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THE STATE OF SOUTH CAROLINA
In the 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Unpublished Opinion No. 2016-UP-408 (Filed September 14, 2016)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 II)

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2012-CP-43-00707

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.

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JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, SC

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER)	THIRD JUDICIAL CIRCUIT
Rebecca Jackson,)	CIVIL ACTION NUMBER: 2012-CP-43-707
Plaintiff,)	
vs.)	**ORDER ADDRESSING PLAINTIFF'S RULE 59(e), SCRCP MOTION**
OSI Restaurant Partners, L.L.C., Outback Steakhouse of South Carolina, Inc., Outback Steakhouse of Florida, L.L.C., Private Restaurant Properties, L.L.C., Private Restaurant Master Lessee, L.L.C., each d/b/a Outback Steakhouse,)	
Defendants.)	

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Sandra C. Dickerson
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendants OSI Restaurant Partners, L.L.C., Outback Steakhouse of South Carolina, Inc., Outback Steakhouse of Florida, L.L.C., Private Restaurant Properties, L.L.C., Private Restaurant Master Lessee, L.L.C., each d/b/a Outback Steakhouse moved this Court for an order granting them summary judgment in the above-referenced case. Based on a review and analysis of the pleadings, the parties' respective memoranda and supporting materials, as well as the parties' respective arguments to the Court on April 7, 2013, in Sumter, this Court granted summary judgment to Defendants in the instant case.

The Court advised the parties of its decision to grant summary judgment by email on May 15, 2014, with instruction to counsel to Defendants to prepare a proposed order reflecting this disposition. Counsel did as instructed and drafted an order, which counsel submitted to

chambers for review, edit, and execution.[1] This Order, as reviewed and executed by this Court, was filed by the Sumter County Clerk of Court on May 28, 2014.

By filing dated May 27, 2014, which was after the Court's announcement of its disposition on May 15, 2014, but before entry of the Order on May 28, 2014, counsel for Plaintiff Rebecca Jackson filed a Rule 56(f) affidavit and an accompanying brief in support of the desired relief. Defendants' counsel objected to the filing of the Rule 56(f) affidavit after both the April 7, 2014, argument in the case and the May 15, 2014, announcement of disposition. Thereafter, on June 9, 2014, Plaintiff timely filed a Rule 59(e), SCRCP motion to alter or amend, which is essentially premised upon the same grounds as enunciated within her Rule 56(f) affidavit and memorandum.[2]

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

- Plaintiff maintains the grant of summary judgment was premature. Specifically, Plaintiff avers that full discovery had not yet come to a conclusion and that summary judgment should not have been granted due to Plaintiff continuing to, inter alia, investigate the identities of Outback Steakhouse employees specifically on duty at the time of Plaintiff's purported fall on June 7, 2009, pursue obtaining a copy of an Outback employee orientation video, and pursue copies of incident reports from other premises-related events at the subject restaurant. As well, Plaintiff represented she sought to take the depositions of additional Outback employees concerning their possession of any knowledge concerning similar falls on the subject "built up curb ramp";[3]
- As an alternative argument, Plaintiff asserts that because the curb access ramp at issue was a condition created by Defendant or Defendant's agents, Plaintiff need not prove specific alleged hazards created by the ramp. In other words,

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

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

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

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

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

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

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

[4] Id. at 4 & 5.

[5] Id. at 5.

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

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

FACTS/PROCEDURAL BACKGROUND

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

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

---

[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 ["]accessible["] in the title is not just for disabled people, it's for everyone, do you agree with that?

Mr. Campbell: Let's look at that. If we look at page one, paragraph one, and 1.1., the purpose and application. 1.1's purpose. **["]The specifications in this standard make buildings and facilities accessible to and useable by people with such disabilities as the inability to walk, difficulty walking, reliance on walking aides, blindness, visual impairment, deafness and hearing impairment, incoordination, reaching and manipulation, disabilities, lack of stamina, difficulty interpreting and reacting to sensory information and extremes of physical size based only upon adult dimensions.["]** My understanding and we've adjusted over the years, i[s] that the purpose of this code is to address those individuals with various disabilities ---

Mrs. Mosier: Okay.

Mr. Campbell: --- and impairments whether it be a mobility impairment, sensory impairment, whatever it may be.

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

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

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

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

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

- The subject accident occurred immediately after Plaintiff stepped off the curb and onto the curb access ramp, which was within the applicable requirements of the Standard Building Code, the governing code as it pertains to Plaintiff. Plaintiff was not walking on the curb access ramp at the time of her fall.[14]

- The proximate cause of Plaintiff's fall was likely a result of her simply stumbling and failing to recover due to her choice of footwear, which were high heels with thin strap.[15]

STANDARD OF REVIEW

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

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

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

Our appellate courts have further stated that when a plaintiff is faced with a defendant's motion for summary judgment, the plaintiff cannot defeat the motion by relying upon the mere

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

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

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

LAW/ANALYSIS

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

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

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

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

(3) resulting in damages to the plaintiff; and

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

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

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

(1) the injury was caused by a specific act of the defendant landowner that created the dangerous condition; or

(2) the defendant landowner had actual or constructive knowledge of the dangerous condition and failed to remedy it.

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

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

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

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

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

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

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

A. International Property Maintenance Code Does Not Apply

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

South Carolina considers the International Property Maintenance Code only to be a "permissive code." Kauffman v. Park Place Hospitality Grp., CIV.A. 2:09-1399-MBS, 2011 WL 1335832 (D.S.C. Apr. 7, 2011) aff'd, 468 F. App'x 220 (4th Cir. 2012). See also

http://www.llr.state.sc.us/pol/bcc/index.asp?file=GENERAL_CodesInEffect.htm (last visited April 4, 2014) (citing S.C. Code Ann. §6-9-60, as amended, which states "permissive codes" may be used as needed by a local jurisdiction, but the codes must first be adopted by ordinance before enforcement can begin. The permissive codes are the ... 2003 International Property Maintenance Code ...."),[16] In the instant case, the Court is unaware of the International Property Maintenance Code being adopted by ordinance as "mandatory" by either the City of Sumter or County of Sumter for purposes of enforcement. Accordingly, based on Plaintiff's express allegations found within her amended complaint concerning duty and breach based upon alleged violation of the International Property Maintenance Code, no such legally-mandated duty exists. Thus, summary judgment is warranted in the instant case as to these allegations.

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

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

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

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

The American National Standards Institute is a private non-profit organization that oversees the development of voluntary consensus standards for products, services, processes, systems, and personnel in the United States. The organization promulgates numerous standards in our society, including those found at ANSI 117.1, which is titled as "Accessible and Useable Buildings and Facilities."

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

This Court's holding concerning the lack of applicability of ANSI as a standard of care for non-disabled persons is supported by case law. In Wisner v. United States, 154 F.R.D. 39 (N.D.N.Y. 1994), the plaintiff slipped and fell on a sidewalk constructed by the United States outside a post office building. The plaintiff contended, inter alia, the sidewalk was negligently

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

designed and constructed by allowing too severe a slope to exist without the placement of handrails. In opposition to a motion for summary judgment, the plaintiff apparently submitted an expert report to the effect the sidewalk was installed at a slope greater than the standard recommended by the American National Standards Institute without the addition of handrails. The defendant argued the standards advanced by the plaintiff related to the "accessibility" of a building to disabled individuals, not to the safety of persons in general. Id. at 15-16. Thus, the defendant asserted the plaintiff—not suffering from a disability–could not prosecute her claim based on the alleged violation of these standards. The magistrate judge adopted the defendant's argument, stating as follows:

> [R]ather than delve into the defendant's successes in meeting these standards, the court finds these standards not applicable to the case at hand. **The standards exist to ensure accessibility for the handicapped. While such standards necessarily take into account the safety of certain construction, the standards protect the handicapped, and cannot be transformed into a sword for another not subject to its protection.**

Id. at 17 (emphasis added); see also Miller v. New York City Hous. Auth., 29 Misc. 3d 1214(A), 918 N.Y.S.2d 399 (Sup. Ct. 2010) ("Although it is true that ANSI 117.1–1986, relating to exterior accessible routes for people with physical disabilities, may have been adopted in section 27–292.4 of the Building Code, the court observes that ANSI standards may not serve as predicates for General Municipal Law x 205(e) liability, as they are not "statutes, ordinances or regulations" (Rosabella v. Metropolitan Tr. Auth., 23 AD3d 365, 366 [2005]). Moreover, even if ANSI 117.1–1986 did apply, **plaintiff is not a member of the class protected under the law, and the court has already held in its Prior Order that Admin. Code x 27–292.4 is inapplicable to plaintiff.**) (emphasis added).

The logic of, inter alia, the magistrate judge in Wisner has equal application to the facts of the instant case. Plaintiff, not being a member of the protected class, is unable to utilize the

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

CONCLUSION

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

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

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

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

AND IT IS SO ORDERED.

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

Sumter, South Carolina
28 July, 2014

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER) THIRD JUDICIAL CIRCUIT

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

Plaintiff,)

vs.) ORDER GRANTING SUMMARY JUDGMENT

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 MAY 28 PM 1:13
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

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

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendants OSI Restaurant Partners, L.L.C., Outback Steakhouse of South Carolina, Inc., Outback Steakhouse of Florida, L.L.C., Private Restaurant Properties, L.L.C., Private Restaurant Master Lessee, L.L.C., each d/b/a Outback Steakhouse moved this Honorable Court for an order granting them summary judgment in the above-referenced case. Based on a review and analysis of the pleadings, the parties' respective memoranda and supporting materials, as well as the parties' respective arguments to the Court on April 7, 2013, in Sumter, this Court grants summary judgment to Defendants in the instant case.

FACTS/PROCEDURAL BACKGROUND

The instant case is a premises liability matter involving alleged static defect and sounds in negligence. Plaintiff Rebecca Jackson maintains that on or about 1:30 p.m. on June 7, 2009, as she and her husband Wayne Jackson exited the Outback Steakhouse restaurant at 2840 Broad

Street in Sumter, she was "unable to appreciate the change in elevation in the [exit] ramp[1] and tripped and fell to the ground." {Amended Complaint, ¶ 11}. Plaintiff alleges Defendants, the owner and operator of the subject Outback Steakhouse, had actual or constructive notice of a dangerous condition created by the curb access ramp and/or created a dangerous condition. {Amended Complaint, ¶ 14 & 16}.

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

> 17. The Defendants, acting together as agents and servants of one another, violated their duty to use reasonable care to protect the Plaintiff from hazardous conditions it created or knowingly permitted to exist on the premises and was careless, negligent and/or grossly negligent, willful and wanton in its acts and/or omissions at the time and place about mentioned in the following particulars:
>
> . . . .
>
> g. In failing to maintain the exterior of the property in compliance with the International Property Maintenance Code.
>
> . . . .
>
> j. In failing to take remedial measures to make the ramps come into compliance with the International Property Maintenance Code.
>
> . . . .
>
> p. In failing to comply with applicable building, health, and/or safety codes or other industry standards applicable to handicap access ramps.

{Amended Complaint, ¶ 17}

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

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

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

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

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

[4] Id. at p. 22, ll. 5-11. Also, Campbell quoted directly from the ANSI 117.1 standards when challenged on his position that ANSI 117.1 does not apply when the claimant is non-disabled:

> Mrs. Mosier: [W]e went over how ANSI A117.1 is titled ["][A]ccessible and [U]sable [B]uildings and [F]acilities,["] and you can verify that. I mean, I know you already know this, but just to be fair, it's right there (indicating), it's the cover. Now, the word ["]accessible["] in the title is not just for disabled people, it's for everyone, do you agree with that?
>
> Mr. Campbell: Let's look at that. If we look at page one, paragraph one, and 1.1., the purpose and application. 1.1's purpose. ["]The specifications in this standard make buildings and facilities accessible to and useable by people with such disabilities as the inability to walk, difficulty walking, reliance on walking aides, blindness, visual impairment, deafness and hearing impairment, incoordination, reaching and manipulation, disabilities, lack of stamina, difficulty interpreting and reacting to sensory information and extremes of physical size based only upon adult dimensions.["] My understanding and we've adjusted over the years, i[s] that the purpose of this code is to address those individuals with various disabilities ---
>
> Mrs. Mosier: Okay.
>
> Mr. Campbell: --- and impairments whether it be a mobility impairment, sensory impairment, whatever it may be.

- Assuming, arguendo, ANSI 117.1 is to be considered in the instant case, from a human factors/biomechanical standpoint, any deviation in standard regarding slope in either the top of the subject ramp or at its flared sides is negligible and would not be perceptible by a non-disabled pedestrian to the point of causing a fall.[5] Moreover, with regard to transition from curb to ramp, ANSI 117.1 does not include requirements for striping or markings on a curb ramp.[6]

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

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

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

STANDARD OF REVIEW

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

> Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule

---

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

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

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

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

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

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

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

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

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

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

LAW/ANALYSIS

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

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

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

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

(3) resulting in damages to the plaintiff; and

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

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

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

(1) the injury was caused by a specific act of the defendant landowner that created the dangerous condition; or

(2) the defendant landowner had actual or constructive knowledge of the dangerous condition and failed to remedy it.

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

In the case sub judice, Defendants' motion for summary judgment is based mainly on the argument that Plaintiff cannot prove elements one (existence of applicable/colorable/recognized duty of care) and two (breach). Specifically, Defendants maintain Plaintiff cannot satisfy the well-stated negligence analysis due to the fact that, inter alia, Plaintiff cannot demonstrate the subject curb access ramp was in fact "dangerous" or "defective" applying a recognized standard of care for the non-disabled population. Additionally, Defendants assert Plaintiff cannot

establish the condition of the subject ramp was the proximate cause of her fall and subsequent alleged injuries. This Court concurs with the Defendants' averments concerning lack of recognized duty and disposes of this case based on that argument. The Court need not reach Defendants' alternative argument pertaining to proximate cause.

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

A. International Property Maintenance Code Does Not Apply

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

South Carolina considers the International Property Maintenance Code only to be a "permissive code." Kauffman v. Park Place Hospitality Grp., CIV.A. 2:09-1399-MBS, 2011 WL 1335832 (D.S.C. Apr. 7, 2011) aff'd, 468 F. App'x 220 (4th Cir. 2012). See also http://www.llr.state.sc.us/pol/bcc/index.asp?file=GENERAL_CodesInEffect.htm (last visited April 4, 2014) (citing S.C. Code Ann. §6-9-60, as amended, which states "permissive codes" may be used as needed by a local jurisdiction, but the codes must first be adopted by ordinance before enforcement can begin. The permissive codes are the ... 2003 International Property Maintenance Code ...").[10] In the instant case, the Court is unaware of the International Property Maintenance Code being adopted by ordinance as "mandatory" by either the City of Sumter or County of Sumter for purposes of enforcement. Accordingly, based on Plaintiff's express

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

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

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

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

The American National Standards Institute is a private non-profit organization that oversees the development of voluntary consensus standards for products, services, processes, systems, and personnel in the United States. The organization promulgates numerous standards in our society, including those found at ANSI 117.1, which is titled as "Accessible and Useable Buildings and Facilities."

To the extent that Plaintiff relies on ANSI 117.1 as a basis for recovery in her case, such pursuit lacks legal efficacy. Although it is true that ANSI 117.1, which relates to exterior accessible routes for people with physical disabilities, may have been adopted or referenced in various building codes, the alleged violations of ANSI standards alone may not serve as

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

predicates for a private cause of action in South Carolina. Cf. Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001), aff'd, 354 S.C. 161, 580 S.E.2d 440 (2003). Moreover, and perhaps most important to the analysis in the instant case, there is no competent evidence in the instant case that establishes Plaintiff was disabled or possessed a disability (as defined by the Americans with Disabilities Act) at the time of the subject fall. Accordingly, even if violation of ANSI 117.1 can serve as a basis for a private cause of action in South Carolina, Plaintiff is not a member of the class protected under this regulation and is thus precluded from employing the same as a basis for her prosecution against Defendants.

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

> [R]ather than delve into the defendant's successes in meeting these standards, the court finds these standards not applicable to the case at hand. The standards exist to ensure accessibility for the handicapped. While such standards necessarily take into account the safety of certain construction, the standards

protect the handicapped, and cannot be transformed into a sword for another not subject to its protection.

Id. at 17 (emphasis added); see also Miller v. New York City Hous. Auth., 29 Misc. 3d 1214(A), 918 N.Y.S.2d 399 (Sup. Ct. 2010) ("Although it is true that ANSI 117.1–1986, relating to exterior accessible routes for people with physical disabilities, may have been adopted in section 27–292.4 of the Building Code, the court observes that ANSI standards may not serve as predicates for General Municipal Law x 205(e) liability, as they are not "statutes, ordinances or regulations" (Rosabella v. Metropolitan Tr. Auth., 23 AD3d 365, 366 [2005]). Moreover, even if ANSI 117.1–1986 did apply, plaintiff is not a member of the class protected under the law, and the court has already held in its Prior Order that Admin. Code x 27–292.4 is inapplicable to plaintiff.) (emphasis added).

The logic of, inter alia, the magistrate judge in Wisner has equal application to the facts of the instant case. Plaintiff, not being a member of the protected class, is unable to utilize the standards of ANSI for purposes of prosecuting her claim as a non-disabled person at the time of her fall.

CONCLUSION

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

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

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

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

IT IS ORDERED that summary judgment be granted to Defendants.

AND IT IS SO ORDERED.

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

Sumter, South Carolina
May 23, 2014

RECORDED
2012 APR 16 PM 12:26
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF SUMTER)	THIRD JUDICIAL CIRCUIT
)	
Rebecca Jackson,)	Case No.: 2012-CP- 43-197
)	
Plaintiff,)	
)	
-vs-)	SUMMONS
)	(Jury Trial Requested)
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.)	

TO: THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiff or his attorney at her office, 119 East Main Street, Lexington, South Carolina 29072, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in this Complaint.

McWHIRTER, BELLINGER, & ASSOCIATES, P.A.

By: /s/ L. Lisa McPherson

L. Lisa McPherson
Attorney for the Plaintiff
119 East Main Street
Lexington, South Carolina 29072
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Lisam@mcwhirterlaw.com

Lexington, South Carolina
April 13, 2012

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER)
) THIRD JUDICIAL CIRCUIT
Rebecca Jackson,)
)
Plaintiff,)
)
-vs-) COMPLAINT
) (Jury Trial Requested)
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
2012 APR 16 PM 12:26
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Case No: 2012-CP-43-787

The Plaintiff would respectfully show upon information and belief that:

1. The Plaintiff, Rebecca Ann Jackson, is a citizen and resident of the County of Sumter, State of South Carolina.

2. OSI Restaurant Partners, L.L.C, is a Florida limited liability corporation, duly authorized to do business in South Carolina, that maintains agents and servants in Sumter County, South Carolina, owns real estate in Sumter County, South Carolina, and maintains an office in Richland County, South Carolina.

3. Defendant Outback Steakhouse of South Carolina Inc., d/b/a Outback Steakhouse is a domestic corporation organized pursuant to the laws of South Carolina, maintains agents and servants in Sumter County, South Carolina and owned and/or occupied real estate located at 2480 Broad Street in Sumter, South Carolina as of June 7, 2009.

4. Defendant Outback Steakhouse of Florida, L.L.C., is a Florida limited liability company, duly authorized to do business in South Carolina, that maintains agents and servants in Sumter County, South Carolina, owns and/or occupies real estate in Sumter County, South Carolina, and maintains an office in Richland County, South Carolina.

5. Defendant Private Restaurant Properties, L.L.C., is a Delaware limited liability company, duly authorized to do business in South Carolina, that maintains agents and servants in Sumter County, South Carolina, owns real estate in Sumter County, South Carolina, and maintains an office in Richland County, South Carolina.

6. Defendant Private Restaurant Master Lessee, L.L.C., is a Delaware limited liability company, duly authorized to do business in South Carolina, that maintains agents and servants in Sumter County, South Carolina, leases real estate in Sumter County, South Carolina, from Defendant Private Restaurant Properties, L.L.C., and maintains an office in Richland County, South Carolina.

7. Defendant OSI Restaurant Partners, L.L.C.'s wholly-owned subsidiary, Private Restaurant Properties, L.L.C., (hereinafter referred to jointly as the Outback Steakhouse) owns the real property situated at 2480 Broad Street in Sumter County, South Carolina.

8. Defendant Private Restaurant Properties, L.L.C. (formerly known as OSF Real Estate, L.L.C.) is a property management company and manages the real property located at 2480 Broad Street in Sumter County, South Carolina.

9. 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. are also agents and servants of one another, each are doing business as Outback Steakhouse, and are thus jointly and severally liable to Plaintiff for the acts and omissions complained of.

10. That on or about one thirty in the afternoon on June 7, 2009, Plaintiff exited the Outback Steakhouse owned by the Outback Steakhouse Defendants located at 2480 Broad Street in Sumter, South Carolina. As she descended the ramp, she was unable to appreciate the change in elevation in the ramp and tripped and fell to the ground.

11. As a result, the Plaintiff suffered great physical harm and injury to her back, right buttock, right hip, left ribs, pelvis, and other body parts which have caused and will in the future cause the Plaintiff to undergo much physical pain, suffering, mental anguish, emotional distress, permanent impairment of health and bodily efficiency, permanent injury, and permanent scarring, have caused and will in the future cause the Plaintiff to have to spend money for medical services and travel related to her injuries.

12. That at the time and place of her fall, Plaintiff was an invitee on the subject premises because she was a customer of the Outback Steakhouse of South Carolina.

13. That the Defendants had actual or constructive notice of the dangerous condition of the handicap access ramp upon which the Plaintiff fell, and/or the Defendants created the dangerous condition of the ramp.

14. Because Plaintiff was a customer and business invitee of the Outback Steakhouse, a property owned and maintained by Defendants, Defendants had a duty to exercise reasonable care to protect Plaintiff and other customers from injury in the parking lot, which included the duty to make reasonable inspections, to discover hazardous conditions in the parking lot, and to take reasonable steps to protect Plaintiff and other customers from such conditions.

15. Defendants, acting by and through their agents, servants, and/or employees, created this hazard or received the property in this manner and knowingly permitted a rounded, uneven walking surface to remain on the premises. In doing so, they failed to take necessary steps to keep customers and business invitees of the Outback Steakhouse safe from harm. They, therefore, created the dangerous condition in an area where it was foreseeable that customers would be walking and therefore needlessly endangered the public.

16. 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, wilful and wanton in its acts and/or omissions at the time and place above mentioned in the following particulars:

a) In failing to properly maintain its premises for tenants, employees of tenants, patrons, and other invitees and licensees;

b) In failing to keep the ramp that Plaintiff traversed in a reasonably safe condition;

c) In failing to take appropriate responsive measures after another person or persons reported falling, prior to June 7, 2009, in the same location that the Plaintiff fell;

d) In failing to provide adequate warning of the dangerous condition presented by the flared edges of the ramp, which are difficult to appreciate when descending the ramp;

e) In failing to provide a flat walking surface on the three handicap ramps used as the exclusive means of ingress and egress;

f) In failing to maintain the area in a safe condition for the use of the tenants, employees of tenants, patrons, and other invitees and licensees;

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

h) In failing to take remedial measures to make the ramps safe for customers once Defendants were on notice of the danger presented by the three rounded ramps;

i) In failing to repair, replace, resurface, or cover the ramp surface that the Defendants knew or should have known posed a danger to tenants, employees of tenants, patrons, and other invitees and licensees;

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

k) In creating a dangerous condition and risk in not erecting warning signs or barricades to reveal the risk the handicap ramps posed to tenants, employees of tenants, patrons, and other invitees and licensees;

l) In creating a dangerous condition and risk to customers by having installed said ramps in areas that are the primary means of ingress and egress to and from the building;

m) In failing to provide a safe ingress and egress to the said building, for tenants, employees of tenants, patrons, and other invitees and licensees;

n) In failing to promptly correct the hazardous condition once it was created;

o) In failing to implement appropriate policies and procedures that would avoid the creation of the hazard at issue in this case;

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

q) In failing to use that degree of care and caution that a reasonable and prudent property owner of South Carolina would have used under the same circumstances; and

r) By such other particulars as the evidence at trial may show.

17. All the above were the direct and proximate cause of the injuries and damages suffered by the Plaintiff, said acts being in violation of the Statutes and Common Laws of the State of South Carolina.

18. The Plaintiff is informed and believes that she is entitled to judgment in this matter in an amount to be determined by a jury.

WHEREFORE, Plaintiff prays for judgment for Actual damages, Punitive damages in an appropriate amount, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

McWHIRTER, BELLINGER, & ASSOCIATES, P.A.

By: L. Lisa McPherson by Melissa G. Moore

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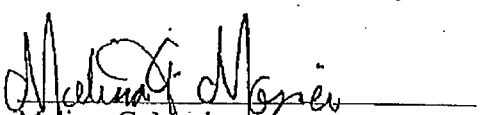
Lexington, South Carolina
April 13, 2012

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF SUMTER RECORDED THIRD JUDICIAL CIRCUIT
)
Rebecca Jackson, 2012 JUN -7 PM 1:46 Case No: 2012-CP-43-0707
)
JAMES C. CAMPBELL
Plaintiff CLERK OF COURT
SUMTER COUNTY, S.C.
-vs-) AMENDED SUMMONS
) (Jury Trial Requested)
Outback/Charlotte-I, L.P.,)
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.)
)

TO: CHRISTIAN STEGMAIER AND CLAUDE T. PREVOST, ATTORNEYS FOR THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiff or his attorney at her office, 119 East Main Street, Lexington, South Carolina 29072, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in this Complaint.

McWHIRTER, BELLINGER, & ASSOCIATES, P.A.

By: 

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Lexington, South Carolina
June 7, 2012

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THIRD JUDICIAL CIRCUIT
)
Rebecca Jackson,) Case No: 2012-CP-43-0707
)
Plaintiff,)
)
-vs-) AMENDED COMPLAINT
) (Jury Trial Requested)
Outback/Charlotte-I, L.P.,)
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
2012 JUN -7 PM 1:46
JANET S. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

The Plaintiff would respectfully show upon information and belief that:

1. The Plaintiff, Rebecca Ann Jackson, is a citizen and resident of the County of Sumter, State of South Carolina.

2. Outback/Charlotte-I Limited Partnership d/b/a Outback Steakhouse is a Florida limited partnership, duly authorized to do business in South Carolina, that maintains agents and servants in Sumter County, South Carolina, owns real estate in Sumter County, South Carolina, and is the owner and operator of the premises that is the subject of this case at all times relevant to this Complaint.

3. OSI Restaurant Partners, L.L.C, is a Florida limited liability corporation, duly authorized to do business in South Carolina, that maintains agents and servants in Sumter County, South Carolina, owns real estate in Sumter County, South Carolina, and maintains an office in Richland County, South Carolina.

4. Defendant Outback Steakhouse of South Carolina Inc., d/b/a Outback Steakhouse is a domestic corporation organized pursuant to the laws of South Carolina, maintains agents and servants in Sumter County, South Carolina and owned and/or occupied real estate located at 2480 Broad Street in Sumter, South Carolina as of June 7, 2009.

5. Defendant Outback Steakhouse of Florida, L.L.C., is a Florida limited liability company, duly authorized to do business in South Carolina, that maintains agents and servants in Sumter County, South Carolina, owns and/or occupies real estate in Sumter County, South Carolina, and maintains an office in Richland County, South Carolina.

6. Defendant Private Restaurant Properties, L.L.C., is a Delaware limited liability company, duly authorized to do business in South Carolina, that maintains agents and servants in Sumter County, South Carolina, owns real estate in Sumter County, South Carolina, and maintains an office in Richland County, South Carolina.

7. Defendant Private Restaurant Master Lessee, L.L.C., is a Delaware limited liability company, duly authorized to do business in South Carolina, that maintains agents and servants in Sumter County, South Carolina, leases real estate in Sumter County, South Carolina, from Defendant Private Restaurant Properties, L.L.C., and maintains an office in Richland County, South Carolina.

8. Defendant OSI Restaurant Partners, L.L.C.'s wholly-owned subsidiary, Private Restaurant Properties, L.L.C., (hereinafter referred to jointly as the Outback Steakhouse) owns the real property situated at 2480 Broad Street in Sumter County, South Carolina.

9. Defendant Private Restaurant Properties, L.L.C. (formerly known as OSF Real Estate, L.L.C.) is a property management company and manages the real property located at 2480 Broad Street in Sumter County, South Carolina.

10. 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. are also agents and servants of one another, each are doing business as Outback Steakhouse, and are thus jointly and severally liable to Plaintiff for the acts and omissions complained of.

11. That on or about one thirty in the afternoon on June 7, 2009, Plaintiff exited the Outback Steakhouse owned by the Outback Steakhouse Defendants located at 2480 Broad Street in Sumter, South Carolina. As she descended the ramp, she was unable to appreciate the change in elevation in the ramp and tripped and fell to the ground.

12. As a result, the Plaintiff suffered great physical harm and injury to her back, right buttock, right hip, left ribs, pelvis, and other body parts which have caused and will in the future cause the Plaintiff to undergo much physical pain, suffering, mental anguish, emotional distress, permanent impairment of health and bodily efficiency, permanent injury, and permanent scarring, have caused and will in the future cause the Plaintiff to have to spend money for medical services and travel related to her injuries

13. That at the time and place of her fall, Plaintiff was an invitee on the subject premises because she was a customer of the Defendants d/b/a Outback Steakhouse.

14. That the Defendants had actual or constructive notice of the dangerous condition of the handicap access ramp upon which the Plaintiff fell, and/or the Defendants created the dangerous condition of the ramp.

15. Because Plaintiff was a customer and business invitee of the Outback Steakhouse, a property owned and maintained by Defendants, Defendants had a duty to exercise reasonable care to protect Plaintiff and other customers from injury in the parking lot, which included the duty to make reasonable inspections, to discover hazardous conditions in the parking lot, and to take reasonable steps to protect Plaintiff and other customers from such conditions.

16. Defendants, acting by and through their agents, servants, and/or employees, created this hazard or received the property in this manner and knowingly permitted a rounded, uneven walking surface to remain on the premises. In doing so, they failed to take necessary steps to keep customers and business invitees of the Outback Steakhouse safe from harm. They, therefore, created the dangerous condition in an area where it was foreseeable that customers would be walking and therefore needlessly endangered the public.

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, wilful and wanton in its acts and/or omissions at the time and place above mentioned in the following particulars:

a) In failing to properly maintain its premises for tenants, employees of tenants, patrons, and other invitees and licensees;

b) In failing to keep the ramp that Plaintiff traversed in a reasonably safe condition;

c) In failing to take appropriate responsive measures after another person or persons reported falling, prior to June 7, 2009, around the same location that the Plaintiff fell;

d) In failing to provide adequate warning of the dangerous condition presented by the flared edges of the ramp, which are difficult to appreciate when descending the ramp;

e) In failing to provide a flat walking surface on the three handicap ramps used as the exclusive means of ingress and egress;

f) In failing to maintain the area in a safe condition for the use of the tenants, employees of tenants, patrons, and other invitees and licensees;

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

h) In failing to take remedial measures to make the ramps safe for customers once Defendants were on notice of the danger presented by the three rounded ramps;

i) In failing to repair, replace, resurface, or cover the ramp surface that the Defendants knew or should have known posed a danger to tenants, employees of tenants, patrons, and other invitees and licensees;

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

k) In creating a dangerous condition and risk in not erecting warning signs or barricades to reveal the risk the handicap ramps posed to tenants, employees of tenants, patrons, and other invitees and licensees;

l) In creating a dangerous condition and risk to customers by having installed said ramps in areas that are the primary means of ingress and egress to and from the building;

m) In failing to provide a safe ingress and egress to the said building, for tenants, employees of tenants, patrons, and other invitees and licensees;

n) In failing to promptly correct the hazardous condition once it was created;

o) In failing to implement appropriate policies and procedures that would avoid the creation of the hazard at issue in this case;

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

q) In failing to use that degree of care and caution that a reasonable and prudent property owner of South Carolina would have used under the same circumstances; and

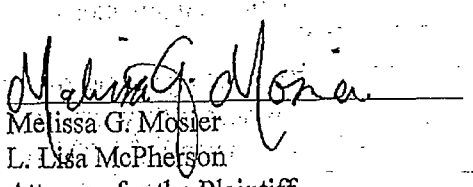
r) By such other particulars as the evidence at trial may show.

18. All the above were the direct and proximate cause of the injuries and damages suffered by the Plaintiff, said acts being in violation of the Statutes and Common Laws of the State of South Carolina.

19. The Plaintiff is informed and believes that she is entitled to judgment in this matter in an amount to be determined by a jury.

WHEREFORE, Plaintiff prays for judgment for Actual damages, Punitive damages in an appropriate amount, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

McWHIRTER, BELLINGER, & ASSOCIATES, P.A.

By: 

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Lexington, South Carolina

June 7, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER	)	THIRD JUDICIAL CIRCUIT
Rebecca Jackson, Plaintiff, vs. Outback/Charlotte-I, L.P., 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.	)	CIVIL ACTION NUMBER: 2012-CP-43-707 **DEFENDANTS' ANSWER TO PLAINTIFF'S AMENDED COMPLAINT** **(Jury Trial Requested)**

To: L. LISA MCPHERSON, ESQUIRE AND MELISSA G. MOSSIER, ESQUIRE, ATTORNEYS FOR PLAINTIFF:

Defendant Outback/Charlotte I, LP, the real party in interest, on behalf of itself and the named defendants, OSI Restaurant Partners, LLC, Outback Steakhouse of South Carolina, Inc., Outback Steakhouse of Florida, LLC, Private Restaurant Properties, LLC and Private Restaurant Master Lessee, LLC, reserving the right to file a motion under Rule 12 of the South Carolina Rules of Civil Procedure, or any other dispositive motion, respond to the Complaint of Plaintiff Rebecca Jackson by denying each and every allegation not herein after specifically admitted, demanding strict proof thereof, and further responds as follows:

FOR A FIRST DEFENSE AND BY WAY OF ANSWER

1. Each and every allegation not herein admitted is hereby denied and strict proof thereof demanded.

2. Defendant is without sufficient information in which to form a belief as to the allegations of Paragraph 1 regarding Plaintiff's county of residence and therefore denies the same and demands strict proof thereof. Defendants admit, upon information and belief, Plaintiff is a citizen of South Carolina.

3. Defendant admits so much of Paragraph 2 as alleges Outback/Charlotte I Limited Partnership is a Florida limited partnership, duly authorized to do business in South Carolina. Defendant further admits so much of Paragraph 2 as alleges Outback/Charlotte I Limited Partnership maintained agents and servants in Sumter County, South Carolina, owned real estate in Sumter County, South Carolina, and owned and operated the premises that are the subject of this case. The remaining allegations of Paragraph 2 are denied in so much as Outback/Charlotte I Limited Partnership was the owner and operator of the Sumter location in 2009 but is not currently the owner/operator of the premises.

4. Defendant admits so much of Paragraph 3 as alleges OSI Restaurant Partners, LLC is a foreign limited liability corporation authorized to do business in South Carolina. The remaining allegations of Paragraph 3 are denied and this Defendant demands strict proof thereof. However, Defendant OSI Restaurant Partners, LLC is not a proper party in interest in the instant case. In 2009, Defendant Outback/Charlotte I, LP was the owner and operator of the subject property and is amenable to suit in the instant case.

5. Defendant admits so much of Paragraph 4 as alleges Outback Steakhouse of South Carolina, Inc. is a domestic corporation organized pursuant to the laws of South Carolina. The remaining allegations of Paragraph 4 are denied and this Defendant demands strict proof thereof. However, Defendant Outback Steakhouse of South Carolina, Inc. is not a

proper party in interest in the instant case. In 2009, Defendant Outback/Charlotte I, LP was the owner and operator of the subject property and is amenable to suit in the instant case.

6. Defendant admits so much of Paragraph 5 as alleges Outback Steakhouse of Florida, LLC is a Florida limited liability company authorized to do business in South Carolina. The remaining allegations of Paragraph 5 are denied and this Defendant demands strict proof thereof. However, Defendant Outback Steakhouse of Florida, LLC is not a proper party in interest in the instant case. In 2009, Defendant Outback/Charlotte I, LP was the owner and operator of the subject property and is amenable to suit in the instant case.

7. Upon information and belief, Defendant admits so much of Paragraph 6 as alleges Private Restaurant Properties, LLC is a Delaware limited liability company authorized to do business in South Carolina. However, Private Restaurant Properties, LLC is not a proper party in interest in the instant case. In 2009, Defendant Outback/Charlotte I, LP was the owner and operator of the subject property and is amenable to suit in the instant case.

8. Upon information and belief, Defendant admits so much of Paragraph 7 as alleges Private Restaurant Master Lessee, LLC, is a Delaware limited liability company authorized to do business in South Carolina. However, Private Restaurant Master Lessee, LLC is not a proper party in interest in the instant case. In 2009, Defendant Outback/Charlotte I, LP was the owner and operator of the subject property.

9. Defendant denies the allegations of Paragraph 8 and responds Defendant Outback/Charlotte I, LP was the owner and operator of the subject property in 2009.

10. In response to Paragraph 9, Defendant denies the same and responds Defendant Outback/Charlotte I, LP was the owner and operator of the subject property in 2009.

11. In response to Paragraph 10, Defendant denies the same and asserts Defendant Outback/Charlotte I, LP was the owner and operator of the subject property in 2009.

12. Upon information and belief, Defendant(s) admit only so much of the allegations of Paragraph 11 as allege Plaintiff was at the Outback Steakhouse restaurant on June 7, 2009. The remaining allegations of Paragraph 11 are denied and Defendant(s) demand strict proof thereof.

13. Defendant(s) deny the allegations of Paragraph 12 and demand strict proof thereof.

14. Paragraphs 13, 14 and 15 constitute conclusions of law and therefore require no response. To the extent these paragraphs do require a response, Defendant(s) deny any allegations of Paragraphs 13, 14 and 15 which are or could be construed as allegations of negligence or other wrongdoing by Defendant(s) and demands strict proof thereof.

15. Defendant(s) deny the allegations of Paragraph 16 and demand strict proof thereof.

16. Responding to Paragraph 17, Defendant(s) deny each and every allegation contained therein, including the allegations in subparts a through r, and demands strict proof thereof. Defendant(s) further maintain the International Property Maintenance Code is not a standard of care applicable in the instant action.

17. Defendant(s) deny the allegations of Paragraph 18 and demand strict proof thereof.

18. In response to Paragraph 19, Defendant(s) deny the same and demand strict proof thereof.

19. Defendant(s) deny Plaintiff is entitled to the relief sought in the "Wherefore" clause and demands strict proof thereof. Defendant(s) also deny any allegations of the "Wherefore" clause that are or could be construed as allegations of negligence or other wrongdoing by Defendant(s) and demands strict proof thereof.

FOR A SECOND DEFENSE

20. The Complaint fails to set forth sufficient facts to constitute a cause of action and, therefore, should be dismissed pursuant to Rule 12(b)(6), FRCP.

FOR A THIRD DEFENSE

21. Even if Defendant(s) were negligent in any respect, which is expressly denied, and such conduct operated as a proximate cause of Plaintiff's injuries, if any, which is expressly denied, Defendant(s) allege Plaintiff's negligent, grossly negligent, reckless, willful, and wanton conduct contributed more than fifty percent (50%) to the cause of the accident; therefore, Plaintiff's claims are barred.

FOR A FOURTH DEFENSE

22. Even if Defendant(s) were negligent in any respect, which is expressly denied, and even if such conduct on the part of Defendant(s) operated as a greater than fifty percent (50%) cause of Plaintiff's injuries, if any, which is also denied, Defendant(s) are entitled to a determination as to the percentage which Plaintiff's negligent, grossly negligent, reckless, willful, and wanton conduct contributed to Plaintiff's accident and resulting injuries, if any, and to a reduction of any amount awarded to Plaintiff by an amount equal to the percentage of Plaintiff's own negligence.

FOR A FIFTH DEFENSE

23. Plaintiff either knew or should have known of any alleged deficiencies in the subject property and accepted the same with such knowledge. As a result, Plaintiff's recovery should be barred.

FOR A SIXTH DEFENSE

24. Any injuries sustained by Plaintiff were due to and caused by the sole negligence of third persons over whom Defendant(s) had no control; therefore, Defendant(s) should not be liable to Plaintiff in any sum whatsoever.

FOR A SEVENTH DEFENSE

25. Such injuries or losses as Plaintiff sustained, if any, were caused by Plaintiff's assumption of a known risk, and Defendant(s) plead Plaintiff's assumption of a known risk as a complete defense to this action.

FOR AN EIGHTH DEFENSE

26. Plaintiff's claims may be barred or otherwise reduced due to Plaintiff's failure to mitigate damages as required by law.

FOR A NINTH DEFENSE

27. Plaintiff's claims may be barred by the doctrine of unavoidable accident.

FOR A TENTH DEFENSE

28. Any injuries sustained by Plaintiff were due to and caused by the intervening and superseding acts of negligence, carelessness, recklessness, and gross negligence on the part of third persons as a proximate cause of injuries as alleged, if any; therefore, Defendant(s) should not be liable to Plaintiff in any sum whatsoever.

FOR AN ELEVENTH DEFENSE

29. Plaintiff's claims may be barred by the doctrine of waiver.

FOR A TWELFTH DEFENSE

30. Under our law and premises liability matters, the patron is under a duty to look where he or she is walking and to see objects in plain view that are at a location where they are

customarily expected to be. In the instant case, Plaintiff failed to observe this duty; accordingly, Plaintiff's claims are barred by the "Plain View" doctrine.

FOR A THIRTEENTH DEFENSE

31. A patron is charged with exercising ordinary care of her personal safety and using ordinary care to avoid the effect of the owner/occupiers negligence after the notice becomes apparent to the patron or in exercise of ordinary care the invitee should have learned of it. In the exercise of ordinary care, the patron must use all senses to discover and avoid hurtful things. Assuming, arguendo, Defendant(s) created a negligent condition in this case – which is strictly denied – Plaintiff nevertheless failed to exercise ordinary care to discover and avoid hurtful things in the instant case. Plaintiff's failure to exercise this ordinary care bars them from recovery in this case.

