it created the alleged dangerous condition - the built up curb ramp where Mrs. Jackson fell. R. p. 55, ll. 1-11. R. p. 3. Like the aggrieved appellant in *Cook*, Mrs. Jackson respectfully urges that the circuit court here has also treated this case as a foreign substance case instead of a creation case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In contrast, Russ Hunt, Mrs. Jackson's Human Factors engineer, who has traveled to the scene, notes the absence of a requirement to mark the curb does not mean that the transition is conspicuous. R. pp. 386-87. Moreover, "[t]he fact that it is visible to one who is looking for it does not mean that the transition will be

seen by the unsuspecting pedestrian who is typically looking forward, for navigation purposes and not for foot placement.” *Id.* Finally, and in conclusion, Hunt opines that the configuration of the parking spaces right next to the subject curb ramp allowed cars to block Mrs. Jackson’s view of the curb ramp, thus making it more difficult for her to recognize that the ramp was there in the first place. *Id.* In combination, the lack of markings on the ramp made it difficult for her to perceive the beginning of the ramp in the first place. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mrs. Jackson is not engaged in a "fishing expedition." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991). Of particular interest to the merits are three different areas of inquiry: (1) Outback's own policies and procedures as set forth in their training video for employees; (2) the identification and deposition of Outback employees, specifically those employees working on the date of Mrs. Jackson's fall; (3) any and all incident reports for falls occurring outside the Outback before the date of Mrs. Jackson's fall.

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

Four days before the hearing on Defendants' Motion for Summary Judgment, and in response to Plaintiff's Motion to Compel, Defendants responded to this interrogatory by mailing a copy of the Outback Employee Orientation Handbook to Plaintiff's counsel. However, page fifteen (15) of the Outback Employee Orientation Handbook references an employee training video that was not produced. As a result, Counsel for Mrs. Jackson served a request for production specifically asking for the video on April 14, 2014. R. p. 320-21.

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

Turning to the second area where further inquiry is desirable, Mrs. Jackson sought to discover the identities of Outback employees present at the restaurant at the time of Mrs. Jackson's fall to take their depositions. Plaintiff's Motion to Compel with attachments. Because entities operate by and through employees, testimony of employees is often used to help establish actual and constructive notice of hazards. *Cook v. Food Lion, Inc.*, 328 S.C. 324, 491 S.E.2d 690 (Ct. App. 1997).

Also provided just four days before the hearing on Outback's Motion for Summary Judgment, and in response to Mrs. Jackson's Motion to Compel, Outback provided the names of seventeen (17) people employed with Outback as of the date

of Mrs. Jackson's fall. Outback was unable to identify which of the Outback employees actually worked on the date of Mrs. Jackson's fall, as requested. As a result, Mrs. Jackson has not had an opportunity to question any of these employees to determine their knowledge of prior falls or the identities of Outback employees present at the restaurant at the time of her fall, as well as their job duties and actions during and after her fall.

Because Outback has yet to identify which of its seventeen (17) total employees actually worked on the date of Mrs. Jackson's fall, she has not had the opportunity to ask if any employees working on the date of Mrs. Jackson's fall interviewed her before or after her fall, saw her fall, provided any assistance to her, or overheard any admissions or statements.

Other than the 30(b)(6) deposition of Managing Partner Rich Adams, Mrs. Jackson has not deposed any Outback employees to determine their knowledge, if any, of prior falls or complaints and/or suggestions from customers concerning the subject ramp. The depositions of Outback employees are also probative to determine if any of the employees suggested changes or revisions to the curb ramps outside the premises, or if any of the employees themselves filed any injury claims which they claim to be a result of the built up curb ramp. Further, not all claims are reported to insurers but may have been reported internally to management. Since employees working with customers on a daily basis have even more exposure to customers than managers like Rich Adams, testimony of Outback employees is desirable. Outback employees can help establish facts, corroborate stories, and

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

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

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

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

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

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

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

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

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

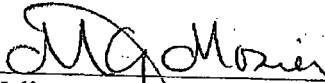
Turning to this case, Mrs. Jackson not only served discovery requests with her complaint, but she has actively engaged in discovery throughout the case in the form of written discovery, depositions, and subpoenas. With regard to written discovery alone, Mrs. Jackson has submitted six (6) sets of interrogatories,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

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

Mrs. Jackson requests an opportunity to conduct further discovery to illuminate the extent to which Outback knew or should have known that the curb ramp posed an unreasonable risk of harm to its invitees.

CONCLUSION

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



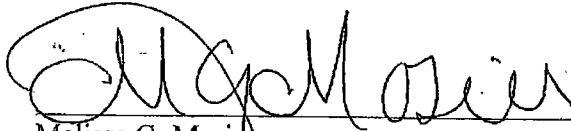
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SC Court of Appeals

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.