FOR A FOURTEENTH DEFENSE

32. Defendant(s) reserve the right to amend its Answer and to raise additional affirmative defenses as may become available or apparent during the course of discovery.

FOR A FIFTEENTH DEFENSE

33. Punitive damages, as currently awarded in South Carolina, are violative of the United States Constitution and South Carolina Constitution, as well as the holding of State Farm Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), and the cases upon which it is based.

FOR A SIXTEENTH DEFENSE

34. Pursuant to Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 522 U.S. 424, 121 S.Ct. 1678 (2001), if punitive damages are recoverable, which is denied, the amount of

punitive damages "[are] not really a fact tried by the jury" therefore Plaintiff's request for punitive damages "to be determined by the jury" violates the United States Constitution.

FOR A SEVENTEENTH DEFENSE

35. The United States Constitution's Due Process Clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly [do not] represent," Phillip Morris USA v. Williams, 127 S.Ct. 1057, 1063 (2007), and, therefore, to the extent that Plaintiff seeks an award of punitive damages for potential or speculative harm to non-parties to the present action, such prayer for relief is unconstitutional and must be struck from the pleadings and is otherwise inadmissible at trial.

FOR AN EIGHTEENTH DEFENSE

36. Notwithstanding Defendant(s)' prior defenses incorporating Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 522 U.S. 424 (2001) and State Farm Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408 (2003), and the cases upon which they are based, in the event the trial court permits the jury to return a punitive damages award in the instant case, such damages are to be limited to an amount that is no greater than the jury's award of actual damages, as explicated within Exxon Shipping Company v. Baker, 128 S. Ct. 2605 (2008).

WHEREFORE, having fully answered Plaintiff's Complaint, Defendant(s) respectfully request that:

a. Plaintiff take nothing by this action;

b. A judgment of dismissal be entered in favor of Defendant(s);

c. Defendant(s) be awarded the cost of the suit incurred; and

d. Defendant be awarded such other and further relief as the Court deems proper.

Respectfully submitted,
COLLINS & LACY, P.C.

By: _____

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ATTORNEYS FOR DEFENDANT(S)

Defendant seeks a trial by jury.

Columbia, South Carolina
July 12, 2012

State of South Carolina

County of Conway

Rebecca Jackson, Plaintiff	Motions Hearing 2012-CP-43-00707
vs.	
Outback/Charlotte Defendants	April 7th, 2014 Sumter, S.C.

BEFORE THE HONORABLE W. Jeffrey Young, Judge.

A P P E A R A N C E S:

Ms. Lisa L. McPherson,
Attorney for Plaintiff

Ms. Melissa Moiser,
Attorney for Plaintiff

Mr. Christian Stegmaier,
Attorney for Defendant

Margaret T. Sullivan,
Court Reporter

THE COURT: This is Rebecca Jackson versus Outback/Charlotte ILP and et al. Present and appearing, if you would please identify yourselves for the record.

MS. MCPHERSON: Your Honor, Lisa McPherson, for the plaintiff.

MS. MOISER: And Melissa Mosier for the plaintiff as well, Your Honor.

MR. STEGMAIER: Good afternoon, Christian Stegmair, Collins and Lacy, for the Outback defendants. Thank you, sir.

THE COURT: I believe this was your motion; is that correct?

MR. STEGMAIER: Correct, sir.

THE COURT: You may proceed.

MR. STEGMAIER: Thank you, sir.

MS. MCPHERSON: Your Honor, may we take up one matter before getting started?

THE COURT: Yes, ma'am.

MS. MCPHERSON: Of course, we greatly appreciate the correspondence with you and your law firm. We hope to get mediation done. And Mr. Stegmair felt strongly of course that we needed to have this motion first. Throughout last week, this weekend and even up through last night,

we discussed with him that we do not have all the discovery. We have most of it; for instance, a couple of things that we are missing are incident reports from two prior files at the Outback location. Judge, this has continued to be an issue. As of last night, he indicated that Outback---

THE COURT: How old is this case?

MR. STEGMAIER: This is a 2012 case, sir.

MS. MCPHERSON: In any event, Judge, answers to our interrogatories indicate when the people fell, where they fell, a brief summary of it. I don't know else they would have come up with that information, but for having incident reports. However, as recently as I think this morning, he has indicated that they can't locate those. Additionally, there is in reviewing some of the discovery---

THE COURT: Wait a minute, you all set up this hearing, and discovery hasn't been completed?

MR. STEGMAIER: Our position, sir, would be that with regard to the discovery that was served on the defendant in this case, I think there were four sets of requests to produce. Four sets of interrogatories. A pretty substantial

amount of discovery has been exchanged. A question that was posed in the initial interrogatories, please advise as to other incidents that might have occurred in the parking lot. We were able to produce the information as far as claimant's names, date of losses and the specifics.

With regard to the actual document, the incident report, and this is going deep inside the way our client handles their matters. They have a third party claim's administer -- administrator, sir. The first -- the initial claim's administer was Wells Fargo, now it's Gallagher Basset. They have changed programs. The actual physical documents that were created for claims that were either litigated or not litigated, they have been in transition to Gallagher Basset. We have been able to identify the location. I just, with regard to getting my hands on the actual documents, sir, we're not able to do that. But we have been able to provide the information as it relates to claimants, date of loss, things along those lines.

So we've done, as far as defense counsel---

THE COURT: Well but this really is just about this restaurant, and the slope of the ramp; is that correct?

MR. STEGMAIER: Yes, sir. And if I interrupt you, and I apologize, sir. The focal point of today's argument is this, with regard to premises liability, premised on static defect in South Carolina, you have to make two showings.

THE COURT: Yeah, I am not going to hold off this hearing for just for that. So if your motion to continue was, if that's what it was, I deny.

MS. MCPHERSON: Thank you, judge.

THE COURT: Please now go forward on this one.

MR. STEGMAIER: Thank you, sir. May it please the Court again, Christian Stegmaier, of Collins and Lacy for the Outback defendant's in this case. As we previously noted both just a second ago, as well as the filings of this court, this is a static defect case involving an alleged trip and fall, misstep and fall, on June 7, 2009, onto a curb access ramp at the Outback here in Sumter. Sir, if I might approach, I have got the copy of the amended summons and complaint. I

don't know how much of the file you have with you.

THE COURT: I have got the file.

MR. STEGMAIER: Okay. Of course with regard to summary judgment, the court's analysis is driven by what is actually pled in the course of the proceedings. We would direct the court's attention to paragraphs 11 and 17 D, G and H. With regard to paragraph 11, sir, back on or about 1:30 in the afternoon on June 7th 2009, plaintiff exited the Outback Steak House, owned by the Outback Steak House defendants, located at 2480 Broad Street in Sumter, South Carolina.

As she descended the ramp, she was unable to appreciate the change in elevation in the ramp, and tripped and fell to the ground. With regard to paragraph 17, these are the specifics as it relates to allegations of negligence. Subsection D is in failing to provide adequate warning of the dangerous condition presented by the flare and edges in the ramp, which were difficult to appreciate when descending the ramp. In failing to take remedial remedy or measures to make the ramps come into compliance with the international property and maintenance code. I'm sorry, I'll have to skip back to Subsection G too as well.

In failing to maintain the exterior of the property in compliance with the international property maintenance code. So the bottom line, sir, of the position at least as it relates to what was pled, what is an actual black and white in this case is, she didn't, the plaintiff in this case was Ms. Jackson, didn't recognize or realize that she was stepping off a curb. That's in essence what was plead in this case. And that's what we're guided by for purposes of defending this action. And we would submit this is what the court would be guided by for purposes of disposing of this motion.

As this court well knows, to recover in a premises liability case that is postured or centered on allegations of static defect, the plaintiff must demonstrate first, that he or she was injured due to an allegedly dangerous condition. That's the first hurdle that needs to get over. And assuming that is some sort of evidence that is demonstrable; that there was an allegedly dangerous condition, then the plaintiff must demonstrate that the landowner either created the condition or had actual or constructive knowledge of the condition.

And, Your Honor, what I would say is this, this is not a notice case. And if this court decides or determines at the end of the day it's at the very least a jury issue as it pertains to the existence of a dangerous condition, then I would admit that for purposes of getting to a jury, getting past summary judgment, getting past a directed verdict, that creation of a condition is satisfied to us as well. And the Anderson, the race track case stands for that. The Winterstein case stands for that.

The whole purpose and the whole reason why defendants have moved for summary judgment in this case is, based on the argument that the subject curb accident ramp is not dangerous; that as a matter of law, sir, that the subject curb access ramp is not a dangerous condition. The reason -- the basis for the arguments and support our argument is this, the only competent or reasonable evidence in this case demonstrates this, and this comes by way of the defendant's expert in this case, the engineer and human factor's expect Allen Campbell from Charleston.

No. 1, that plaintiff was not disabled or possessed with mobility disability on June

7th 2009. That is done. That the special code here ANSI 117.1 is not applicable in the instant case. No. 2, even if ANSI 117.1 did apply, any deviation from the standard was as Mr. Campbell was found negligible or imperceptible. No. 4, that the curb access ramp complies the with standard building code. And that's very important. And Mr. Campbell was able to distinguish this; inasmuch as, again, Ms. Jackson is not disabled. She is not a part of that protective class. But what Mr. Campbell was able to say was ultimately at the end of the day, a standard business code. We're not talking about ANSI 117.1. The standard business code, the building code was complied with.

The other, the ancillary, consideration for all this too, sir, is an issue has come about whether the curb should have been painted at the time of the accident. We would say or we would freely admit that on June 7th 2009, the curb between the pavement where the cars were situated and the sidewalk was not painted. But, Your Honor, I would say this as well. For what's it worth, the courthouse when we walked in here today doesn't have to painted curbs. And what's

important, irrelevant of that, that observation is this; is that, Mr. Campbell says that ANSI nor any other code that would possibly or potentially apply, especially as it relates to the analysis in 2007, does not mandate or dictate that the curbs should have been painted.

We can at any point and time whether it's trial or summary judgment setting say well, isn't it true Mr. Campbell, that it would be good if the curb is painted. Well it would have been good too if somebody from Outback had held Ms. Jackson's hand when she got off the curb onto the sidewalk. We can do a lot of ifs and how abouts. And let's consider this as a hypothetical. But what this court has to be preoccupied with regard to the disposition of this motion is, what does the standard say. Is there a cognizable standard, a cognizable rule, that Outback violated with regard to the curb and the painting. And the answer to that is, no.

And finally for what it's worth, Your Honor, the proximate cause in this case as x by Mr. Campbell was attributable to Ms. Jackson stumbling and falling and being unable to recover, largely by virtue of the shoes that she was

wearing. Ms. Jackson is an elderly person, and at the time was wearing, as Mr. Campbell has identified, high heels with a thin strap on them. Just to take it a step back, and I know the court has had the opportunity to have a brief. I know that you've had the opportunity to review it too as well. So what I'm not going to do is spend the next 20 minutes here, restating everything that has been briefed. But again, a third, the three central arguments that were outlined is this: If we go by the pleadings, which is what we think the court should be guided by, the International Property Maintenance Code does not apply. In South Carolina it is a permissive statute. It is a permissive set of codes. It is not required. And of course, we cited to LLR. And again there was a recent case disposed of by the District Court down in the Charleston division. Caughman vs. Park Place Hospitality Group. A 2011 disposition by Judge Seymour; wherein, it was recognized that the International Property Maintenance Code, the thing that was pled as being violated, is permissive. And in that case summary judgment was granted.

The second point, Your Honor, is again,

ANSI does not apply. We provided the court with several cases. I will tell you, I believe Ms. McPherson and Ms. Mosier would admit to you freely, that the case law is not vast out there as it relates to standards concerning whether ANSI applies or doesn't apply. We've done the best we can. I think what's particularly telling is, at least I haven't had the opportunity to study the brief and detail that's been submitted by the plaintiff's in this case. But I am not aware of any cases that they have put together in Contra to the ones presented to the court. The ones that have presented to the court again admittedly are from outside the jurisdiction. But they stand for the proposition that where you have a person that falls outside the protective class ANSI, is not part of the argument.

Additionally, we are guided to some extent by the Faculty House case that was decided---

THE COURT: Ms. McPherson, do you agree that this plaintiff was not in that class, because she was not disabled in any way whatsoever?

MS. MCPHERSON: No, sir, I don't.

THE COURT: And what disability did she have?

MS. MCPHERSON: Your Honor, she had bilateral knee replacements.

THE COURT: How can they protect against that?

MS. MCPHERSON: Judge, in cases from New York that Mr. Stegmaier has quoted, clearly talk about---

THE COURT: I mean does have a sign on her saying that she is disabled?

MS. MCPHERSON: Her husband had a disabled veteran tag which enabled him to park in handicap spaces.

THE COURT: But he didn't fall.

MS. MCPHERSON: No, sir, he didn't. However, those New York cases require that there be a statute violation in order for her to have a causes of action. This is a clearly distinguishable. That is not what the law of South Carolina says. Judge, I disagree with a number of points that he made; including the fact that his expert said---

THE COURT: Well we won't get -- I just wanted to see if you stipulated to that. Go back to your argument.

MR. MCPHERSON: Yes, sir.

MR. STEGMAIER: And then again, Your Honor, my suggestion with regard to with the court's determination about disability versus non-disabled, our position is she non-disabled. She's not a part of that protective class. We would suggest that what guides this court as any court in this country would be, what -- how is it defined as it relates to the Americans with Disabilities Act.

It's not what Ms. Jackson says or Ms. Jackson's lawyers say or even what I say as far as this goes. But as we understand it, the fact, and even Mr. Campbell was asked this in the course of his deposition. Well he had -- she had bilateral knee replacements. And Mr. Campbell says well a lot of people have all sorts of procedures all the time. And if they get back from it, if they are able to recoup from it, they're not disabled. My father took shrapnel in his knee in Vietnam, which was ultimately removed. And it was obviously a surgical procedure. When throughout the days of his life, he never said anything to anybody that he was disabled.

So we will leave it at that as far as that goes. As far as the second point goes ANSI 117.1

it does not apply. We have cited these cases. And Wisner vs. the United States is probably the case that's the most efficacious for purposes of determining that ANSI applies in a setting where the claimant is non-disabled. Now with regard Wisner, if we look hard at it, and I have a copy of the case for the court, if the court cares for it. There was a two-pronged analysis that was undertaken in this case. It was a summary judgment. And the court first dealt with whatever the ANSI standards apply. And they said no. They said no it doesn't apply. So we're not going to even get into it.

Ultimately there some additional evidence about debris. And the court ultimately determines that a genuine issue of material fact exists for purposes of pushing the cases to trial, but we don't need go get wrapped around the axle about the ultimate disposition concerning Wisner. Because what we need to be fixing or focused on is what was the analysis that was applied by the court as it pertains to the applicability of ANSI. And the court in that case said no. And we would humbly suggest and request the court adopt that type of reasoning.

The other thing, again for what it's worth, we do have a case in South Carolina, the Faculty House case. Olson vs. Faculty House. Which at the Court of Appeals stage, Judge Anderson wrote the lead opinion on that case. It was ultimately affirmed by the Supreme Court.

In that case there was a question presented to the court that this is where the lady who had been a crutch walker, indisputable that she was disabled. She put her crutch in a puddle of water, and ended up falling. And unfortunately becoming paralyzed.

They had prosecuted their case in part on a theory that the Handicapped Accessibility Act, which is on the books in South Carolina, would be a basis for a private cause of action. The Court of Appeals stated or ultimately held that that was not the case. The Supreme Court agreed to that as far as that goes. What's important again is that Olson was disabled. Ms. Jackson in this case is not. The other thing for what it's worth that we would note is, the case law that is legion when it relates to the ADA, the federal act, the federal Americans with Disabilities Act. The cases are legion in support of the proposition that

violation of the ADA, does not create a private right of action in those situations.

Lastly, sir, the International Building Code, I think there might be some mention ultimately about that. That does not apply as explicated within our briefing. Like the International Property Maintenance Code, that is permissive in South Carolina and does govern.

And, again, Your Honor, to my knowledge, based on my research, and if I proven wrong, I am proven wrong. But I don't believe that either the City of Sumter or the County of Sumter, have adopted as mandatory either the International Property Maintenance Code or the International Building Code. And lastly, Your Honor, just several points here, I know that Ms. McPherson talked about the incident reports that have not been produced. But again as we have stated that all we are focused on, this is not a notice case. All we are focused and fixated on, is whether that curb, that curb access was in fact a dangerous condition.

And again, just because Ms. Jackson says that this is a dangerous condition, it doesn't make it a dangerous condition. I think the court

has already observed, how do we guard or protect against that. Our standards apply to populations not just individuals. And what I would, lastly I would I would argue ancillary to that this, the District Court in the Rock Hill division and this somewhat argument by analogy. The case is Griffin vs. Wilco Hess. And it actually emanated up in York County. And I've got a copy that I can hand up to you, sir. But this is a food adulteration case. This is food adulteration case. And I cite this for what it's worth.

One of the ways or one of the reasons why summary judgment in Griffin was issued was this; is that, the defendant in that case, which was a Wendy's franchisee, was able to show listen, we've got thousands, we served thousands of items of food that day, and nobody else said they got sick.

And that was persuasive argument for purposes of -- persuasive for purposes of summary judgment. That was one of -- just one of the basis. And of course the court is from Sumter. And I'm certain that at points in time, maybe the court has visited the Outback here in Sumter. And when you think about this business that has been operating since 1999, how many thousands of people

have walked in and out of that building. And of course we found that 3 people have had some sort of injury, including Ms. Jackson concerning the parking lot. But we believe that, you know, in many respects, if this is a close question in this case, that's what pushes this over the goal line.

And finally, Your Honor, for what it's worth, we would oppose the -- for purposes of defending the summary judgment motion, we have presented here within the last 2 days, some reports. One from a man named Mr. Hunt, and other from Dr. Durigg who are premises experts. Or that's what they purport themselves to be. These are reports that I probably feel certain have been provided the court in tandem with the briefing in this case. We just identify for the court the mandates that exist with regard to summary judgment concerning the affidavit Rule 5 and Rule 56 (c) and Rule 56 (d) concerning the presentation of testimony for purposes of encountering summary judgment. Our position would be that neither one of these reports should be considered for disposition of this motion. Thank you, sir.

THE COURT: Thank you. Ms. McPherson or Ms. Mosier.

MS. MOSIER: Actually, Your Honor, if you don't mind, and thanks again for allowing us to come here before today to respond to the defendant motion. And we do apologize that we were somewhat tardy to getting here, Your Honor. Our sincere apologies for that.

THE COURT: Yes, ma'am.

MS. MOSIER: We just went to the wrong courtroom. But as to the merits of Mr. Stegmaier's motion for summary judgment against the defendant, Your Honor, we just received defendant's memorandum Friday night at 11:00 p.m. So we have done the best we could to respond---

THE COURT: How long has this been set now?

MS. MOSIER: It was just set last week, Your Honor. And we received the defense motion Friday night at 11. We have responded to Mr. Stegmaier in an informal manner to say look, this the plaintiff's---

THE COURT: Well if you like 15 days to respond. You can go ahead and make your oral argument.

MS. MOSIER: Sure. Yes, Your Honor. As

you know, summary judgment, the non-moving party does not necessarily have to come forward with any evidence. Because we believe, Your Honor, that the defendant's own motion sheds light on the fact that there are genuine issues of material fact here in this case. Because Ms. Jackson says she was not able to appreciate the change in elevation from a white concrete sidewalk to a white ramp. We have---

THE COURT: You mean to tell me that people -- that under your theory, people should not be appreciating change in -- that everywhere people should be busting their behinds all over the place.

MS. MOSIER: No, Your Honor. That's not the case at all. See Ms. Jackson was not looking to go out and fall on June 7th of 2009. She had been to church with her husband. She was wearing her beautiful red suit and her nice little shoes. She had eaten at the Outback. She went into the Outback to have her lunch, using the main ramp. She's not exactly sure about that. But she's pretty sure she used the main Outback ramp. Well on her way out, as she enjoyed her meal at the Outback, the parking lot was chalk full of cars.

THE COURT: Which is a good thing.

MS. MOSIER: It is a good thing. Good for the Outback. Chalk full of cars. And so when you look at the photos, Your Honor, you will see that when the Outback was chalk full of cars, what a pedestrian may likely do as Ms. Jackson chose to do, was not walk between vehicles where there is not as much space. But she's going to walk down the ramp where is plenty of space for her to walk down. There is an opening for her to navigate. And so as she is walking down and trying to navigate the way back to her car, she steps off the curb, not knowing that the curb transitioned to a ramp that was 55 percent too steep on the top of it. And 17 percent too steep on the side of it, Your Honor.

THE COURT: Doesn't she still have a responsibility to look where she's walking?

MS. MOSIER: Absolutely. She has an ample opportunity, and she was looking where she was going, Your Honor. That's why we have human factor experts to help us figure out why in the world was she unable to appreciate this change in evaluation. Because believe me, Your Honor, before we've spent the many hours and money that

we have in this case, we wanted to make sure that it was a meritorious one, Your Honor. And so Ms. Jackson was unable to like we said earlier, unable to appreciate the change in evaluation. The paint would have helped her see that.

THE COURT: Well under your theory, it really does sounds like, and I have been living in town all my life. And that has not been a problem. I mean, it may be a problem for Ms. Jackson, because she wasn't watching where she was going. But I just -- I mean I just have not heard of a problem out at Outback.

MS. MOSIER: She did testify that she was looking where she was going, Your Honor. And as the defendant's own expert who serves -- he is going to be testifying as an engineer, and also as a human factor's expert which Your Honor has never laid eyes on this ramp himself. He sent out an engineer in training to do the measurements, to look at the ramp, and to essentially draft the report.

THE COURT: Well I think y'alls argument is that it doesn't matter, because she is not a disabled person so it doesn't apply to her.

MR. STEGMAIER: That's correct, sir.

That's absolutely correct. The other thing I would note, and I will stop talking in 10 seconds. This motion was filed back in March, sir. It wasn't filed like last week. The court set it for the motion -- for a hearing on Tuesday, just for what that's worth, sir.

MS. MOSIER: She is a disabled person, Your Honor. But again, that doesn't matter in this case, because South Carolina has adopted the Southern Building Code. It applies in Sumter. And the defendants own expert admits that as well. He says over and over that the Southern Building Code applies.

And, Your Honor, that really matters, because the Southern Building Code both the 1994 version and the 1997 version, which were firmly in place at the time this building was constructed and open to the public in 1999. Okay. Southern Building code references ANSI (a) 117.1. And ANSI (a) 117.1 is really important, Your Honor, not just for people who use walker and wheelchairs. It's for important people just like Ms. Jackson. Because the defendant, we deposed the defendant's expert, and he admits in his deposition, Your Honor, that the purpose of ANSI (a) 117.1 is very

broad. And it's to, and I quote, this is his testimony reading from the standard: To make buildings and facilities accessible to and usable by, people with such disabilities as the inability to walk, difficulty walking, reliance on walking aids, blindness, official impairment, deafness, hearing impairment, incoordination, reaching and manipulation difficulties.

THE COURT: That applies to everybody in the world.

MS. MOSIER: Right. Difficulty interpreting. But here's the last one, Your Honor. Reacting to sensory information and extremes of physical and dementias. And so the standards, Your Honor, these are national standards. When folks build buildings, they don't just build them without any standards. A business wants to make sure that their business wants to make sure that their business is safe. And so they abide by certain standards. ANSI is one of them. It's been in place since the 1910's. And it's there for a reason. It's constructed by and modified over the years by engineers who have the public interest in mind.

When you look at ANSI (a) 117.1, the cover

of it, talks about accessibility to buildings. It doesn't say accessibility only for people in walkers in wheelchairs. It talks about disability. Meaning people who have a hard time seeing a change in elevation just like Ms. Jackson.

THE COURT: Do you have any documentation that she is -- that's her disability is she can't tell the difference in evaluation?

MS. MOSIER: But, Your Honor, the standard doesn't---

THE COURT: But that's what you just said though. You said she's disabled because she can't visually tell the difference in evaluation.

MS. MOSIER: No, Your Honor. What I'm saying is that the ANSI (a) 117.1 standard talks about folks who may not be disabled according to the ADA. It's not referencing the Americans with Disabilities Act. It's talking about like Mr. Stegmaier said himself, you know, standards apply to populations not just to individuals. And so in constructing this ramp for the benefit of people who are handicapped and have a physical disability, you have to make it accessible for everyone. Safe for everyone. For the benefit of

everyone.

THE COURT: Should they have somebody to hold, on that, should somebody hold every patron's hand when they drive up and walk them in, and then walk them back to the car?

MS. MOSIER: Of course not.

THE COURT: Because that's everyone. Because everybody -- somebody might not be able to tell that there is a one quarter inch decline in the elevation.

MS. MOSIER: Well, no, Your Honor.

THE COURT: Because that's everyone. Because somebody might not---

MS. MOSIER: Your Honor, we're talking about a 55 percent too steep ramp on the top, which is called a running slope. The top of the ramp in this case---

THE COURT: But she was of the -- not being actually disabled, she could have stepped off the curb, right?

MS. MOSIER: Your Honor, that's the thing. With a full parking lot, which she -- if you look at the photos, she would have had to walk, well her car is over here to the left. She would have had to walk all the way around these other cars

just to get to it.

THE COURT: Well that would have been terrible, to walk an extra 15 feet.

MS. MOSIER: Even the defendants own human factors and engineering expert agrees, that these ramps are foreseeable pedestrian paths. Which those are buss words in the industry. And which is why I intentionally used them when I disposed him. And he agrees, these are foreseeable pedestrian paths. Of course our expert echos that. When folks are leaving or coming into a business, 9 times out of 10, they are going to choose the most direct path towards where they are going. And that's what Ms. Jackson was doing. Her vehicle was over here to the left. And so naturally she's going to go down towards that way. And naturally as an older lady like Mr. Stegmaier.

THE COURT: How old was she?

MS. MOSIER: She was 70 at the time, Your Honor. So as an older lady, and she's wearing her nice suit. She doesn't want to brush up against cars. She wants to have a wider space to navigate. Plus she's thinking about her husband who is disabled. Plus she's thinking about herself with two reconstructed knees.

THE COURT: She should have been looking at the ground.

MS. MOSIER: She was absolutely looking at the ground, Your Honor. She wasn't looking to fall down and as a result break 3 ribs and have scraped up hands and have a scraped up knee. And end up having to have back surgery, Your Honor. That is not what we submit to you that she went out looking to do.

THE COURT: Well I don't think she did that. But I mean the easiest thing in this whole matter would have been for her to watch where she was going.

MS. MCPHERSON: Judge, may I chime in for moment?

THE COURT: You may, if you need to.

MS. MCPHERSON: Your Honor, and you have this photograph. But may I pass a couple of photographs up to you. That may be easier than referring to them.

THE COURT: Are these?

MS. MCPHERSON: They are. Do you see this one, Judge? That shows where the cars are parked. And it actually shows Ms. Jackson down on the ground---

THE COURT: Yeah. Uh-huh. (Affirmative.)

MS. MCPHERSON: ---after her fall.

THE COURT: There is not a half inch drop off. There is a two inch drop off. And you will see in the one that shows the black car in the forefront of that picture, how difficult that is to see. You see the concrete all blending together. The cars, if I may back up. Let me address one other thing. Every expert in this, agrees that ANSI was violated in about 4 different ways. There is no smooth walking slope. The cross slope is off. You're not supposed to place it in a place where it juts out into cars and parking spaces. So everybody agrees there were key things wrong with the ramp.

THE COURT: When did this happen?

MR. STEGMAIER: In June of 2007, sir.

THE COURT: And they opened when?

MS. MOSIER: 2009.

MR. STEGMAIER: I'm sorry, 2009. I apologize. Thank you.

THE COURT: So it's been there almost 10 years.

MS. MCPHERSON: Yes, Your Honor. And with the prior incidents that we still don't have.

Because, Your Honor, while this is a creation case where Outback created this ramp and has allowed it to exist, we still need those incident reports in order to determine whether or not Outback should have intervened sooner. All we have are, is just the very basic information from these folks. It's not enough for us to determine whether or not those folks fell in the same way that Ms. Jackson fell.

Also, there's a list of employees that we just got last week. We don't even have, we've asked for their contact information, but we don't have that either. We have a list of employees and their responses. These employees may or may not have been working on the day that Ms. Jackson fell; can't tell us whether they're working there still now. It would be great to have the ability to interview these employees to see if they themselves have experienced a problem that may or may not have been reported to the Outback.

THE COURT: Yes, Ms. McPherson, you were standing up, and she got back up.

MS. MCPHERSON: I'm sorry.

MS. MCPHERSON: Judge, it is interesting

that their expert didn't even visit the scene. But he did rely on photographs such as this. Throughout his deposition I really didn't hear him render any opinions regarding human factors, even though it was argued that he was human factor's expert. This is great example of how difficult it is to see a 2-inch drop off. The cars obstruct your view. And there is no -- if you look at the reports we submitted, there is no smooth walking surface. So we believe ANSI applies, because she doesn't have to be disabled for it to apply. There is that wide range.

Secondly, even if it didn't, the case goes forward we believe for a couple of different reasons. A, the pleadings of course allege certain things, and then allege whatever else the discovery may show. I will tell you that this is a notice case. It kind of weaves that in and out. And let me tell you why.

THE COURT: Is this like an egg dropping on the floor in a Piggly Wiggly case? The notice?

MR. STEGMAIER: Yes, sir.

THE COURT: You're not telling me that I know.

MS. MCPHERSON: Well I call it a notice

case. And what I'm referring to is that Outback should have known it was a problem; that they had actual notice of that.

THE COURT: Do go know how many people go through an Outback every year in Sumter?

MS. MCPHERSON: Judge, and I had always been under impression whether anybody else fell is really not admissible. Like maybe nobody else had a -- so no question she fell. Judge, our experts greatly, our two experts say, not only did it find with every aspect of ANSI, as their expert agrees, but that it absolutely applies in this case. Because of that broad definition that brings her in. Even if it doesn't apply, the case does go forward. Because regardless of those things, they have to provide a safe walking surface. There was not really much of a flat walking surface on this ramp. It began to curve and be uneven which is what she said she felt immediately before her fall.

The way they have this constructed, it is absolutely foreseeable, and Mr. Campbell agreed that she was going to use that ramp. Because if you look at photograph, Judge, in the front of Outback, now the yellow sign has since been

painted. She and her husband could not park here. He could have if there had been an empty.

THE COURT: But she was leaving at the time, correct?

MS. MCPHERSON: She was leaving.

THE COURT: So the yellow line wouldn't make any difference. So she was leaving to go out. She wouldn't have seen the yellow line anyway.

MS. MCPHERSON: Right. I'm just pointing out to that degree the picture differs. She walked out to the front door to the left, and took the ramp that is closest to the trees. Her car was parked over here on the edge of the parameter of the parking lot that is not actually shown in this photograph. So just as Ms. Mosier said, instead of, it's absolutely predictable. And the expert addresses it. She took a path that was 7 to 9 or 10 feet wide as opposed to one that would have been right up in between the cars.

Not only is it foreseeable that she would have done it. Outback knew people took this all time. People who had no kind of disability or impairment. And we actually have some reason to believe, I have to think very good reason to

believe, that they were on notice this was a problem. Our clients both testified in their depositions that while she was on the ground, the manager got on the phone with someone, and said, we've had another fall. It's bad. It's an older lady. They need to get paint out here.

Now paint is not necessarily the singular issue, but the fact that their had been another fall, is something that I believe is important here. So if we're looking at whether or not there's a genuine issue of fact, we certainly have experts who disagree on whether ANSI applies. I don't think differ completely because the Southern Building Code, which their experts said applied, incorporates ANSI into the standard. Even if it doesn't, they didn't provide a safe walking path for her. I agree they're not required to paint it, but even their experts said it would be helpful. They've certainly taken upon themselves to do it at this point.

Judge, even in the defendant's memo on page 8. And this is first, the second full---

THE COURT: We had you all here to start at one o'clock, and you all didn't. I've got another---

MS. MCPHERSON: Yes, sir.

THE COURT: ---at two.

MS. MCPHERSON: Thank you very much.

THE COURT: If you would like to supplement since you said you didn't have enough time, I will give 10 days to do it.

MS. MCPHERSON: You should have our memorandum, Your Honor.

THE COURT: Okay.

MR. MCPHERSON: Judge, however if in fact we need to provide affidavits from the experts, because we do just have their reports at this point. They have been furnished to you. But we would be happy, and would to have take advantage of that 15 days to have them put in an affidavit form. Should we need to that, we're happy to do that.

MR. STEGMAIER: Not to be difficult, sir, but would oppose that request.

THE COURT: I'll give them 15 days.

MR. STEGMAIER: Yes, I understand, sir.

THE COURT: Please provide those to me within 15 days. And then based upon what y'alls position is, I want proposed orders from both of you within 30 days.

MR. STEGMAIER: Yes, sir.

MS. MCPHERSON: Thank Your Honor.

--End of Requested Transcript of Record--

C-E-R-T-I-F-I-C-A-T-E

I, Margaret T. Sullivan, Court Reporter, for the Third Judicial Circuit of the State of South Carolina, do hereby Certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced on April 7th 2014, in the Common Pleas Nonjury Court in Sumter County, Sumter, South Carolina.

I do further that I am neither kin, counsel nor interest to any party hereto.

7/8/14
DATE

Margaret T. Sullivan
COURT REPORTER
My Commission expires: 9/7/2021

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
)
COUNTY OF SUMTER) C/A #: 2012-CP-43-707

Rebecca Jackson,

Plaintiff,

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,

Defendants.

COPY

DEPOSITION OF

ALAN O. CAMPBELL, PE, RRC

****

Tuesday, April 1, 2014
10:22 a.m. - 2:15 p.m.

The deposition of ALAN O. CAMPBELL, PE, RRC, taken on behalf of the Plaintiff at the law offices of Collins and Lacy, P.C., 1330 Lady Street, 6th Floor, Columbia, South Carolina, on the 1st day of April, 2014 before Amanda Creel Godfrey, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition and/or agreement of counsel.

APPEARANCES

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(Deposition transcript of Alan O. Campbell, P.E. in the caseof Vuicich v. CVS)

STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the South Carolina Rules of Civil Procedure.

It is stipulated by and between counsel and the witness that the reading and signing of the following deposition be, and the same are, hereby not waived. Signature sheet is attached at page 188.

(Plaintiff's Exhibit Number One was marked for identification purposes prior to the deposition.)

ALAN O. CAMPBELL, PE, RRC, having been duly sworn, deposes and testifies as follows:

MR. CAMPBELL - EXAMINATION BY MS. MOSIER:

Q: Good morning, Mr. Campbell. My name is Melissa Mosier. We met just a few minutes ago, but I'll introduce myself to you again. As you may be aware, I represent the plaintiff, Mrs. Jackson, for a fall that she suffered as she exited the Outback Steakhouse after she had a nice supper with her husband back on June 7th of 2009. And we're here today to talk about the built-up curb ramps outside of the Outback location at 2480 Broad Street in Sumter.

A: Okay.

Q: As you know, my firm represents Mrs. Jackson as it relates to her injuries in this case. And I understand you've been retained as an expert for Outback to provide us some opinions concerning these ramps. First of all, I did want to refer to Plaintiff's Exhibit One which is a copy of the subpoena that we sent to your office requesting a variety of items from you including a detailed case list number,

memoranda, letters, emails and the like. And it's my understanding that you have responded to this inquiry with a CD. And Mr. Stegmaier and I have agreed to keep the record open so that we may look into these items and see if there's anything else that requires further testimony from you.

A: That should be on the CD.

MR. STEGMAIER: And we're in concurrence with that.

MS. MOSIER: Okay. Thank you, Christian.

A: And if it's not on the CD, I mean Catherine and Lisa fully understand all of that, but by chance something is not on the CD that you -- that you're looking for specifically, like a CV or testimony summary, if you'll just let Catherine know then she'll get it to you immediately.

Q: Okay.

A: But it should be there.

Q: Have you reviewed the subpoena that we sent to your office?

A: I have.

Q: And have you directed the folks at your office as to what to include on the CD responsive to our subpoena?

A: We discussed it. I told her to review it and whatever was requested to send it.
Q: Okay. Have you looked at the contents of this CD to ensure that all the requested items are on there?
A: I have not.
Q: Okay. We'll look into it and see if that is -- -
A: Okay.
Q: --- the case and we'll go from there. Mr. Campbell, you being retained by the defense, can you explain to us what you've been retained to do in this case?
A: I was contacted by Mr. Stegmaier and he explained that Ms. Jackson was having a meal with her family after church and as they were exiting she fell down -- fell on the ramp outside of the restaurant.
Q: And you've probably had your deposition taken hundreds if not more times, right?
A: There have been a few.
Q: Okay. I'm still obligated, believe it or not, to go over some ground rules with you before we get too far into the deposition. And just indulge me because I've got to do it as part of

my obligations here. Just remember to give verbal responses, please. I'm going to try to talk one at a time. Hopefully if we're doing -- if I'm doing my job right, this feels more like a discussion ---

A: Uh-huh.

Q: --- than it does an interrogation or anything else. And I'll apologize in advance if I jump in on you. I'm going to really try to let you finish answering your question before I give you another one.

A: All right.

Q: If you'll do the same for me. If you don't understand my question or if I give you a long drawn out question, please just ask me to break it down, okay. If you'll direct any questions that you have to me and not to Mr. Stegmaier.

A: Okay.

Q: If we take a break, don't talk with your lawyer, Mr. Stegmaier, I'll ask you about what you talked about.

A: All right.

Q: Fair enough?

A: Sure.

Q: I looked at the CV that you posted on your

website. I guess really it's like a resume and it says you've been qualified as an expert on building codes and standards, correct?

A: I have.

Q: You've also been qualified as an expert as to ANSI A117.1(a) in various slip and fall and trip and fall investigations, correct?

A: I don't know that it specifically says that. Is that what you gleaned from it is that specifically what it says?

Q: It says that you've provided testimony in the area of ANSI A117.1(a).

A: Okay.

Q: Would you ---

A: I would agree with that.

Q: --- agree to that?

A: Yes.

Q: Sorry, I thought I'd printed out the web page where it said that. But I'll submit to you that if you go to your website it does say that you've provided testimony regarding ANSI A117.1(a).

A: Yeah. I don't disagree with that, I just wasn't aware it -- wasn't aware it was that specific.

Q: You are also providing a human factors opinion in this case, correct?
A: I am.
Q: And you've been qualified as an expert -- as to a human factors expert, correct?
A: I have.
Q: Have you ever given opinions concerning Outback Steakhouse's handicap ramps other than in this case?
A: I've given Outback opinions. I don't think we've ever had an Outback ramp case that I'm aware of.
Q: Okay. So, any other cases that you have been contacted by Outback, those would all be pertaining to incidences not involving ramps?
A: Yes, ma'am.
Q: And are you talking about Outback Steakhouses other than this one in Sumter or just this Sumter Outback?
A: No, other -- other locations.
Q: Okay. How many cases have you evaluated for Outback?
A: Maybe -- maybe four or five over the years.
Q: Have all of those been with Mr. Stegmaier?
A: No, ma'am.

Q: Or through Mr. Stegmaier?
A: No, ma'am.
Q: Okay. Those cases, are they included in the case list here on the CD that we requested?
A: If there was a deposition they would be included.
Q: Okay. But if you were merely consulted, it would not be in this CD?
A: If there was no deposition then it would not be listed.
Q: Okay. Have you ever given opinions concerning built-up curb ramps other than in this case?
A: I have.
Q: Okay. And again, this may have to just be an estimate on your part, but can you tell us about how many times you've provided testimony on built-up curb ramps?
A: Probably at least 30 or 40.
Q: Okay. And have you generated reports in each of those cases?
A: Some of them.
Q: In those cases that you've provided testimony, at the very least, would be in this case list on the CD, correct?
A: Is that something you specifically asked for?

Q: It would be -- let's see. That's a fair question. The very last sentence asks for a detailed case list including, but not limited to: case classifications, like slip and fall, trip and fall, et cetera; the alleged injury site; the attorneys involved; and whether you testified for the plaintiff or defense.

A: That's on my testimony summary, yes.

Q: Okay.

A: Well, it's a Rule 26 summary that covers the last five years.

Q: Okay.

MR. STEGMAIER: A Daubert report?

THE WITNESS: What's that?

MR. STEGMAIER: For Daubert?

THE WITNESS: Yes.

MR. STEGMAIER: Yeah.

A: But as far as anything breaking out cases specific to just ramps or slips and falls, I don't know.

Q: Sure. In those cases where you've testified concerning built-up curb ramps, can you tell us what percentage of the time you testified for the plaintiff versus the defense?

A: Probably runs about -- most definitely always

predominantly defense but probably runs two-thirds/one-third.

Q: Two-thirds ---

A: And that changes, you know, every year ---

Q: Excuse me. So ---

A: --- plus or minus.

Q: So two-thirds usually for the defense, correct?

A: Correct.

Q: Have you given an opinion for this Sumter Outback in any other case?

A: We had another case, a parking lot or pavement case and I saw it in Mr. Adam's deposition. I can't remember if that was in Sumter or not. I would have to -- I'll just have to double check my file.

Q: Does the name Louis Chandler ring a bell?

A: There was a lady who fell standing in the parking lot regarding the slip resistance of the parking lot, the pavement and the resealing. It many or may not have been Chandler, I don't remember.

Q: Okay. And ---

A: You might remember more details than I do.

Q: Excuse me. And you testified on behalf of the defense for Outback?

A: I don't think there was a deposition, it was just a case that we worked on.
Q: Okay. Did you provided an opinion in support of the defense or in support of the plaintiff?
A: We worked on it. There were probably conference calls. I cannot remember that we wrote a report. I don't think we did.
Q: Okay. Can you remember what your conclusions were with regards to that case?
A: The conclusion was that the parking lot was safe, the coefficient of friction was within a reasonably safe range and there was no defective condition that would have been a contributing factor to her fall.
Q: Okay. And in that case, I think just to make sure that I'm on the same page, that happened in the parking lot, you said on some paint?
A: On the resealed surface of the parking lot.
Q: Okay.
A: Of the pavement.
Q: I understand. Do you remember when the fall occurred?
A: It was a fairly recent case. We probably finished it about a year ago, so probably within the last five years.

Q: Okay. So fair to say this happened after Mrs. Jackson's fall in 2009?

A: Maybe, maybe not, but probably.

Q: Okay, fair enough. Is that the only other opinion you've given for this Sumter Outback that you can recall as you're sitting here?

MR. STEGMAIER: Object to the form. And I don't want to make a speaking objection, but here I am. I don't know if there's a concurrence or agreement that we're talking about the same location. I think what Mr. Campbell said was maybe.

A: Yeah, I think I made that clear that this may or may not have been the same Outback and that one may or may not have been in Sumter ---

Q: Sure.

A: --- but I seem to remember vaguely that it may have been Sumter but I'm not positive.

Q: Okay.

A: We would have to check our file if that needs to be verified.

Q: Okay. And I'm just asking you as you're sitting here today whether or not you recall any other Sumter Outback opinions that you may have given.

A: That's the only one that there may have been.
Q: Okay. And if I were to change the word opinion to testimony, your response would be the same? You've not ---
A: Sumter ---
Q: --- you don't remember giving any other testimony with regards to Sumter Outback?
A: Definitely do not remember any testimony in Sumter.
Q: Fair enough. And in this case, Mr. Campbell, what kind of investigation did you perform as to what I understand you to refer to as ramp number three outside the Outback?
A: Actually the site visit was performed by Bobby Funcik, he's one of the engineers from our office. And it was done with my coordination and under my direction. And he made a site visit, took notes and measurements of the ramp, slope measurements and then performed building code research and review of applicable industry standards.
Q: So, have you ever been out to this Sumter Outback before, personally?
A: Not at least from a billable standpoint. I may have been there but not, you know, for the

purposes of performing an investigation.
Q: Okay. And so Mr. Funcik has the abbreviation EIT behind his name, correct?
A: Correct.
Q: That stands for engineer in training?
A: Correct.
Q: So tell us what's the difference between an EIT and a professional engineer like yourself.
A: An EIT has graduated from an accredited engineering school, he has taken the first of two engineering exams, passed it successfully and therefore he has earned the accreditation of EIT.
Q: Okay.
A: So, a professional engineer also graduates from an accredited engineering school, four years of experience working under another licensed professional engineer and then takes both the EIT exam and the professional engineers exam.
Q: Okay. So he's got one other EIT exam, he's got a few other criteria to meet before he's a professional engineer?
A: He will take the PE exam later this year, yes.
Q: But he has not taken it yet?
A: He has not taken it, correct.

Q: All right. So if I understand your testimony, you sent Mr. Funcik, the engineer in training, to perform the site visit, correct?
A: I did.
Q: And he performed the measurements on the ramp, correct?
A: He did.
Q: And he performed the research as to the applicable codes?
A: Some of the research, yes.
Q: Okay. Who did the other research?
A: He and I did it concurrently.
Q: How do you know, Mr. Campbell, that his measurements are accurate?
A: Because I trust his qualifications, capabilities and field measurements.
Q: Afterwards, did you come back to the Outback just to double check and make sure that his measurements were correct?
A: I've not been there for purposes of this investigation.
Q: Okay. And I'm not doing a very good job of showing you the picture in front of this Outback. How are you able to identify that this is the correct site?

A: Through coordination with Mr. Stegmaier.
Q: Okay. And I guess with Mr. Funcik, correct?
A: Well, Mr. Funcik coordinated with Mr. Stegmaier, so we all did.
Q: Right, okay.
A: We were contacted by Mr. Stegmaier who gave us the site location and the site visit was performed.
Q: And so can you point out to us which ramp it is that you are going to give opinions in on this case?
A: It was my understanding is the far right ramp which would be that one (indicating).
Q: Okay. And so when we're looking at this photo and we're just saying it's the furthest one to the right, furthest ramp to the right, correct?
A: Correct.
Q: It's nearby this tree?
A: It is.
Q: And I think that's just the best way to identify it. We'll refer to this as Plaintiff's Exhibit Two.
(Plaintiff's Exhibit Number Two was marked for identification purposes.)
A: Facing that entrance, there are three ramps.

It is the one to the farthest right.
Q: Okay, fair enough. Before reaching your opinions in this case, I know you sent out Mr. Funcik to do the measurements and take a look at the site, you and he both performed some research into the applicable codes, what else did you do before reaching your opinions or conclusions in this case?
A: Well, we were provided Bryan Durig's report, we were provided depositions and various file materials and it was reviewed.
Q: Okay. Can you recall which depositions you reviewed before providing your conclusions?
A: I reviewed, I believe it was Mr. Adams, the general manager, and I reviewed relevant excerpts from Ms. Jackson's, portions of Mr. Jackson.
Q: Were you provided the entire depositions from Mr. and Mrs. Jackson?
A: As far as I know we were. I don't think we were provided any -- or limited to any parts of it.
Q: Sure. I ask just because you said you reviewed portions of it.
A: Well, Bobby -- Bobby went through, Bobby

Funcik, reviewed the entire Jackson deposition and then identified the specific areas that identified her description of how the accident occurred. So there's always general information that would be redundant for me to review as well which I did not.

Q: Sure. So who wrote the report?

A: Bobby did the draft, I did the review, I did editing and I did the final signature.

Q: How did you know or how were you able to verify his report for accuracy?

MR. STEGMAIER: Object to the form.

A: Can you restate the question?

Q: Sure. Having never been to the site, this Outback where Mrs. Jackson fell, and having not measured the ramp yourself, how can you verify Mr. Funcik's report?

A: Because he's working under my direction, because he has worked for me for years, and because he has been trained on the proper usage of the tools that we use and the proper methodology to take those measurements and I rely upon his expertise.

Q: Okay. So did you personally review the depositions in trying to verify Mr. Funcik's

draft of the report?

A: I did. I reviewed the details from her deposition as to how she fell. Also reviewed Bryan Durig's report.

Q: Did you also review Charles Smith's deposition?

A: I did not.

Q: Okay. Were you aware that his deposition was taken?

A: I didn't go through it. Mr. Funcik may have gone through it. I'm not aware of who he is or what he did.

Q: Okay. I was just going to ask you if you knew who Charles Smith was?

A: No.

Q: Okay. Anything else that you reviewed in drafting or I guess revising the report that provides your opinions in this case that comes to your mind?

A: No.

Q: Okay. It seems to me when I look at your report, or your and Mr. Funcik's report, that you essentially reach four conclusions, okay. Number one, although the built-up curb ramp does not meet ANSI A117.1 standards, the difference was, and I quote, negligible and

would not be perceptible by a pedestrian.
A: Correct.
Q: Is that fair?
A: (Nods head affirmatively.)
Q: Point number two that you make in your report is ANSI A117.1 standard does not allow built-up curb ramps to extend into parking areas but this should not apply to Mrs. Jackson because she was not, and I quote, mobility impaired or a wheelchair user.
A: Correct.
Q: Point number three in your report says ANSI A117.1 does not require markings on a curb ramp and, and I quote, the transition from sidewalk to ramp should have been visible within her field of view.
A: Correct.
Q: And point number four in your report says the case of Mrs. Jackson fall -- Mrs. Jackson's fall was, and I quote, likely a result of her simply stumbling and failing to recover due to her choice of footwear.
A: Correct.
Q: Would you agree that these are your essential conclusions as of your December 16th, 2013

report?
A: They are.
Q: Did I miss anything critical in your report?
A: I don't think so.
Q: Is there anything that you wish to add or to change to your report as of today?
A: No, ma'am.
Q: Okay. Because this is the one and only report that I have from you.
A: That's it.
Q: Now, you site ANSI A117.1 in your report, correct?
A: We do.
Q: And A117.1 is titled the accessible and usable buildings and facilities, correct?
A: It is.
Q: And I brought the standards here just in case we do need to refer to them.
A: Which year?
Q: '92 and '98.
A: Okay.
Q: And it's my understanding you're relying on the 1992 version, correct?
A: That is correct.
Q: Would you agree with me in saying that the 1992

version and the 1998 version are essentially identical?

A: I haven't cross-checked, but that's probably reasonably true.

Q: Okay, I have. So we can go ahead and get to that point if you like. I will submit to you that aside from the numbering and the wording, these standards are the same. And so, here, they are separated by this tab that says -- well, it says ASTM but it should say ANSI 1998.

A: Okay.

Q: So the first is '92 and second's '98. First I want to talk about slope of curb ramps. And you agree with me, I'm trying to use the technical words here, I'm not an engineer so you'll have to forgive me. But we're talking about here a built-up curb ramp, correct?

A: We are.

Q: And the top of it, when you're looking down at the ramp is called the running slope, correct?

A: Correct.

Q: And the sides are flared sides or side slopes, right?

A: Correct.

Q: Okay. So first I want to talk about the slope

of the curb ramp and I want to talk about the 1992 version. It's like page seven, something like that, in 1992 version.

A: That's where you want me to be, page seven?

Q: Yes, sir. I think that's where the standard is.

A: All right.

Q: All right. So, in the 1992 version it said the slopes of curb ramp shall comply with 4.8.2 which states that the slope shall not be steeper than one to twelve, correct?

A: Correct.

Q: All right. Now, the 1998 version, so you'll kind of have to hold your place there and skip to 1998.

A: Does it matter?

Q: Sure, if you want to verify the wording of it.

A: The 1998 does not apply. We really don't need to check it.

Q: Okay. If I ---

A: The 1992 version of ANSI A117 was incorporated by reference into the 1997 Standard Building Code. 1998 does not apply.

Q: And your source for that is where?

A: Well, it come out of the 1997 Standard Building

Code incorporated references section in the back of the code.

Q: And was that specifically adopted by the city or the county of Sumter?

A: Well, it -- you mean ANSI?

Q: Yes, sir.

A: ANSI would not be specifically adopted, not likely. It's incorporated by reference and adopted through the building code.

Q: But again, where is the -- your cite to anywhere in Sumter that specifically incorporates the 1992 version versus the 1998 version?

A: It's incorporated by reference through the building code. What you have to do is go back to the local town council and review their ordinances or they're going to publish their list of adopted building codes.

Q: Okay. Have you consulted with LLR's website as to which may apply, which standard may apply?

A: I doubt seriously the LLR goes back to prior to 2000. And at some point the legislature mandated that the IBC and the IRC would be adopted through the state legislature, but prior to that they were adopted through the

local town council.
Q: And IBC meaning International Building Code?
A: Correct.
Q: And then IRC meaning what again?
A: International Residential Code.
Q: Now, you asked -- you know, you don't want to look at the 1998 version because you said ---
A: No, we can look at it.
Q: Okay.
A: That's fine.
Q: Again, I think we're talking apples to apples essentially because they're virtually identical. We just read that the slope of curb ramps shall not be steeper than one to twelve and the 1998 version says essentially the same thing.
A: Okay.
Q: And I'll wait for you to find that page.
A: All right. Do you want me to look for it or do you want to point me in the right direction?
Q: It should be towards the front again, just like it was for 1992.
A: It's not on page seven, it's going to be somewhere within chapter four.
Q: Let's look at the table of contents.

A: 4.05.
Q: Yeah. It should be 4.05, so I guess it's page 18 or 20. I'm reading upside down, I'm sorry. So with regard to the slope of a curb ramp it shall comply with 4.05.2 which states that the curb ramp shall not be steeper than one to twelve.
A: Correct.
Q: That's the same as the 1992 version, correct?
A: Same today.
Q: So whether it's the 1998 version of ANSI A117.1 or the 1992 version of ANSI A117.1, it's the same standard, is it not?
A: Sure.
Q: When it comes to transitions, it's the same thing. 1992 version says the transition from ramp to walks, gutters or streets shall be flush. Does that ring a bell?
A: Should be.
Q: And in 1998, again, ANSI A117.1 says the transition from ramp to walk, gutters or streets must be at the same level. So whether it's shall be flush or must be at the same level, do you agree that that's basically the same thing?

A: Yes, same terminology.
Q: Okay. When it comes ---
A: Intent.
Q: Okay. When it comes to the sides of a curb ramp, which are also called the flares, correct?
A: They are.
Q: The 1992 version of ANSI A117.1 says curb ramps located where pedestrians must walk across the ramp shall have flared sides. The slope of the flares shall not be steeper than one to ten.
A: Correct.
Q: You agree with that, correct?
A: I do.
Q: That's actually in your report, correct?
A: It is.
Q: The 1998 version of ANSI A117.1 says, and I quote, where pedestrians must walk across a curb ramp, the ramp shall have flare sides. Slope of flares shall not be steeper than one to ten. That's identical, isn't it?
A: It is.
Q: So whether it's the 1992 version or the 1998 version of ANSI A117.1, the standard is the same, is it not?

A: They are.
Q: The 1992 version with regards to built-up curb ramps says that they shall be located so they do not protrude into vehicular traffic lanes or into parking space access aisles. Flare shall not be steeper than one to ten. Does that sound right?
A: It does.
Q: That's actually in your report, correct?
A: It is.
Q: And the 1998 version of the ANSI A117.1 states that curb ramps and their side flares shall not protrude into vehicular traffic lanes, parking spaces or into parking space access aisles. So that one's a little bit stronger than the 1992 version, right?
MR. STEGMAIER: Object to the form.
A: I wouldn't say that.
Q: But it's essentially the same?
A: Same intent.
Q: Okay. I want to talk about obstructions. In the 1992 version of ANSI A117.1, the text of the standard says that curb ramp shall be located or protected to prevent their obstruction by parked vehicles. Do you agree

with that?

A: I do.

Q: Do you agree that the 1998 version is verbatim, the same?

A: I'll take your word for it; it's essentially the same.

Q: So do you agree with me that whether it's the 1992 version or the 1998 version, we're talking about the same standards?

A: Yeah, pretty much the same. I mean usually these standards evolve and they become -- sometimes they will clear up some ambiguity, sometimes they will change but, you know, during that time frame there were minimal changes between the two standards. But technically the 1992 standard is the one that would apply.

Q: Okay. But again, it's only technical because the 1992 version and the 1998 version are virtually identical, correct?

A: I don't have a problem with you comparing the two, but if we're going to talk about the standard that applies, it is the 1992 version because it is incorporated by reference into the applicable building code.

Q: Sure.
A: So, I mean, if we start down a slippery slope, I think it's much easier to stick to one standard. I understand you're probably trying to cover what Bryan Durig had to say, but I really don't think it matters. I think it's totally irrelevant.
Q: But to answer my question, Mr. Campbell, the 1992 version with regards to the standards you cite in your report, are the same in 1998, correct?
A: If your purpose sitting here today is to compare the two standards and for me to state that they are essentially the same, I don't have a problem with that.
Q: They are the same, correct?
A: I think I just said that, they are essentially the same. From that standpoint, that particular section, and those particular sections of that standard, yes.
Q: Yes, sir. Those sections that are in your report?
A: Those sections that address accessible route and curb ramps, yes.
Q: Yes, sir, okay. Now again, we went over how

ANSI A117.1 is titled accessible and usable buildings and facilities, and you can verify that. I mean, I know you probably already know this, but just to be fair, it's right there (indicating), it's the cover. Now, the word accessible in the title is not just for disabled people, it's for everyone, do you agree with that?

MR. STEGMAIER: Object to the form.

A: 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 usable 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 the way we've adjusted over the years, it that the purpose of this code is to address

those individuals with various disabilities ---

Q: Okay.

A: --- and impairments whether it be a mobility impairment, sensory impairment, whatever it may be.

Q: Uncoordinated according to that ---

A: There you go.

Q: --- purpose that you just said. But, like we just reviewed, the standard that we just talked about, when it comes to sides of curb ramps, says that curb ramps are located where pedestrians must walk across the ramp shall have flared sides. Do you agree that the text of that rule contemplates that pedestrians walk on ramps in the normal day-to-day life?

A: Sure they do.

Q: So, do you agree then that these ANSI A117.1 standards contemplate that pedestrians will walk on ramps?

MR. STEGMAIER: Object to the form.

A: They will from the standpoint of the fact that these ramps are within the foreseeable pedestrian path. So if you install one of these ramps whether it's for someone with a mobility impairment or not, it certainly needs

to be installed in a safe manner, yes.

Q: Sure. And if the ramp is your only way to get to your car, then we can expect to have a safe ramp to walk on, correct?

A: I think that's reasonable. But to go beyond that to say that only a ramp constructed with a one to twelve running slope and a one to ten side slope, that is the only ramp that is safe for those pedestrians and individuals walking across it is not correct. Individuals -- and it's well established that individuals can walk across much steeper ramps. So the purpose of these standards would have been established regarding the one to twelve and one to ten is for those individuals with various types of impairments. So, to have a -- have a ramp with side slopes of one to eight or one to six may be safe for the general population but may not be safe for those individuals with impairments. So we need to go beyond, okay, this is the standard for individuals who are handicapped, but is a ramp that has steeper slopes, is that unsafe for individuals that don't have a handicap or some type of impairment. So to say that this is the only ramp that would apply for

the general population is not correct.
Q: Now, these ANSI A117.1 standards are in fact national standards, correct?
A: They are.
Q: Okay. So when folks are building curb ramps and all the other apparatus, whatever you call them, that are addressed in these standards, the builders are encouraged to comply with these standards, correct?
A: For purposes of constructing a safe ramp for handicapped individuals, yes.
Q: And what would have applied at the time that this ramp was constructed was either the 1992 version or 1998 version of ANSI A117?
A: Restate that.
Q: Okay. The standard that would have applied to the ramp that we're here talking about today is ANSI A117, you're saying the 1992 version, correct?
A: 117.1.
Q: And 117.1, excuse me.
A: Correct.
Q: Okay. Now again, these are national standards that are put out there -- ANSI's been around since 1918, correct?

A: Been around a long time.
Q: This is not a fly-by-night organization, correct?
A: No, they've been around a long time.
Q: And consultants like you are in fact hired to advise business owners about the safety of built-up curb ramps just like the one we're talking about today?
A: We do.
Q: So if Outback was to call on you as this ramp was being built, would you tell them that this ramp was acceptable?
A: If we had checked this ramp and they said this is not just a standard ramp, this is a ramp for handicapped individuals, then we would've -- then we would've checked the slopes and I would have told them that those slopes do not comply with ramps constructed for use by handicapped individuals. Now, would it have been safe for individuals without mobility impairments, sure. But if it's to -- if the purposes of this ramp is to deal with handicapped individuals, no, it does not comply with that standard. So, I think we need to differentiate between the two before we get -- before we kind of ---

Q: Sure.
A: --- overlap the two together and get into that gray area.
Q: And these being national standards that we're talking about, you agree with me then that as it pertains to folks using wheelchairs or walkers, that this ramp is out of compliance, correct?
MR. STEGMAIER: Object to the form.
A: It does not comply with the standard, you are correct.
Q: Okay. And you're saying that folks who walk on the ramp, though, it's not out of compliance for them?
MR. STEGMAIER: Object to the form.
A: I'd have to verify that. I don't think so, no.
Q: Okay. So just to be clear, you're applying ANSI A117.1 1992 version to this built-up curb ramp, ramp number three, where Ms. Jackson fell, correct?
A: I'm applying it?
Q: Use it -- it applies to this ramp?
A: Huh, interesting debate, I don't know. Because we have multiple ramps here. If by chance they were designated that that is not to be the curb

ramp for use by handicapped individuals, then it could just be a standard ramp. I don't know. That's an interesting question. I mean we're looking at three ramps here.

Q: Sure.

A: You could designate the ramp to the far left, looking at Exhibit Two and say, well that's our handicap ramp. The one in the far right is just a standard ramp for anybody to use.

Q: Right. And I think you're hitting on an important point. Built-up curb ramps, that's not necessarily the same thing as a handicap ramp, is it?

A: No.

Q: And built-up curb ramps then are not just for use by handicapped people, are they?

A: Can be sued by anybody.

Q: Like Ms. Jackson?

A: Correct. There's nothing that stops her from using it, that's correct.

Q: And so ramp number three could reasonably be anticipated to be used by pedestrians like Ms. Jackson?

A: If it is within foreseeable pedestrian path, then I think it's reasonable that anyone

exiting the Outback Steakhouse could use that ramp, sure.

Q: And your report specifically references ANSI A117.1 to provide some standards to gauge this ramp and it's slope, correct?

A: Well, keep in mind ---

MR. STEGMAIER: Object to the form.

A: Keep in mind that we were already provided Bryan Durig's report which had focused on this ramp. So in response to his report, then we addressed those conditions identified by his report. Whether or not they were considered to be significant or whether or not they applied or whether or not his code interpretations were accurate or not. For us to say that I singled out that ramp and evaluated purely from the standpoint of ANSI A117.1 because I -- I mean evaluate as a handicap ramp is not correct.

Q: Well, I think we agree it's not just a handicap ramp, this is a built-up ramp that anyone could use, correct?

A: No, but the purpose of me citing ANSI A117.1 is because it was already cited by Bryan Durig and I was evaluating his opinions.

Q: Okay. So, let me make sure I'm on the same

page with you then because you seem to have some issue with me saying that ANSI A117 applies in this case. Do you say that any standards apply to the ramp in this case?

A: Any standards? Sure the code ---

Q: What ---

A: --- the Standard Building Code would apply.

Q: Which incorporates by reference you say ANSI A117.1, correct?

A: Well, sure it's -- that's a -- that's a reference in the building code, but that building code does not say every ramp shall be constructed in accordance with ANSI A117.1, it just says if you have a handicap ramp those are the standards that apply and that is the slope geometry that shall be used by the designer and the contractor when they design and build that ramp.

Q: So we keep going round and around. Are you saying that ANSI A117 applies to this ramp or not to determine whether it is safe for pedestrians or folks using wheelchairs?

MR. STEGMAIER: Object to the form.

A: Well, I think I've already answered that. You brought that question up earlier and I said

that is an interesting question because we have three ramps. It could be that that is not the intent -- it is not the intent of that ramp to be a handicap ramp.

Q: And how would a pedestrian know that or a person using a wheelchair know that?

MR. STEGMAIER: Object to the form.

A: That's another good question. I don't know. I would have to go back and look at this from probably a global state -- code standpoint, maybe even look at the original design drawings and see what the intent of the designer and the owner are.

Q: Right. And, Mr. Campbell, so you're giving not only your engineering opinion but also your human factors opinion having never been to this parking lot to see what a field of view might have been, correct?

MR. STEGMAIER: Object to the form.

A: I don't need to go to the site to comprehend and provide an opinion regarding the field of-view because I've seen this condition many, many times, I've seen photographs from many angles and I've been through it in review with Mr. Funcik.

Q: Okay. And you've actually provided testimony regarding a plaintiff's field of view in a parking lot case before, haven't you?
A: I don't know, have I?
Q: In August of 2013 in a CVS case, correct?
A: I did. You're correct.
Q: We'll come back to that. Mr. Campbell, if we instead took your deposition in your office in Charleston instead of at your lawyer's office here in Columbia, would we go back and find ANSI A117.1 standards in your office?
A: You would.
Q: Would you say that those are authoritative?
A: They are.
Q: Would you agree that ANSI A117.1 provides industry standards?
MR. STEGMAIER: Object to the form.
A: You can call them industry standards.
Q: When folks are building a built-up curb ramp, would you think it's advisable for them to call on someone like you for advice on whether or not this ramp is safe for use?
A: Well, the first thing I'm going to tell them to do is refer to the building code and the ANSI standards and ADA. And then beyond that if

they have questions they can let me know.
Q: And so it's appropriate for them to call on someone like you for your professional expertise when it comes to the safety of the ramp, correct?
A: Sure.
MR. STEGMAIER: Object to the form.
A: If they need a consultant.
Q: And which codes apply, correct?
A: Correct.
Q: They would come to you and rely on you for that advice?
A: If they need a consultant, yes.
Q: Would you agree that ANSI A117.1, let's go with your version of it, the 1992 version, provides minimum standards?
MR. STEGMAIER: Object to the form.
A: Well, there are minimum applicable standards as specified by the building code, yes.
Q: Right.
A: And there's no obligation to -- to exceed those standards.
Q: There is no obligation to go above and beyond those standards?
A: No, ma'am.

Q: So, for instance, ANSI A117.1 does not require paint to distinguish a curb from a ramp, correct?
A: That is correct.
Q: Would you still think it's advisable if you were consulting a business to use some paint to call a pedestrian's attention --
MR. STEGMAIER: Object to the form.
A: There is no restriction or no limitation upon an owner or that owner to prevent them from using paint, but it's not required. I mean I think it's their call.
Q: Sure. It's not required but if you're called on to provide advice to a business owner, would you tell them, hey, it's worth some paint to call attention to a curb for instance? And bear in mind Plaintiff's Exhibit Two has paint after Ms. Jackson's incident.
MR. STEGMAIER: Object to the form.
A: The ramp is fine like it is. There's nothing wrong with them adding paint. Would I tell them to add paint? Maybe, maybe not, I don't know.
Q: Why wouldn't you tell them to add paint?
A: Why wouldn't I?

Q: Yes, sir.

A: Because I look at it objectively. I look at it from the standpoint of what is the industry standard, what is the applicable building code and what's reasonable and what's safe. And if I did not see an unsafe condition, I probably wouldn't tell them to paint it. Now, on the other hand -- I mean, where do you draw the line? You could tell them to paint the whole sidewalk. You could tell them to paint everything. But who we usually -- I usually rely upon the applicable building code unless there's something that's open and obvious that is dangerous.

Q: Okay. Now, painting the entire sidewalk is not going to provide any help, you agree, in a case like this? If you paint the whole thing then you lose the benefit of calling someone's attention, you agree with that, right?

A: Not necessarily. I mean you create a condition of color contrast so you've created a visual cue. But at the same time paint can be slippery when it gets wet. You may have created a dangerous condition that was not otherwise dangerous.

Q: Right.
A: So you need to evaluate it on a case-by-case basis and see what's necessary and reasonable.
Q: Do you agree that part of ANSI's mission is to assure the safety and health of consumers and the protection of the environment in setting forth these national standards we've been talking about?
MR. STEGMAIER: Object to the form.
A: I think I remember that language from somewhere. I didn't read it, but it does not sound unreasonable.
Q: Do you agree that by having national standards it makes everyone more safe?
MR. STEGMAIER: Object to the form.
A: That's kind of a broad statement. If these standards are safe and they're standardized, yes, it makes it more safe, but I've seen unsafe national standards that were adopted.
Q: Are you testifying here today that any of the ANSI standards you cited in your report are unsafe?
A: No, but you made a catch-all statement and I'm telling you why I would not necessarily agree with that statement just because it sounds

reasonable because you didn't -- you weren't specific.

Q: Sure, I appreciate that. And I think we've gotten on the same page about that. These ANSI standards, A117.1 -- standards are not unreasonable and they're not unsafe, correct?

MR. STEGMAIER: Object to the form.

A: No. I mean they've been revised. It's a completely different design now for curb ramps, but at the time they were perfectly safe.

Q: Right. And you said earlier that you do consulting work, correct?

A: I do.

Q: So if you were called out to -- it doesn't even have to be an Outback, let's just say a new business owner is trying to make their parking lot accessible, they build some ramps. You were called out there to provide them with some advice on those ramps. How would you tell them to go about looking for standards to build that ramp?

A: We've already answered that. We had to back to -- through the applicable building code, you know, which would be the -- the building code depending on what year it was built and what

year we're talking about, the various standards which would be ANSI and ADA.

Q: Okay. So there are going to be standards that apply to a built-up curb ramp, correct?

A: There are.

Q: Okay. You just have to know where to find them, correct?

A: That is correct.

Q: You can't just go building a ramp and expect it to come into conformity with ANSI A117 or the ADA, correct?

A: Well, it may or may not but probably not. But the question is, if we're just building a ramp, are we building a ramp or a handicap ramp and that's the question about this ramp. This ramp, other than as applied to handicapped individuals, would be considered safe by normal standards for individuals without mobility impairments.

Q: Okay. And we'll definitely come back to that. You mentioned the word objective which I think is very important. You agree that ANSI A117.1 standards are objective, correct?

A: For the most part.

Q: What about them is subjective?

A: I'd have to go through and dig it out. Knowing most codes, some codes are very prescriptive and some codes are more performance standard. So if they give you a performance standard then that could be subjective. So if it's a performance standard, like for example -- I'll give you a roadway example. Our interstate highways, most highways, most all sections of the highway are safe for driving 70 miles an hour, right?

Q: Right.

A: So, from a prescriptive standpoint, the AASHTO or NHTSA standards could show you how to build a roadway of a certain width and a certain length and a certain slope and a certain curvature and radius, okay. So it's very prescriptive, very objective, right. But if they just give you a performance standard like, well build me a safe road capable of accommodating vehicles going 70 miles an hour, that gets -- now you're getting kind of subjective.

Q: Uh-huh.

A: If you follow where I'm going with that because vehicle can be a broad term. Could it be a --

I don't know, a Greyhound bus, you know, and it may accommodate a Volkswagen going 70 miles an hour but it may not accommodate a Greyhound bus going 70 miles an hour. So, if it's not prescriptive, then that leaves some subjectivity to it.

Q: All right.

A: And that's kind of a long drawn out way of answering it, but there are codes that we have that are performance based and not prescriptive.

Q: How would you characterize the standards that are in your report, objective standards?

A: They are.

Q: Okay. And so all that about prescriptive and subjective, that doesn't apply to the standards that you cite in the report, correct?

A: No, it's very specific because it gives you performance criteria regarding slope.

Q: Right.

A: So these are objective standards and is it fair to apply ANSI A117.1 standards in this case?

MR. STEGMAIER: Object to the form.

A: No.

Q: Why not?

A: Because my understanding that she was not handicapped in anyway whatsoever.
Q: Okay. Now, why doesn't your report specifically say that ANSI A117 should not apply?
A: Because I already told you we were dressing Bryan Durig's report and his opinions. So we were addressing from the standpoint of A117, what was in Bryan Durig's report. If we want to go back and generate a report from a different perspective, then we would tell you that ANSI A117 should not apply. And I've already told Mr. Stegmaier that ANSI A117 should not apply to this condition.
Q: Because she's not in a wheelchair or using a walker?
A: That's my understanding. Now, obviously I'm not going to provide a diagnosis, you know, on her mobility and any impairments that she has, that's certainly up to a physician.
Q: Right.
A: But it's my understanding that she was not handicapped. And if she's not handicapped, does not fall within the protected class, then these standards do not apply.

Q: Okay. Even though we just went over the fact that the standards that you cite in your own report contemplate pedestrians walking across curb ramps?

MR. STEGMAIER: Object to the form.

A: Sure. My report is not considered to be comprehensive and all inclusive, but it does address the conditions addressed by Bryan Durig and that was the intent of my report.

Q: So, and again, even though the standards we just went over that you cite specifically say that pedestrians will walk across curb ramps, you're saying she should not -- that basically you shouldn't be able to walk across curb ramps, you can only roll over them?

MR. STEGMAIER: Object to the form.

A: I didn't say that in any way, shape or form.

Q: Well, help me understand though because you're saying the ramp that Ms. Jackson used basically should only have been used by folks in wheelchairs or folks in walkers?

A: No. What I'm saying is that the -- that the specifications to design and build that ramp only apply to handicapped individuals. And as we already said earlier, is that that ramp was

designed for handicapped individuals. And if we were talking about a handicapped individual that fell on this ramp we'd probably be having a whole different conversation. But what I'm saying is that other than those handicapped individuals, this ramp was safe for the general population. And that's -- that is my opinion.

Q: So, only people who are disabled, okay, wheelchairs, walkers, canes, things like that, ought to receive the benefit of a ramp that complies with ANSI A117.1, is that what you're saying?

A: That is the group to which you would apply the standards of ANSI A117.1. If by chance we can somehow get into a condition of this ramp because it does not apply but would be considered dangerous then we'd have a different issue here. But the building code allows the construction of ramps with a slope of one to eight, which is twelve and a half percent for the general population.

Q: Did you cite that in your report?

A: I did not.

Q: Because -- does it apply?

A: The Standard Building Code, absolutely applies.

Q: Why is that not in your report if it's so important?

A: I think we've been through that, that the purpose of my report was to address those allegations by Bryan Durig. My report is not to be considered all inclusive.

Q: I asked you in the beginning of this deposition if there were any other opinions that you had in this case that were not in your report and you said no.

A: My interpretation was you were asking me were those the opinions that were in my report.

Q: Okay. So what other opinions do you intend to offer at trial?

A: I think -- let me look at the report real quick. I think it's inferred. And let's talk about it.

Q: Because you understand that the reason why we ask for a report is to figure out what your testimony would be at trial so now is the time to tell us.

A: It's here.

MR. STEGMAIER: Object to the form.

A: All right. Let's go down to the bottom of page three, in summary. Although the slope of the

side flares slightly exceeded code limits, an able-bodied individual should have had no trouble navigating the slope of the side flare. So whether I said specifically or not that a twelve and a half percent slope is acceptable, what we're saying here is that same opinion, that this slope, as constructed, is safe for individuals of the general population that are not handicapped. So, I mean -- and if there's any doubt we just addressed it much more explicitly.

Q: In your same report I think you recognized the fact that Ms. Jackson has had knee problems.

A: She has.

Q: So ---

A: But, I mean, like any other medical condition, I've had a broken arm but it's repaired. I'm not -- it's not been brought to my attention that as a result of her knee problems she is now considered to be handicapped, I'm not aware of that. I mean if she is, then we'll address this completely differently.

Q: Sure. So with knee problems depending on how extensive they were, she may fall into this class and your opinion may change is what

you're saying?

MR. STEGMAIER: Object to the form.

A: I'm not aware she's handicapped. I mean if somebody tells me she's handicapped, she's been handicapped, I think we've got something different to talk about. I understand she's not handicapped. The slopes of this ramp are reasonable and can be easily walked upon and navigated by an otherwise healthy individual. And that is my opinion.

Q: Whether you need an objective assessment of your plans during your project's developmental stage or need an emergency investigation conducted to identify and assess a new problem, you can count on our team to deliver an accurate and objective report detailing the problem as well as provide recommendations and assistance for solving the problem. That's a quote from your website. Does that ring a bell?

A: It sounds like it. It sounds like it's probably from one of the environmental pages.

Q: Oh, so it wouldn't apply to you going out to a construction site or to look at a site like this?

A: No, it would. It sounds like -- it may have been on the general page, it may have been more specifically from the environmental group. I really don't know, I mean ---

Q: Okay.

A: --- I don't have it memorized and I really don't look at it that much.

Q: But again, the word objective is right there on your website so it looks like it's important to be objective when you're an engineer, correct?

A: Well, it should not be a surprise to you because I think I already testified earlier in this deposition that I address these conditions objectively. I don't like subjective opinions. I like to have a building code reference to rely upon, an industry standard to rely upon or some type of objective information to rely upon.

Q: Industry standards, you like to rely on those, those are important, correct?

A: Applicable industry standards, yes.

Q: Okay. Are there any -- since -- are there any other industry standards that apply in this case that we haven't already discussed?

A: I think we covered most of them. We've covered

the building code, we've covered ANSI, we've covered ADA. There may be an ASTM standard, but I think we've covered the majority of them. And when they -- when you get into the different organizations there's a lot of overlap and very similar.

Q: Right. And an ASTM standard, I think we've kind of touched on it, would be foreseeable pedestrian walkways?

A: That term is used within some of the ASTM standards, yes.

Q: Okay.

A: Either pedestrian walkway or foreseeable pedestrian path.

Q: Right. Path, that's the right word, correct?

A: There you go, yep.

Q: So, I understand your report to say that these ramps fall outside of ANSI A117.1 1992 version, correct?

A: From a construction criteria standpoint?

Q: Yes. I mean according to your report they are -- the slope exceeds the max allowable slope?

A: They do. I don't have a problem with that. We stated that.

Q: Sure. Both the running slope and then the

slope on the flares, correct?
A: They do.
Q: All right. Now, your report does not suggest that these ramps need to be altered in any way, correct?
A: That was not even remotely the intent of our investigation. Right now we're performing this investigation purely from a forensic standpoint. We have not been asked to be consultants, we've not been asked to provide recommendations and we have not consulted directly with the owner. So that is not even -- that's the first this has even been addressed. That is not one of my opinions. They are not part of the scope of our being retained in this project.
Q: Sure. Hypothetically speaking, Mr. Campbell, if you were hired as a consultant in this case to look at this ramp, would your opinion be consistent with this one?
MR. STEGMAIER: Object to the form.
A: With which one, what are you talking about?
Q: Would your opinions in the report be consistent with what you've provided us here today?
A: That that ramp does not comply with ANSI

A117.1?
Q: Yes.
A: Yeah, it's not gonna change. I told you I agree with that. I mean, we read it.
Q: And so would you recommend that the ramp be changed to come into compliance with ANSI A117.1?
MR. STEGMAIER: Object to the form.
A: It would either need to be changed or there would need to be some methodology to identify handicapped individuals that that is not the ramp to be used by them. As we said, there's three different ramps out there. So, you know, they could be directed away from that ramp or you could change it and make it a handicap ramp. I mean, there's several different solutions, but it is not recommended to be a handicap ramp.
Q: Okay. You would recommend some kind of signage or something like that is what I hear you to testify.
A: Either signage or some obstruction that would prevent them from using it or provide rails or remove and replace it. You could remove it altogether period. I mean that's one solution.

Q: Okay.
A: It's gone and then you don't have to worry about it.
Q: Am I correct in assuming that there is no other document out there that pertains at all to your investigation or evaluation of these ramps aside from the report that we've been referencing and maybe these documents you've provided me here on this CD?
A: You're saying a formal document with our opinions?
Q: Yes, sir.
A: Does not exist.
Q: Or any recommendations for that matter.
A: Does not exist.
Q: When it comes to this ramp.
A: Nope.
Q: Or any of the three ramps outside of the Sumter Outback?
A: It's not there, nope, you've got it.
Q: All right.
A: You've got it all.
Q: You said that your role in the case is purely, I think you said, from a forensic standpoint and an investigative standpoint?

A: Sure. As I sit here today that's all I've been asked to do.
Q: Would you ---
A: I've been asked to consult with Mr. Stegmaier as a -- as an expert witness.
Q: Would you as a professional engineer, and it's my understanding that engineers are -- they swear an oath to protect the public. Would you ever recommend a plan to fix the ramps?
MR. STEGMAIER: Object to the form.
A: If I were working for Outback Steakhouse and they asked my opinion then we would address those ramps, yes.
Q: Person-to-person to, let's say, Mr. Adams who manages -- is the managing partner of this Outback, do you recommend to him that he fix these ramps?
MR. STEGMAIER: Object to the form.
A: Yeah, he has a liability there. Sure, it should be addressed.
Q: Would you agree, Mr. Campbell, it's a liability to all customers of the Outback?
MR. STEGMAIER: Object to the form.
A: I'm not sure how you -- I mean, if it's a liability to him I think -- I think somehow

it's a liability to everyone using the -- using that location. I don't know. I mean that's a legal question. I mean I think lawyers determine liability.

Q: Sure.

A: I'm not going to give an opinion on that.

Q: I understand, that's fair. Would you recommend to Mr. Adams, the managing partner of this Outback, that these ramps need to be modified to keep his customers safe?

MR. STEGMAIER: Object to the form.

A: Well, now you've used ramps as a plural. I have no idea whatsoever of the condition of the other two ramps. We're ---

Q: Okay. Let's talk ---

A: We're addressing one ramp in particular which has a known problem which we've addressed and you've asked me what I think about it. And I think if it's going to be used as a handicap ramp, then there are probably certain modifications necessary.

Q: Okay.

A: But, I mean, is it -- is it just an outright dangerous deadly condition, no. Is it a condition that could cause someone to fall

down, it could. The individuals you need to be concerned about though are the handicapped individuals, not -- not the general population that does not have a mobility impairment. Mobility or sensory impairment, whatever it may be.

Q: Okay. I know you testified earlier that you read the parts of Ms. Jackson's deposition where she talks about her fall?

A: I did.

Q: Did you -- have you read any of her medical background, any medical reports at all?

A: I read the ER, ER report. I know she has a bilateral knee replacement.

Q: Other than that, do you know anything about her medical history?

A: I haven't really dug into it, no.

Q: Or her husband's medical history?

A: I've not dug into it, no, ma'am.

Q: Would it ---

A: I probably will if we go to trial and I think that's information that I certainly would dig into more deeply, but as we sit here today I think based on my conversations with Mr. Stegmaier and preparing for this deposition, I

focused primarily on her actions related to the fall and the ramp itself and of course those opinions by Bryan Durig.

Q: Would it surprise you if I told you that Ms. Jackson's husband is disabled?

A: I mean, I'm not sure that's relevant.

Q: Did you know that before I just told you?

A: No, ma'am.

Q: Did you know that they had a handicapped parking decal, just couldn't use it because all the spaces were full?

MR. STEGMAIER: Object to the form.

A: That could be accurate. But if all the spaces were full, I mean, it looks like they have more than adequate number of spaces here, so if they were full, I mean, I think they probably beat the odds that they had a high concentration of handicap diners that day. But if that's legitimate and all the spaces were full, I mean that's -- that's a conversation for another day. That has nothing to do with this unless somehow somebody's made the allegation that the number of spaces in that -- is inadequate. And based on the size of this restaurant and the spaces that I see out front, I'd be shocked if

that's correct.
Q: Do you recall reading Ms. Jackson's testimony where she said all the spots were full?
A: No, I didn't get into that part.
Q: So how much of this deposition did you read, Mr. Campbell?
A: What I said was I focused on the parts specific to what happened when she fell, what she was doing, how it occurred.
Q: Was that just a few lines of the deposition?
A: It was a few pages. I mean, if we're going to get into the specifics, she didn't even fall according to the ER report, her husband pulled her down. I understand there's probably some strong disagreement about that and that's for another day, but I mean I've read -- I've read her testimony, what she was doing, how the accident occurred, how her husband was involved in it. Those are pretty much the specifics of what I reviewed and that covered quite a few pages.
Q: Sure. Are you a member of the National Society of Professional Engineers?
A: No, ma'am.
Q: Okay. But you're a licensed engineer here in

South Carolina, I think I saw your seal somewhere?

A: I am.

Q: Now, you agree with me that engineering has a direct and vital impact on the quality of life for people here in South Carolina?

A: It does.