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Circuit Court Erred by Granting Summary Judgment to Respondents for the Reasons Stated Within the Subject Order?
- II. Whether this Court Should Affirm the Grant of Summary Judgment to Respondents Upon the Additional Sustaining Ground of Absence of Competent Expert Testimony from Appellant Regarding Proximate Cause?

STATEMENT OF THE FACTS

The instant case is a premises liability matter involving alleged static defect and sounds in negligence. Appellant Rebecca Jackson appeals the grant of summary judgment rendered in favor of Respondents OSI Restaurant Partners, L.L.C., Outback Steakhouse of South Carolina, Inc., Outback Steakhouse of Florida, L.L.C., Private Restaurant Properties, L.L.C., Private Restaurant Master Lessee, L.L.C., each d/b/a Outback Steakhouse by the Circuit Court.

Appellant maintains that on or about 1:30 p.m. on June 7, 2009, as she and her husband exited the Outback Steakhouse restaurant at 2840 Broad Street in Sumter, she was “unable to appreciate the change in elevation in the [exit] ramp¹ and tripped and fell to the ground.” (R. 35). Appellant alleges Respondents, the owner and operator of the subject Outback Steakhouse, had actual or constructive notice of dangerous condition created by the curb access ramp and/or created the condition itself. (R. 36).

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

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

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

.....

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

.....

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

(R. 36-37).

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

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

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

- Appellant was not disabled or possessed a mobility disability (as defined by the Americans with Disabilities Act) at the time of the subject fall;³
- ANSI 117.1 is not applicable in the instant case as it pertains to Appellant;⁴

factors/biomechanical science. See Rule 56(e), SCRPC (“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), SCRPC: “Under the South Carolina Rules of Civil Procedure, an affidavit supporting summary judgment must be made on personal knowledge, must be admissible, and must show the affiant’s competency to testify.”). Dr. Durig did not enunciate competency in his affidavit in any specific science or specialty, including human factors and biomechanics.

³ (R. 107, 137, 139, 142).

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

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

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

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, sensor impairment, whatever it may be.

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

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

- The subject curb access ramp was safe for the general non-disabled population and comports with the 1997 Standard Building Code as it relates to non-disabled persons such as Appellant.⁷
- The subject accident occurred immediately after Appellant stepped off the curb and onto the curb access ramp, which was within the applicable requirements of the Standard Building Code, the governing code as it pertains to Appellant. Appellant was not walking on the curb access ramp at the time of her fall.⁸
- The proximate cause of Appellant's fall was likely a result of her simply stumbling and failing to recover due to her choice of footwear, which were high heels with a thin strap.⁹

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

⁵(R. 106-07, 160, 163).

⁶(R. 107, 130, 181-82).

⁷(R. 139-41, 142, 196).

⁸(R. 205).

⁹(R. 107, 226-29).

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

- Appellant asserted the grant of summary judgment was premature. Specifically, Appellant averred that full discovery had not yet come to a conclusion and that summary judgment should not have been granted due to Appellant continuing to, inter alia, investigate the identities of Outback Steakhouse employees specifically on duty at the time of Appellant's purported fall on June 7, 2009, pursue obtaining a copy of an Outback employee orientation video, and pursue copies of incident reports from other premises-related events at the subject restaurant. As well, Appellant represented she sought to take the depositions of additional Outback employees concerning their possession of any knowledge concerning similar falls on the subject "built up curb ramp";¹¹
- As an alternative argument, Appellant asserted that because the curb access ramp at issue was a condition created by Respondents or Respondents' agents, Appellant need not prove specific alleged hazards created by the ramp. In other words, the condition—which Appellant averred was "dangerous"—was created by Respondents and therefore Appellant need not demonstrate notice or knowledge of specific hazard that allegedly caused Appellant's injury.¹²

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

¹¹ (R. 276-78).

¹² (R. 277-78).

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

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

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

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

This appeal follows.

STANDARD OF REVIEW

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

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

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

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

LAW/ANALYSIS

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

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

- (1) a duty of care owed by Respondent to Appellant;
- (2) breach of that duty by a negligent act or omission;¹³
- (3) resulting in damages to the Appellant; and
- (4) damages proximately resulted from the breach of duty.

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

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

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

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

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

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

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

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

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

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

A. International Property Maintenance Code Does Not Apply

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To the extent Appellant relies upon the 2006 International Building Code as a basis for relief, Respondents assert Appellant is in error. Respondents maintain the 2006 International Building Code does not apply because the subject ramp was an existing structure that was not altered during the time between its original installation in 1999¹⁶ and the date of the incident involving Appellant.¹⁷ Section 101.2 of the 2006 International Building

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

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

Mrs. McPherson: Do you know when these ramps were put in, and when I say "these ramps," I'm talking about the three ramps from the front parking lot up onto the sidewalk.