Q: Do you agree that professional engineers like yourself can be called out at any stage of a job to ensure compliance with standards?

A: I'm not sure I agree with that.

Q: You can be called out at the beginning of a job to tell folks how to do something, correct?

A: Yeah. And if I interpret your fist statement, it's almost like I can be sitting at my desk and somebody calls me out of the blue and I'm supposed to respond immediately, I don't agree with that.

Q: Well, you could come out, let's say within a couple of hours if need be, right, as a consultant?

A: I mean somebody could call me and ask me to become involved and obviously we would have to negotiate what my role is and responsibilities and fee structure ---

Q: Uh-huh.
A: --- but, I mean, just to say that you can call me up anytime on any job, I don't think that's accurate.
Q: Sure. I don't mean to say that, you know, you're available any time. But at any stage of a job, would you or someone on your staff make yourself available to provide consultation concerning standards?
A: That may or may not be true. I mean if somebody asked us and we -- we take this very seriously. If somebody asked us to do something that we can't do, no matter how much you're going to pay us, and either we can't do it or it creates, from a liability standpoint, far more risk than reward -- for example, I want you to come out and review my building and certify that it is built in full compliance with the building code, completely safe and nobody's ever going to get hurt. We would never even remotely consider doing that. So, I think your statement is way too broad.
Q: Okay. Then I'll make it more fair, okay. Someone's calling you out with regards to just a ramp anywhere else. It doesn't even -- it's

not this specific Outback ---

A: And look, look, look. I'm not trying to be argumentative, I'm not a big fan of hypotheticals. If we could -- and maybe it's my engineer brain. Maybe if we could zero it, kind of narrow it down and say -- your hypothetical being a little bit more specific. Say you're inviting me to go to McDonald's to look at a ramp or something. So if we could narrow it down ---

Q: Sure.

A: --- to a specific condition ---

Q: Okay.

A: --- a specific situation without being just kind of overly broad ---

Q: Yeah.

A: --- I think that would be easier to answer.

Q: Okay. Well, there is -- for instance we just had a McDonald's that got torn down and another one built right back up where the old one was, you remember that? So, just to have a new better looking McDonald's, I guess.

A: Uh-huh.

Q: So I imagine they tore everything down and they have built everything right back up.

A: Okay.
A: And so that McDonald's has got to have a ramp to the front, you agree?
A: Absolutely, yes.
Q: All right. And so could you have been called, let's say, hey, in a week or two, in the next week I've got my guys out there going to go pour this ramp ---
A: Uh-huh.
Q: --- will you be out there to kind of tell them what they need to do?
A: We don't supervise. We don't -- that -- you're -- basically you're getting into means and methods and we don't do means and methods.
Q: Okay.
A: We would -- if they've already laid it out in the concrete where we're talking about forming the ramp, so you put up your boards and you form it, we would go out and check the slope. They could ask us specifics and then we would -- they could pour the ramp and we could go back and check it after the fact.
Q: Okay.
A: But as far as how to do it, that's means and methods and we don't get into that.

Q: Gotcha. So, let's say they poured it, you go out there to take a look-see to see if they did an okay job?
A: Uh-huh.
Q: Okay?
A: Okay.
Q: And you would tell them whether or not they conform with the applicable standards or not, correct?
A: We probably would, yeah.
Q: And if asked, you would provide them with a recommendation as to how to fix it, correct?
A: Well, if they were in violation.
Q: If they were in violation ---
A: Sure.
Q: --- you would tell them how to -- not necessarily how to fix it but what they -- what's wrong with it.
A: We don't do how but we would identify specifically what's wrong.
Q: You would say what's wrong, okay.
A: Exactly.
Q: I think we're on the same page.
A: Yeah.
Q: Do you agree, Mr. Campbell, that when you're

called on should be honest and impartial and dedicated to the protection of public health, safety and welfare?

MR. STEGAIER: Object to the form.

A: I don't have a problem with that.

Q: Okay. And you, in fact, I alluded to this earlier, you swear an oath as a professional engineer to quote, hold paramount the safety, health and welfare of the public, end quote.

A: Huh. I don't remember swearing that oath. I may have. I don't remember it.

Q: But, is it fair to say that probably at some time you've sworn that oath?

A: Or something similar, sure.

Q: Okay. Even if you don't remember swearing it, is that something that you take seriously or as a part of your job as a professional engineer?

A: Oh, absolutely.

Q: Okay. I want to turn specifically to the ramp where Ms. Jackson fell. We've been referring to it as ramp number three, close to the tree. Let me see if I have a closer up picture.

MR. STEGMAIER: You can go off for a second.

(Off the record from 11:38 a.m. until 11:41 a.m.)

Q: All right, Mr. Campbell, I'm going to show you

a grouping of photos, I think there's five pages and there's ten photos, so take the time you need and lift up your head to let me know you're finished reviewing them.

A: All right.

Q: These will be Plaintiff's Exhibit Two, the collective group. Three.

(Plaintiff's Exhibit Number Three was introduced into the record at this time.)

A: I haven't seen these since this morning.

Q: Okay. I guess according to what Mr. Funcik has told you, this is the ramp where Mrs. Jackson fell, ramp number three?

A: It is. They're all the same which is what I was looking at, and they appear to be -- at least most of them are in that corner.

Q: Okay. At the top of the ramp when we go and measure it's steepness, the measurement we refer to is called the running slope, correct?

A: Correct.

Q: And the sides of the ramp again are called the flares, correct?

A: Side slope, either way.

Q: Side slope or flares?

A: Correct.

Q: And the running slope of the curb ramp where Ms. Jackson fell was 12.9 percent according to your measurements, correct?
A: I think that's correct.
Q: And according to ANSI A117.1, the 1992 version that you cite, the max allowable slope is 8.3 percent, correct?
A: One to twelve, correct.
Q: Okay. Now, do you also agree then, doing the quick math that the running slope of this ramp exceeds the max allowable slope by 55 percent?
MR. STEGMAIER: Object to the form.
A: 8.3, 12.9, yes, 55.
Q: Okay. In other words, using your own measurements, the running slope, the slope on the top of this ramp, is 55 percent too steep?
A: At the top.
Q: Is 55 percent a negligible amount to you?
A: It's imperceptible. Is it negligible, I think that would be getting into a subject term.
Q: You ---
A: Negligible regarding what?
Q: I used the term negligible because that's the term you used in your report.
A: From a -- yeah, from a perceptibility

standpoint it is negligible.
Q: Now, perceptible meaning visually?
A: Sensory.
Q: Okay, so her foot. As to her foot she would not have been able to perceive a 55 percent more steep ramp?
A: Upon stepping from a level surface onto that slope, she would not be able to perceive the difference in slope, correct. She does not have the sensory ability to discern the difference.
Q: And you say sensory-wise meaning when she stepped on it?
A: Correct.
Q: How about -- and you say visually she would not have been able to perceive a 55 percent too steep slope either?
A: There's no way.
Q: Now, the sides of the ramp, the flared sides, they also exceed the maximum allowable slope as well, correct?
A: Minimally.
Q: In fact, you measured the slope at 10.9 percent and it also measured 11.7 percent near the top of the side of the ramp, correct?

A: Correct.
Q: And according to the standard that you've cited, the maximum allowable slope on the flared side of the curb ramp is actually 10 percent?
A: One to ten, correct.
Q: So, using your measurements, the slope of the sides of this ramp exceed the maximum allowed slope by 17 percent?
A: Correct.
Q: Is 17 percent a negligible amount to you?
A: It is.
Q: And negligible how so?
A: From a sensory and perception standpoint.
Q: So her ability to see the difference, she would not have been able to perceive the difference, correct?
A: No.
Q: Between a ramp that complied with ANSI A117.1 or one that didn't?
A: Correct.
Q: And you're also saying though that with regards to when she stepped on it, she wouldn't have been able to tell a difference with that's 17 percent too steep?

A: Correct.
Q: Okay.
A: And from a visual perception standpoint it would be incomprehensible to her anyway. I think she, unless I'm totally mistaken, I'm sure she had no clue whatsoever what a handicap ramp slope should be. So, we evaluate our walking surfaces based on our visual and sensory perception, so. And obviously you have sensory feedback from your feet and from your body, you know, proprioception and even from your vision, and it has to be a fairly extreme variation in order to perceive that condition.
Q: Right. Do you think 55 percent is a pretty extreme variation?
A: From the standpoint of sensory perception, no.
Q: Okay. Just to make sure I'm clear, using your own measurements, the running slope on the top of the ramp and the flared sides are both too steep according to the ANSI A117.1 standard?
A: They are.
Q: Okay. Now, let's say hypothetical, and you can tweak this hypothetical to your liking to make it fair.
A: Okay.

Q: So chime in when necessary because I don't want to be unfair.
A: All right.
Q: Let's say a construction company is building a house on a hill. And let's -- this house is going to be up on stilts and it's going to have crawl space and all that stuff. That's -- that house has got to be able to accommodate people, furniture, et cetera, and stand the test of time?
A: Some time.
Q: Some time. Is it okay for that house to have 50 percent less support beams on it?
MR. STEGMAIER: Object to the form.
A: It could be. It depends on what the original designer did. And it's not unusual -- I can tell you, many designers often over design. And some will over design with the intent of compensating for a contractor that does it wrong. So, it could be that a particular residence could be -- the contractor could reduce the strength of the structural framing system by 50 percent. Is that likely, no. Is it something that if that designer designed that structure in accordance with the minimum

standards established by the building code, could you reduce it by 50 percent, no.

Q: Right.

A: The answer is on that one, this is your hypothetical, it depends.

Q: But like you said, the minimum standards are the minimum and it's not intended to go any further below those, correct?

A: Correct.

Q: You can exceed the minimum standards gratuitously to just provide more protection, right?

A: Within reason, sure.

Q: If, let's say, you went out to look at this property and were specifically asked to take a look at the supports to see if they were adequate or not.

A: Sure.

Q: If you notice that there were 50 percent less supports than required, would you tell them about it?

A: Absolutely. And that is the term as required.

Q: According to the building codes and ---

A: Well, the applicable codes, yes.

Q: Same thing if you're called to take a look at

a deck out on the lake for a business, let's say. If the deck is built so that it will handle 50 percent less weight than what it should hold, that's a problem, correct?

A: Well, it could be. Sooner or later it's likely going to be a problem.

Q: Likely to be a problem?

A: Yes.

Q: Okay. We've talked about your first point, okay. I want to talk about the second point in your report. It says that even though ANSI A117.1 doesn't allow built-up curb ramps to extend into the parking spots, that this should not apply to Mrs. Jackson because she was not mobility impaired or a wheelchair user. Now, I think you disagree with me that ANSI A117.1 is intended to accommodate all levels of mobility, or do you agree with me?

A: No, I don't disagree with that. I mean it's foreseeable that this ramp is going to be used by the general population.

Q: Okay. So you agree with me that it's created to accommodate persons of all mobility?

MR. STEGMAIER: Object to the form.

A: But for Ms. Jackson, was it necessary to design

this ramp in accordance with ANSI A117.1 to prevent her from falling, absolutely not. That's where we're going to disagree.

Q: Okay. So the ANSI A117.1 standards apply, they don't apply to her?

A: No. The intent of ANSI A117.1 is to design these ramps for handicapped individuals, not for the general population. Or not for this ramp to meet that standard for the general population to be safe as well because the general population can adapt to ramps with much steeper slopes.

Q: But it's foreseeable, is it not, that this Outback had these ramps constructed for handicapped folks, correct?

A: Yeah, based on the striping and layout design, I would say that is reasonable, yes.

Q: And it's also foreseeable that they were constructed for use by just regular pedestrians, able-bodied?

A: Sure. But was it unsafe for those able-bodied pedestrians, absolutely not.

Q: Let me get to my next question. Now, you would expect that the Outback would have constructed ramps that comply with ANSI A117.1 for the

benefit of the folks that -- benefit of their customers, correct?

MR. STEGMAIER: Object to the form.

A: Yeah. The Outback, they're not expert designers, they're not expert contractors. They have a right to rely upon those designers and contractors. And I think when that restaurant was turned over to them I think it was their expectation and anticipation that it met the applicable requirements of those various building codes. So I would speculate that for all practical purposes they thought they had and had purchased and contracted for a ramp that met those applicable codes and standards. So the fact that it does not, I mean, you can put it back on them, which you have in, but did they knowing do it or did they try to cover it up, I don't think so.

Q: Do you have any evidence to support that Outback knew of any problems with this ramp, ramp number three, before Mrs. Jackson fell?

A: None whatsoever.

Q: Do you have any inspection reports or site plans or anything like that as to the construction of ramp number three were Mrs.

Jackson fell?
A: No, ma'am.
Q: Did you think it was important to look at a site plan to see what the original plans for the ramp were?
A: If they were made available, but they were not.
Q: Did you ask for them?
A: I rely upon Mr. Stegmaier. He and I have worked together long enough. He knows what I need to work with and it was not produced. I haven't specifically said, hey, are there additional plans, documents, drawings, design manuals that I haven't seen. I didn't ask that question, no.
Q: It just wouldn't have been helpful to you?
A: It may have been helpful. It's there, it exists, it's built, it's in the environment. I mean, that's what we're relying upon when we -- I mean, nothing gets better than the physical model. So, I mean, maybe -- I think it's actually probably more helpful for you and for the attorneys to determine liability, but from a design standpoint, I mean, we don't have -- we don't have a designer, we don't have a general contractor, we don't have a

subcontractor as a defendant here, so I don't think it serves any purpose for me to try to push it off on anybody else. So I'm not sure how much benefit I would get out of that. We're looking at the actual ramp. It's not built in accordance with the applicable code and we have a problem. That's what we're dealing with.

Q: Do you agree, Mr. Campbell, that Mrs. Jackson has probably walked on thousands of ramps in her lifetime?

MR. STEGMAIER: Object to the form.

A: I expect she has.

Q: I mean, I think just on the sidewalk to get here today I walked on a small ramp that had raised little yellow dots on it.

A: Tactile strip.

Q: Right. For ---

A: ADA.

Q: --- people who are blind, correct?

A: For ADA, yeah.

Q: So, if that ramp is built out of compliance, I mean, are you saying that someone like me who trips and falls is not protected by some kind of standard, some expectation?

A: Well, just like Mrs. Jackson, we need to evaluate the cause of your fall. Were you talking on your cell phone, walking a dog, carrying a bag of groceries and looking the other way when you fell down, I don't know. I mean, just for you to tell me that basic piece of information, you fell on a ramp doesn't necessarily mean it's the ramp's fault.

Q: Okay.

A: And you may have been wearing stiletto heels all at the same time.

Q: If the ramp's too steep and someone falls because they say they could not perceive the ramp or a change in elevation, does that change your opinion?

A: I mean, we're talking about a hypothetical and you give me a hypothetical scenario. I mean people provide us information all the time, both on the plaintiff and defendant's side, but we rely upon that information to the extent it applies. Sometimes it's correct and sometimes it's not. So once again, I think you have to evaluate these situations on a case-by-case basis.

Q: I want you to -- I'm going to refer to

Plaintiff's Exhibit Two. I know you've read portions of Mrs. Jackson's deposition and I will submit to you that a portion of that deposition, which I do have with me here today in case you feel more comfortable reviewing it, okay. She testifies that all of these spots in front of the Outback were occupied as she exited the Outback with her husband, okay?

A: Okay.

Q: All right. So taking that assumption for what it is, and again I have the deposition for you here to review ---

A: Don't need it.

Q: --- should you feel more comfortable doing so.

A: I'm okay.

A: How else would you expect Mrs. Jackson to get to her car other than going down one of those ramps, built-up curb ramps?

A: Step off the curb. I mean, if she wanted to. I don't know how far -- I don't know the position of the other vehicles, I mean, if she could have stepped down and walked around them, I don't know. I mean, no body would know unless they were there and had photographs of those conditions.

Q: It just so happens we have some photographs. Have you seen any photographs from the date of this incident that were taken by Mr. Aligood?

A: I don't know who took them. I've seen photographs from that day.

Q: Okay. I'm just going to show you Plaintiff's Four.

(Plaintiff's Exhibit Number Four was introduced into the record at this time.)

Q: And I'll submit to you that this is ramp number three we've been talking about, and that's Mrs. Jackson in a little red suit after she left the Outback.

A: Okay.

Q: And there is a car parked on one side of the built-up curb ramp and there's another car parked on the other side of the built-up curb ramp.

A: Okay.

Q: How else was she supposed to get to her vehicle?

A: I mean the most likely area and the foreseeable route is going to be to use the ramp. I mean I can come up with the other scenarios, I mean, hypothetically she could have walked around and

walked through the flower bed. You might say that's kind of a facetious comment but we see that all the time. We've had slip and falls where people walked through parking lots and tripped over sprinkler heads. I mean walked through flower beds and tripped over sprinkler heads. So, you know, there are other ways around. Did she take the most probable and most reasonable route, she probably did. I'm not here to say that she took the wrong route, she fell because she went the wrong way.

Q: Right.

A: I haven't -- haven't hypothesized that at all.

Q: Do you have a general idea of where her vehicle was parked?

A: No, ma'am.

COURT REPORTER: Before it gets lost, can I just -- these are with that one? Did you want to mark them all?

MS. MOSIER: No, I'm just going to mark the one.

COURT REPORTER: You're just going to mark the one?

MS. MOSIER: Yeah.

COURT REPORTER: That's Four.

MS. MOSIER: Yes.

COURT REPORTER: Thank you. I'm sorry, I just want

to make sure before they get shuffled and I don't know which ones are which.

(Plaintiff's Exhibit Number Four was marked for identification purposes.)

COURT REPORTER: And if you'll hand me that stack, I can go ahead an mark that stack as well, please.

MR. STEGMAIER: Here you go.

COURT REPORTER: Thank you kindly.

(Plaintiff's Exhibit Number Three was marked for identification purposes.)

Q: All right. So, Mr. Campbell, I understand you to be saying here that it's entirely foreseeable and reasonable for Ms. Jackson to have descended this ramp on the way to her car?

A: Well, one of the ramps.

Q: Okay.

A: You say entirely foreseeable. I think, when you say this particular ramp, I think it's entirely foreseeable she would have likely used one of the ramps. I don't know if entirely foreseeable she would have used that particular ramp.

Q: Okay. I thought you might say that which is why I brought Plaintiff's Exhibit Five.

(Plaintiff's Exhibit Number Five was marked for identification purposes.)

Q: Ms. Jackson's car was parked somewhere where it looks like a -- there's two white vehicles here.

MR. STEGMAIER: That's in another parking lot.

MS. MOSIER: That's the same parking lot, is it not?

MR. STEGMAIER: No.

MS. MOSIER: All this right here?

MS. McPHERSON: No, that's different.

MS. MOSIER: Well -- I'm sorry. There's grass on the other side of it. This is all one large parking lot here, right? I mean, I'm not pointing to that parking lot where the white cars are, I'm talking about in front of that.

MR. STEGMAIER: Oh, okay.

MS. MOSIER: There's parking spots here. Sorry, that might have been unclear on the record.

Q: With reference to Plaintiff's Exhibit Five, Mr. Campbell, there is parking, let's see, if you're facing the Outback off to the right and it's facing another parking lot, correct?

A: It is.

Q: If Ms. Jackson was parked out in that general direction, does it make sense that she used

handicapped -- the built-up ramp number three to get to her car?

A: It's not unreasonable.

Q: Okay. Because people generally will pick the path that's most direct to where they're going ---

A: Sure.

Q: --- correct? Okay. Going back to Plaintiff's Exhibit Number Four, we reviewed ANSI A117.1 standards that say that curb ramps shall be located or protected to prevent their obstruction by parked vehicles. Do you remember that?

A: I do.

Q: And that's part of your report as well, correct?

A: It is.

Q: Now, that might not be the best photo. This might actually be a better one, Plaintiff's Six.

(Plaintiff's Exhibit Number Six was marked for identification purposes.)

Q: This Suzuki is parked on top of the built-up curb ramp, correct?

A: It's on one of the side slopes, one of the

flared sides. I mean, it doesn't cover the ramp if that's your point.

Q: Right. It's blocking the flared side, correct?

A: It is.

Q: Okay. And with reference to Plaintiff's Exhibit Four, would you agree that the corner of this other blue vehicle is also protruding to the flared side?

A: It partially blocks it.

Q: On ramp number three?

A: Yes.

Q: Do you agree that pedestrians don't expect cars to be parked on ramps or ---

A: Yeah.

Q: --- parked to block ramps?

A: They -- I think they expect cars to be parked anywhere. I mean if you want to talk about pedestrians and where they see cars. I mean there's -- there's a fully accessible pedestrian path in that photo. Yeah, I mean, to say that this car protruded onto the edge of the flare caused her to fall down is totally unreasonable.

Q: It's not -- I'm not saying that it caused her to fall down, but do you agree with me that

those cars are obstructing the built-up curb ramp in violation of the ANSI standard you cite?

A: It does obstruct that edge of the flared ramp, yes.

Q: Okay.

A: Is that a contributing factor to her fall, absolutely not.

Q: Sure. Would you, as a professional engineer, give your client, let's say they came to you for consultation about the specific ramp number three that we're looking at pictures of, would you give them the green light to proceed with this ramp when it protrudes into parking spots?

A: Now, see, there you're getting into a -- getting into a design debate because the way to stop those vehicles is to put out a wheel-stop. And then you get into -- get you get into a whole new issue and even ASTM F16.37 says parking lots should be designed without wheel-stops. But how are you going to stop those vehicles? You've got to put in a wheel-stop. So, I mean, yeah, if you want to follow the code and satisfy the requirements of the code, you put it wheel-stops, you keep the vehicles

off the edge of the ramp, yes. Do you create another condition which may be worse, yes. So, I mean, yeah, there are ways of addressing that condition. Would I provide that information to an owner or a client, I probably would, but we've got to debate -- debate the condition that we've created of going from one problem to another.

Q: Could the parking spot have simply been moved over a little bit further?

A: Well, then you're getting into -- you're getting into design standards again. You probably would go in there and maybe even reconfigured the parking lot. I think one of the problems is that you have so many handicap spaces there together and we're getting into a design question that I don't think can be answered without going out, taking measurements, and then evaluating the size of the space, the allowable space and then the most practical and efficient and economic usage of that space. So yeah, you can do a redesign. What that would be, I really don't know. And I think we're almost getting into the minutia because we really need to ask what caused her

to fall down. And the fact that we had a space with a car that partially protruded onto a flared slope, did that cause her to fall down? Absolutely not, that's a nonissue here.

Q: Uh-huh.

A: But, you know, we can talk about it.

Q: If called on for advice by Outback, would you tell them that their parking lot needs some work?

MR. STEGMAIER: Object to the form.

A: Yeah. Based on what I know here today and the questions that you've asked and what I see, I mean if you ask me to go from working for Mr. Stegmaier as my client in a forensic project to go into the consulting world and evaluate this parking lot, yeah, I would probably have some recommendations. That's not why I've been -- why I've been called or have I even begun to put together those opinions.

Q: I understand. I want to move on to your third point and it's that the ANSI A117.1 doesn't require markings on a curb ramp and that, and I quote, the transition from sidewalk to ramp would have been visible from Mrs. Jackson's field of view. Earlier you've agreed that ANSI

A117.1, those are minimum standards, correct?
A: They are. Minimum requirements, minimum standards.
Q: Okay, minimum standards, minimum requirements. Businesses can do more than what ANSI A117.1 requires if it chooses to do so?
A: They can but there is absolutely no requirement to do that.
Q: Do you agree that paint can help call attention to a curb?
A: Paint -- the purpose of paint on curbs is to provide a visual cue so they can help.
Q: So it can help guide someone's attention to a curb?
A: They can. Or they can provide a slipping hazard. So, but from the standpoint of a visual perspective, they can make it more obvious through contrast, yes.
Q: There is special paint to protect against slip hazards, correct?
A: There is.
Q: So you can, to the extent possible, remove the slip hazard when it comes to the paint on the curb, right?
A: Well, you need to ask the people that we've had

-- we've had lawsuits that have fallen on that paint. And ask those lawyers that have sued the -- sued everybody for that paint, so falls occur on paint, too. Yes, the paint is -- usually has some type of additive. It does meet the industry standard. It is more slippery than concrete and yes, it causes people to fall down. So, that's a whole different issue. And even when it meets the industry standard, it doesn't prevent that lawsuit. So, I mean, I'm just throwing this out there because you're going from one arena to another. Okay, we've got an encroaching car, you put in a wheel-stop. People sue for wheel-stops all the time. We've got a curb that's not painted, but yet pain causes people to fall down even though that paint and that wheel-stop fully comply with the industry standard.

Q: Sure.

A: But the answer to your question is yes, it does provide a visual cue that could make it more open and obvious.

Q: Now, I know you've been involved in a wheel-stop case before. What about paint cases?

Have you been involved or provided any opinions regarding slippery paint that causes folks to fall in a parking lot?

A: I've been involved providing opinions related to paint but not slippery paint. But I guess that's an allegation, you need to evaluate that as to what we would cause or describe as slippery pain.

Q: Okay. Have you been called to provide any consultation or testimony with regards to paint that allegedly caused injuries in a parking lot?

A: Yes.

Q: Is that in your case list?

A: I'm trying to think if I've -- I'm not sure I've done a deposition on any of those cases. I'd have to check. I mean if we need to print it out and go through it, I can let you know. I don't remember -- we've got a couple now that we have. One just settled, one we just started. No depositions taken. I've done several in years past and I can't remember if I gave depositions or not.

Q: Okay. You referred to a couple of cases you've got going on right now, yes?

A: One just settled, one's active, yes.
Q: All right. So with regards to the settled one, were you hired for the plaintiff or for the defense?
A: Defense.
Q: Who is the attorney you worked with?
A: Knox Haynesworth.
Q: And where was that case pending?
A: Anderson.
Q: What was the case caption, do you remember?
A: I can't remember the lady's name but it was a Target case.
Q: Were you deposed?
A: As I said, I was not. There was----
Q: I'm sorry.
A: There was no deposition.
Q: Okay. And the case that's still active, where is that case pending?
A: Columbia.
Q: And who's the defense attorney?
A: Roopal Samuels.
Q: Which defendant are you providing opinions on behalf of?
A: Paint manufacturer.
COURT REPORTER: I'm sorry, what manufacturer?

A: No, the paint, the paint applicator.
Q: Oh, the person who applied the paint?
A: Correct.
Q: Where did the fall occur?
A: Zaxby's.
Q: Which one, there's tons of them?
A: I -- I mean, if we need to produce that I can. I really don't know the address. Or you can pull the caption, I'm sure.
Q: Have you provided testimony in this case?
A: No, ma'am.
Q: Have you generated a report for the Zaxby's case?
A: No, ma'am.
Q: Report for the Target case?
A: I can't remember.
Q: And you were not deposed, you said, for the Target case?
A: I was not.
Q: Other paint cases that come to mind where someone was allegedly injured because they slipped on the paint in the parking lot?
A: I've done some, yes.
Q: Can you think of any where you testified for the plaintiff?

A: Not that I can think of, no, because they weren't dangerous. I mean if -- whenever a plaintiff attorney asks me to take on a case, for starters I need to make sure that I can help him and his client. And if my opinion is not helpful to him, then I'm going to tell him there's no sense in him hiring me, wasting his money and getting involved. These paint cases that I've been involved in are all easily defensible because the paint was not determined to be dangerous or slippery in accordance with industry standards. Obviously that's a relative term, but in accordance with industry standards they were not slippery.

Q: Okay. And ---

A: Wait, wait, wait. I did a -- I did a paint case, there was a plaintiff case up in Charlotte.

Q: Okay. Out of how many -- would you say you've done 20 paint cases, less than that? Could you estimate?

A: I'd say less than ten.

Q: Okay. And out of the ten, you've had, it sounds like, one plaintiff's case?

A: That I remember.

Q: Okay, fair enough. So would it be fair to say that paint in this case would probably do more harm than -- more good than it would harm to call someone's attention to the ramp or to the curb?

MR. STEGMAIER: Object to the form.

Q: Sorry, that was a really botched question, all right.

A: Do you want to restate it.

Q: Let me try it again.

A: All right.

Q: So, given all this testimony that you've just given on paint cases, would you agree that the benefits that paint can provide to call a pedestrian's attention to the curb outweigh the risks of harm?

MR. STEGMAIER: Object to the form.

A: I'd say there are benefits to paint and the intent is that it should certainly eliminate or minimize those risks. I think you would have to evaluate on a case-by-case basis to -- rather than just making kind of an overly broad statement because it could be based on -- you always have to take into consideration moisture. If there were a sprinkler right next

to it that's going to keep it wet all the time, you know, you have to -- you just have to evaluate it. Obviously you can add enough -- enough additive to the paint to make it safe. Under normal situations I think the benefit risk analysis would probably show that the paint should be helpful.

Q: Okay. And whether there's paint or not on this curb or this ramp, it still doesn't change the fact that the ramp is too steep?

MR. STEGMAIER: Object to the form.

A: Paint has no affect whatsoever.

Q: Okay. Years after Mrs. Jackson's fall, as you can see on Plaintiff's Exhibit Five, there was some yellow paint applied to the curb, agreed?

A: It's there. I don't think that's unusual at all.

Q: Okay. Do you have any opinions about the paint on the curb?

MR. STEGMAIER: Object to the form.

Q: Whether it complies with standards or not?

A: None whatsoever. I haven't seen it, haven't seen the spec, haven't tested it, so I really can't tell you.

Q: So you can't say here today whether the paint

was appropriately applied or not?
A: No, ma'am. I mean it's a traffic yellow paint and typically paints of that type are pedestrian rated but other than that, I mean, if you ask me what I think about it, I haven't seen the spec, I don't know how it was applied, I don't know what additives are in it, so I really don't know.
Q: Okay. In keeping aside that we don't know whether the appropriate type of paint was used, I'm talking about specifically the placement of it and where the yellow is painted, do you see any problems with it?
A: No, not at first glance.
Q: Okay. Because what I'm looking at is the edge of the curb is painted yellow, the curb itself, like the inside of it is painted yellow, and also a little bit of the asphalt looks to be painted yellow, correct?
A: Yeah, it's what it looks like. It looks like it may extend partially onto the asphalt.
Q: And the tops of the ramps are also painted yellow, correct?
A: I can't -- I don't have that perspective. I can't tell if that's vertical or horizontal.

I mean it could -- I mean certainly at the top where it is relatively flat appears to be about maybe three to four inches wide, so it either extends onto the sidewalk or the ramp or both. But, you know, I haven't been there, don't have a good photo.

Q: Now, we've been kind of talking about this a little bit today, but now I want to hit on it more. You've provided testimony on behalf of the plaintiff in a wheel-stop case in August of 2013, correct?

A: I did. I mean I remember the case and I expect it was probably August, so I'll take your word for it.

Q: It's Rebecca Jean V. Her name starts with a V. Vuicich versus CVS in Georgetown.

A: Vuicich is what we called it.

MR. STEGMAIER: Spell it for her.

MS. MOSIER: Okay. It's V-U-I-C-I-C-H.

Q: What do you remember about this case?

A: That it involved a handicap ramp, that it did not even remotely comply with any industry standard and the wheel-stop was placed in the foreseeable pedestrian path and there were minimal visual cues and she fell and got hurt.

Q: Right. When I read it, you know, it seemed to me very much in line with what you said. It was a lady on the way to CVS who walked around an SUV and tripped on a wheel-stop that was not where it should have been?

A: That's exactly correct.

Q: Okay. You cited ASTM standards to support your conclusions in that case, right?

A: I did.

Q: And I think you already told me what conclusions you came to, that the wheel-stop placement was incorrect, right?

A: Well, it violated almost every standard applicable.

Q: And what about the -- you said the wheelchair ramp?

A: Well, the ramp was there, but I mean they put the wheel-stop directly in front of the ramp for the purpose -- the purpose of the wheel-stop was to protect the ramp because it was a plywood ramp, cars didn't see it because it was plywood, it was not concrete, and cars drove upon the ramp and crushed it. So they had to protect the ramp, so they put the wheel-stop in, they painted it and they put in a traffic

cone.

Q: Right. The emphasis of your investigation and your assessment was more about the wheel-stop in that case, right? Or was it also with regards to the ramp?

A: I think it was the general layout but the wheel-stop was the problem because she fell on the wheel-stop.

Q: She fell on it, right. In your deposition, and I apologize, I do not have an unmarked copy.

MS. MOSIER: If we need to make another copy ---

MR. STEGMAIER: We will because I just kind of have a rule about if we're going to ---

MS. MOSIER: Yep.

MR. STEGMAIER: --- I'd like to have it marked.

MS. MOSIER: Okay. I'm sorry. If you can just make a copy of it.

MR. STEGMAIER: No problem, just give me ten seconds.

MS. MOSIER: Sure.

(Off the record from 12:20 p.m. until 12:26 p.m.)

Q: Mr. Campbell, I've gone ahead and you have a copy in front of you of the deposition that I've reference, this CVS case. If you need a few moments to review that, please take some time. You don't --

A: I remember it.
Q: Okay. All right. I'm specifically referencing page eight on this condensed version where you're asked about your conclusions in this wheel-stop case. And towards the middle of the page you say, and I quote, the wheel-stop was placed in the foreseeable pedestrian path which became a problem for her, the plaintiff, as she rounded the end of the SUV and proceeded to go into the entrance of the store, correct?
A: Correct.
Q: Now, would you agree with me that in this case Mrs. Jackson's case, that the curb ramp that we're talking about is in the foreseeable pedestrian in and out of the Outback?
A: It is.
Q: On that same page, you go on to say, and I quote, I just can't believe she would intentionally walk across a wheel-stop. The wheel-stop was placed too far over to the line and in the foreseeable pedestrian path. Are you with me?
A: I am.
Q: On page 13 ---
A: Well, let's see what we're talking about here,

though. I mean, what we had and what I'm talking about, rather than the wheel-stop, and I'm looking at Exhibit One to that deposition, rather than that wheel-stop being placed in the center of the parking space, it is too far over, almost on the line.

Q: Right.

A: So, and that's my point there. The wheel-stop was in the foreseeable pedestrian path and it was certainly unforeseeable to her that one would place a wheel-stop at the entrance to the parking space rather than at the head of the parking space.

Q: Uh-huh.

A: I mean it's totally different than what we are accustomed to or what we anticipate.

Q: Right.

A: So, I mean, we're going on and on and on here about conditions that are not typical. Wherein this particular situation, we have a ramp that is not unusual, is not outside the ordinary other than this minor variation in slope. But, I mean, you can go on with your questioning ---

Q: Sure.

A: --- I just wanted to clarify what my opinion

was there.
Q: Other than a 55 percent and a 17 percent max -- going over the max allowable slope?
A: Sure. It exceeds the industry standards for handicapped ramps, yes.
Q: Well, these are built-up curb ramps, they're not handicap ramps necessarily?
A: It's a curb ramp for handicapped individuals with Bryan Durig's opinion that it was constructed with the intent of complying with ANSI A117.1. So, I mean, if we want to be that specific about it.
Q: Right. But again, going back to, and I think you agreed with this, the language of the standard talks about pedestrians walking across the ramp, correct?
A: Sure, it does. But does that create a dangerous condition for able-bodied pedestrians that are part of a general population, absolutely not. It's well within the applicable requirements of the building code.
Q: And do you -- in generating your report, don't cite any of the -- well, except for the very beginning, cite the SBC. Is there any other type of document that you plan to prepare for

Mr. Stegmaier for Outback showing how this ramp number three actually comes into compliance with those standards?

A: We haven't addressed that.

MR. STEGMAIER: Let me put this on the record. I asked Mr. Campbell to generate that report as a courtesy to you. This is a state court case rather than federal courts and so we weren't under any sort of compulsion to produce a report, Dr. Durig had done that. So in response we wanted to make sure you had that one. But, as Mr. Campbell has stated in prior testimony today, this is not all inclusive, exhaustive ---

MS. MOSIER: Uh-huh.

MR. STEGMAIER: And that's the purpose of the deposition.

MS. MOSIER: Right, exactly.

Q: That is the purpose of the deposition today, so I'm trying to figure out what other opinions that you have, what other conclusions you have that are not encompassed in this document.

A: Well, let's go back to the first sentence and I think it goes back with what my testimony has been so far and I'll just read the first

sentence into the record. And this is to Mr. Stegmaier. Pursuant to your request I performed an engineering and human factors investigation into the fall reportedly experienced by the plaintiff on July -- on June 7th, 2009. As I've already stated, the purpose of my investigation was to evaluate her fall, the conditions related to her fall, and what those contributing factors may have been. It was not to perform a building code analysis or to provide recommendations to the owner or to address other conditions related to the building code. I evaluated conditions related to her fall.

Q: Sure. But ---

A: As specifically -- as explicitly stated right there in the first sentence of the report.

Q: Excuse me, I didn't mean to jump in on you there. But as someone who is qualified as an expert to provide testimony on building codes and standards according to your CV, what building codes or standards does this ramp comply with?

A: And I have not performed that investigation. I mean if we need to -- if we need to get into

that a go back to another evaluation and Mr. Stegmaier asks me to do that, then I will. But that has not been the intent of my work here. My work is based on the fall experienced by Ms. Jackson as specifically stated in the intro to the report.

Q: Sure. I just want to ---

A: I have not done a code assessment.

Q: Sorry. I just would have anticipated in responding to Mr. Durig's report that if his allegations are, which you seem to agree with here, that the slope is too sleep -- too steep on the run slope and the flares, that there would be some response from you that actually it does comply with these standards.

A: I addressed it from ---

MR. STEGMAIER: Object to the form.

A: I addressed it from her fall and as we've already been through that part in the summary paragraph ---

Q: Okay.

A: --- that it would not be dangerous to normal individuals.

Q: Mr. Campbell, I don't want to belabor that point, but I do want to ask about the photos in

this deposition. Do you have color photos?

A: Of that?

Q: Of -- yes. Of these exhibits?

A: No, that was -- that condition was gone within a day and a half. I wasn't there. That was provided to me by the plaintiff or by the contractor. I don't know who took that photo, it's not mine.

Q: Well, help us here because this is a very poor quality black and white photo. I think you said there is an improperly placed wheel-stop and it's leading up to a plywood ramp, correct?

A: Correct.

Q: Now, the plaintiff in that case, it seems, was going to go up the ramp to get to the CVS, correct?

A: Well, the ramp was right at the front entrance. I don't know if you have the other photos. There were other photos that were -- you know, we can see in the upper photo, looking at Exhibit One, those lines are the front entrance, those are the front entrance doors. So she had parked over to the right, walked around her car, and was attempting to enter the store using a ramp.

Q: Right.
A: That was the foreseeable pedestrian path to the front door and the ramp was right in front of the front entrance.
Q: Okay.
(Ms. Nanney left the room at this time.)
Q: Now, when you testified on behalf of the plaintiff in this wheel-stop case, you said that you couldn't believe she would intentionally walk across that wheel-stop.
A: Not in a manner that would make her fall down.
Q: Right. Now, in this case with regards to Mrs. Jackson, wouldn't that same reasoning apply? I mean why would she intentionally just keep on walking right onto a curb ramp without preparing herself to descend if she truly didn't see it.
MR. STEGMAIER: Object to the form.
A: Can you restate that?
Q: Sure. Wouldn't the same reasoning apply to Mrs. Jackson who is the plaintiff in this case, why would she intentionally just keep right on walking onto a ramp without preparing herself to descend if she actually knew that there was a ramp there?

A: You'd have to ask her that.
Q: Okay. In this wheel-stop case it seems like there was some question, I don't know that you would necessarily call it a dispute, but there was some question as to whether or not the wheel-stop was painted at the time?
A: There may have been, I don't know.
Q: Your testimony on that point begins on line 24 on page 8 and keeps on going to page 9. You were asked by the defense attorney for CVS, and if the stop had been painted prior to her fall, does that altar what your opinions are? And are you with me on page 9, number 1, you say, no because the placement was improper. So even though -- even if the wheel-stop was painted in that case it didn't even matter because the placement was improper?
A: That's my opinion, yes.
Q: And how about in this case, wouldn't have even mattered if the ramp was painted because it was still too steep, right?
MR. STEGMAIER: Object to the form.
A: As required by ANSI A117.1 the ramp was too steep, you're correct.
Q: On page 16 beginning line 19, and I'm going to

refer to the plaintiff in this case as Ms. V, if that's ---

A: Okay.

Q: --- okay with you.

A: Sure.

Q: You were asked, do you know why Ms. V wasn't able to see this wheel-stop. And your response was, Mr. Campbell, beginning on line 21, because of her intention of walking around the SUV which blocked part of her vision and then when she approached the store, she realized she needed to negotiate that ramp. She's taking a path towards the front entrance, the wheel-stop is in her path, the ramp is in her path, the entrance door is in her path and then there are various other features on the building that are drawing her attention. And so the wheel-stop's being placed improperly factored into your conclusion heavily it seems, when you represented the plaintiff in this CVS case, correct?

(Ms. Nanney reentered the room at this time.)

A: Yeah, because it was just a gross violation of where the wheel-stop should have been placed.

Q: And it also seems, though, that you realized

that Ms. V, the plaintiff in that case, was busy trying to navigate her path versus looking down at the ground, correct?

A: I don't think I said that at all. She was absolutely looking forward in the direction of travel. She was negotiating the ramp because she looked forward as in a forward direction toward the door and saw the ramp. But as she rounded the car, the wheel-stop was much lower at her feet as opposed to out within her field of view. So her field of view was obstructed and blocked by the vehicle. She walked around, she's looking forward, not anticipating that that wheel-stop is going to be there because one would not anticipate a wheel-stop at the entrance to the parking space. She's focused on the ramp.

Q: Likewise, do you think folks who are walking on a ramp anticipate one that is 55 percent too steep?

MR. STEGMAIER: Object to the form.

A: I doubt individuals even remotely consider that when they look at a ramp.

Q: Or when they walk down a ramp?

A: Oh, this ramp is 55 percent too steep, I don't

think that's going to happen. They're going to look at that ramp, they're going to evaluate it and determine if it's too steep for them to walk upon or not.

Q: You agree though that when someone begins walking on a ramp they may not be able to make that decision, oh this is too steep, I better get off of this ramp?

A: She had no idea. My understanding is that -- is that the ramp is a nonissue other than the one point where she stepped down. So she stepped off the sidewalk onto the ramp. My understanding that is when she fell, when she immediately stepped down. She's not walking on the ramp, she's stepping down. So, the ramp where she stepped was well within the applicable requirements of the building code.

Q: Do you agree with me, Mr. Campbell, that the steeper a ramp is the more likely it is to pitch someone forward?

A: Sure. That's gravity.

Q: Do you agree that that is highly likely what happened to Mrs. Jackson?

A: We don't know if she pitched forward or if she turned her ankle and fell sideways or both. We

really don't know.

Q: Did you see anything in her testimony that leads you to believe that she pitched -- that she twisted her ankle or anything like that?

A: I really need to go back and review that if we're going to get into that part because it kind of goes around and round as far as what she remembers, what she did, which way she was going. And if you've got that section tabbed, that would be helpful.

Q: It starts probably -- start you off early, going on page 65, but I guess really her recount goes to page 67. I just want to give you more background.

A: Well, she started falling but she ended up on her left side and fell to her left, so.

Q: Sure.

A: So she's going forward and left.

Q: Sure. And please note, you can review whatever you need to from that deposition to make you feel more comfortable answering any of these questions.

A: Okay. Go ahead and ask your question.

Q: In the wheel-stop case that we're talking about involving Ms. V, when you were asked why the

plaintiff wasn't able to see the wheel-stop, you testified about her intention of walking around the SUV which blocked her field of vision, and then you talk about her realizing that she needed to negotiate the ramp, she's taking a path towards the front entrance. I'm asking how that is different from Mrs. Jackson, whose view of the ramp might be obstructed by cars that are parked partially on that ramp?

A: We're talking about two totally separate components and one is -- one is conceivable. In one, we have a condition where the ramp is open and obvious, she's walking and stepping from a sidewalk. She clearly knows the ramp is there. She's made a conscientious effort to step onto the ramp. In the other case, we have a wheel-stop that is concealed, is not in the direction of travel and she walks around the car, she's looking forward at the ramp, not at the wheel-stop. So we've got two components versus one. We have a component that is not observed and unanticipated, and a major code violation, including a wheel-stop that should have never ever even remotely have been installed there. So there's not even any kind

of similarity whatsoever.

Q: So, is a ramp that's 55 percent too steep and 17 percent too steep, that's not a major violation?

A: I mean you can continue to reiterate that point, but the issue is, is that a condition that would have been dangerous to an individual without mobility impairments that is part of the general population, no. Is it something that violates an applicable industry standard and building code requirement when constructing a ramp for handicapped individuals, yes. Those are separate and different.

Q: Do you agree that when Outback had ramp number three constructed that it anticipated use by customers of all ages, of all abilities?

MR. STEGMAIER: Object to the form.

A: I would say more along the lines of they consulted with an architect and an engineer and a contractor to design a facility to meet my needs. I don't think they anticipated or thought -- made that -- made the direct thought that this ramp is gonna be used by all individuals. I think they said I've got people coming to my restaurant, they're gonna walk in

the front door and they're gonna get there any way they can. I don't think they broke it down by class of people. I would be surprised if they did.

Q: Right. Because they tell whether or not the ramp is going to be used exclusively by people in wheelchairs or using walkers, or if it's going to be used by pedestrians?

A: Yeah, we need to make it very clear that the -- that the condition where this ramp becomes dangerous to a class of people are for handicapped individuals, not the general population.

Q: And what's your authority for that?

A: We can go back into -- we'll have to dig a little deeper but it's going to go back into biomechanics, gait, flexural angles of ankles, negotiable -- or negotiating ramps, and there's the -- the main authority that's spelled out is Templer ---

Q: Is there ---

A: --- which I've actually brought a copy of today that addresses that.

Q: Is there any law, building code or ordinance that specifically goes to your point?

A: No, the building code does not get into -- get into theory or analysis. The building code is prescriptive based upon that theory and analysis. So the building code says for our general population, and when we talk about the general population we're talking about the 95th percentile, so we're trying to cover 95 percent of the general population and you're not going to cover -- for example, a door opening -- these doors would probably cover everybody, but a normal door in your house at home has a height of six foot eight. So 95 percent of the population is going to be able to get through that door without bending over. Can Shaquille O'Neal get through that door? No, because he's seven feet tall. So he's outside that general population, that's what we're talking about. But though -- but for 95 percent of our population then these standards apply. And what has been deemed safe by the applicable building code, which would be the 1997 Standard Building Code, would be a slope of one to eight for the general population, not for handicapped individuals.

Q: Okay. And are you going to at some point

provide or supplement your opinion with that standard or any other standards that you contend apply in this case to Mrs. Jackson?

A: I think I've stated my opinion very clearly.

Q: Right. Are you going to -- or is there anything else that you intend to testify to opinion-wise, conclusion-wise, that you haven't already stated?

A: I may -- I may -- if we go to trial, I expect that my testimony will include one's ability to negotiate slopes up to a certain angle, flexural angles for the ankle, our ability to walk upon slope surfaces and what are safe and what are unsafe. So, I expect I will get into that probably quite a bit if we go to trial.

Q: Okay.

A: But as far as do I intend to write a supplemental report summing my opinions that we've discussed today, I doubt that very seriously unless for some reason I'm asked to do that.

Q: Okay. Do you agree in this wheel-stop case that -- and this is your testimony on page 16, when you have a specific instruction as to how to place a wheel-stop, those instructions

should be followed? That's lines 1 through 5. On page 16.

A: Okay.

Q: How does that not apply to the ramp in this case?

A: I think it applies directly and I think I've already clearly stated that. If one's intent is to design and construct a ramp for handicapped individuals, that ramp -- the guidelines for constructing that ramp should be ADA, the building code and ANSI A117.1. Those are the standards that apply. So to apply that statement to what we have here, it applies directly. Yes, that ramp should be constructed with the appropriate slopes as specified by ANSI A117.1. But let's take that situation and look at it differently. Construct a ramp that is safe for the general population, excluding handicapped individuals, and we come up with a ramp that can comply and meet the standards that -- or the, excuse me, the slopes that we have on this particular ramp. So to be more clear, that applies if we're talking about a handicapped ramp, which we are, but we're not talking about handicapped individuals. We're

talking about what is safe and what is not safe.

Q: These ramps though are not necessarily handicap ramps. They are called built-up ramps, correct?

A: Well, yeah, and then if we want to be technical, I think -- I think when we talk about these ramps generically, if one wants to ask -- if you were to ask a lay person what's a built-up ramp or a curb ramp, and you ask them is that a handicap ramp, they're going to say probably not. But if you use the term handicap ramp, we all know what we're talking about. We're talking about a ramp utilized by handicapped individuals. So I use that term generically to make sure we know what we're talking about.

Q: Gotcha. I'm just trying to figure out a reason why, in your opinion these ramps are only negligibly above the max allowable slope. How could that be if the folks who are constructing these ramps weren't trying to come into compliance with ANSI 117.1?

MR. STEGMAIER: Object to the form.

A: How do we know they were not?

Q: Right.
A: I mean you're ---
Q: I mean they're ---
A: You're implying that they were not attempting to construct these ramps in accordance with ANSI A117.1?
Q: We would assume they are trying to comply with ANSI A117.1, correct?
A: That's my point, yeah.
Q: Right.
A: But you're implying that they're not.
Q: I'm sorry. I didn't -- either which way, these ramps come so close that, at least in your opinion, to what is acceptable according to ANSI A117.1, correct?
A: Yes.
Q: So doesn't it make sense that they were trying to comply with ANSI A117.1 perhaps?
A: Sure.
Q: And they would want to have complied with that standard?
A: I would think so, sure.
Q: For the benefit of their customers, correct?
MR. STEGMAIER: Object to the form.
A: No. I would say for -- from the contractor's

standpoint, he's not -- he's not serving those customers. He's performing his work for the benefit of whoever he has the contract with.

Q: Right. And that person who he has a contract with, the business owner, is going to be pretty upset if the ramp isn't built according to the standards, correct?

A: He's probably not gonna be happy.

Q: Right. Because those standards are in place for a reason, correct?

A: They are.

Q: Okay. To protect the public, I think, as we've already gone over?

MR. STEGMAIER: Object to the form.

A: Yes.

Q: Okay. You agree with me that those ANSI standards we've been talking about specifically talks about public health and safety, and doesn't say just for folks who are handicapped, correct?

MR. STEGMAIER: Object to the form.

A: Where are you?

Q: We are talking about ANSI's mission to, and I quote, assure the safety and health of consumers and the protection of the

environment.

A: Yeah, but if we go back to paragraph 1, which we've already cited, the purpose and application, it specifically addresses handicapped individuals and individuals with various other types of impairments.

Q: But at a very broad sense, in the mission statement itself, ANSI's mission does not discriminate between people who are able-bodied or people who are not, they're meant to serve everyone.

A: No, they're not going to isolate a particular class of individual if it's not safe.

Q: I don't understand what you mean by that.

A: I mean you're trying to -- you're trying to say they're not -- they're not gonna create a standard or condition that's dangerous so yeah, I mean, what may be safe for one individual may not be safe for another.

Q: They've got to come up with standards that are for the 95 percent, like you were saying, correct?

A: Correct, yes. So if it applies -- so for that to -- to reduce the slope of that ramp that would be safe for the general population, they

need to make sure that by altering or making that alternation or modification that it is safe for all individuals, including those that they've made the modification for.

Q: Earlier I asked you if you agree that people generally do not look at the ground when they walk, and I think you said that you did not agree with that.

A: No, not at all.

Q: Okay. I want you to turn to page 21 of this CVS deposition.

MS. MOSIER: This will be what, Plaintiff's Six?

COURT REPORTER: Seven.

MS. MOSIER: Seven. And we're going to mark his copy because mine is ...

(Plaintiff's Exhibit Number Seven was marked for identification purposes.)

Q: I want you to read with me page 21 beginning at line 18. You were asked by the defense attorney for CVS, in your opinion is that she, the plaintiff, didn't have any obligation or duty to look down in front of her to see what was there. Your response was I think that's a legal -- legal opinion but from a standpoint of human factors and our field of view, you

generally don't watch your feet when you walk. You scan out at that 10 to 15 degree angle. At the point she's coming around the SUV and scanning out, she would not have seen the end of the wheel-stop closest to the line. And it keeps going.

A: Okay.

Q: So, do you agree that people generally are not going to be watching their feet where they walk?

A: They absolutely do not walk and stare at their feet because they will fall down, period.

Q: All right. They're going to be looking out, scanning at that 10 to 15 degree angle, right?

A: You're going to look down, you're going to look up, you're going to scan back and forth.

Q: Sure.

A: You're going to look down at your feet and then you're going to look out, but you're not going to stare at your feet.

Q: Sure.

A: It speaks for itself.

Q: Okay.

A: And I don't know that it was produced, I don't know if it was made an exhibit, but there's

actually a document that goes with this regarding field of view.

Q: That you offered?

A: We've referenced it. We've created it, yes.

Q: Okay. Would you be able to get us that document?

A: If we need to.

Q: Okay. Do you remember what the document was called or what it was?

A: Probably field of view.

Q: All right. It's called field of view?

A: Yes.

Q: Okay.

A: It's either field of view or visual field or something along the lines ---

Q: Okay.

A: --- of that.

Q: And just for the record, and that same field of view comes up again on page 18, lines 2 and 3. You said that the plaintiff, she is not looking straight down because the way we -- our field of view is that we probably -- that's probably a typo -- projecting out at a 10 to 15 degree angle. You see where I'm at?

A: I do.

Q: So in the CVS case, it's my understanding that your testimony was supportive of the plaintiff because she was projecting her view to the front of the store where she was headed, correct?

A: Right.

Q: So using that same analysis, don't you agree that Mrs. Jackson was projecting her view to the parking lot when she was trying to get to her car?

A: She's back and forth. She had already looked down because she's not gonna step where she has not already looked. You scan -- you scan down, you scan forward, back and forth, up and down.

Q: How do you ---

A: You would never ever walk out a door and look straight out without ever looking down where you're going.

Q: Sure, sure.

A: Never. If you do, you're in trouble.

Q: Having never been out to the scene, Mr. Campbell, how can you provide testimony to the jury about how she would have been able to perceive the change in elevation presented by this ramp?

MR. STEGMAIER: Object to the form.

A: My testimony is based on normal individuals and human factors in the way we perceive the environment. So if, by chance, she has a visual impairment, she has a depth perception issue, she has some type of other impairment, she has monocular vision as opposed to binocular vision that precludes her from having depth perception, yeah, then she's got some other issues that we haven't addressed here. But for normal individuals in the environment that is well lit and fully visible, that is what my opinion is based on.

Q: And you know that Mrs. Jackson wears glasses normally, correct?

A: A lot of people wear glasses.

Q: Sure.

A: I don't think that's unusual at all.

Q: And ---

A: We've got people in this room wearing glasses.

MR. STEGMAIER: I wear glasses.

Q: Myself included. Now, you know that you -- she was wearing them at the time that she fell, are you aware of that?

A: That's good.

Q: Okay. You haven't reviewed any of her vision records or anything like that ---

A: No.

Q: In the wheel-stop case, at the point where your deposition was taken in August, you were in the process of preparing an animation on behalf of the plaintiff to show the defense what your client's -- or what the plaintiff's field of view would have been to help explain why she didn't see the wheel-stop. Did you ever complete that animation?

A: Case settled.

Q: What did you intend to do in the animation, did I fairly summarize?

A: Sure. It was gonna be an animation based on exactly what we just discussed about how she would have exited her vehicle, rounded the SUV, scanned the environment and walked toward the store.

Q: Okay.

A: And Ms. Jackson was not blocked by a large SUV, she was not walking in a circular path, or an angular path, she had wide open field of view and she was walking forward.

Q: You said she wasn't walking in an angular path?

A: As in making a 90 degree turn and immediately encountering the ramp. In Ms. Vuicich's case, she rounded the SUV, made a 90 degree turn and at her feet immediately was a wheel-stop. He reaction time alone would have suggested she's probably gonna fall down because you don't have enough reaction time to react to that particular condition.

Q: Okay.

A: Very, very different situation. This ramp was open and obvious, it was in front of her and in her direction of travel. I mean, we can -- we can make a long list of different conditions, I mean, if you want to pick this thing apart. Which apparently we may need to do.

Q: Yeah, all the conditions that -- I'm a little lost. What do you mean, what other conditions we can make a list of?

A: We just went through it. I mean, she's rounding an SUV, they have a major building code violation, we have a blocked view, we have different path of travel, and I mean it goes on and on.

Q: Uh-huh.

A: A condition that clearly caused her to fall

down as opposed to Ms. Jackson, a condition that for the general population would otherwise be safe. I mean we're talking apples and oranges here.

Q: Okay. Do you agree that the area -- if we -- if we agree, or we assume anyway, that Ms. Jackson's testimony is truthful and that all of these spots in front of the Outback were occupied, okay, there is a car in -- it's actually on Plaintiff's -- is that Four and and Plaintiff's Six, there's cars on either side. She's trying to navigate to her car. Isn't she making a 90 degree turn to try to get on this ramp?

A: There's no reason she would be making a 90 degree turn. A 90 degree turn would be out and in. That would be a strange way to walk. She may walk in 90 degree angles. I doubt it.

Q: Sure.

A: She's not going around a 90 degree obstruction.

Q: Well, the car is, after all, parked on the ramp?

A: Well, it protrudes on to the edge of the flared side, it's not parked on the ramp.

Q: Well, whether the wheel's on the ramp or not,

the car, like you said, is protruding onto the ramp, the flared side, and it's awful close to what should be the running slope, correct?

MR. STEGMAIER: Object to the form.

A: It's nowhere near the running slope. But for her to make a 90 degree turn, she's going to be walking along, and I'm looking at Exhibit Six, she's going to be walking along this edge of the sidewalk, walk all the way out and then make a right turn. She would be on the running slope, she wouldn't even be on the flared side. I see a -- what appears to be a shadow line to me right there (indicating).

Q: Uh-huh.

A: Which appears to be the running slope. She was over here. That's probably a 30 to 40 degree angle.

Q: Sure. Even looking at this ---

A: And I don't have perspective here. I mean, we need to look at it.

Q: Okay.

A: All right. So she's coming out the front door, and I'm looking at Exhibit Two, she comes out the front door. Once again, it'd be highly unusual for her to come out the front door and

then make one 90 degree turn and then come over to the ramp and make another 90 degree turn. It's highly unusual. Most likely, she's gonna come out the front door and probably -- and you said it earlier, the shortest path, which is normal, that is the foreseeable pedestrian path, probably at about a 30 degree angle which is almost a straight line. I'm going to disagree with you on that one. There's no way she was making a 90 degree turn.

Q: Sure. And what -- whatever amount of degrees it is, she's turning onto this ramp, correct?

A: She's stepping onto the ramp, yes.

Q: Okay.

A: I don't know. There's probably some angle of turn.

Q: Let's move on to your last point then so we can begin to wrap this up, Mr. Campbell. The last point of your report is that Mrs. Jackson's fall was likely a result of her simply stumbling and failing to recover due to her choice of footwear, and those are your words. What evidence do you have to base this conclusion off of?

A: Well, if we go back to Templer, and if you're

not familiar with Templer, he's probably somebody who's dedicated I would say probably most of his entire life, although he was a professor, to researching falls, researching stairs, researching ramps, researching those -- those particular relevant conditions that apply to those and apply to ramps, falls and stairs. So if you go back to various references, and one of his contributing factors to falls is footwear. And then if you look at her footwear, it appears to be somewhat of a tall heel with a narrow strap. Beyond that, I would defer to probably an orthopaedic surgeon or a physical therapist to see if they would recommend that she should wear shoes of that type. But we can get into the biomechanical analysis of the -- of the support of those shoes and if they're safe or unsafe.

Q: Are you offering any kind of biomechanical opinion in this case?

A: Regarding -- regarding the safe slope and slopes that can be negotiated by individuals of the general population without mobility impairments, yes.

Q: And you've been qualified to provide testimony

in this area before?

A: I've been qualified to offer biomechanics opinions regarding one, negotiating a safe slope on a ramp, I don't think that's ever specifically come up.

Q: Okay. And what's your -- you'll have to help me because the CV on the website was just not as in depth as I was hoping it was going to be which is why I asked you to bring your case list and all those kinds of things. But what's your background when it comes to biomechanics?

A: I'm not sure which CV you have, there are two Cvs. But I've had classes in engineering mechanics, physics, structural engineering, biomechanics, human factors, physiology.

Q: Okay. Have you completed a degree in biomechanics?

A: I have a -- I have taken industrial engineering classes in occupational biomechanics. I've got a master's degree in applied -- in applied psychology with a concentration in human factors so I've taken those classes that cover those subject areas and I'm a registered professional engineer.

Q: Okay. And you said you got a degree with

regards to the human factors?
A: I did.
Q: When did that occur?
A: 2012.
Q: Okay. And I thought it had to be fairly recent. Okay. Because -- the reason why I ask is your -- this report does not state that you're giving a biomechanical type of opinion, it just says engineering and human factors.
A: Biomechanics is part of human factors.
Q: Okay. So, we're really talking apples to apples, same thing?
A: Should be.
Q: Okay. Now, other than Plaintiff's Six, have you seen any other photographs of the shoes that Mrs. Jackson was wearing?
A: Sure.
Q: Okay. And do you have any knowledge if she was comfortable wearing high-heeled shoes?
A: Haven't spoken with her.
Q: Okay. Do you -- would it be helpful to you to know whether or not she was comfortable wearing high-heeled shoes?
A: I mean I don't have any doubt what her answer would be, I expect she was gonna say she was

very comfortable wearing those shoes.
Q: And I'm saying high heels but would it surprise you if I told you that these heels were not even two inches tall?
A: Well, we need to look at the heels and the shoe itself. If you tell me that from the bottom of the shoe to the place where her foot would rest in the back of the shoe, that's less than two inches, I would be quite surprised.
Q: Wouldn't you want to know whether or not she had ever fallen before ---
A: It's always helpful.
Q: --- as a result of footwear?
A: It's always helpful.
Q: Do you agree that it's kind of an easy way out to blame her fall on her choice of footwear versus the ramp?
MR. STEGMAIER: Object to the form.
A: Not at all. Absolutely not.
Q: Are you saying that women shouldn't wear shoes with heels on them in public when they walk down ramps?
MR. STEGMAIER: Object to the form.
A: Once again I would defer to a physical therapist and a occupa- -- a orthopaedic

surgeon, but one should wear appropriate footwear.

Q: Appropriate meaning, in your opinion, not having heels?

A: Or offering firm support. I mean the straps on those shoes are probably a quarter of an inch wide and the heels, to me, the height of the shoe, the elevated part of the shoe is more than two inches. I might be wrong.

Q: Now, your website says that your business, Applied Building Services provides ---

A: That's not my business.

Q: I'm sorry. I thought you were -- you're from Applied Building Services, correct?

A: No, I'm not.

Q: I'm sorry. Sciences.

A: There you go.

Q: I apologize, Applied Building Sciences, Incorporated, correct?

A: That's us.

Q: This is your -- your baby essentially, correct?

A: It is.

Q: You started it, I think your website says in '04?

A: We did.

Q: Okay. When it comes to providing testimony, it seems like that's all you, correct?
A: You mean I'm the only one that provides testimony?
Q: You're one of the only ones, correct?
A: Absolutely not.
Q: Who else provides testimony, when it comes to this particular kind of case, ANSI A117.1?
A: Now, in the -- in the human factors area, that's primarily me.
Q: Okay. I'm sorry. My question was not specific. I didn't mean for it to be that broad. Now, your business, Applied Building Sciences, provides architectural and engineering oriented courses, actually, correct?
A: And environmental actually. We teach a whole lot more environmental classes than anything else.
Q: Okay. But you all -- you still do engineering courses as well?
A: We speak on a lot of different topics, yes.
Q: Do you personally teach any of the courses?
A: Not the environmental classes, no. I mean, I speak on a regular basis when I'm asked.

Q: Okay. I mean, of course, I'm specifically interested in your engineering, human factors, in the same line of -- in the same wheelhouse as what we're talking about here today.

A: I've spoken on that topic many times, many occasions, yes. As far as a -- if we'd call it an academic class that's, you know, accredited to a university, no.

Q: Okay. Now, the courses that your website talks about, are these courses that are taught on-site, or are these courses that are offered and taught by folks that work at Applied Building Sciences?

A: Both.

Q: Okay. You have not taught any of the courses per se but you've given talks is what it sounds like, correct?

A: I have -- we have have a training facility in our office.

Q: Okay. And what's the last talk that you had? Or that you gave I should say.

A: I did a talk on human factors in Myrtle Beach probably six months ago.

Q: Do you go talk with insurance companies?

A: We do.

Q: How often do you do that?
MR. STEGMAIER: Object to the form.
A: Now, when you say -- restate that to be more specific ---
Q: Sure.
A: --- what you mean by insurance company cause that's kind of broad.
Q: On your website, it seems like you've given talks with insurance defense firms, insurance companies, about managing their risks. How often do you do that?
A: Actually, within that audience is -- has been -- I don't know if they're always in there, but have also been plaintiff attorneys, and we do that probably once or twice a year.
Q: Okay. Does part of the curriculum that you have, or the courses that you teach at Applied Building Services ---
A: Sciences.
Q: I'm so sorry. Applied Building Sciences. I am so sorry. Does it focus on industry standards?
A: It does.
Q: Okay. Do you agree that if the city of Sumter or the county of Sumter adopted a given code, that that code is authoritative?

MR. STEGMAIER: Object to the form.
A: It should be, yes.
Q: Have you gone to the city of Sumter's website?
A: Not for this case.
Q: Do you know if Mr. Funcik has?
A: I don't know.
Q: Would it surprise you to know that the city of Sumter adopts the International Building Code?
A: They don't have a choice.
Q: Right. But I mean that it ---
A: It's manditated (sic) -- it's mandated by our Legislature through the State of South Carolina. They have no choice whatsoever.
Q: Right, right. And so, our state, the city of Sumter, has to abide by those codes, correct?
A: Should.
Q: Okay. You agree that those standards are deliberate and they're tested?
A: For all intents and purposes.
Q: And ANSI standards are as well, deliberate and tested?
A: For all intents and purposes.
Q: Okay.
A: Not everything within that standard is tested.
Q: The items specifically that we've discussed

today, ANSI A117.1, do you have any information that those standards are not tested?

A: No.

Q: Do you believe they are in fact tested?

A: They should be. I don't have any documentation of that, but they should be.

Q: Do you have any notes about when you were first contacted regarding Mrs. Jackson's fall? And I don't want you to tell me the substance of that conversation, I'm only asking you when you were first contacted.

A: You've got it.

Q: It's ---

A: We gave them to you at the beginning of the deposition ---

Q: Okay. So it's in the CD?

A: No.

MR. STEGMAIER: Objection.

A: No. We gave you a hard copy at the beginning of the deposition.

Q: Oh, okay. This hard written copy, okay.

A: That's what I told you, that was from the day that Mr. Stegmaier called me ---

Q: Okay.

A: --- he called about two cases and I jotted down

my notes.

Q: Understood.

A: We're all running late.

MR. STEGMAIER: Yeah, I know.

MS. MOSIER: Sorry.

MR. STEGMAIER: No, that's fine.

A: We're fine.

Q: Your website says that you, Alan, provides engineering support services to many major insurance and adjusting companies and law firms throughout the Mid-Atlantic region. What percentage of your business, would you say, goes to providing these engineering support services?

MR. STEGMAIER: Object to the form.

A: Probably 60 percent.

Q: Okay. So, is it 60 percent consulting for major insurance companies and adjusting companies and law firms, or would that 60 percent also include consulting like, do I have a case, is this a good case, that kind of thing?

A: No, that's probably right, 60 percent. The -- well, was attorneys one of those categories?

Q: Yes, law firms.

A: Okay. Yeah, that's good, 60 percent.
Q: Okay. And I think you said earlier that two-thirds of your work is for the defense, one-third probably for the plaintiff?
A: Yeah, plus or minus. I mean, it varies up and down but, you know, 60 or 70 percent on any given year.
Q: Okay. What do you mean by support services that you provide to insurance companies and adjusting companies, what does that mean?
MR. STEGMAIER: Object to the form.
A: Sometimes they'll ask us to review a file, they ask us to perform testing, they'll ask us to provide second opinions, they will ask us to provide engineering design.
Q: And you may or may not generate any kind of documentation or paper trail as to that, correct?
A: We may or may not, that is correct.
Q: So there's really no way to verify exactly how much business you do for insurance companies?
MR. STEGMAIER: Object to the form.
A: Well, it's going to take some effort. We could. I mean, you've gotta go back. We -- you'll see from our report, there's a

particular job number, and the job number on this is -- huh, not included. That's unusual. Oh, there it is, the second line. It's not where it usually is. Second line down under the reference Jackson v. Outback, 980-1342.

Q: Right.

A: That tells me that's a human factors defense job.

Q: Okay. So if I ask you the same question again and just instead of said insurance companies, I said defendants, would your answer be pretty much the same, that there's really no way for us to go back and verify how much work you've done for defendants?

A: My interpretation of the term defendant is that they've been sued so we would probably be working for, either directly or indirectly, for an insurance company.

Q: Correct.

A: I mean, every now and then, you'll get somebody who's -- who represents themself but they still hire an attorney.

Q: Right. Which major insurance companies are you referring to?

MR. STEGMAIER: Object to the form.

A: You know, sometimes I don't even know. Don't know who the carriers are because we get brought in directly by the lawyers, but we work for quite a few, AIG, State Farm, Nationwide, Aspen, and we work for the IRF.

Q: Okay. The Insurance Reserve Fund?

A: Correct.

Q: What adjusting companies, other than of course the ones that we just spoke of?

MR. STEGMAIER: Object to the form.

A: Some of the -- some of the adjusters we work for directly, like State Farm has their own adjusters. And then there are independent adjusters like Reid Jones, Adaire Horne. I'm trying to remember some of the other ones. Castle, Custard, you know, those are just some of the -- some of the main names.

Q: Okay. And it's my understanding in -- cause your office sent me an invoice, that you charge your clients $245 an hour?

A: Well, depositions are 345.

Q: Right, that's my point. You're charging us who are taking your deposition to find out your opinions and conclusions for trial a hundred more dollars an hour, correct?

A: That is correct.
Q: Do you intend to ever go to the Outback to take a look at ramp number three?
A: If cases go to trial, I usual recommend to the clients that I go there, yes. But they may not let me so I don't know.
Q: As a professional engineer who swears an oath, do you think it's important to go out there?
MR. STEGMAIER: Object to the form.
A: That's why I recommend to them that they let me go but, on the other hand, I'm allowed to rely upon the work, measurements, photographs, documentation prepared by those other engineers working under me.
Q: In order to provide the most truthful and objective opinions possible, do you agree that you would ideally go out there and see the site with your own two eyes?
A: Absolutely.
Q: Okay. Whether or not you get paid to do it or not?
A: You know, I mean, if they're not going to let me, if I'm in the area, I'm probably going to drive by any way, but I would like to think that they're gonna authorize me to perform that

work.

Q: When you say let me, you mean pay you?

A: Authorize, yes.

Q: Because you do expect a check or some money for the work that you do?

A: I think that's reasonable, yes. If they're -- if I'm performing consulting work on their behalf, those people that are doing something in the interest of work expect to be compensated. I mean, we all do pro bono work. Lawyers do pro bono work all the time. But for something like this, that is litigation related and requires an expert opinion, I think it's not unreasonable to expect compensation.

Q: Sure. I think I've already asked you this but I just want to make sure, Mr. Campbell, is there anything that you've not yet prepared but intend to prepare for the defense?

A: Nothing we haven't already addressed or discussed.

Q: Is there anything you're currently preparing for the defense?

A: No, just getting ready for the deposition. Now, I expect we will use exhibits at trial.

Q: Now ---

A: That may be including animation, I don't know, but we haven't had that discussion yet so what I think we need, what they think we need, what they authorize us to prepare, I really don't know but I expect -- I expect, you know, we may prepare exhibits, we may prepare animation, we may prepare PowerPoint, photographs, blowups, sketches, diagrams, code references. I don't know, but those are things that I would -- that I would contemplate.

Q: Mr. Campbell, have you ever been prevented from providing testimony in a case before?

A: No, ma'am.

Q: Has your opinion ever been excluded before?

A: No, ma'am.

Q: Do you recall the case of Brenda McMullen versus Live Oaks Construction?

A: That's been vacated.

Q: Right. But your opinion has in fact been excluded before, has it not?

A: No.

Q: Tell me what happened in this case then because ---

A: We ---

Q: --- your opinion was not used.

A: We need to either take a break or go off the record.

MR. STEGMAIER: Yeah, let's get some clarity. I don't -- I don't have any idea what this is all about so can we take -- go off for a second and let him tell you whatever he's gonna tell you?

Q: You have provided testimony on this to other lawyers before.

MR. STEGMAIER: We -- I don't know, might have to get a protective order for that category, that doesn't involve me necessarily.

Q: Back in I guess 2011 or so, you went back to court on a case that happened in Charleston County asking them to amend, or to change an order from this construction defect case, Brenda McMullen versus Live Oaks Construction, correct?

A: Yes, but that order has been vacated ---

Q: All right.

A: --- by Judge Young.

Q: Just for the record, though, this order that I know has been vacated, okay, that you have fought to have vacated, does say that after hearing all the testimony from you discounts your testimony in toto. It appears to this

court that the witness was heard to say that by his testimony he would muddy up the waters and, quote, make the record of the trial confusing. This conduct will not be condoned by this court. This witness is admonished from activity similar to this in the future. It is never acceptable for a witness to testify in a purposeful manner to confuse a trier of fact. And that's the original 1998 order in this McCullen versus Live Oak case, correct?

MR. STEGMAIER: Object to the form.

A: My answer is that the order has been vacated, does not exist.

Q: Right, because you fought to get it taken off the record, correct?

MR. STEGMAIER: Object to the form.

A: It was vacated by mutual agreement from all the attorneys, including the plaintiff attorney that wrote that order and Judge Young.

Q: Right.

A: Vacated by mutual agreement. And there was no fight involved, it was simply vacated. Everyone agreed. In fact, it was initiated by the plaintiff attorney and signed, without question, by Judge Young.

MR. STEGMAIER: And, Ms. Mosier, just for -- in case we're going to take this up with a circuit judge, for purposes of record, I would -- my position would be if this order is in fact a legal nullity then at that point in time, it's an improper basis for cross-examination.

MS. MOSIER: Sure. And it's been the basis for examination before though in another case.

MR. STEGMAIER: Okay. Well that ---

MS. MOSIER: And so I would -- I would ---

MR. STEGMAIER: I wasn't here.

MS. MOSIER: Sure.

MR. STEGMAIER: I wasn't there. That's our position as far as that goes. And I'm not Mr. Campbell's lawyer so I'm not going to advise him whether to answer or not answer. He's got personal counsel. You know, if it's a matter that needs to be taken up with the court for purposes of a protective order under Rule 26, that's fine. But that's just our position concerning this cross-examination based on that order which apparently doesn't exist any more as a legal fact.

MS. MOSIER: Sure.

A: There was another case where it came up. It

was actually in Judge Young's courtroom, involved ironically Judge Young and the same plaintiff attorney, and had no merit whatsoever because we got a plaintiff verdict -- we got a defense verdict in that case and it was before the order was vacated. Since the time the order was vacated, there has been no inclusion of that order whatsoever in any case.

Q: But it's never your intention as an expert to muddy the waters, correct?

A: That is not what I did during that case.

Q: Right. I understand. I just -- I simply bring it up because it is out there.

A: And you've asked the question. I've answered it. And the order's been vacated.

Q: Yes.

A: Just for that very reason because that was not the intent of that order.

Q: We'll just make this an exhibit under his objection.

MR. STEGMAIER: We'll have to file it under seal. We'll have to do something under seal. I -- I can just review ---

MS. MOSIER: Or ---

MR. STEGMAIER: --- how that operates. You can

mark it if you want, but I don't want it included in the transcript until we get some clarity about whether it can in fact be included. And again, I understand, and you're certainly entitled to ask questions that you think are, you know, create some sort of impeachment, but if it's not an order that is a legal fact any more, but in fact a legal nullity, we get into a 403 issue among other things ---

MS. MOSIER: Uh-huh.

MR. STEGMAIER: --- by it, number one, being a part of the record; number two, being a basis of any sort of cross-examination.

MS. MOSIER: Uh-huh. Well, what we can do is -- I've referred to it, I've been quite candid with you. I'm not going to spring this on you at trial.

MR. STEGMAIER: Well ---

MS. MOSIER: We don't have to necessarily make this an exhibit now.

MR. STEGMAIER: Well, and that would be my request.

MS. MOSIER: Okay.

MR. STEGMAIER: My request would be not to mark it as a record and if the full -- and I would

invite you, and if you do, in fact, believe that it is an acceptable basis for cross-examination, we'll just take it up as a motion in limine if and when this case is tried.

MS. MOSIER: Yep, that's reasonable.

MR. STEGMAIER: Good.

MS. MOSIER: We're almost at the finish line, okay?

MR. STEGMAIER: Famous last words.

MS. MOSIER: Yeah.

Q: Do you know of Russ Hunt?

A: I do.

Q: Okay. You're aware he is a dean, he teaches human factors, correct?

A: I don't know if he's a dean or not. I understand he's a professor and he may teach human factors.

Q: Are you aware that he has been -- he is the plaintiff's expert when it comes to human factors in this case?

A: My understand as of about 10:00 o'clock this morning I was notified of that.

Q: And his reputation in the community, can you provide us any insight on that?

A: I have no idea whatsoever.

Q: Or insight into his reputation as an engineer?

A: I have no idea whatsoever. I know he's not a register engineer, which would cause me concern.
Q: Okay. Whether registered or not, you're just talking about statewide or national?
A: Either. He's not either.
Q: Okay. Would ---
A: He has no engineering registration whatsoever that I'm aware of.
Q: In human factors?
A: Right.
Q: Do you have any insight as to his ---
A: Maybe I'm wrong. Strike that comment. I really don't know. I don't know anything about the guy. I know his name. He's been involved in other cases. Other than that, I really don't have any ---
Q: Okay. Are you calling into question at all his capability or his credentials to provide a human factors opinion in this case?
MR. STEGMAIER: Object to the form.
A: I'd want to read his opinion.
Q: Okay.
A: I told -- I told Mr. Stegmaier this morning, I said I like the idea he's involved. I think

that's good.

Q: Right.

A: Because we can get on the same page with that so ask him yourself, I asked -- I said I have no problem with you being involved. I think it's a good idea. I think that works well for both of us.

Q: Gotcha.

A: So there you go.

Q: Well, instead of going through and asking you a whole bunch of your background information, I'll save that and anticipate that your CV is going to address those questions. If you'll provide us just a few minutes to get together, we'll be right back.

A: Sure.

(Off the record from 1:36 p.m. until 1:43 p.m.)

Q: All right, Mr. Campbell, I think you remarked to me a few times that in generating your opinions and your report in this case that you're essentially responding to Mr. Durig's report, correct?

A: I mean, the first line states for itself -- speaks for itself, and evaluating the conditions surrounding her fall, yes.

Q: Right. So, in your -- again, your website, and you even use the word yourself today, being an objective engineer, which seems to be an important thing when you are serving in this professional capacity. You've given us today all of your objective opinions with regards to Mrs. Jackson's fall?

A: I think those have been stated, yes.

Q: Okay. Do you consider high heels to be a mobility impairment?

MR. STEGMAIER: Object to the form.

A: In a foot race. I mean, there's a way to evaluate everything, I mean, you've given me a lot of broad and hypothetical questions today so we need to -- we need to narrow it down as to something specific.

Q: Sure. Given a person of Mrs. Jackson's age, and you seem to know a little bit about her medical history cause you said you looked through her ER report, do -- would you consider shoes with a heel on them to be a mobility impairment?

A: Not necessarily.

Q: Okay. So for Mrs. Jackson, wearing high-heeled shoes does not constitute a mobility impairment

in your opinion?

MR. STEGMAIER: Object to the form.

A: As I said, it depends on the situation and application. I mean -- and I've already stated that the issues regarding those shoes, if they are contributing factors to her fall, I would likely defer to a physical therapist and/or an orthopaedic surgeon.

Q: And they, you say, are in a better posture to figure out whether or not heeled shoes, or high-heeled shoes, are a mobility impairment or not?

A: Well, I know they provide recommendations. Even if you go to the AR report, within the A -- ER -- I think I said AR. The ER report. Even if you go to the ER report, the American Geriatric Society has provided recommendations of safe footwear, even in the report to her for older adults. I think she would fall within that classification of older adults and that needs to be evaluated. If you go back to the Templer reference that we discussed, evaluation of falls, footwear needs to be considered. So, it may not be solely my opinion, but I'm going to rely upon the opinions of others and I

intend to do some additional research of contributing factors to falls related to shoes so that will be more research that I will do if we proceed toward trial.

Q: Okay.

A: So, that's already been established in my report. I expect I will probably develop those opinions in more detail and I will probably try to provide more references from a human factor standpoint to bolster my testimony.

Q: Okay. And understand the purpose of your testimony today was to try to determine what your own opinions are for trial because as you will admit, you're responding to Mr. Durig's report in formulating your own report. So my expectation coming here today was to get all of your opinions for trial.

A: Which we've covered in detail.

Q: But you said -- just said you plan to supplement your opinion, or bolster it, with more information, correct?

A: That's not a new opinion.

Q: Okay. Well ---

A: It's already been -- it's already been established.

Q: --- would you provide us with any reference material that you use to bolster your opinion?
A: Gladly.
Q: Okay, thank you. I want to ask you though, with regards to the high-heeled shoes, how can her heels be a factor but not be a mobility impairment?
MR. STEGMAIER: Object to the form.
A: I don't think I said they were not a mobility impairment. Maybe -- may need to go back and review the record, but I think I said we need to look at it based on application.
Q: Sure. And that's the thing, you keep on giving me this I'm not sure, it might be, but help us figure out ---
A: You've asked me a ---.
Q: --- how would it not be?
A: You've asked me a generic question, are shoes a mobility impairment?
Q: For Ms. Jackson.
A: They can be. Well, for anybody, they can be. My first comment was in a foot race. There are a mobility impairment in a foot race. If you want to ask me, are they a mobility impairment to Ms. Jackson based on bilateral knee

replacement, based on her age, based on her anthropometry, based on walking on this ramp, they very well could be a mobility impairment; and I consider them to be a contributing factor to this fall, yes, if that helps you out.

Q: Okay. If I'm putting two and two together, if her wearing these heeled shoes is a contributing factor, is it also a mobility impairment for her?

A: In this particular situation, yes, absolutely.

Q: Is there anything else in Mr. Durig's report that you disagree with?

A: You're getting into a whole new area.

MR. STEGMAIER: So much for wrapping this up.

A: Yeah, exactly.

MS. MOSIER: We're getting there.

A: We need to take some time. I'm going to need to review the report if you want to rest the reporter or take a break.

MR. STEGMAIER: Let's take a break.

THE WITNESS: Well, hang on, Christian.

MR. STEGMAIER: Okay.

THE WITNESS: How about -- how about we defer, I mean, that was -- we can decide, I mean, I don't want to go on the record here and then

leave something out and there be objections when I come up with the second opinion later so, I mean, I -- I'm really not prepared to answer that question as I sit here today.

MS. MOSIER: So, is that on the record?

COURT REPORTER: (Nods head affirmatively.)

MS. MOSIER: That is on the record?

COURT REPORTER: (Nods head affirmatively.)

MS. MOSIER: Okay.

Q: So, as of ---

A: I mean if you want to take a break for a half hour, let me review the report, let me sit down, write down these opinions, I'll be glad to do it. Have no problem with that whatsoever.

MR. STEGMAIER: Let's go ahead and do it. I mean --

A: We want to get it right.