Mr. Adams: To the best of my knowledge, they are originals, so I'm guessing the same month [of construction of the building, June 1999], but those are the original ramps.

(R. 431).

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

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

Mrs. McPherson: Are you aware of any work that was done to [the ramps] once y’all opened doors for business in June of 1999 until the time you came in September of ’07.

Mr. Adams: No, ma’am.

(R. 432-33).

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

¹⁸ See (R. 427-29), supra.

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

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

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

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

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

¹⁹ See footnotes 2 & 15, supra.

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

²⁰ (R. 106-07, 160, 163).

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

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

CONCLUSION

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

Respectfully submitted,

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June 9, 2015

**FINAL BRIEF – 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**

Columbia, South Carolina
June 9, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

JUN 30 2015

APPEAL FROM SUMTER COUNTY SC Court of Appeals
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2012-CP-43-00707

Rebecca Jackson,

Appellant,

v.

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

Respondents.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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

Melissa G. Mosier
L. Lisa McPherson
McWhirter, Bellinger and Associates
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Attorneys for Appellant Rebecca Jackson

June 30, 2015

[illegible]

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MAR 04 2015

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).

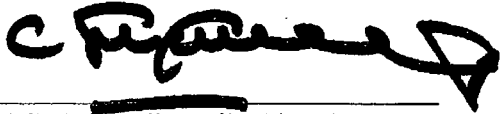
in rendering his decision to grant summary judgment in favor of Respondents, and such unsupported and unsworn reports as relied upon by the Appellants would be inadmissible. Accordingly, because these matters relating to proximate cause were not reached in rendering summary judgment, and such unsworn 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

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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

RECEIVED

MAR 04 2015

APPEAL FROM SUMTER COUNTY **SC Court of Appeals**
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
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Counsel for Appellant

Respectfully submitted,

COLLINS & LACY, P.C.

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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**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2012-CP-43-00707

Rebecca Jackson,

Appellant,

v.

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

Respondents.

RETURN TO RESPONDENTS' MOTION TO STRIKE

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Attorneys for Appellant

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MAR 12 2015
SC Court of Appeals

Ms. Rebecca Jackson slipped and fell while leaving an Outback restaurant in Sumter, South Carolina. The trial court ruled that Outback did not owe her, its invitee, a duty of care. Mrs. Jackson appealed and cited in her initial reply brief an affidavit from Bryan During, her engineering expert, as well as report from Russ Hunt, her human-factors expert. Outback has moved to strike these citations from the Record on Appeal and the Initial Reply.

I. Durig's affidavit was submitted to the trial court.

Outback mistakenly represents that Durig's affidavit was not submitted to the trial court. At the end of the summary-judgment hearing, the circuit court granted Mrs. Jackson 15 days to supplement her opposition to the motion. Summary Judgment Hearing 37:20. Her supplemental memorandum was timely filed and included Durig's affidavit as its Exhibit G. Because the affidavit was properly submitted to the trial court, it is properly included in the Record on Appeal.

II. This Court should consider Russ Hunt's human-factors report in determining whether to reach Outback's additional sustaining ground.

Outback next points out that Hunt's human-factors report is unsworn. While true, the Court should still consider the report in determining if it is fair to reach Outback's additional sustaining ground.

For background, Mrs. Jackson and Outback agree that the trial court never ruled on proximate causation. Order Addressing Plaintiff's Rule 59(e) Motion, p. 14. Outback nevertheless asks the Court to affirm the summary judgment because it did not cause the fall. Russ Hunt's human-factors report addresses this argument directly.

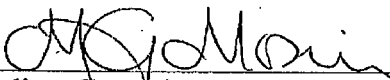
This Court may decline to reach an additional sustaining ground, especially when it is unfair to do so. *I'on, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 724 (2000); *Fisher v. Shipyard Village Council of Co-Owners, Inc.*, 409 S.C. 164, 760 S.E.2d 121 (Ct. App. 2014). Mrs. Jackson asks this Court to consider the human-factor report in determining if it is fair to rule --- as a matter of law --- that Outback did not cause Mrs. Jackson's fall. The trial court declined to reach the issue. The Hunt report shows that this Court should too.

CONCLUSION

This Court should deny Outback's Motion to Strike and allow the Record on Appeal to include Durig's affidavit and Hunt's human-factors report.

Respectfully submitted,

McWHIRTER, BELLINGER & ASSOCIATES, P.A.



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Attorneys for Appellant

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March 12, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAR 23 2015
SC Court of Appeals

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

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

Rebecca Jackson, ...Appellant.

v.

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

**RESPONDENTS' REPLY TO APPELLANT'S RETURN TO
MOTION TO STRIKE**

Pursuant to Rule 209(b) and Rule 210(c), as well as Rule 240(f),
SCACR, Respondents respectfully reply to Appellant's Return regarding
Respondents' Motion to Strike.

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.

I. This Court Should Not Consider Potential Testimony of Appellant's Expert, Bryan Durig, Had Durig Been Deposed By Respondents

Appellant opines that Durig's affidavit was properly submitted to the Circuit Court, and should be considered in the Record on Appeal. However, Respondents moved 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. Respondents' motion to strike was made on the grounds discussed supra, not as to Durig's affidavit.

Respondents move to strike Appellant's attorney's unsworn statement as to what a witness may testify to at some unknown time in the future carries no weight whatsoever. 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 Seeks to Offer Inadmissible Hearsay

Appellant admits that Hunt's human factors report is unsworn, but that this Court should still consider the report. Appellant cites no case law for this proposition.

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

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).

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”).

The unsworn Hunt report is not properly before this Court, and is not a basis for appeal. Therefore, Respondents reassert their motion to strike the aforementioned portions of Appellant’s Initial Reply Brief on the grounds previously asserted, as well as those stated herein.

[Signature Page to Follow]

Respectfully submitted

COLLINS & LACY, P.C.

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**ATTORNEYS FOR
RESPONDENTS**

**RESPONDENTS' MOTION TO
STRIKE**

Columbia, South Carolina
March 19, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAR 23 2015
SC Court of Appeals

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

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

Rebecca Jackson, ...Appellant.

v.

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

PROOF OF SERVICE

Counsel for Respondents certifies that he has served Respondents' Reply to Appellant's Return to Respondents' Motion to Strike on all parties by depositing a copy of it in the United States Mail, postage prepaid, on March 19, 2015, addressed to the following attorneys of record:

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Counsel for Appellant

Respectfully submitted,

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**PROOF OF SERVICE –
ATTORNEYS FOR THE
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RESTAURANT PARTNERS,
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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**

The South Carolina Court of Appeals

Rebecca Jackson, Appellant,

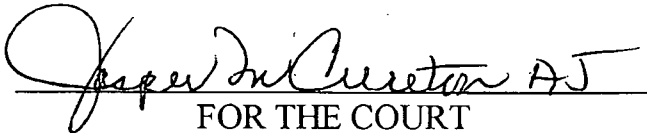
v.

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

ORDER

After careful consideration, the motion to strike is denied. The record on appeal shall be served on Respondents and a proof of service filed with this Court within thirty days of the date of this order.


FOR THE COURT

Columbia, South Carolina

cc:
Melissa Garcia Mosier, Esquire
Christian Stegmaier, Esquire
L. Lisa McPherson, Esquire
Claude Townsend Prevost, III, Esquire

FILED
5/1/15



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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January 04, 2017

Mr. Christian Stegmaier, Esquire
PO Box 12487
Columbia SC 29211

Re: Rebecca Jackson v. OSI Restaurant Partners
Appellate Case No. 2014-001861

Dear Counsel:

The Court received your email dated December 21, 2016. In response, the Court considers your suggestion for rehearing en banc to be moot in light of the panel's order granting your petition for rehearing. Accordingly, we will not take any further action on the suggestion for rehearing en banc. The timelines pursuant to Rule 221 of the South Carolina Appellate Court Rules remain the same.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jenny A. Kitchings", written over the typed name.

CLERK

cc: Melissa Garcia Mosier, Esquire
L. Lisa McPherson, Esquire
Claude Townsend Prevost, III, Esquire
Kerri Brown Rupert, Esquire
Meghan Hazelwood Hall, Esquire

Christian Stegmaier

From: Christian Stegmaier
Sent: Wednesday, December 21, 2016 3:15 PM
To: 'Kitchings, Jenny'
Cc: 'Melissa G. Mosier'
Subject: Rebecca Jackson v. OSI Restaurant Partners, LLC

Jenny-

Hope you're well. Need some insight on how to proceed in a curious circumstance. Counsel for the Appellant, Melissa Mossier, is on this email.

Respondents were awarded summary judgment by the Circuit Court. Appellant appealed. The Ct. App. reversed and remanded. We moved for rehearing and rehearing en banc. The panel granted the petition for rehearing, but did not change the outcome. The panel made no reference to the en banc petition nor was there a separate order disposing of it, which is creating a question for us.

<http://www.sccourts.org/opinions/unpublishedopinions/HTMLFiles/COA/2016-UP-408.pdf>

Question: What do Respondents do now? We remain aggrieved with the panel's decision. Is there going to be a ruling on the en banc petition? Is it still operative? Do/can we refile a petition for en banc review? Or do we go ahead and petition for cert? Don't want to guess wrong and get past either 15 days for the en banc petition or 30 days for the cert petition without doing what needs to be done to protect our client's position.

Thanks in advance for any help/insight.

CS