Q: Okay. Because, I mean, I'm just surprised that now it's April Fool's Day, it's April 1st, and your report was originally generated December 16th of 2013, I would have hoped that us having noticed your deposition and have been in talks holding the date for this deposition, that you would have come up with your opinions before

just now.
A: Not necessarily. You asked me for my opinions. We've gone through my opinions. Now it's -- now you've asked me to extend and elaborate on those opinions as they apply to Mr. -- to Bryan Durig's opinions. I did not go through his report and enumerate those specific items that we should be discussing regarding those areas where I disagree with his opinion. I have not done that.
Q: Okay. Well, you know, we can take a break.
A: Okay.
MR. STEGMAIER: Fine.
A: And this -- this is off the record.
(Off the record discussions from 1:51 p.m. until 1:56 p.m.)
Q: Mr. Campbell, we've had an off the record discussion with Mr. Stegmaier, just all of us got together and I think what we've agreed to do is you're going to supplement your report in response to Mr. Durig's report, in all the points that you disagree with it, correct?
A: No. No, I am not doing that.
MR. STEGMAIER: That was a suggestion, and apparently that's not something that Mr. Campbell wants to

do. So apparently, that's not gonna be a scenario.

MS. McPHERSON: Christian, let me ask you this.

MR. STEGMAIER: Okay.

MS. McPHERSON: And I know we're having sort of an informal discussion ---

MR. STEGMAIER: Sure.

MS. McPHERSON: --- but let's leave it on the record. Knowing what we're trying to get at and to not be surprised at trial if Mr. Campbell came in and said, well, you know, not only do I disagree that ANSI applies, I disagree this. How do you best think that's accomplished?

MR. STEGMAIER: My -- one of two ways. We either -- as we historically do in these types of cases, plaintiff's counsel will ask, Dr. Durig has this opinion and enunciate the opinion. Mr. Campbell, do you agree or disagree and, if you disagree, what's the basis for that. Alternatively, which is not my desire, you could forward to us either in discovery or a letter that would say this is what we understand Dr. Durig's opinions to be in the instant case, what, if any, response does Mr.

Campbell have, agree or disagree. I think either way -- either way, what we want is for y'all to articulate what you understand Dr. Durig's opinions to be in this case first, which is historically the way it's handled.

MS. McPHERSON: Right.

THE WITNESS: And usually I have the benefit of reviewing his deposition.

MR. STEGMAIER: Well, we haven't deposed him.

THE WITNESS: Well, I mean, we're -- that's my point, we're typically, I mean, we're ---

MS. McPHERSON: Well ---

THE WITNESS: --- we're essentially out of order here because usually the plaintiff's expert goes first. He gives his opinions, I review those opinions, and then you can ask me about his deposition which is absolutely what is usually done ---

MS. McPHERSON: Can we solve that, Christian, let's -- I think we can work this out. Can we solve that problem that you just raised, Mr. Campbell, by confining it to opinions or findings that are contained in the report? And then that would ---

MR. STEGMAIER: Well ---

MS. McPHERSON: And then the second thing was, if we can just -- I would be interested to know, not just what opinions he differs with but if he believes his approach in reaching those opinions was wrong and why.

MR. STEGMAIER: This is what's becoming apparently clear to me, you know, Mrs. Mosier and I have been very cooperative with one another as well as you, Lisa McPherson, about trying to provide everybody with complete candor on what everybody's gonna testify to and I -- we've certainly been appreciative of that. We have -- applied some of our -- somewhat of a quasi-federal expert protocol to this particular case. I think what's becoming apparent to me is we need to take Dr. Durig's deposition. And what I would propose to do is take Dr. Durig's deposition, elicit from him everything that he has in the way of opinion and if you want to hold open -- we've already agreed to hold open Mr. Campbell's deposition, we can do that. That might be the better form for all this. And I could -- I could test- -- I could depose Dr. Durig whenever. Whenever he's available, I could take the deposition. I can get from

him everything, we give Mr. Campbell -- he obviously has the report, he gives the testimony and if you all want to ask Mr. Campbell some more questions, that's fine because as Mr. Campbell has articulated just here, maybe we've taken this a little bit out of order. But that's a bila- -- if it's a mistake, then it's a bilateral mistake because I haven't noticed Dr. Durig's deposition.

MS. McPHERSON: Right, right.

MR. STEGMAIER: Then again, I could -- we could take it next week, we could take it whenever. I don't need a lot of preparation time, I could take it tomorrow if I needed to. It's just the getting him.

THE WITNESS: Yeah, that'll take some time.

MS. McPHERSON: Well, maybe I made this more complicated than it needed to be. I guess my thought was that the big difference is -- I couldn't tell from the testimony whether Mr. Campbell actually disagreed with any of the substance of Bryan's report or if he essentially was saying I don't have any problem with his report, I just don't believe that it matters because ANSI doesn't apply.

THE WITNESS: One of the big problems in his report, because his report essentially says everything he's identified was a contributing factor to the fall and that's not -- that's not accurate at all.

MR. STEGMAIER: Plus he's applying the wrong standard -- at least we think he's applying the wrong standard.

MS. McPHERSON: Okay. All right, so the -- so you -- all right. You don't just disagree, you -- we can go off the record.

(Off the record discussion from 2:01 p.m. until 2:06 p.m.)

Q: What I hope is my last question to you, Mr. Campbell, is do you agree it's important in evaluating where you were stepping to have an unobstructed view to evaluate where you're stepping?

A: I think you lost me with that.

Q: Sure.

A: I might need you to restate that one.

Q: Okay. Do you agree that it's important in evaluating where you are stepping that it's important to have an unobstructed view?

A: Sure. You should, that's correct.

Q: That's all the questions I have for now.
A: Okay.
Q: Mr. Stagmaier might have some more.
A: Okay.
MR. CAMPBELL - EXAMINATION BY MR. STAGMAIER:
Q: Okay. Just several wrap up questions, just to make sure I've got complete clarity, and I'm referring to Plaintiff's Exhibit Number five. And you've been asked questions about this Exhibit in your direct testimony. You remember those?
A: I do, yeah.
Q: Okay. And Ms. Mosier had represented to you, and I'm in concurrence, that Mr. And Mrs. Jackson arrived at the Outback and parked probably closest -- I guess it's fair to say -- closest to ramp number three along this curb. And what I'll do is I'll just circle that so when somebody looks at the transcript, they know what we're talking about.
A: Okay.
Q: Do you remember those questions?
A: I do.
Q: I will make this representation to you. We had the opportunity to talk with Mr. Jackson during

the course of his testimony, and one of the things I was really interested in knowing is when you all parked your car prior to going in the Outback, which ramp did you come up on? This is a pretty important analysis in these types of cases. And Mr. Jackson, and Mrs. Mosier can correct me if I'm wrong, Mr. Jackson testifies that they entered the store or the restaurant through the middle ramp, I guess would be ramp number two.

A: Okay.

Q: Okay? First question, I know that we don't have exact measurements as to each ramp. I don't think even Dr. Durig or Mr. Hunt took those types of measurements. But would you agree with me to the best of your ability that the conditions that are extent and ramps number one and number two are, at the very least, similar to the conditions extent on ramp number three?

MS. MOSIER: Object to the form.

A: They appear to be.

Q: Okay. All right. So, one of the things that Mrs. Mosier asked you during the course of your testimony, she prefaced one of the questions

as, let's just assume for the sake of discussion that what Mrs. Jackson testified to is in fact the truth, and I guess we can apply that too, as well with regard to Mr. Jackson. I lead up to -- but my second -- I guess my follow up here is, do you remember a question posed to you by Mrs. Mosier where she said people will generally pick the path that is closest to where they are going.

A: I do.

Q: And your answer to that question was what?

A: That is generally the route they will follow.

Q: Okay.

A: And that is part of the foreseeable pedestrian path.

Q: And I will represent to you and, if I'm wrong, Mrs. Mosier can certainly correct me, during the course of their meal inside the Outback, the car didn't move?

A: I doubt it. No, not likely.

Q: So where they -- wherever they parked prior to entering into the restaurant, that's where the car was at the -- at the time of their exit from the restaurant after their meal?

A: That's reasonable, yes.

Q: Applying Mrs. Mosier's logic that people will generally pick the path that is closest to where they are going, does it stand to reason that if they parked along this curb, there is a chance or a likelihood that in fact the Jacksons entered the restaurant via ramp number three?

MS. MOSIER: Object to the form.

A: There's a good chance because that's the first ramp they're likely to see and they see that it is in the direction of the front entrance.

Q: Okay. And if in fact that happened, if Mr. Jackson was confused or otherwise, and the Jacksons had actually entered the restaurant via ramp number three because according to the Jacksons, all these lanes, all these spaces were blocked in front of the restaurant. Is it fair to say that at that point in time, Mrs. Jackson would become acquainted with the conditions of the ramp upon their entry into the restaurant?

A: She would.

MS. MOSIER: Object to the form.

A: Even, I mean, even if she took one of the other ramps. I mean, either ramp, I mean, gives you

-- gives you an idea of the layout, location, configuration.

Q: And does that lend itself to the idea of -- notion of perception --

A: Perception and expectancy, yes, it does.

Q: Two last questions, last two questions here. Mrs. Mosier asked you some questions about your fee schedule. If I have to drag you up to Sumter, are you gonna send me a bill for $345 an hour?

A: 245.

Q: Is it 245?

A: 245 for -- for engineering analysis and investigation time, and then 345 for expert testimony.

Q: Okay. Well, let me be more clear. If I have to bring you up to testify in open court in Sumter County, is it 345 an hour?

A: That's the charge.

Q: Okay. So, you're gonna send me that bill, right?

A: I will. I mean I was just testifying in court two weeks and then they got a bill for 345 ---

Q: Okay. So, there's no Stagmaier discount or defense lawyer discount for testifying in open

court?

A: You hire me, that's the bill I'm gonna send you. I expect Bryan Durig will do the same thing.

Q: I'm certain of that. There were a lot of questions that were pretty intriguing towards the end of Mrs. Mosier's questioning concerning this idea of mobility impairment and whether her wearing heels constituted a mobility impairment. Let's just say for the sake of this question that we're applying ADA or ANSI. Mobility impairment is a term of art, is it not?

A: It is.

Q: Okay. That doesn't mean wearing shoes that are too big for you, does it?

A: No, sir.

Q: Okay. Would it be more fair to say, or would it be better to characterize what y'all have already exchanged in the way of questioning, calling it a mobility impairment, with wearing shoes that are too big or too tall for you essentially be a more appropriately an impairment to the ability to ambulate?

MS. MOSIER: Object to the form.

A: Sure, it could be a gait impairment. It could be a balance impairment there.
Q: Okay. But it's not like -- it's not -- it's not like the traditional application of the term of art mobility impairment as applied by the ADA or ANSI, is it?
A: That's generally more physiological.
Q: Okay. You don't get special license plates for wearing high heels, do you?
A: Not for wearing bad shoes, no, sir.
Q: Thank you. That's all the questions I've got.
A: Thank you.

MR. CAMPBELL - RE-EXAMINATION BY MS. MOSIER:

Q: But you could get a handicapped decal if your husband's disabled, correct?
A: Sure, you could.
Q: Or if you have total knee replacements, correct?
A: Well, as we said, maybe, maybe not. I mean, I gave you the analogy of a broken arm. It depends if he heals or not or ---
Q: Right. But you don't walk on your arms ---
A: --- or at least -- at least during that rehab period, you may get a temporary handicapped sticker that expires after six months, 90 days,

whatever it may be.

Q: Right.

A: It -- it just depends on the rehab period, the longevity of the injury and the severity of the injury or surgery.

Q: I asked you specifically though if someone with knee replacements. Would you agree that someone that has knee problems or knee replacements may have a mobility impairment?

A: And once again, that's a hypothetical question. You could and certainly, at least for some period of time she did, during those knee replacements, during the physical therapy rehab period. But was that a permanent impairment, I do not know.

Q: Have you provided all the opinions here today truthfully and to the best of your ability, Mr. Campbell?

A: Absolutely.

Q: I guess since we've agreed to leave the record open so we can review these documents you've brought, we'll just wrap it up for today. And thank you very much for your time, Mr. Campbell.

A: Thank you. Appreciate it.

(There being no further questions, the deposition concluded at 2:15 p.m.)

SIGNATURE

I have read the foregoing deposition and confirm that it is a true and accurate transcript of my testimony. Any errors I may have noticed have been listed below and returned to the court reporter for checking against the tapes.

_____
ALAN O. CAMPBELL, PE, RRC

Date: _____

Page	Line	Correction	Reason for Change

Re: Rebecca Jackson V. OSI Restaurant Partners
ag

CERTIFICATE

This is to certify that the deposition of ALAN O. CAMPBELL, PE, RRC, consisting of one hundred eighty-seven (187) pages, is a true and correct transcript of the testimony given by said deponent after being duly sworn; said deposition was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on April 4, 2014.

Amanda J. Creel-Godfrey
Court Reporter

Notary Public for South Carolina
My Commission Expires: August 17, 2021

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER) THIRD JUDICIAL CIRCUIT

RECORDED
2014 JUN -9 PM 4:18
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Rebecca Jackson, Case No: 2012-CP-43-0707

Plaintiff,

-vs-

Outback/Charlotte-I, L.P., 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.

PLAINTIFF'S MOTION TO ALTER OR AMEND THE JUDGMENT PER RULE 59(e), *SCRCP*

INTRODUCTION

Plaintiff respectfully requests a ruling on three different matters previously raised but not ruled upon in the Order Granting Summary Judgment. Ruling on three issues raised but not ruled on: (1) summary judgment is premature; (2) the fact that Outback created the dangerous condition; (3) Plaintiff's status as an invitee.

PROCEDURAL HISTORY

Plaintiff filed a complaint against the Defendants on April 16, 2012, which was amended on June 7, 2012. The amended complaint alleges that Plaintiff is an invitee owed a duty of care. The amended complaint further alleges the violation of industry standards as evidence of the breach of a duty of care owed to the Plaintiff.

The case has proceeded through discovery, and Defendants have deposed both Plaintiff and her husband, and Plaintiff has deposed Mr. Adams, Mr. Smith, and Mr. Alan Campbell, P.E. On February 28, 2014 Defendant's filed a Motion for Summary Judgment indicating seven (7) bases to dispose of the Plaintiff's case without the benefit of a trial by jury. The Motion did not cite any case

law or statutes in support of the motion. In addition, Plaintiffs tried asking for several different discovery responses in different ways and tried to procure the discovery via deposition as an alternative to paper discovery. However, still not discovering the relevant and important information sought, Plaintiff filed a Motion to Compel on March 24, 2014.

Via two (2) different sets of discovery requests Plaintiff sought to discover the names and addresses of all Defendant employees present at the restaurant at the time of the Plaintiff's fall, as well as their job duties and actions during and after Plaintiff's fall. In response to these discovery requests, on April 3, 2014 and March 28, 2014, Defendants provided a list of seventeen (17) Outback employees all employed by the Sumter Outback as of the date of Plaintiff's fall, but Defendant did not identify which of the seventeen (17) employees actually worked on the day of Plaintiff's fall in either discovery responses. To notice the deposition of seventeen (17) workers is unduly burdensome and costly upon the Plaintiff, whereas a simple reference to Defendant's documents should be able to answer this inquiry. Managing Partner Rich Adams was on the scene moments after Plaintiff's fall and knew or should have known the importance of retaining such information. Plaintiff has not had an opportunity to question any Outback employees - other than Managing Partner Rich Adams - to determine their knowledge, if any, of prior falls or complaints and/or suggests from customers concerning the subject ramp where Mrs. Jackson fell prior to her fall. After all, during the Managing Partner's deposition, he testified that he was incited to paint the ramp at the suggestion of a customer.

In addition, Plaintiff has not had the opportunity to question any other Outback employees listed 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.

Moreover, because Defendant has yet to identify which of the seventeen total Outback employees actually worked on the date of Mrs. Jackson's fall, Plaintiff has not had the opportunity to ask if any employees working on the date of Ms. Jackson's fall interviewed her before or after her fall, saw her fall, provided any assistance to her, or overheard an alleged comment by the Managing Partner, Rich Adams, that the built up curb ramp that is the subject of this case "needed to be painted, like, yesterday."

Plaintiff also sought to discover all standard operating procedures, manuals and training materials produced by the Defendant concerning maintenance and cleaning of the outside of the premises, "to include public safety, outside walkways, ramps, handicap ramps and parking lots." In response to this interrogatory, on March 28, 2014 Defendants mailed a copy of the Outback Employee Orientation Handbook to Plaintiff's counsel. However, page 15 of the Outback Employee Orientation Handbook references an employee training video that was not produced.

As mentioned in Plaintiff's Supplemental Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment on file with this Court, the standard of care owed to the Plaintiff may be established by referencing the common law, statutes, regulations, industry standards, and the defendant's own policies and procedures. Because the training video can be expected to contain rules for Outback employees to follow and/or policies and procedures, the training video is both relevant and probative in determining whether the Defendant violated the standard of care in this case as set forth in its own training materials.[1]

While Defendants have produced a portion of their training materials directly responsive to Plaintiff's request for production, Plaintiff counsel's review of the discovery response logically led to an additional request for information, a training video, referenced within the employee training documents. Such is the nature of discovery in general - a review of discovery responses generally leads to more discovery. This is evidenced by the various sets of written discovery propounded by the Plaintiff in this case. Plaintiff 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, Plaintiff has submitted six (6) sets of interrogatories and five (5) sets of requests for production in this case. *See* Plaintiff's Rule 56(f) Affidavit, Exhibit A - Litigation Timeline.

Just before eleven in the evening on Friday, April 4, 2014, Defendants sent their memorandum in support of the motion for summary judgment narrowing the bases of its motion to tell this Court that Plaintiff's entire theory of liability is based on a violation of codes that do not apply in the instant case.

---

[1]As a result, Plaintiff issued a discovery request for a complete copy of the training video referenced in the Outback Employee Orientation Handbook on April 14, 2014.

Plaintiff sent Defendant's counsel an e-mail highlighting the points Plaintiff would make in her Memorandum in Opposition to the motion for summary judgment as to the merits of the motion.

At the hearing on Defendant's Motion for Summary Judgment on April 7, 2014, Plaintiff's Counsel raised the Plaintiff's outstanding Motion to Compel, and after brief discussion, the hearing turned towards the merits of Defendant's Motion for Summary Judgment.

During oral argument and for the first time, Counsel for the Defendants handed up their memorandum and discussed South Carolina cases, providing only case names to Plaintiff's counsel. As a result, this Court granted Plaintiff's counsel fifteen (15) days to supplement her Memorandum in Opposition to the Defendants' Motion for Summary Judgment and provide supporting affidavits instead of signed reports and assigned the parties thirty (30) days to submit proposed orders.

In Plaintiff's Supplemental Memorandum of Law timely filed with this Court, Plaintiff raised prematurity of Defendant's Motion for Summary Judgment. *See* Plaintiff's Supplemental Memorandum of Law, pp. 4-5. In addressing the merits of the Defendant's Motion, Plaintiff reiterated that Plaintiff is an invitee owed a duty of care. *Id.* at pp. 5-7. Further, with regard to Plaintiff's burden of proof, Plaintiff pointed out that during oral argument, Defendant conceded that the built up curb ramp at issue in the case was created by Defendants. *Id.* at p. 8. And that because Defendants created the condition alleged to be dangerous, Plaintiff need not prove notice of the specific hazard that caused the Plaintiff's injury. *Id.*

Plaintiff also timely provided the Court with two proposed orders. One proposed order denied Defendants' Motion for Summary Judgment on the basis that a motion for summary judgment is premature because of the ongoing nature of discovery. *See* Plaintiff's Brief Regarding Timeliness of Rule 56(f) Affidavit, Exhibit A. The alternative proposed order denied Defendant's Motion for Summary Judgment on the grounds that Plaintiff, as an invitee, is owed a duty of care in accordance with the common law of this State. In addition, Plaintiff's alternative proposed order reiterated that because Defendant's admitted creating the allegedly dangerous condition of the built up curb ramp, Plaintiff need not prove the specific hazards posed by the ramp.

On May 15, 2014 the parties received e-mail notification of the Court's decision to grant summary judgment. On May 27, 2014 Plaintiff submitted a Rule 56(f) affidavit with Exhibits along with a brief regarding the timeliness of the affidavit and exhibits. On May 28, 2014 the Clerk entered the Motion Granting Summary Judgment.

DISCUSSION

Plaintiff respectfully requests a ruling on three different matters previously raised but not ruled upon in the Court's Order Granting Summary Judgment. First, Plaintiff requests a ruling with regard to Plaintiff's contention that the Defendant's Motion for Summary Judgment is premature. Second, Plaintiff requests a ruling with regard to Defendants' admission at oral argument that the built up curb ramp was a condition created by the Defendants. Third, Plaintiff requests a ruling on her status as an invitee at the Defendants' restaurant at the time of her fall.

Turning to the first matter, at the summary judgment hearing, Plaintiff argued that discovery in the case was still ongoing. In fact, just days before the summary judgment hearing, Defendants provided some of the discovery sought to Plaintiffs. The discovery responses lead to additional discovery requests for which Plaintiff submitted days following the summary judgment hearing. Plaintiff respectfully requests a ruling on the alleged prematurity of Defendant's motion for summary judgment.

As to the second matter raised by not ruled on, Plaintiff requests a ruling on her contention that Defendants created the alleged dangerous condition - a point that was conceded by counsel for Defendants at oral argument and incorporated into Plaintiff's Supplemental Memorandum of law and alternative proposed order. Plaintiff respectfully requests a ruling on Defendants' admission that they created the built in curb ramp, which Plaintiff alleges to be an unreasonably dangerous condition that caused her fall.

As to the final matter raised but not ruled upon, the word "invitee" does not appear in the current version of the Order Granting Summary Judgment. From the very beginning Plaintiff has contended that Plaintiff is owed a common law duty of care by virtue of her status as an invitee. *See* Complaint, Amended Complaint, Plaintiff's Supplemental Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment. Because the current order disposes of Plaintiff's case without referencing her status as an invitee, Plaintiff respectfully requests a ruling from the Court as to her legal status.

CONCLUSION

For the reasons aforementioned, Plaintiff respectfully requests that this Court address all three matters previously raised but not ruled upon in the Court's Order Granting Summary Judgment.

(Signature Page to follow)

Respectfully submitted,

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June 4, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THIRD JUDICIAL CIRCUIT
Rebecca Jackson,	)	CIVIL ACTION NUMBER: 2012-CP-43-707
	)	
Plaintiff,	)	
	)	
vs.	)	DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
	)	
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.	)	

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 respectfully move this Honorable Court for an order granting them summary judgment in the above-referenced case.

The instant case is a premises liability matter and sounds in negligence. Plaintiff alleges that on or about 1:30 p.m. on June 7, 2009, as she and her husband exited the Outback restaurant at 2840 Broad Street in Sumter, she was "unable to appreciate the change in elevation in the [exit] ramp and tripped and fell to the ground." (Complaint, ¶ 10). Plaintiff alleges Outback had actual or constructive notice of the dangerous condition created by the handicap access ramp and/or created the condition itself.

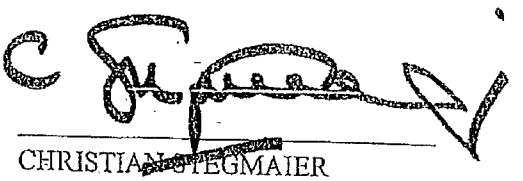
Defendants bottom and premise their pursuit of summary judgment upon several arguments:

- The Allegedly Dangerous Condition was Open and Obvious and/or Patent to Plaintiff
- The Allegedly Dangerous Condition was a Known Condition to Plaintiff
- ANSI Standards Do Not Apply to Plaintiff as a Recognized Standard of Care in the Instant Case
- To the Extent Plaintiff is Articulating a Violation of the Handicapped Accessibility Act, There Exists No Recognized Private Cause of Action
- The 2006 International Building Code Does Not Apply as a Recognized Standard of Care in the Instant Case
- The International Property Maintenance Code Does Not Apply as a Recognized Standard of Care in the Instant Case
- To the Extent Plaintiff Relies Upon on the Americans with Disabilities Act as Basis for Relief, Such Relief is Not Available to Her

Defendants respectfully request argument on the instant motion. Moreover, Defendants reserves the right to amend the instant motion prior to argument and disposition of the motion, as well as supplement its argument via written memorandum, affidavits, and other materials permitted by Rule 56, SCRCP to be considered by this Court

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,
COLLINS & LACY, P.C.

By: 

CHRISTIAN STEGMAIER
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1330 Lady Street, Sixth Floor (29201)
Post Office Box 12487
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(803) 771-4484 (Facsimile)

ATTORNEYS FOR DEFENDANTS

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Columbia, South Carolina
28 FEB, 2014

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) RECORDED
COUNTY OF SUMTER) 2014 MAR 24 AM 8:42 THIRD JUDICIAL CIRCUIT
) JESS C. CAMPBELL
Rebecca Jackson,) CLERK OF COURT Case No: 2012-CP-43-0707
) SUMTER COUNTY, S.C
Plaintiff,)
)
-vs-)
)
Outback/Charlotte-I, L.P.,)
OSI Restaurant Partners, L.L.C.,)
Outback Steakhouse of South) PLAINTIFF'S MOTION TO COMPEL
Carolina, Inc., Outback) DISCOVERY RESPONSES
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.)
)

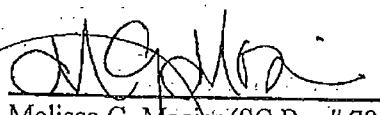
TO: CHRISTIAN STEGMAIER, ESQUIRE, ATTORNEY FOR DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through the undersigned attorney, will move before the Presiding Judge on the tenth (10) day after service, or as soon as counsel may be heard pursuant to Rule 37 of the *South Carolina Rules of Civil Procedure* for an Order compelling the Defendants to answer or respond to the following: Numbers 12 and 16 on Plaintiff's First Set of Interrogatories; Plaintiff's Third Set of Interrogatories; Plaintiff's Second Set of Requests for Production; Plaintiff's Fourth Set of Requests for Production, all of which have been previously served and re-served upon the Defendants' attorney. All relief under Rule 37 will be sought.

Plaintiff's counsel has issued a follow up letter dated January 3, 2014 and engaged in an exchange of a series of e-mails culminating with a February 26, 2014 e-mail where counsel mutually assented to a March 12 deadline for Defendant to supplement or otherwise respond to Plaintiff's discovery requests to avoid a Motion to Compel. To date, the undersigned attorney has not received any responses, objections or requests for extension since that time.

In accordance with Rule 11 of the *South Carolina Rules of Civil Procedure*, I affirm that I have communicated with opposing counsel and have attempted in good faith to resolve the matter contained in this motion.

McWHIRTER, BELLINGER & ASSOCIATES, P.A.

BY: 

Melissa G. Mosier (SC Bar # 78693)
L. Lisa McPherson
119 E. Main Street
Lexington, SC 29072
803-359-5523 - Phone
803-447-9985 - Fax
Attorneys for the Plaintiff

March 20, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THIRD JUDICIAL CIRCUIT
	)	
Rebecca Jackson,	)	Case No: 2012-CP- 43-787
	)	
Plaintiff,	)	
	)	
-vs-	)	PLAINTIFF'S FIRST SET OF INTERROGATORIES TO THE 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,	)	
	)	
Defendants.	)	

RECORDED
2012 APR 16 PM 12:25

TO: THE DEFENDANTS ABOVE-NAMED:

The Plaintiff by and through her undersigned attorney, request that you answer the following Interrogatories pursuant to Rule 33 of the South Carolina Rules of Civil Procedure:

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the Defendants that relate to the claim or the defense in this case.

3. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim, and set forth the number or numbers of the policies involved and the amount or the amounts of liability coverage provided in each policy.

4. List the names and addresses of any expert witnesses whom the Defendant proposes to use as a witness at the trial of this case.

5. For each person known to the Defendant or counsel to be a witness concerning the facts of this case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

6. List the name and address of each person or entity to which the insurance adjuster responsible for this case has spoken or written while investigating the matters set forth in Plaintiff's Complaint.

7. List each document, electronic or otherwise, which mentions or refers to the adjuster's contact or the content thereof with each person identified in response to the previous Interrogatory.

8. If the Defendant is improperly identified, give the proper identification and state whether counsel will accept service of an Amended Summons and Complaint reflecting the correct information.

9. Please identify any information, material, writings, posts, updates, correspondence, photographs, email, and other items that have been deleted from any account or profile identified above after the date of the incident giving rise to this lawsuit.

10. Pursuant to S.C. Code Ann. 15-38-15 (D), please identify any person or entity, whether a party or not, whom you allege contributed to any injury or damages to the Plaintiff.

11. List the names and addresses of all personnel, employees, or officers of the corporation who were responsible for safety procedures regarding the maintenance and building of the handicap ramp on the date of the Plaintiff's injury.

12. List the names and addresses of all the employees of the Defendant who were present on the premises at the time of the incident set forth in the complaint, their actions thirty (30) minutes prior to, at the time of, and thirty (30) minutes following the incident, together with their full names, addresses, telephone numbers, job titles, and the nature of the duties that they normally perform for the defendant.

13. State the net worth of the Defendants.

14. State the number of Outback Steakhouse Restaurants in the State of South Carolina.

15. State the number of Outback Steakhouse Restaurants within the country.

16. Identify all standard operating procedures, manuals, training manuals, and any other documents or materials produced by defendant concerning maintenance and cleaning of the outside premisses of Outback Steakhouses to include public safety, outside walkways, ramps, handicap ramps, and parking lots.

17. Describe whether any warning signs were located within or outside the Outback Steakhouse Restaurant where the incident occurred to warn invitees and other members of the public about the handicap ramps and describe the location of said signs.

18. List all prior falls known to defendants at the Outback Steakhouse Restaurant where this incident occurred, including the following information:

a) name of person falling;

b) date of fall;

c) circumstances surrounding fall;

d) nature of injury;

e) whether suit was filed;

f) name and address of plaintiff's attorney; and,

g) disposition of claim.

19. List any documents, letters, correspondence, internal company memos, or information from any other source known to Defendants concerning the problem(s) of the handicap ramps to invitees and other members of the public legally on the premises of Outback Steakhouse Restaurant

20. List the names, addresses, and telephone numbers of all corporate officers of the named defendants.

21. List the name, address, and telephone number of the appropriate person to testify as to the networth, assets, and liabilities of the Defendant, Outback Steakhouse Restaurant.

22. List the name, address, and telephone number of the accountant and accounting firm that produced financial statements for the Defendant, Outback Steakhouse Restaurant, for the years, 2006 to 2012.

23. List the name, address and telephone number of the person and/or persons who prepared the financial statements of the Defendant, Outback Steakhouse Restaurant, for the years, 2006 to 2012.

24. List the name, address and telephone number of the person and/or persons who prepared the tax returns of the Defendant, Outback Steakhouse Restaurant, for the years, 2006 to 2012.

Signature page to follow

McWHIRTER, BELLINGER, & ASSOCIATES, P.A.

By: L. Lisa McPherson by Melissa G. Main

L. Lisa McPherson
Attorney for the Plaintiff
119 East Main Street
Lexington, South Carolina 29072
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(803) 359-1248 Fax
Lisam@mcwhirterlaw.com

Lexington, South Carolina

April 13, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THIRD JUDICIAL CIRCUIT
	)	
Rebecca Jackson,	)	Case No: 2012-CP-43-0707
	)	
Plaintiff,	)	
	)	
-vs-	)	
	)	PLAINTIFF'S THIRD SET OF
Outback/Charlotte-I, L.P.,	)	INTERROGATORIES TO THE 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,	)	
	)	
Defendants.	)	

TO: CHRISTIAN STEGMAIER AND CLAUDE T. PREVOST, ATTORNEYS FOR THE ABOVE-NAMED DEFENDANTS:

26. The name of the employee, person and/or entity who ordered the handicap ramp to be painted.

27. The name of company and person(s) who painted the ramp after the Plaintiff's fall of June 7, 2009.

28. Provide the name employee/manager/entity or person who was involved in the decision-making process to paint the ramp after Plaintiff's fall.

29. Provide the name of the entity and person(s) who generated any post-incident inspection report regarding the handicap ramp on the Defendant's property.

30. State whether or not there was a security or surveillance camera which would capture the handicap ramp where the Plaintiff fell.

31. Please provide the names of all employees, including managers and cooks, who were on the job on the afternoon of June 7, 2009, at the Outback where the Plaintiff fell.

32. Provide the names of all agents, servants, and/or employees who saw Ms. Jackson's

fall.

33. Please provide the names of any and all persons who reported Ms. Jackson's fall to emergency personnel and Outback Steakhouse.

34. Provide the names of all agents, servants and/or employees who assisted Ms. Jackson after her fall.

35. Identify the person(s) who called 911 after Ms. Jackson's fall.

36. Identify the person(s) who took the photos taken and produced by Defendants (Bastes #DEF0008-0010);

37. Identify the employee who filled out an incident/accident report or similar report regarding the Plaintiff's fall;

38. Identify the employee who called corporate and/or risk management to report the Plaintiff's fall.

39. List any and all incidents involving the handicap ramp depicted in **Exhibit A.**

40. List the name, contact information, job duties, and dates of employment for all janitors, maintenance personnel, and security personnel for the building referenced above on June 7, 2009, and for two (2) years prior to that date.

41. Please provide the telephone numbers and addresses for the witnesses identified in Defendants' Answer to Plaintiff's First Set of Interrogatories, Number Eighteen (18).

42. Please provide the name and contact information for any and all former and current agents, servants, and/or employees of the Outback Steakhouse who have fallen where this incident occurred.

McWHIRTER, BELLINGER, & ASSOCIATES, P.A.

By: _____

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L. Lisa McPherson
Attorney for the Plaintiff
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Lisam@mcwhirterlaw.com

Lexington, South Carolina

February 25, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THIRD JUDICIAL CIRCUIT
	)	
Rebecca Jackson,	)	Case No: 2012-CP-43-0707
	)	
Plaintiff,	)	
	)	
-vs-	)	
	)	PLAINTIFF'S SECOND REQUEST
Outback/Charlotte-I, L.P.,	)	FOR PRODUCTION TO THE 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,	)	
	)	
Defendants.	)	
	)	

TO: CHRISTIAN STEGMAIER AND CLAUDE T. PREVOST, ATTORNEYS FOR THE DEFENDANTS ABOVE-NAMED:

Pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, the Plaintiff, above-named, hereby requests that the Defendants respond within thirty (30) days after the service hereof to the following requests, to-wit, that the Defendants produce and permit the undersigned attorney for said Plaintiff to inspect, copy, or photograph each of the following documents or things, which may be in the possession, custody, or control of the Defendants or their attorney(s):

9. Copies of any and all repair and maintenance logs and/or invoices for maintenance performed on the handicap ramp from January 1, 2007 to June 7, 2009.

10. Copies of any and all repair and maintenance logs and/or invoices for maintenance performed on the handicap ramp after June 7, 2009 to June 7, 2011.

11. Please provide any post-incident inspection reports generated by an agent, servant, and\or employee of the Defendants.

12. Please provide a copy of the policy and procedures regarding the maintenance of surveillance videos.

13. Please provide a copy of the policies and procedures regarding the Outback Steakhouse employees.

14. Please provide any notes, agendas, memos, e-mails regarding any Outback Steakhouse meetings among staff, managers, and/or management regarding safety.

16. Produce any records, notes, emails, memos, and/or all other recordings of any kind, whether written or verbal regarding any and all slip and fall/trip and fall incidents that occurred on the exterior of the building that is the subject of this case, on the handicap ramp depicted in Exhibit A for the two (2) years prior to June 7, 2009.

17. Any and all correspondence, e-mail, jpg files, data, test results, readings, reports, charts, photographs, drawings, videotapes, movies, surveillance footage, surveys, statements, maps, brochures, manuals, memoranda, time sheets, animations, time records, billing records, expense records or other documents, materials or physical evidence of any kind received from, provided to or generated by any expert witness whom Defendants expect to call as a witness at the trial of this case.

18. Any and all correspondence, reports, charts, photographs, jpg files, data, test results, readings, statements, animations, drawings, diagrams, videotapes, movies, surveillance footage, surveys, statements, maps, brochures, manuals, treatises, measurements, notes or other documents, materials or physical evidence of any kind relied upon by any expert witness in forming an opinion in this case whom Defendants expect to call as a witness at trial.

19. All writings, recordings and documents, including correspondence, notices, letters, emails, reprimands or warnings, related to Defendant's compliance with legal codes, regulations, and industry standards as it pertains to Defendant's control, maintenance, management, leasing, or possession of the premises.

20. All materials, photographs, videotapes, audio cassettes, diagrams, slide show presentations, and other materials or guidelines utilized to train Defendant's agents and/or employees for the two years preceding Plaintiff's injury, up to and including the present.

21. All reports prepared by any persons investigating the matters complained of in the Complaint, including expert witness reports, with the exception of documents prepared by Defendant's counsel or counsel's staff. If any privilege is claimed with respect to any such

documents, identify the nature of the document, the date and time of its preparation, the person requesting the preparation of the document, the person(s) to whom the document was provided, and the current whereabouts of the document and all copies.

22. Produce copies of all complaints naming this Defendant as a defendant, where the complaint included allegations of a physical and/or personal injury, and which were filed within the three-year period of time preceding Plaintiff's injury, and up to and including the present.

23. Any and all settlement agreements and releases with any persons who have alleged to have been injured on the Defendant's premises in the five-year period of time preceding Plaintiff's injury, up to and including the present.

24. Copies of all writings or recordings related in any fashion to the events or claims in the Complaint obtained by this Defendant or anyone acting on its behalf via Subpoena Duces Tecum, signed authorization form, or other legal process.

McWHIRTER, BELLINGER, & ASSOCIATES, P.A.

By: _____

Melissa G. Mosier
L. Lisa McPherson
Attorney for the Plaintiff
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Lexington, South Carolina 29072
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Lisam@mcwhirterlaw.com

Lexington, South Carolina

February 25, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THIRD JUDICIAL CIRCUIT
	)	
Rebecca Jackson,	)	Case No: 2012-CP-43-0707
	)	
Plaintiff,	)	
	)	
-vs-	)	
	)	PLAINTIFF'S FOURTH OF
Outback/Charlotte-I, L.P.,	)	REQUEST PRODUCTION
OSI Restaurant Partners, L.L.C.,	)	TO THE DEFENDANTS
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.	)	
	)	

TO: CHRISTIAN STEGMAIER AND CLAUDE T. PREVOST, ATTORNEYS FOR THE ABOVE-NAMED DEFENDANTS:

Pursuant to Rule 34 of the *South Carolina Rules of Civil Procedure*, the Plaintiff, above-named, hereby requests that the Defendants respond within thirty (30) days after the service hereof to the following requests, *to-wit*, that the Defendants produce and permit the undersigned attorney for said Plaintiff to inspect, copy, or photograph each of the following documents or things, which may be in the possession, custody, or control of the Defendants or their attorney(s):

1. Curriculum Vitaes for Defendant's experts Bobby Funcik, EIT and Alan O. Campbell, P.E.

2. A three-year period, beginning January 1, 2010 to December 31, 2013, detailed case list from Defendant's Experts.

3. Please provide the Site Plan for the subject property.

4. Copies of all documents, correspondence, e-mails, jpg files, data, reports, charts, photographs, drawings, measurements, photographs of measurements, video tapes, DVD's, surveys statements, maps, brochures, manuals, memoranda, time sheets, animations, time records, billing records, expense records, or other documents, materials, or physical evidence of any kind in which the expert Bobby Funcik EIT and\or Alan O. Campbell, PE with Applied Building Sciences, Inc., has reviewed or considered when rendering their opinions in this case.

5. Copies of any and all surveillance on the Plaintiff.

McWHIRTER, BELLINGER, & ASSOCIATES, P.A.

By: _____

Melissa G. Mosier
L. Lisa McPherson
Attorney for the Plaintiff
119 East Main Street
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Lisam@mcwhirterlaw.com

Lexington, South Carolina

January 2nd, 2014

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER) THIRD JUDICIAL CIRCUIT

RECORDED
2014 MAY 27 PM 2:40
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Rebecca Jackson,

Plaintiff,

-vs-

Outback/Charlotte-I, L.P., 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.

Case No: 2012-CP-43-0707

RULE 56(f) AFFIDAVIT BY MELISSA G. MOSIER, ATTORNEY FOR PLAINTIFF

PERSONALLY, appeared before me the undersigned, who first being duly sworn deposes and says:

1. I, Melissa Garcia Mosier, Attorney for the Plaintiff, respectfully urge this Court that the grant of summary judgment is premature for the reasons set forth more fully below because: (1) Plaintiff has not been provided a full and fair opportunity to conduct discovery; (2) further discovery is desirable in the case; (3) Plaintiff has not been dilatory in pursuing discovery; and (4) further discovery would uncover additional relevant evidence supporting the existence of a genuine issue of material fact. *See* Exhibit A - Litigation Timeline.

2. Following numerous phone calls and e-mails over the course of litigation, on March 24, 2014 Plaintiff filed a Motion to Compel requesting responses to Plaintiff's Third Set of

Interrogatories, Second and Fourth Requests for Production, and answers to two questions from Plaintiff's First Set of Interrogatories. At the time of the hearing for Defendants' Motion for Summary Judgment the Plaintiff's Motion to Compel was outstanding, and scheduled to be heard after Defendants' Motion for Summary Judgment. *See* Exhibit A - Litigation Timeline.

3. The matter of prematurity of the Defendants' Motion for Summary Judgement was mentioned and briefly addressed at the very beginning of the hearing on Defendant's Motion for Summary Judgment.

4. The matter of prematurity of the Defendants' Motion for Summary Judgment was also addressed in Plaintiff's Memorandum of Law handed to the Court at the Motion Hearing and also in Plaintiff's Supplemental Memorandum of Law filed with the Court.

5. The matter of prematurity of the Defendants' Motion for Summary Judgment was also addressed by Plaintiff in her submission of an alternative proposed order disposing of Defendants' Motion for Summary Judgment as premature.

6. Via two (2) different sets of discovery requests Plaintiff sought to discover the names and addresses of all Defendant employees present at the restaurant at the time of the Plaintiff's fall, as well as their job duties and actions during and after Plaintiff's fall. See Exhibit B - Plaintiff's First Set of Interrogatories, Number Twelve of Twenty-Four. *See also* Exhibit C - Plaintiff's Third Set of Interrogatories, Number 31.

7. In response to these discovery requests, on April 3, 2014 and March 28, 2014, Defendants provided a list of seventeen (17) Outback employees all employed by Outback as of the date of Plaintiff's fall, but Defendant did not identify which of the seventeen (17) employees

actually worked on the day of Plaintiff's fall in either discovery responses. *See* Exhibit D - Defendants' Second Supplemental Answers to Plaintiff's First Set of Interrogatories - Number 6. *See also* Exhibit E - Defendants' Answers to Plaintiff's Third Set of Interrogatories - Number 31.

8. Plaintiff also sought to discover all standard operating procedures, manuals and training materials produced by the Defendant concerning maintenance and cleaning of the outside of the premises, "to include public safety, outside walkways, ramps, handicap ramps and parking lots." *See* Exhibit B - Plaintiff's First Set of Interrogatories - Number 16.

9. In response to this interrogatory, on March 28, 2014 Defendants mailed a copy of the Outback Employee Orientation Handbook to Plaintiff's counsel. However, page 15 of the Outback Employee Orientation Handbook references an employee training video that was not produced.

10. Plaintiff issued a discovery request for a complete copy of the training video referenced in the Outback Employee Orientation Handbook on April 14, 2014.

11. The training video is both relevant and probative because whereas the Defendant's Motion for Summary Judgment is premised on the lack of a duty towards the Plaintiff, the standard of care in this case may be established by referencing the common law, statutes, regulations, industry standards, and the defendant's own policies and procedures. *See* Plaintiff's Supplemental Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment.

12. While Defendants have produced a portion of their training materials directly responsive to Plaintiff's request for production, Plaintiff counsel's review of the discovery logically led to

an additional request for information, a training video, referenced within the employee training documents.

13. On April 14, 2014 Plaintiff mailed her Fifth Set of Requests for production requesting the time in and time out sheets for the employees working at Outback Steakhouse as well as a complete copy of the employee orientation video referenced in the Outback Employee Handbook. *See* Exhibit F - Plaintiff's Fifth Set of Requests for Production.

14. Plaintiffs have not had an opportunity to question any Outback employees other than Managing Partner Rich Adams, to determine their knowledge, if any, of prior falls or complaints and/or suggests from customers concerning the subject ramp where Mrs. Jackson fell prior to her fall.

15. In addition, Plaintiff has not had the opportunity to question any of the Outback employees listed, other than Managing Partner Rich Adams, 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.

16. Moreover, because Defendant has yet to identify which of the seventeen total Outback employees actually worked on the date of Mrs. Jackson's fall, Plaintiff has not had the opportunity to ask if any employees working on the date of Ms. Jackson's fall interviewed her, saw her fall, provided any assistance to her, or overheard an alleged comment by the Managing Partner, Rich Adams, that the built up curb ramp that is the subject of this case "needed to be painted, like, yesterday."

17. As Plaintiff's counsel pointed out in her Supplemental Memorandum of Law in Opposition

to Summary Judgment filed with this Court and in oral argument, testimony of Defendant employees is important because it is often used to help establish actual and constructive notice of hazards.

18. In this case, testimony of Defendants' employees is relevant and important in order to determine whether one or more of the employees have personal knowledge of prior falls or near-falls, or unreported incidents involving the built up curb ramp. Not all claims are reported to insurers but may have been reported internally to management or to Outback employees. Since employees working on the ground level have even more exposure to customers than managers like Rich Adams, testimony of Outback employees working on the date of Mrs. Jackson's injury is relevant to determining the existence of any prior incidents that may not have been reported. In addition, the employees can help verify the circumstances surrounding any prior falls to confirm the alleged location of the fall, the injured person's condition, their footwear, their physical appearance, injury, any excited utterances, present sense impressions, admissions, and/or declarations against interest. Finally, employee testimony of prior falls or prior near-falls could help establish that Defendants' failed to use their superior knowledge regarding a problem with the ramp - and failed to protect invitees from an unreasonably dangerous and latent defect.

19. In addition, testimony of Defendant employees is often used to help establish facts and could help verify Plaintiff's recollection of the events leading up to her fall. For instance, Rich Adams denies making the statement that the built up curb ramp "needed to be painted, like, yesterday." Should another Outback employee have heard Mr. Adams make such a statement on the scene, later that day, or at any time after Plaintiff's fall - whether he was

overheard or the matter was even discussed among employees in a meeting or casually - such a statement goes directly to demonstrate the Defendants' failure to remedy a known hazard that was unreasonably dangerous.

20. In addition, an Outback employee working on the date of Mrs. Jackson's fall could help verify whether or not Plaintiff appeared to have any difficulty walking in her choice of footwear. Because Defendants cite Plaintiff's choice of footwear as a more likely cause of her fall than the condition of the built up curb ramp versus any sensory of physical difficulties, any indication that she did or did not have any trouble walking around in her choice of footwear is relevant and important to the case at hand.

21. Moreover, at this time Defendants have finally concluded that they will be unable to provide the incident reports leading up to Mrs. Jackson's fall. Plaintiff asserts that these are probative as to prior knowledge of an unreasonably dangerous condition for invitees and, as they are kept by the Defendants' insurer, Wells Fargo, should be readily attainable by the Defendants.

22. The incident reports, Plaintiff argues, could help shed light on the extent of notice to the Defendants of the dangerous condition, and the indifference to remedy or repair the ramp at issue. Therefore, Plaintiff would have the Court compel the Defendants to also procure the prior incident reports from their insurer.

Signature page following

Melissa Garcia Mosier

SWORN to be subscribed before me

this 27 day of May 2014.

Notary Public of South Carolina

My Commission Expires: 2-25-2018

EXHIBIT A

Litigation Timeline

4/16/12 - Plaintiff files Summons and Complaint and served with First Set of Interrogatories and First Set of Requests for Production

5/7/12 - Plaintiff files Amended Summons and Complaint

5/21/12 - Defendants file Notice of Removal

5/27/12 - Defendant accepts service of the Amended Summons and Complaint

6/1/12 - Defendant Answers in the District Court

6/7/12 - Judge Currie issues her order remanding the case to Sumter Common Pleas

7/6/2014 - Defendant issues First Set of Interrogatories and Requests for Production to Plaintiff

7/12/12 - Defendant files Answer to Amended Complaint in Sumter Common Pleas

11/9/12 - Defendant Answers Plaintiff's First Set of Interrogatories and Requests for Production

2/26/13 - Defendant sends Second Supplemental Responses to Plaintiff's First Interrogatories

4/3/14 - Defendant sends Second[sic] Supplemental Responses to Plaintiff's First Interrogatories

11/5/12 - Defendant issues supboena *duces tecum* to: Bon Secours St. Francis, Colonial Family Practice, Marion Davis, MD, Lexington Heart Clinic, Sumter County EMS, Sumter Neurology & Pain Management, Sumter Physical Therapy Clinic, Sumter Radiology, Tuomey Regional Medical Center

11/8/2012 - Plaintiff Answers Defendant's First Set of Interrogatories and Responds to Defendant's First Set of Requests for Production

11/28/12 - Defendant issues subpoena to Brian R. Durig, P.E., Summit Engineering

12/3/12 - Defendant issues subpoena to Charleston Neurological Associates, Roper Hospital, MUSC, Cardiovascular Center of Hampton Roads, Dr. Jason Andrew Curry

12/6/12 - Defendant issues subpoena to Dr. Robert Edward Turner III, Dr. Michael Keith Drakeford

12/10/12 - Plaintiff issues Second Set of Interrogatories to Defendant

1/8/13 - Defendant issues subpoena to Stokes Regional Eye Center, Sumter Neck and Back Center

1/21/13 - Defendant Answers Plaintiff's Second Interrogatories

2/25/13 - Plaintiff issues Third Interrogatories and Requests for Production to Defendants

2/27/13 Plaintiff issues Fourth Interrogatories to Defendant

3/14/13 - Defendant Answers Plaintiff's Fourth Interrogatories

3/28/13 - Defendant Answers Plaintiff's Third Interrogatories

2/25/13 - Plaintiff notices 30(b)(6) deposition for 4/12/13 (cancelled at request of Defendant via telephone call on 4/11/13)

5/24/13 - Plaintiff issues amended notice of Rule 30(b)(6) deposition for 7/10/13

7/9/13 - Defendant calls to asking to reschedule 30(b)(6) deposition scheduled for the following day

7/10/13 - Defendant deposes Plaintiff and her husband

7/22/13 - Plaintiff deposes Defendant's Rule 30(b)(6) designee, Rich Adams

7/22/13 - Defendant issues subpoena to Bryan Durig, P.E., Sumter Engineering

7/22/13 - Plaintiff's expert inspects Outback with Counsel of Record present

8/7/13 - Plaintiff issues Subpoena to T-Mobile

8/8/13 - Plaintiff takes video deposition of Dr. John Steichen

8/22/13 - Plaintiff issues subpoena to Lou Stella

9/30/13 - Plaintiff issues Notice of Deposition of Charles Smith for 10/15/13 and issues subpoena to procure witness attendance

9/30/13 - Plaintiff issues First Supplemental Answers to Defendants' First Set of Interrogatories

10/2/13 - Charles Smith personally served with subpoena, witness fee, mileage check and Notice of Deposition for 10/15/13

10/11/13 - Defense counsel sends e-mail notifying Plaintiff's counsel of scheduling conflict with 10/15/13 deposition of Charles Smith

10/14/13 - Plaintiff issues Amended Notice of Deposition for Charles Smith for 11/7/13

10/14/13 - Plaintiff issues Sixth Set of Interrogatories

10/15/13 - Plaintiff Issues Subpoena to Alan Campbell, P.E.

11/7/13 - Plaintiff deposes Charles Smith

11/16/13 - Defendant Answers Plaintiff's Sixth Set of Interrogatories

1/3/14 - Plaintiff issues Fourth Set of Requests for Production to Defendants

2/21/14 - Plaintiff issues Second Supplemental Answers to Defendant's First Set of Interrogatories and First Supplemental Responses to Defendants' Request for Production.

2/28/14 - Plaintiff issues subpoena to permit inspection of Outback Premises by Plaintiff's Human Factors expert

2/28/14 - Defendant files Motion for Summary Judgment

3/4/14 - Defendant deposes Dr. Clayton Lowder

3/5/14 - Defendant Issues Subpoena to Tracy Hill, P.T.

3/13/14 - Defendant files Motion to Quash Plaintiff's 2/28/14 subpoena and moves for a

Protective Order

3/14/14 - Defendant takes discovery deposition of Tracy Hill, P.T.; Plaintiff takes video deposition of Tracy Hill, P.T.

3/18/14 - Plaintiff's Human Factors expert inspects Defendant premises of premises with counsel present

3/24/14 - Plaintiff Files Motion to Compel

3/25/14 - Plaintiff issues Third Supplemental Answers to Defendant's First Set of Interrogatories

3/28/14 - Defendant responds to Plaintiff's Second Requests for Production

4/1/14 - Plaintiff deposes Defendant's Human Factors and Engineering expert, Alan Campbell

4/3/14 - Defendant Responds to Plaintiff's Fourth Set of Requests for Production

4/3/14 - Defendant e-mails Memorandum in Support of Motion for Summary Judgment to the Court and parties

4/6/14 - Plaintiff e-mails Defense Counsel outline of Memo in Opposition to Motion for Summary Judgment

4/7/14 - Summary Judgment hearing; Plaintiff hands up Memorandum of Law in Opposition to Motion for Summary Judgment with Exhibits

4/14/14 - Plaintiff issues Fifth Set of Requests for Production

4/22/14 - Plaintiff files Supplemental Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment with Exhibits A-K

6/2/2014 - Plaintiff's Motion to Compel Hearing Scheduled in Sumter Common Pleas

EXHIBIT D

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER	)	THIRD JUDICIAL CIRCUIT
Rebecca Jackson, Plaintiff,	)	CIVIL ACTION NUMBER: 2012-CP-43-707
vs.	)	**DEFENDANTS' SECOND SUPPLEMENTAL ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES**
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.	)	

TO: L. LISA MCPHERSON, ESQUIRE AND MELISSA G. MOSIER, ESQUIRE, ATTORNEYS FOR PLAINTIFF:

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, Defendants supplement their answers to Plaintiff's First Set of Interrogatories as follows:

12. List the names and addresses of all the employees of the Defendant who were present on the premises at the time of the incident set forth in the Complaint, their actions thirty (30) minutes prior to, at the time of, and thirty (30) minutes following the incident, together with their full names, addresses, telephone numbers, job titles, and the nature of the duties that they normally perform for the Defendant.

ANSWER: To be supplemented.

SUPPLEMENTAL ANSWER: In addition to the managing partner, Rich Adams, the following persons were employed by Outback Steakhouse on June 7, 2009; however, presently, it is not known which of them were actually working and when on June 7, 2009:

a. Shannon Nail;
b. Meghan Lynch;
c. Stephanie Barnes;

d. Alisha Winters;
e. Kelly Hageman;
f. Latifah Walker;
g. Alisha Maxon;
h. Larry Brunson;
i. Jacqueline Bodiford;
j. Cassandra Lowery;
k. Matilda Brown;
l. Lasonya Wilson;
m. Lisa Moseley;
n. Derrick Johnson;
o. Erika Carruth;
p. Dennis Seruya;
q. Aimee Lee.

16. Identify all standard operating procedures, manuals, training manuals, and any other documents or materials produced by Defendant concerning maintenance and cleaning of the outside premises of Outback Steakhouses to include public safety, outside walkways, ramps, handicap ramps, and parking lots.

ANSWER: To be supplemented.

SUPPLEMENTAL ANSWER: Please see copy Employee Orientation Handbook, marked 'CONFIDENTIAL' (Bates No. DEF0078-0102), which has previously been provided to Plaintiff in response to Plaintiff's Second Requests for Production.

Per the managing partner of this location, he is not in possession of any specific or particularized standard operating procedures, manuals, training manuals, and any other documents or materials regarding "outside walkways, ramps, handicap ramps, and parking lots."

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,
COLLINS & LACY, P.C.

By:

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ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina
April 3, 2014

EXHIBIT E

STATE OF SOUTH CAROLINA COUNTY OF SUMTER	)))	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT
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.	)))))))))))))	CIVIL ACTION NUMBER: 2012-CP-43-707 DEFENDANTS' ANSWERS TO PLAINTIFF'S THIRD SET OF INTERROGATORIES

TO: L. LISA MCPHERSON, ESQUIRE AND MELISSA G. MOSIER, ESQUIRE, ATTORNEYS FOR PLAINTIFF:

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, Defendants answer Plaintiff's Third Set of Interrogatories as follows:

PRELIMINARY RESPONSE

Defendants have not fully completed their investigation of the facts relating to this case, have not completed discovery, and have not completed its preparation for trial. All of the responses contained herein are based only upon such information and documents as are presently available to and specifically known to Defendants.

It is anticipated that further discovery, independent investigation, and legal research and analyses will supply additional facts and add new meaning to known facts, as well as establish new factual conclusions and legal contentions, all of which may lead to additions to, changes in and variations from the responses herein set forth.

The following responses are given without prejudice to Defendants' right to produce evidence and subsequently discovered documents. Defendants accordingly reserve the right to revise any and all responses herein as additional facts are ascertained and other factual and legal analyses are completed. The responses contained herein are made in a good faith effort to supply as much information and as much specification as is presently known, but should in no way be to the prejudice of Defendants in relation to further discovery research or analyses.

In the interest of cooperation in the discovery process, Defendants will voluntarily provide information as reasonably appropriate and will specifically or by reference to responses given by Defendants object where appropriate to discovery requests that are outside the scope of reasonable and permissible discovery under the applicable rules.

INTERROGATORIES

26. The name of the employee, person and/or entity who ordered the handicap ramp to be painted.

ANSWER: Richard Adams, Managing Partner.

27. The name of the company and person(s) who painted the ramp after the Plaintiff's fall of June 7, 2009.

ANSWER: Charles Smith of the Charles Smith Company.

28. Provide name of the employee/manager/entity or person who was involved in the decision-making process to paint the ramp after Plaintiff's fall.

ANSWER: Richard Adams, Managing Partner.

29. Provide the name of the entity and person(s) who generated any post-incident inspection report regarding the handicap ramp on the Defendant's property.

ANSWER: None, other than the reports and opinions provided by the experts retained on behalf of Plaintiff and Defendants.

30. State whether or not there was a security or surveillance camera which would capture the handicap ramp where the Plaintiff fell.

ANSWER: None.

31. Please provide the names of all employees, including managers and cooks, who were on the job on the afternoon of June 7, 2009, at the Outback where the Plaintiff fell.

ANSWER: The following employees were employed by Outback Steakhouse on June 7, 2009; however, it is not clear at this time which of them were actually working on June 7, 2009 specifically:

a. Shannon Nail;
b. Meghan Lynch;
c. Stephanie Barnes;
d. Alisha Winters;
e. Kelly Hageman;
f. Latifah Walker;
g. Alisha Maxon;
h. Larry Brunson;
i. Jacqueline Bodiford;
j. Cassandra Lowery;
k. Matilda Brown;
l. Lasonya Wilson;
m. Lisa Moseley;
n. Derrick Johnson;
o. Erika Carruth;
p. Dennis Seruya;
q. Aimee Lee.

32. Provide the names of all agents, servants, and/or employees who saw Ms. Jackson's fall.

ANSWER: None.

33. Please provide the names of any and all persons who reported Ms. Jackson's fall to emergency personnel and Outback Steakhouse.

ANSWER: Richard Adams, Managing Partner.

34. Provide the names of all agents, servants and/or employees who assisted Ms. Jackson after her fall.

ANSWER: Richard Adams, Managing Partner.

35. Identify the person(s) who called 911 after Ms. Jackson's fall.

ANSWER: Upon information and belief, Richard Adams, Managing Partner.

36. Identify the person(s) who took the photos taken and produced by Defendants (Bates # DEF0008-0010).

ANSWER: Richard Adams, Managing Partner.

37. Identify the employee who filled out an incident/accident report or similar report regarding the Plaintiff's fall.

ANSWER: Richard Adams, Managing Partner.

38. Identify the employee who called corporate and/or risk management to report the Plaintiff's fall.

ANSWER: Richard Adams, Managing Partner.

39. List any and all incidents involving the handicap ramp depicted in Exhibit A.

ANSWER: None to Defendants' knowledge.

40. List the name, contact information, job duties, and dates of employment for all janitors maintenance personnel, and security personnel for the building referenced above on June 7, 2009, and for two (2) years prior to the date.

ANSWER: None as it pertains to Outback-employed individuals.

41. Please provide the telephone numbers and addresses for the witnesses identified in Defendants' Answer to Plaintiff's First Set of Interrogatories, Number Eighteen (18).

ANSWER: Defendants are not in possession of the telephone numbers and addresses for the individuals identified in Defendants' Answers to Plaintiff's First Set of Interrogatories.

42. Please provide the name and contact information for any and all former and current agents, servants, and/or employees of the Outback Steakhouse who have fallen where this incident occurred.

ANSWER: None to Defendant's knowledge.

Respectfully submitted,
COLLINS & LACY, P.C.

By: _____

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ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina
28 March, 2014

EXHIBIT F

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THIRD JUDICIAL CIRCUIT
	)	
Rebecca Jackson,	)	Case No: 2012-CP-43-0707
	)	
Plaintiff,	)	
	)	
-vs-	)	
	)	PLAINTIFF'S FIFTH SET OF REQUESTS FOR PRODUCTION TO THE DEFENDANTS
Outback/Charlotte-I, L.P., 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.	)	

TO: CHRISTIAN STEGMAIER, ATTORNEY FOR THE ABOVE-NAMED DEFENDANTS:

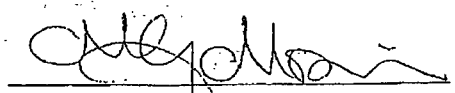
Pursuant to Rule 34 of the *South Carolina Rules of Civil Procedure,* the Plaintiff, above-named, hereby requests that the Defendants respond within thirty (30) days after the service hereof to the following requests, *to-wit,* that the Defendants produce and permit the undersigned attorney for said Plaintiff to inspect, copy, or photograph each of the following documents or things, which may be in the possession, custody, or control of the Defendants or their attorney(s):

1. Please produce a complete copy of the employee orientation video which is referenced in the Outback Employee Handbook (see Defense Bate stamp 0093).

2. Please produce the time in/out sheets for employees working at the Outback Steakhouse on the date of Mrs. Jackson's fall.

Signature page following

McWHIRTER, BELLINGER, & ASSOCIATES, P.A.

By: 

Melissa G. Moser
L. Lisa McPherson
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Lexington, South Carolina

April 14, 2014

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER) THIRD JUDICIAL CIRCUIT

RECORDED
2014 MAY 27 PM 1:58
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Rebecca Jackson,) Case No: 2012-CP-43-0707

Plaintiff,)

-vs-)

Outback/Charlotte-I, L.P., 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.)

PLAINTIFF'S BRIEF REGARDING TIMELINESS OF RULE 56(f) AFFIDAVIT

This matter comes before the Court pursuant to the Court's request for an explanation of the timeliness of her Rule 56(f) affidavit following a Motion for Summary Judgment. A hearing was held on Defendant's Motion for Summary Judgment April 7, 2014, in Sumter County. Christian Stegmaier, Esquire, appeared on behalf of the Defendants. Melissa Mosier, Esquire, and L. Lisa McPherson, Esquire appeared on behalf of the Plaintiff. The Court requested proposed Orders from both parties. On May 15, 2014, the Court e-mailed the parties notifying of its decision to grant summary judgment in favor of the Defendants.

DISCUSSION

The Rule 56(f) affidavit submitted on May 27, 2014 is timely because the order has not yet been entered. In *Christy v. Christy,* 354 S.C.203, 580 S.E.2d 444 (2003) the South Carolina Supreme Court held that a judge may alter or change the order in any way prior to delivery to the

Clerk of Court for filing. The notion that the judge retains ultimate discretion until the order is filed is well-settled: "[u]ntil the paper has been delivered by the judge to the clerk of court, to be filed by him as an order in the case, it is subject to the control of the judge, and may be withdrawn at any time before such delivery." *Archer v. Long,* 46 S.C. 292, 24 S.E. 83 (1896); *see also e.g., Bowman v. Richland Mem. Hosp.,* 335 S.C. 88, 515 S.E.2d 259 (Ct.App.1999)(citing *Archer v. Long*); *see also Ford v. State Ethics Comm'n,* 344 S.C. 642, 545 S.E.2d 821 (2001)("Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling"). Moreover, Rule 58(a) of the *South Carolina Rules of Civil Procedure* also provides that "A judgment is effective only when ... entered on the record." In addition, case law has fleshed out that the 2-day rule does not apply to Rule 56(f) affidavits. *Schmidt v. Courtney,* 357 S.C. 310, 321, 592 S.E.2d 326, 332 (Ct. App. 2003). Thus, until the order is signed and entered, the judge retains authority to alter the order.

Turning to the facts of this case, as Plaintiff's counsel mentioned at the Summary Judgment hearing, Plaintiff's Motion to Compel was outstanding at the time of Defendants' Motion for Summary Judgment and not yet scheduled for a hearing. At the summary judgment hearing, Plaintiff argued prematurity of the Motion for Summary Judgment in light of the outstanding Motion to Compel. Plaintiff again reiterated prematurity of the Motion for Summary Judgment in her filed Memorandum in Opposition to Summary Judgment and again in her proposed order. *See* Exhibit A - Plaintiff's Proposed Order Denying Summary Judgment[1]. Therefore, Plaintiff respectfully requests a ruling on prematurity - a matter previously raised.

In conclusion, with regard to the substance of the Rule 56(f) affidavit filed with the Court, the affidavit does not raise a new issue. Second, the Rule 56(f) affidavit is timely pursuant to Rule 58(a), *Schmidt, supra, and Christy, supra.* Third, the Rule 56(f) affidavit is part of Plaintiff's request for a ruling on a matter raised but not ruled on. Plaintiff had a motion to compel pending when the Defendant's Summary Judgment motion was heard. Plaintiff raised

---

[1]Plaintiff submitted two proposed orders in the alternative on May 6, 2014 - one order denying Defendant's Motion for Summary Judgment based on prematurity; the other proposed order denying Defendants' Motion for Summary Judgment on the merits.

prematurity at the hearing, and again in her Supplemental Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and again in one of her proposed orders. *See* Exhibit A.

For the reasons stated above, Plaintiff respectfully requests that this Court review the Rule 56(f) affidavit, as it is timely, for the sake of judicial economy and in an effort to avoid having to make a Rule 59 motion.

BY: McWHIRTER, BELLINGER & ASSOCIATES, P.A.

Melissa G. Mosier
Attorney for the Plaintiff
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Lexington, SC 29075
803-359-5523 - Office
803-996-9080 - Fax
Melissam@mcwhirterlaw.com

May 27, 2014

EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF SUMTER Rebecca Jackson, Plaintiff, -vs- Outback/Charlotte-I, L.P., 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.	)	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT Case No: 2012-CP-43-0707 **ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This matter comes before the Court pursuant to Defendants' Motion for Summary Judgment. A hearing was held on April 7, 2014, in Sumter County. Christian Stegmaier, Esquire, appeared on behalf of the Defendants. Melissa Mosier, Esquire, and L. Lisa McPherson, Esquire appeared on behalf of the Plaintiff.

FACTS

Mrs. Jackson and her husband, both residents of Sumter County, went to the Defendant's restaurant after church on Sunday, June 7, 2009. While Mr. and Mrs. Jackson's vehicle had a handicap decal on their vehicle enabling them to parking in a handicap space in front of the Outback, all of those spots were occupied at the time of their arrival to the Outback parking lot. Rebecca Jackson Dep. 41:17-22. Therefore, the Jacksons parked in one of the general customer parking spaces and walked through the parking lot to get to the restaurant. Mrs. Jackson can recall having

visited this Outback Steakhouse just once before - a couple years ago. Rebecca Jackson Dep. 19:18-23. As Mrs. Jackson and her husband entered the Outback from the parking lot, they walked up the front, center ramp referred to by the parties as Ramp #2. (Plaintiff's Exhibit A).

Mr. and Mrs. Jackson enjoyed a nice meal that Sunday afternoon, when alcohol is not served at the restaurant. Rebecca Jackson Dep. 22:22-23:1. As Mrs. Jackson and her husband departed the restaurant, the parking lot in front of the restaurant was full, as was the front ramp. Therefore, Mr. and Mrs. Jackson proceeded down Ramp #3. Rebecca Jackson Dep. 34:10-12. (Plaintiff's Exhibit A).

In other words, instead of walking between vehicles and stepping off the curb, Mrs. Jackson exited the restaurant, turned left, and started down the concrete sidewalk towards her car. Seeing a larger space through which to navigate towards her car, Mrs. Jackson proceeded down what she later determined to be a ramp. The sidewalk and the ramp are both the same color concrete. *(See* Plaintiff's Exhibits B & C). She did not notice the change in elevation of the ramp, stating that the ramp was "uneven, it was unpainted, [and it] all blended together." Rebecca Jackson Dep. 33:6-7. As a result, after just a step or two onto the ramp, Mrs. Jackson started falling. 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. Rebecca Jackson Dep. 67:11-25, 68:1-3. (Plaintiff's Exhibits D &E). Mrs. Jackson was unable to get up on her own power after her fall. She suffered three (3) broken ribs, immediate back pain, skinned hands, and a skinned knee. Rebecca Jackson 66:1-21. Mrs. Jackson has since undergone a regimen of medications and physical therapy, but when conservative treatments failed, Mrs. Jackson had no choice but to undergo back surgery. Defendants move for summary judgment alleging that the Defendants do not owe a duty of care to the Plaintiff.

STANDARD OF REVIEW

South Carolina Rule of Civil Procedure Rule 56 governs Defendants' Motion. To obtain summary judgment, the moving party must demonstrate there is "no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Rule 56(c), *SCRCP*. This showing is most commonly made by using the pleadings, depositions, answers to interrogatories, admissions on file, and/or affidavits filed in support of the motion. Rule 56(c),(e), *SCRCP*.

Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). In addition, the movant must also show that further inquiry into the facts is not desirable to clarify the application of the law. 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. *Rice v. School Dist. of Fairfield*, 317 S.C. 87, 452 S.E.2d 352, 96 Ed. Law Rep. 1210 (Ct. App. 1994); *Moshtaghi v. The Citadel*, 314 S.C. 316, 443 S.E.2d 915, 91 Ed. Law Rep. 686 (Ct. App. 1994); *Koester v. Carolina Rental Center, Inc.*, 313 S.C. 490, 443 S.E.2d 392, Prod. Liab. Rep. (CCH) P 13862 (1994).

When the moving party makes and supports a motion for summary judgment, the opposing party may not rest upon "the mere allegations or denials of his pleading." Rule 56(e), *SCRCP*. Instead, the party opposed to the motion must show there is a genuine issue for trial by use of the same methods used to support a motion for summary judgment. Rule 56(e), *SCRCP*. *See also City of Columbia v. Town of Irmo*, 316 S.C. 193, 447 S.E.2d 855 (1994).

The party opposing summary judgment need not come forward in any way. But if the record is devoid of any allegation or evidence indicating that there is a material fact at issue, the moving

party is entitled to summary judgment as a matter of law. *Milligan v. Liberty Life Ins. Co.* 313 S.C. 478, 443 S.E.2d 381 (1994).

In ruling on a motion for summary judgment, the evidence and inferences to be drawn therefrom should be viewed in a light most favorable to the nonmoving party. 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, 511 S.E.2d 69 (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. *Id.* If inferences properly deducible from controverted evidence are doubtful, or tend to show both parties of negligence, and there may be fair difference of opinion as to whose act proximately caused the injury complained of, the question must be submitted to a jury. *Richardson v. Piggly Wiggly Cent. Inc.*, 404 S.C. 231, 743 S.E.2d 858 (Ct. App. 2013).

DISCUSSION

I. A motion for summary judgment is premature when discovery has not yet come to a conclusion.

Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). Four days before the hearing on Defendants' Motion for Summary Judgment, and subsequent to Plaintiff's Motion to Compel, Defendants provided the names of Outback employees as of the date of Mrs. Jackson's fall. Defendants were unable to identify which of the Outback employees was actually working on the date of Plaintiff's fall, as requested. Plaintiffs have not had

an opportunity to question any of these employees to determine their knowledge of prior falls or complaints, if any, on the subject ramp where Mrs. Jackson fell.

As Plaintiff pointed out during oral argument and in her Memorandum, testimony of Defendant employees is often used to help establish actual and constructive notice of hazards. *See, e.g., Baker v. Toys-R-Us, Inc.* 133 F. 913 (1998 WL 7939(4th Cir. 1998); *Cook v. Food Lion, Inc.*, 328 S.C. 324, 491 S.E.2d 690 (Ct. App. 1997).

In addition, in reviewing the discovery responses provided April 3, Plaintiff seeks production of the Outback employee orientation video referenced in DEF 0093 and a discovery request has been submitted. This information, Plaintiff has argued, is probative because whereas the Defendant's Motion for Summary Judgment is premised on the lack of a duty towards the Plaintiff, the standard of care in this case 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). While Defendants have produced a portion of their training materials directly responsive to Plaintiff's request for production, Plaintiff's review of the discovery logically led to an additional request for information, a training video, referenced within the employee training documents.

Moreover, at this time Defendants have been unable to provide the incident reports leading up to Mrs. Jackson's fall. Plaintiff asserts that these are probative and, as they are kept by the Defendants' insurer, Wells Fargo, should be readily attainable by the Defendants. The incident reports, Plaintiff argues, could help shed light on the extent of notice to the Defendants of the dangerous condition, and the indifference to remedy or repair the ramp at issue.

CONCLUSIONS OF LAW

Based on the above findings, I find and conclude the following as a matter of law:

that as discovery has not yet reached a conclusion, and that because summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (1999). Defendants have yet to identify which of its employees were working on the date of the Plaintiff's fall and which are still employed by the Defendants. Plaintiff seeks to depose these employees, as the testimony of Defendant employees is often used to help establish actual and constructive notice of hazards. *See, e.g., Baker v. Toys-R-Us, Inc.* 133 F. 913 (1998 WL 7939(4th Cir. 1998); *Cook v. Food Lion, Inc.*, 328 S.C. 324, 491 S.E.2d 690 (Ct. App. 1997).

In addition, Plaintiff's counsel has continued issuing discovery in light of Defendants' most recent discovery responses to assist the Plaintiff in determining the standard of care. It is well-settled that this Court can rely on a Defendant's training materials to illuminate the standard of care, along with other sources. *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006). Because Defendant premises his Motion for Summary Judgment on the defense that the standard of care was not breached, Defendant's Motion for Summary Judgment is premature and this Court refuses to deprive the Plaintiff of the opportunity to present her case to a jury. Based on the above conclusions of law, as stated above, it is hereby ORDERED that the Defendants' Motion for Summary Judgment is, therefore, DENIED and the matter shall proceed.

The Honorable W. Jeffrey Young
Presiding Judge, Third Judicial Circuit

May __, 2014

STATE OF SOUTH CAROLINA COUNTY OF SUMTER Rebecca Jackson, Plaintiff, -vs- Outback/Charlotte-I, L.P., 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.	)	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT Case No: 2012-CP-43-0707 **PLAINTIFF'S *SUPPLEMENTAL* MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

NOW COMES the Plaintiff, by and through her undersigned attorneys, and herewith submits this Supplemental Memorandum of Law in Opposition to the Defendants' Motion for Summary Judgment along with supporting affidavit and other exhibits, which matter is pending in the Court of Common Pleas in and for the Third Judicial Circuit, Sumter, South Carolina and would respectfully show unto this Honorable Court as follows:

GENERAL PRINCIPLES: STANDARD OF REVIEW

South Carolina Rule of Civil Procedure Rule 56 governs Defendants' Motion. To obtain summary judgment, the moving party must demonstrate there is "no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Rule 56(c), *SCRCP*. This showing is most commonly made by using the pleadings, depositions, answers to interrogatories, admissions on file, and/or affidavits filed in support of the motion. Rule 56(c),(e), *SCRCP*.

Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). In addition, the movant must also show that further inquiry into the facts is not desirable to

clarify the application of the law. 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. *Rice v. School Dist. of Fairfield,* 317 S.C. 87, 452 S.E.2d 352, 96 Ed. Law Rep. 1210 (Ct. App. 1994); *Moshtaghi v. The Citadel,* 314 S.C. 316, 443 S.E.2d 915, 91 Ed. Law Rep. 686 (Ct. App. 1994); *Koester v. Carolina Rental Center, Inc.*, 313 S.C. 490, 443 S.E.2d 392, Prod. Liab. Rep. (CCH) P 13862 (1994).

When the moving party makes and supports a motion for summary judgment, the opposing party may not rest upon "the mere allegations or denials of his pleading." Rule 56(e), *SCRCP.* Instead, the party opposed to the motion must show there is a genuine issue for trial by use of the same methods used to support a motion for summary judgment. Rule 56(e), *SCRCP. See also City of Columbia v. Town of Irmo,* 316 S.C. 193, 447 S.E.2d 855 (1994).

The party opposing summary judgment need not come forward in any way. But if the record is devoid of any allegation or evidence indicating that there is a material fact at issue, the moving party is entitled to summary judgment as a matter of law. *Milligan v. Liberty Life Ins. Co.* 313 S.C. 478, 443 S.E.2d 381 (1994).

In ruling on a motion for summary judgment, the evidence and inferences to be drawn therefrom should be viewed in a light most favorable to the nonmoving party. 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, 511 S.E.2d 69 (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. *Id.* If inferences properly deducible from controverted evidence are doubtful, or tend to show both parties of negligence, and there may be fair difference of opinion as to whose act proximately caused the injury complained of, the question must be submitted to a jury. *Richardson v. Piggly Wiggly Cent. Inc.,* 404 S.C. 231, 743 S.E.2d 858 (Ct. App. 2013).

FACTS

Mrs. Jackson and her husband, both residents of Sumter County, went to the Defendant's

restaurant after church on Sunday, June 7, 2009. While Mr. and Mrs. Jackson's vehicle had a handicap decal on their vehicle enabling them to parking in a handicap space in front of the Outback, all of those spots were occupied at the time of their arrival to the Outback parking lot. Rebecca Jackson Dep. 41:17-22. Therefore, the Jacksons parked in one of the general customer parking spaces and walked through the parking lot to get to the restaurant. Mrs. Jackson can recall having visited this Outback Steakhouse just once before - a couple years ago. Rebecca Jackson Dep. 19:18-23. As Mrs. Jackson and her husband entered the Outback from the parking lot, they walked up the front, center ramp referred to by the parties as Ramp #2. (Exhibit A).

Mr. and Mrs. Jackson enjoyed a nice meal that Sunday afternoon, when alcohol is not served at the restaurant. Rebecca Jackson Dep. 22:22-23:1. As Mrs. Jackson and her husband departed the restaurant, the parking lot in front of the restaurant was full, as was the front ramp. Therefore, Mr. and Mrs. Jackson proceeded down Ramp #3. Rebecca Jackson Dep. 34:10-12. (Exhibit A).

In other words, instead of walking between vehicles and stepping off the curb, Mrs. Jackson exited the restaurant, turned left, and started down the concrete sidewalk towards her car. Seeing a larger space through which to navigate towards her car, Mrs. Jackson proceeded down what she later determined to be a ramp. The sidewalk and the ramp are both the same color concrete. *(See* Exhibits B & C). She did not notice the change in elevation of the ramp, stating that the ramp was "uneven, it was unpainted, [and it] all blended together." Rebecca Jackson Dep. 33:6-7. As a result, after just a step or two onto the ramp, Mrs. Jackson started falling. 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. Rebecca Jackson Dep. 67:11-25, 68:1-3. (Exhibits D &E). Mrs. Jackson was unable to get up on her own power after her fall. She suffered three (3) broken ribs, immediate back pain, skinned hands, and a skinned knee. Rebecca Jackson 66:1-21. Mrs. Jackson has since undergone a regimen of medications and physical therapy, but when conservative treatments failed, Mrs. Jackson had no choice but to undergo back surgery.

PROCEDURAL HISTORY

Plaintiff filed a complaint against the Defendants on April 16, 2012, which was amended on June 7, 2012. Defendants attempted to remove the case, but the District Court remanded the matter on May 25, 2012 due to a lack of subject matter jurisdiction.

The case has proceeded through discovery, and Defendants have deposed both Plaintiff and her husband, and Plaintiff has deposed Mr. Adams, Mr. Smith, and Mr. Alan Campbell, P.E. On February 28, 2014 Defendant's filed a Motion for Summary Judgment indicating seven (7) bases to dispose of the Plaintiff's case without the benefit of a trial by jury. The Motion did not cite any case law or statutes in support of the motion. Plaintiff filed a motion to compel after repeated attempts to procure discovery. Defendants produced some of the requested discovery, but has failed to produce incident reports predating Plaintiff's fall, as Plaintiff requests. Just before eleven in the evening on Friday, April 4, 2014, Defendant's sent its memorandum in support of the motion for summary judgment narrowing the bases of its motion to tell this Court that Plaintiff's entire theory of liability is based on a violation of codes that do not apply in the instant case.

In response, Plaintiff's counsel again reiterated the need for incident reports yet to be produced in discovery, in light of previous conversations that a motion for summary judgment is premature before the conclusion of all discovery. In addition, Plaintiff sent Defendant's counsel an e-mail highlighting the points Plaintiff would make in her Memorandum in Opposition to the motion for summary judgment as to the merits of the motion.

At oral argument and for the first time, Counsel for the Defendants handed up and discussed South Carolina cases, providing only case names to Plaintiff's counsel. As a result, this Court granted Plaintiff's counsel fifteen (15) days to supplement her Memorandum in Opposition to the Defendants' Motion for Summary Judgment and provide supporting affidavits instead of signed reports and thirty (30) days to submit a proposed order.

DISCUSSION

I. As a threshold matter, a motion for summary judgment is premature when discovery has not yet come to a conclusion.

Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (1999). Just Thursday, April 3, Defendants provided the names of Outback employees as of the date of Mrs. Jackson's fall. Defendant was unable to identify which of the Outback employees was actually working on the date of Plaintiff's fall, as requested. Plaintiffs have not had an opportunity to question any of these employees to determine their knowledge of prior falls or complaints, if any,

on the subject ramp where Mrs. Jackson fell. Testimony of Defendant employees is often used to help establish actual and constructive notice of hazards. *See, e.g., Baker v. Toys-R-Us, Inc.* 133 F. 913 (1998 WL 7939(4th Cir. 1998); *Cook v. Food Lion, Inc.*, 328 S.C. 324, 491 S.E.2d 690 (Ct. App. 1997)

In addition, in reviewing the discovery responses provided April 3, Plaintiff seeks production of the Outback employee orientation video referenced in DEF 0093 and a discovery request has been submitted.

Defendants have further failed to provide the incident reports leading up to Mrs. Jackson's fall. Plaintiff believes that these are probative and, as they are kept by Wells Fargo, should be readily attainable by the Defendants. Because the incident reports could help shed light on the extent of notice to the Defendants of the dangerous condition, and the indifference to remedy or repair the ramp at issue, Plaintiffs seek an Order Compelling Production of the incident reports, and a finding that this Motion for Summary Judgment is premature in light of Plaintiff's review of the last set of discovery responses produced by the Defendants.

II. Turning to the merits of the defendants' motion should this Court proceed with a ruling, regardless of the applicability of industry standards such as ANSI and the International Property Maintenance Code, Outback owes a common law duty of care to the Plaintiff, an invitee, to exercise due care to keep the premises in a reasonably safe condition.

Defendants owe a duty of care to Mrs. Jackson by virtue of her uncontroverted status as an invitee.[1] The existence of statutes, regulations or industry standards has no bearing whatsoever on the existence of a duty. The time to consider relevant standards of care from various sources is in determining whether the Defendants breached the duty of care. *Madison ex rel. Bryant v. Babcock*

[1]In her Complaint, Plaintiff alleges that she is an invitee , that Defendants had actual or constructive notice of the dangerous condition of the ramp, and that because Mrs. Jackson is a customer of the Defendant, Outback, Outback owes her a duty of care. Amended Compl. ¶¶13,14,15. Plaintiff further alleges that Outback created the property and knowingly permitted a rounded, uneven walking surface to remain on the premises, and that as a result, the Defendant "created a dangerous condition in an area where it was foreseeable that customers would be walking." Amended Compl. ¶16.

Center, Inc., 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006).

A person owes an invitee the duty of exercising reasonable or ordinary care for his 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). An owner or possessor of a business held open to the public owes the same duties and bears the same responsibility in case of a violation of the duty owed. *Pennington v. Zayre Corp.*, 252 S.C. 176, 165 S.E.2d 695 (1969). Although a merchant is not an insurer of the safety of his customers, he owes a duty to keep aisles and passageways in a reasonably safe condition. *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 542 S.E.2d 728 (2001); *Moore v. Levitre*, 294 S.C. 453, 365 S.E.2d 730 (1988).

Under this rule, to recover damages for injuries caused by a dangerous or defective condition on a restaurant's premises, the plaintiff must show either (1) that the injury was caused by a specific act of the defendant which created the dangerous condition; or (2) that the defendant 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); *Pennington v. Zayre Corp.*, 252 S.C. 176, 165 S.E.2d 695 (1969); *Hunter v. Dixie Home Stores*, 232 S.C. 139, 101 S.E.2d 262 (1957).

An invitee, such as the Plaintiff, is a person who enters the premises of another at the express or implied invitation of the owner or possessor. *Parker v. Stevenson Oil Co.*, 245 S.C. 275, 140 S.E.2d 177 (1965). It is well-settled that the degree of care as to an invitee "must be commensurate with the particular circumstances involved, *including the age and capacity of the invitee.* This duty is an active or affirmative duty. *It includes refraining from any act which may make the invitee's use of the premises dangerous or result in injury to him.*" *Lowrimore v. Fast Fare Stores, Inc.*, 299 S.C. 418, 385 S.E.2d 218 (Ct. App. 1989) citing *Graham* at 398, 321 S.E.2d at 43 (emphasis supplied in *Lowrimore*). This duty of care is a creature of the common law, not statute, regulation, or industry standard.

Turning to the facts of this case, the Plaintiff, Mrs. Jackson, was sixty-five (65) years old at the time of her fall, and had bilateral knee replacements before her fall. Therefore, it was not unusual for Mrs. Jackson to choose to navigate her path by using ramps as opposed to steps. Rebecca Jackson Dep: 44:1-24. Defendants' own line of questioning to the Plaintiff during her deposition recognizes the fact that unmarked curb ramps such as those in front of the Outback are

not exclusively for use by people in wheelchairs, but "people who can maybe walk but not walk as well as other folks[.]" Rebecca Jackson Dep. 52:20-21.

In light of the circumstances set forth above and the testimony Defendants owe a duty of care to Mrs. Jackson by virtue of her status as an invitee. The existence of statutes, regulations or industry standards has no bearing whatsoever on the existence of a duty in this case. The time to consider relevant standards of care from various sources is in determining whether the Defendants breached the duty of care. *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006).

In conclusion, the Plaintiff asks this Court to find that Defendants unquestionably owe a duty to Mrs. Jackson by virtue of her status as an invitee. The notion that the Outback does not owe a duty to an invitee such as the Plaintiff is an unsupportable position as a matter of law for the reasons cited above.

a. **Because Defendants admit they created the alleged danger posed by the built up curb ramp at issue, the Plaintiff need not prove that the Defendants knew of the specific hazards posed by the ramp.**

In *Baker v. Toys–R–Us Inc.*, 133 F.3d 913 (1998 WL 7939)(4th Cir.1998)(applying South Carolina law), the Fourth Circuit Court of Appeals, analyzed the distinction between a "created danger" case and a "foreign substance" case. In *Baker*, the key issue was whether the case involved a dangerous condition created by the merchant or if it involved a condition relating to a foreign substance, for which the merchant is liable only if it had actual or construction knowledge of the specific hazard and failed to remedy it. *Id.* at 3. The distinction is important because in the case of a created danger, it is not necessary to show that the Defendant had notice of the particular hazard. *See Baker v. Toys-R-Us, Inc.* 133 F. 913 (1998 WL 7939(4th Cir. 1998) citing *Cook v. Food Lion, Inc.*, 328 S.C. 324, 327, 491 S.E.2d 690, 691-92 (Ct. App. 1997). In other words, to prove negligence, the plaintiff must show *either* that the defendant or defendant's employees created the condition, *or* that the defendant had "notice" of it. *Anderson v. Racetrac Petroleum, Inc.*, 296 S.C. 204, 205, 371 S.E.2d 530, 531 (1988); *Gillespie*, 302 S.C. at 91, 394 S.E.2d at 24.

There is a strong public policy reason for treating "created hazard" cases differently from

"foreign substance" cases. In the case of dangerous conditions created when store customers drop products on the floor, for instance, the danger is a necessary consequence of the retail business. Such foreign substance hazards are necessarily reasonable as a matter of law so long as they are remedied when discovery. *Richards v. Great Atl. Pac. Tea Co.*, 226 S.C. 119, 122, 83 S.E.2d 917, 918 (1954)(Where "the defect results from the unauthorized act of another, the storekeeper is held only to reasonable care in the discovery and remedy or removal of it."). Any other result renders a storekeeper the insurer of customers' safety. But the same public policy concern is not present when the danger at issue is not inherent to the business. *Baker*, 133 F.3d at 5. In fact, "when an unreasonably hazardous condition is created by the proprietor, he breaches his duty of care and is held liable." *Id.*

Defendants openly conceded at oral argument that Defendants created the alleged dangerous condition - the built up curb ramp where Mrs. Jackson fell. *See* Exhibit B. As a result, Plaintiff need not prove that the Defendants knew of the specific fall hazard posed by the ramp.

III. In keeping with the well-settled case law of this State, this Court may appropriately consider relevant standards of care from various sources in determining whether the Defendants violated the duty owed to Mrs. Jackson

In regard to negligence, South Carolina law provides that "[t]he factfinder may consider relevant standards of care from various sources in determining whether a defendant breached a duty owed to an injured person in a negligence case." *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006). "The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines." *Id.*

The general rule is that 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)[2] citing *Walheim v. Kirkpatrick*, 305 Pa.Super. 590, 451 A.2d 1033, 1034-35 (1992) (holding that safety standards regarding the safe design and use of trampolines, including ASTM

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[2]In *Ellege*, the South Carolina Supreme Court held that the trial court abused its discretion in refusing to permit Plaintiff's Counsel from using Consumer Product Safety Commission and ASTM standards to establish the standard of care in a negligence case.

standards, were admissible on the issue of defendant's negligence, even though the defendants were unaware of the standards); *Stone v. United Eng'g*, 197 W.Va 347, 475 S.E.2d 439, 453-55 (1996) (no error to admit evidence of safety standards for the design and guarding of conveyors even though the standards at issue had not been imposed by statute and did not have the force of law); *see generally* Daniel E. Feld, *Annotation, Admissibility in Evidence, on Issue of Negligence, of Codes or Standards of Safety Issued or Sponsored by Governmental Body or by Voluntary Association*, 58 A.L.R.3d 148, 154 (1974) (the modern trend is to admit safety codes on the issue of negligence). As our South Carolina Supreme Court recognized in *Ellege v. Richland/Lexington School District*, 352 S.C. 179, 186, 573 S.E.2d 789, 794 (2002) "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.'" citing *McComish v. DeSoi*, 200 A.2d at 121.

Evidence is relevant and admissible if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rules 401, 402, *SCRE*.

Defendant's engineer agrees that pedestrians commonly walk on what laypersons may refer to as "handicap ramps." Mr. Campbell testified, and Mr. Durig agrees, that the ramp where Mrs. Jackson fell is not a "handicap ramp," *per se*, but is, instead, a "built up curb ramp" that is available for use by all pedestrians.[3]

a. **ANSI A117.1 is relevant to this case[4] because it not only helps illustrate prevailing safety practice in the industry, but for three additional reasons: (1)**

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[3]Mosier: Built-up curb ramps, that's not necessarily the same thing as a handicap ramp, is it?

Campbell: No. Campbell Dep. 39:11-14
Mosier: And built up curb ramps then are not just for use by handicapped people, are they?
Campbell: Can be sued[sic] by anybody. Campbell Dep. 39:15-18
Mosier: Like Mrs. Jackson?
Cambpell: Correct. There's nothing that stops her from using it, that's correct. Campbell Dep. 39:18-20

[4]As are the International Property Maintenance Code and the International Building Code

The Standard Building Code[5] references ANSI A117.1; (2) Defendants' engineer testified that ANSI A117.1 provides the objective criteria to construct the ramp that is the subject of this case; (3) ANSI A117.1 provides the basis for the Defendant engineer's recommendation[6] to tear down and rebuild the ramp that is the subject of this case.

Evidence of objective safety standards is generally offered in connection with expert testimony which identifies the standards as illustrative evidence of safety practices or rules prevailing in the industry, and as such, it provides support for the expert's opinion concerning the proper standard of care. *Ellege, supra,* citing *McComish,* 200 A2d at 121.

In rendering his opinion Plaintiff's expert engineer, Bryan Durig, referenced objective industry standards - ANSI A117.1 - in evaluating the built up curb ramp at issue in this case. (Exhibit F - Bryan Durig's October 2, 2012 Report; Exhibit G - Bryan Durig's Affidavit; Campbell Dep. 43:7-18[7]). As his report states, ANSI A117.1 standards are industry standards adopted by building codes, and they specifically address the proper slope geometry of a built up curb ramp.[8] *There is no dispute among the experts that the Standard Building Code applies in this case, and that*

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[5]Campbell Dep. 54:25 "The Standard Building Code, absolutely applies."

[6]Over Defense counsel's objection.

[7]Mosier: Mr. Campbell, if we instead took your deposition in your office in Charleston instead of at your lawyer's office here in Columbia, would we go back and find ANSI A117.1 standards in your office?
Campbell: You would.
Mosier: Would you say that those are authoritative?
Campbell: They are.
Mosier: Would you agree that ANSI A117.1 provides industry standards?
Stegmaier: Object to the form.
Campbell: You can call them industry standards.
Mosier: When folks are building a built up curb ramp, would you think it's advisable for them to call on someone like you for advice on whether or not this ramp is safe for use?
Campbell: Well, the first thing I'm going to tell them to do is refer to the building code and the ANSI standards and ADA."

[8]Defendant's engineer agrees: "ANSI would not be specifically adopted, not likely. It's incorporated by reference and adopted through the building code." Campbell Dep. 26:7-9.

the Standard Building Code adopts ANSI A117.1 by reference. *See* Exhibit F, p. 2 - Bryan Durig's October 2, 2012 Report; and Exhibit H, p. 3 - Alan Campbell's December 16, 2013 Report); Campbell Dep. 41:3-25.

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). The plain language of this standard contemplates that pedestrians will walk on the top of, or what is referred to as the "running slope" of the ramp.[9] The Defendant's engineer agrees: "I mean it's foreseeable that this ramp is going to be used by the general population." Campbell Dep. 81:19-21. It also 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.

To be sure, when specifically asked whether it is foreseeable that the Plaintiff would use one of the ramps in front of Outback, Mr. Campbell agreed, and stated that "I think it's entirely foreseeable she would have likely used one of the ramps." Campbell Dep. 90:19-21; *see also* Campbell Dep. 109:13-16 ("Mosier: Now, would you agree with me that in this case Mrs. Jackson's case, that the curb ramp that we're talking about is in the foreseeable pedestrian [path] in and out of the Outback? Campbell: It is")

Defendant's engineer also conceded at his deposition that in constructing the ramp at issue in this case, we can assume that the builders aimed to construct the built up curb ramps in accordance with ANSI A117.1. Campbell Dep. 129:7-9.[10] This is so in light of ANSI's mission statement: "To assure the safety and health of consumers and the protection of the environment." Campbell Dep. 129:23-131:1. ANSI's mission statement does not distinguish between able-bodied consumers and consumers with disabilities, as Mr. Campbell agrees. Campbell Dep. 131:7-12. In other words:

Mosier: "[ANSI's] got to come up with standards that are for the 95 percent, like you were

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[9]Mosier: Do you agree that ... pedestrians walk on ramps in the normal day-to-day life? Campbell: Sure they do." Campbell Dep. 34:13-16

[10](Mosier: We would assume [the builder was] trying to comply with ANSI A117.1, correct? Campbell: That's my point, yeah.); see also Campbell Dep. 129:17-22 Mosier: So doesn't it make sense that they were trying to comply with ANSI A117.1 perhaps? Cambpell: Sure. Mosier: And they would want to have complied with that standard? Campbell: I would think so, sure.".

saying, correct? Campbell: Correct, yes."

To this end, Plaintiff's counsel asked Mr. Campbell, a Professional Engineer and consultant by trade, if he would recommend a plan to fix the built up curb ramps outside of the Defendant's restaurant, to which he replied: "If I were working for Outback Steakhouse and they asked my opinion then we would address those ramps, yes." Campbell, Dep. 63:8-13. But the Defense engineer did not stop there:

Mosier: [L]et's say, Mr. Adams who manages - is the managing partner of this Outback, do you recommend to him that he fix these ramps?

Stegmaier: Object to the form.

Campbell: Yeah, he has a liability there. Sure, it should be addressed.

Mosier: Would you agree, Mr. Campbell, it's a liability to all customers of the Outback?

Stegmaier: Object to the form.

Campbell: I'm not sure how you – I mean, if it's a liability to him I think - I think somehow it's a liability to everyone using the – using that location." Campbell Dep. 63:8-64:1-2.

Mosier: Would you recommend to Mr. Adams, the managing partner of this Outback, that these ramps need to be modified to keep his customers safe?

Stegmaier: Object to the form.

...

Campbell: [I]s it an outright deadly dangerous condition, no. Is it a condition that could cause someone to fall down, it could."Campbell Dep. 64:7-65:1-6.

Plaintiff and Defendant's engineers opines and agree that the ramp at issue in this case is over 50% too steep on the running slope and too steep on the flared side by 17% according to the objective standards set forth by ANSI A117.1.[11] *Id.* Both experts further observe that the edge of

[11]Both the 1998 and 1992 version of ANSI A117.1 are virtually identical, with very minor deviations. While Plaintiff's expert relied on the 1998 version and Defendant's engineer states that the 1992 version is the correct year to cite, there is no substantive deviation between the standards cited. Campbell Dep. 23:14-321-24.

Moreover, per the Department of Labor, Licensing and Regulation's website, the mandatory building codes adopted for current use in South Carolina "and which must be enforced by local jurisdictions" include the International Building Code and the 1998 ICC/ANSI A117.1 Accessible and Useable Buildings and Facilities. In addition and per LLR's website,

the curb and ramp were not painted safety yellow at the time of Mrs. Jackson's fall, but that ANSI A117.1 does not require the ramp to be painted. *Id.* Both experts agree that the side flares of the curb ramp at issue protrude into parking spaces, which is also a violation of the ANSI A117.1 standard. *Id.*

Where the Plaintiff and Defense engineers diverge in opinion is this: Mr. 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. Mr. Campbell, the Defendant's engineer, opines that violation of the standards set forth in ANSI A117.1 did not contribute to Mrs. Jackson's fall,[12] instead stating that many other factors are the more probable cause of her fall: Plaintiff's choice of footwear, possible intoxication, eyesight, distractions, or drug use.[13] Throughout his deposition, Mr. Campbell also testifies that, while the ramps were likely intended to be built in compliance with ANSI A117.1, those safety standards were not intended to protect Mrs. Jackson. (Exhibit H, p. 3 -

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"[a]s permitted by Section 6-9-90 of the South Carolina Code of Laws, 1976 as amended, "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 include the 2003 International Property Maintenance Code. (Exhibit K).

[12]Even though:

Mosier: Industry standards, you like to rely on those, those are important, correct?

Campbell: Applicable industry standards, yes.

Mosier: Okay. Are there any – since – are there any other industry standards that apply in this case that we haven't already discussed?

Campbell: I think we covered most of them. We've covered the building code, we've covered ANSI, we've covered ADA. There may be an ASTM standard, but I think we've covered the majority of them." Campbell Dep. 58:19-591-3.

[13]As to each of the "contributing factors" Mr. Campbell cites: (1) choice of footwear: Mr. Cambpell has never asked for or inspected Plaintiff's shoes. Moreover, she does not have a history of falling. (2) intoxication: Outback does not serve alcohol on Sundays and Mrs. Jackson dos not drink. (3) eyesight: Mrs. Jackson was wearing glasses at the time of her fall, as depicted in photographs taken at the scene by an independent witness. Further, Defendant's engineer has not reviewed or requested for review any of Mrs. Jackson's eye records. (4) distractions: there is no evidence - by way of testimony or otherwise - that Mrs. Jackson was distracted at the time of her fall. (5) drug use: there is no evidence to substantiate the very notion that Mrs. Jackson is a drug user, and such an unsubstantiated allegation is insulting to the Plaintiff.

Alan Campbell's December 16, 2013 Report). Because the ramp at issue was more likely than not created with the specific intent to come into compliance with ANSI A117.1, it is fair to apprise its safety by the same standard. Plaintiff urges this Court to consider the implications of the Defendants' position on the applicability of ANSI A117.1 and agree that it is not only disingenuous, but it does not make sense.

I. "Mobility impairment" is not a *sine qua non* for ANSI A117.1 applicability

Defendant's engineer opines that ANSI A117.1A does not apply because Mrs. Jackson was not "mobility impaired."[14] However, as Defendant's engineer read into the record, the purpose of ANSI A117.1 is very broad, and it is to "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 sides based only upon adult dimensions." Campbell Dep. 33:10-34:1-1 citing ANSI A117.1 *Accessible and Usable Buildings and Facilities* (1992) and (1998) (emphasis supplied); Exhibit G - Bryan Durig's Affidavit. Thus, ANSI standards were not just written for consumers who are not able bodied, but for people with all types of infirmities, including sensory infirmities.

During his deposition, Defendant's engineer agreed that the running slope on the top of the ramp exceeds the maximum allowable slope according to ANSI A117.1 by 55%, and that the side slopes are 17% too steep. Campbell Dep. 75:9-24; 77:7-12. He further testified that a ramp that is 55% too steep on the top and 17% too steep on the side would be a flaw imperceptible to Mrs. Jackson - she could not see this defect or feel this defect as she walked. Campbell Dep. 76:4-11; 77:7-14. Importantly, later on in his testimony, Defendant's engineer conceded that "the steeper the ramp is the more likely it is to pitch someone forward.[15] Campbell Dep. 120:18-21.

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[14]During his deposition just days ago, Mr. Campbell refused to admit that a sixty five year old woman who has bilateral knee replacements, like Mrs. Jackson, could qualify as "mobility impaired." Campbell Dep. 186:6-15.

[15]Mosier: Do you agree with me, Mr. Campbell, that the steeper a ramp is the more likely it is to pitch someone forward? Campbell: Sure. That's gravity."

The fact that the ramp defect is undetectable by a pedestrian like the Plaintiff renders the defect all the more dangerous. Therefore, in light of the Defendant engineer's testimony, the Plaintiff's testimony, and the stated purpose of the ANSI A117.1 standard there can be no doubt that ANSI A117.1 provides a relevant standard of care in this case.

IV. Additionally, there is a genuine issue of material fact regarding the usefulness and desirability of yellow paint to call attention to the curb ramp at issue in this case.

Mr. Rich Adams, proprietor of this Outback location, was called out to the front of the Outback and dialed 911 for Mrs. Jackson after her fall. Mr. Adams testified that he reported Mrs. Jackson's fall over the phone.

April 2011, Mr. Adams had a contractor come out and paint yellow lines on the curb "to pronounce the curb to where it was easier to see coming up to the restaurant." Adams Dep. 24:23-25. (Exhibit I). When asked why he thought it important to make the curb pronounced, he said that "a patron who came in a lot, and every time she came in, she would say that, you know, 'I think that you should have something out there,' this and that, and it didn't cost much more money in order to be able to do it, so I said, 'No problem." Adams Dep. 25:15-24. When asked if the curb area where Mrs. Jackson fell is safer now that it is marked with yellow paint, Mr. Adams responded that "I believe that yellow paint anywhere makes things more noticeable." Adams Dep. 27:13-19.

Despite this testimony, Defendant's engineer refuses to concede that yellow paint could have assisted a customer like Mrs. Jackson appreciate the ramp ahead of her. Instead, Mr. Campbell repeats a refrain over and over: "there is absolutely no requirement to do that." *See, e.g.*, Campbell Dep. 97:4-8. *See also* Exhibit I, p. 3 - Alan Campbell's December 16, 2013 Report. In his report, Defendant's engineer dismisses the notion that paint could have warned Mrs. Jackson, stating that "ANSI A117.1 does not include requirements for markings on a curb ramp." Exhibit H, p. 3 - Alan Campbell's December 16, 2013 Report

Defendant's engineer has never made a site visit to see or measure the Outback ramp - instead choosing to send an engineer in training to take measurements and photographs for him to

rely upon in providing testimony. Campbell Dep. 15:10-21; 16:2-6.[16] Despite this, Defendant's engineer opines that "[t]he transition from sidewalk to ramp would have been visible from her field of view." Exhibit H, p. 3 - Alan Campbell's December 16, 2013 Report.

In contrast, Russ Hunt, Plaintiff'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. (Exhibit J - Russ Hunt's 4/2/14 Report, p. 9). 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. 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. (Exhibit D - scene photograph produced in discovery; Exhibit J - Russ Hunt's 4/2/14 Report - p. 9).

V. **Additionally, there is a genuine issue of material fact regarding the Plaintiff experts' contentions that the built up curb ramp fails to provide a flat walking surface, rendering the subject ramp unreasonably dangerous.**

Human factors expert Russ Hunt opines, and the Defendant's engineer agrees, that the built up curb ramp where Mrs. Jackson fell is often referred to as a handicap ramp, but is actually a foreseeable pedestrian ramp - particularly when the parking lot is full. (Exhibit J - Russ Hunt's April 2, 2014 Report). Mr. Hunt notes that all sets of measurements - by both Plaintiff's expert and Defendant's engineers - unanimously establish that the ramp where Mrs. Jackson fell exceeds ANSI

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[16]Mosier: And in this case, Mr. Campbell, what kind of investigation did you perform as to what I understand you to refer to as ramp number three outside the Outback?

Campbell: Actually the site visit was performed by Bobby Funcik, he's one of our engineers from our office. And it was done with my coordination and under my direction. And he made a site visit, took notes and measurements of the ramp, slope measurements and then performed building code research and review of applicable industry standards.

Mosier: And so Mr. Funcik has the abbreviation EIT behind his name, correct?

Campbell: Correct.

Mosier: And that stands for engineer in training?

Campbell: Correct.

A117.1 maximum allowable slopes on both the running slope and the side slopes. (Exhibit J - Russ Hunt's April 2, 2014 Report page 5). Mr. Hunt opines that this is likely due to the lack of uniformity in the construction of the ramp itself, and the fact that **the ramp is rounded in nature with no discreet edge between the running and the side slopes.** *Id.* (emphasis supplied). Defendant's engineer does not respond to the contention that the ramp fails to provide a flat walking surface.

Plaintiff, by and through her counsel, submits that this development in the case provides an additional sustaining ground to permit this matter to proceed towards a determination by a jury to determine whether the allegedly defective ramp caused her injuries and damages.

VI. Case law Defendants cite in support of their contention are neither persuasive nor helpful because they are (1) unpublished decisions; (2) require a statutorily-mandated ordinance or standard violation as a predicate to sue, which we do not have here; (3) are inapposite to the case at hand.

Cases that Defendants cite in their Memorandum are not only all out of state, and not cited with approval in South Carolina, but they are all distinguishable. In the case that comes closest, *Wisner v. United States*, 154 F.R.D. 39, a post office patron tripped and fell outside of the post office on the sidewalk. The Plaintiff, who was not handicapped, cited the fact that the slope was too severe and had no handrail in violation of ANSI standards. *Wisner*, 154 F.R.D. at 44. However, the postal service adopted its own regulations,[17] and while those standards closely mirrored ANSI, the ramp at issue in that case complied with the postal service's standards. *Id.*

There are two critical points to be made concerning *Wisner*. First, the USPS adopted its own standards which, unlike the broad statement of purpose of ANSI, applied *solely* for the benefit of physically handicapped customers. Thus, the discussion regarding applicability of ANSI standards is unavailing to the Defendants in this case. Second, even though the New York Court declined to allow the Plaintiff to cite ANSI standards in her case in chief, the Court still denied the Defendant's motion for summary judgment, citing some evidence of gravel and other debris on the sidewalk caused her to fall. *Id.* at 45-46.

Similarly, and with reference to the case at hand, we have here a curb ramp the same color

[17]The Architectural Barriers Act, which requires all buildings leased by the Postal Service after 1/1/1977 to be accessible to the handicapped. (See note 2 of *Wisner*)

as the side walk leading up to it, which was not painted for the benefit of customers. (Exhibits A, B, C, D, E). In addition, we have a curb ramp that fails to provide a flat walking surface. (See Russ Hunt's Report- Exhibit I). These are two additional grounds upon which this case should survive a motion for summary judgment even if this Court declared that ANSI A117.1 does not apply to the matter at hand.

Rosabella, too, is off-base because it deals with a police officer's statutory right to sue under municipal law 205(e). *Rosabella v. Metropolitan Transp. Auth.*, 23 A.D.3d 365, 804 N.Y.S.2d 771 (2005). Under 205(e), a landowner can only be held liable if there is a violation of an ordinance, rule, regulation or order. In other words, in the absence of a violation of code or other rule, the police officer was missing an essential element of his statutory claim to recover following his injuries. This case is readily distinguishable from *Rosabella* and the case is, also, completely unavailing to the Defendants.

Miller v. NY Housing Auth, 29 Misc 3d 1214(A) is an unreported decision out of a New York trial court. It too, relies on a municipal law 205(e) for which there is no corollary in this case.

During oral argument, Defendants cited *Griffin v. Wilcohess*, F.Supp.2d, 2010 WL 3803695, an unreported District Court decision, in support of Defendants' motion for summary judgment. In that case, the plaintiff ate a double cheeseburger from Wendy's located inside a Wilcohess gas station. *Id.* at 1. In his complaint, the plaintiff alleged that the defendant was negligent in preparing his food and that as a result, he developed food poisoning. *Id.* The plaintiff had to bear the burden of showing that the cheeseburger was unfit for consumption and caused his illness. *Id.* The defendant filed a motion for summary judgment, arguing that the plaintiff failed to show that the defendant sold the plaintiff an unfit cheeseburger. *Id.* In support of its motion, the Defendants submitted evidence that the Wilcohess maintained a 100% retail food inspection from DHEC, that all food is prepared in accordance with the Wendy's Operations Standards Manual, and that the computer-controlled grill prevents employees from serving under-cooked food. *Id.* Further, in his deposition, the plaintiff admitted that the burger appeared to be fully-cooked and tasted normal. *Id.* The plaintiff's case consisted of nothing more than a claim that he was the only member of his family to eat the cheeseburger and the only member of his family to become ill following the meal.

Id. Even the plaintiff's doctor was unable to determine the source of the salmonella poisoning. *Id.*

While *Griffin* is readily distinguishable from the present case, it is notable that the Defendant in that case relied upon regulations and its own employee standards to defect the plaintiff's claim. Such standards work as, thus, a sword and a shield. While the plaintiff in Griffin lacked objective evidence and expert testimony to substantiate his claim of food poisoning, Mrs. Jackson has two experts both agreeing that the subject ramp is unreasonably dangerous and that the danger was not readily apparent to her. In addition, the Plaintiff has come forward with an affidavit attached hereto, and has undergone additional discovery in the way of deposing the Defendant's expert, to further demonstrate that there is more than one, genuine issue of material fact ripe for jury determination.

VII. Proximate cause is a question of fact appropriate for determination by the jury.

Based only upon memoranda, oral arguments and limited documentation, Defendants ask this Court to decide the proximate cause of Mrs. Jackson's fall. For the reasons more fully set forth below, Plaintiff urges this Court to stay its hand and allow this matter to proceed to a jury.

"Proximate cause is normally a question of fact for determination by the jury, and may be proved by direct or circumstantial evidence." *Player v. Thompson*, 259 S.C. 600, 606, 193 S.E.2d 531, 533 (1972). Plaintiff need not prove the defendant's negligence was the sole proximate cause of the injury. *J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006). "To exculpate a negligent defendant, the intervening cause must be one which breaks the sequence or causal connection between the defendant's negligence and the injury alleged." *Matthews v. Porter*, 239 S.C. 620, 628, 124 S.E.2d 321, 325 (1962). If inferences properly deducible from controverted evidence are doubtful, or tend to show both parties guilty of negligence, and there may be fair different of opinion as to whose act proximately caused injury complained of, the question must be submitted to a jury. *Richardson v. Piggly Wiggly Cent., Inc.*, 404 S.C. 231, 743 S.E.2d 858 (Ct. App. 2013). Only in rare or exceptional circumstances may the issue of proximate cause be decided as a matter of law. *Bailey v. Segars*, 346 S.C. 359, 367, 550 S.E.2d 910, 914 (Ct. App. 2001).

In this case, Plaintiff avers and testifies that she was unable to appreciate the transition from the white sidewalk to the white, curved ramp, causing her to fall. Two experts on her behalf provide rationales for her fall: (1) failure to warn; (2) failure to provide a flat walking surface on a foreseeable pedestrian path; failure to comply with other recognized industry standards. Defendants

state that the proximate cause of Mrs. Jackson's fall was that she tripped and, due to her choice in footwear, she could not recover causing her to fall. Even though Defendant's own expert recommends that the ramp in question be destroyed and rebuilt in accordance with ANSI and Standard Building Code standards, ANSI A 117.1 should not apply for the benefit of a customer like Mrs. Jackson.

Plaintiff asks this Court to stay its hand and allow the jury to evaluate the testimony and other evidence to decide the matter of proximate cause.

CONCLUSION

For the reasons aforementioned, Plaintiff respectfully requests that this Court first issue an Order compelling discovery. Second, and getting to the merits of the Defendant's Motion for Summary Judgment, Plaintiff's respectfully request that this Court issue an order DENYING the Defendant's Motion for Summary Judgment, as genuine issues of material fact still exist.

Respectfully submitted,

McWHIRTER, BELLINGER, & ASSOCIATES, P.A.

By: _____

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Attorneys for the Plaintiff

Lexington, South Carolina

April 17, 2014

EXHIBIT A

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EXHIBIT B

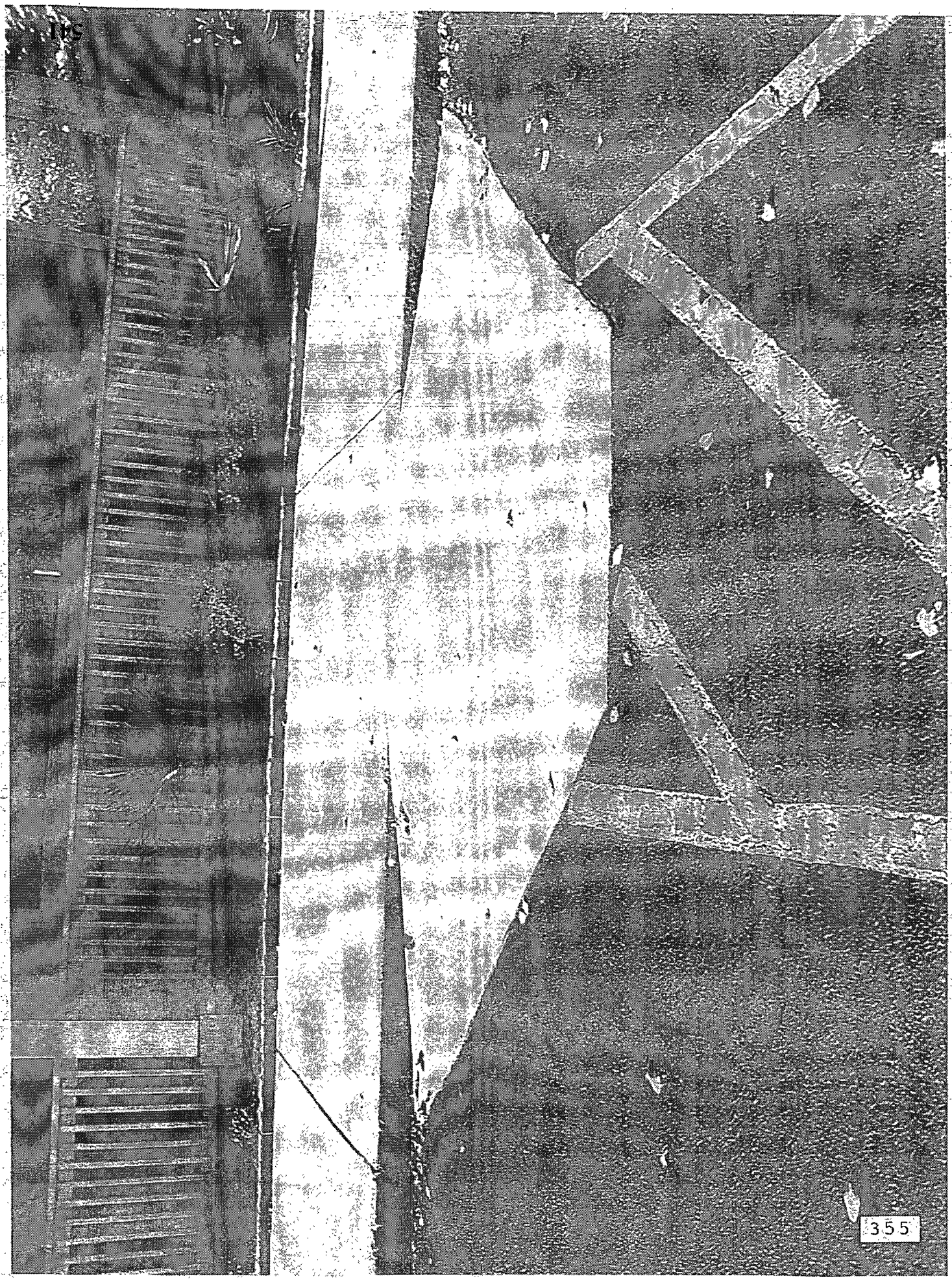
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EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT F

SUMMIT ENGINEERING

SUMMIT ENGINEERING, L.L.P.
P.O. BOX 211426
COLUMBIA, SC 29221-6426

TEL (803) 731-1200
FAX (803) 731-1202

October 2, 2013

Ms. Melissa Mosier
McWhirter, Bellinger & Associates, P.A.
485 N. Lafayette Drive
Sumter, South Carolina 29150

Reference: Rebecca Jackson
Location: Outback Steakhouse
Sumter, SC
C/A No.: 2012-CP-43-707
Summit File Number: DK202

Dear Ms. Mosier:

In follow-up to your request, Summit Engineering, L.L.P. has conducted an engineering investigation of a fall accident that injured Ms. Rebecca Jackson. Ms. Jackson reportedly fell while descending a handicap ramp at the Outback Steakhouse in Sumter, South Carolina. The purpose of this investigation has been to review photographs, observe the handicap ramps and evaluate if a defective condition may have caused Ms. Jackson's fall accident.

The opinions and conclusions stated herein are stated to a reasonable degree of engineering certainty and are based on information available as of this writing. It is conceivable that additional information may be forthcoming which bears on these conclusions and opinions. The right is reserved, therefore, to review all conclusions and opinions at any future point in time should, in fact, additional information become available.

The outback Steakhouse is located on Highway 378 on the west side of Sumter, South Carolina. The Outback Steakhouse was reportedly constructed in 1999. There are two curb ramps at the front of the Outback Steakhouse facility that extend from the sidewalk into the parking lot/parking spaces. The curb ramps appeared to be rounded on the walking surfaces and do not provide a flat walking surface for patrons. Neither curb ramp had a "flat" walking surface. The curb ramps have flared sides that may be difficult to observe while descending the handicap ramps. At the time of Ms. Jackson's fall accident, there leading edge of the sidewalk was not painted safety yellow as they are currently. The lack of painting at the edge of the sidewalk transition to the handicap ramp would make it difficult to see the change in elevation.

There are industry standards that have been adopted by the building codes that specifically address handicap ramps (ANSI A117.1). In addition, the building codes themselves have design

requirements for ramps. The 1998 ANSI A117.1 Accessible and Usable Buildings and Facilities standard would have been in effect when the Outback Steakhouse was constructed. The 1994 and 1997 Southern Building Code (SBC) both reference the ANSI A117.1 in Chapter 11 Accessibility for People with Physical Disabilities.

I have not been able to review design drawings for the subject Outback Steakhouse at this time. The 1998 ANSI A117.1 discusses ramps in Section 405 and curb ramps in Section 406. The subject ramp at the Outback Steakhouse is considered a curb ramp and should meet the requirements spelled out in Section 406. Section 406.2 Slope states "Slopes of curb ramps shall comply with section 405.2". The slopes of the curb ramps shall not be steeper than 1:12 which is 4.78°. Section 406.3 Counter Slope states "Transitions from ramps to walks, gutters or streets shall be at the same level." Section 406.4 Sides of Curb Ramps states "Where pedestrians must walk across a curb ramp, the ramp shall have flared sides. Slope of flares shall not be steeper than 1:10..." Section 406.7 Location states "Curb ramps and their side flares shall not protrude into vehicular traffic lanes, parking spaces, or into parking space access aisles." Section 406.8 Obstructions states "Curb ramps shall be located or protected to prevent their obstruction by parked vehicles." It is clear that the subject curb ramp extends into the vehicle parking spaces which is a violation of the ANSI A117.1 standard. The curb ramp is not protected to prevent vehicles from parking on the flared sides which is a violation of the ANSI A117.1 standard. The slope at the top of the curb ramp was measured to range from 7.4° to 8.2° which is almost twice the allowed slope which is a violation of the ANSI A117.1 standard. The slope at the bottom of the curb ramp was measured to be 5.2° which is also higher than allowed slope and would be considered a violation of the ANSI A117.1 standard. The flared sides near the sidewalk end of the curb ramp was measured to be 6.8 on the side closest to the entrance door to the restaurant which is higher than allowed by ANSI A117.1 and would be considered a violation of the standard. There was a change of elevation of ½ inch between the sidewalk and the curb ramp which is excessive and considered a trip hazard. The ANSI A117.1 requires change in elevations great than ½ inch to be transitioned with a ramp (see Section 303 Changes in Level). The transition at the top of the curb ramp would be considered in violation of the ANSI A117.1 standard and would create a trip hazard as a patron transitions form the sidewalk to the curb ramp, which is the direction Ms. Jackson was walking at the time of her fall accident. Overall, the subject curb ramp was not constructed in accordance with the requirements of the 1998 ANSI A117.1 in many aspects. The deviations from the ANSI A117.1 standard requirements make the subject curb ramp a defective and hazardous walkway and is considered a contributing factor of Ms. Jackson's fall accident.

The International Property Maintenance Code states in section 301.2 "Responsibility. The owner of the premises shall maintain the structures and exterior property in compliance with these requirements..." In section 302.3 it states "Sidewalks and driveways. All sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions." The subject curb ramp was not properly maintained in a hazard free condition as required by the IPMC.

Section 3401.2 of the 2006 International Building Code states "Buildings and Structures, and parts thereof, shall be maintained in a safe and sanitary condition...The owner or the owner's designated agent shall be responsible for the maintenance of buildings and structures..." The subject curb ramp was not being maintained in a safe condition in violation of the IBC.

If you have any questions, please do not hesitate to call.

Sincerely,

Bryan R. Durig, Ph.D., P.E.

EXHIBIT G

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THIRD JUDICIAL CIRCUIT
	)	
Rebecca Jackson,	)	Case No: 2012-CP-43-0707
	)	
Plaintiff,	)	
	)	
-vs-	)	
	)	
Outback/Charlotte-I, L.P.,	)	
OSI Restaurant Partners, L.L.C.,	)	AFFIDAVIT OF BRYAN R. DURIG, Ph.D., P.E.
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.	)	
	)	

PERSONALLY, appeared before me the undersigned, who first being duly sworn, deposes and says:

1. I, Bryan R. Durig, Ph.D., P.E. have personally inspected and measured the ramp where Mrs. Jackson indicates she fell - said ramp located to the far right looking at the building from the parking lot at the Outback Steakhouse location on 2480 Broad Street, Sumter.
2. The Outback Steakhouse at issue in this case was constructed in 1999.
3. A review of the South Carolina Department of Labor Licensing and Regulation website shows that the latest edition of ANSI A117.1 Accessible and Usable Buildings and Facilities standard should be followed when a building is constructed.
4. Therefore, I have concluded that the 1998 edition of the ANSI A117.1 standard would be the applicable standard when the subject Outback Steakhouse was constructed in1999.
5. I have not been provided any architectural drawings showing how the parking lot was designed/drawn to determine whether the drawings show the location of the three curb ramps and the curb ramp specifications – i.e. slope.
6. In addition to the requirements of the South Carolina accessible building requirements, the 1994 and 1997 Southern Building Code both reference ANSI A117.1.
7. The 1998 ANSI A117.1 discusses ramps in Section 405 and curb ramps in Section 406.

8. The subject ramp at issue in front of the Outback Steakhouse is considered a curb ramp and should meet the requirements spelled out in Section 406.

9. Section 406.2 Slope states "Slopes of curb ramps shall comply with Section 405.2" which provides that slopes of curb ramps shall not be steeper than 1:12" which is 4.78°.

10. Section 406.4 Sides of Curb Ramps states, "Where pedestrians must walk across a curb ramp, the ramp shall have flared sides. Slope of flares shall not be steeper than 1:10"

11. Section 406.7 Location states "Curb ramps and their flared sides shall not protrude into vehicular traffic lanes, parking spaces, or into parking space access aisles."

12. Section 406.8 Obstructions states "Curb ramps shall be located or protected to prevent their obstruction by parked vehicles."

13. The subject curb ramp extends into the vehicle parking spaces which is a violation of the applicable ANSI A117.1 standard.

14. I measured the slope at the top of curb ramp and the slope ranged from 7.4° to 8.2° - which is almost twice the allowed slope. This is a violation of the applicable ANSI A117.1 standard.

15. There was a change in elevation of ½ inch between the sidewalk and the curb ramp which is excessive, a trip hazard and another violation of the ANSI A117.1 standard. ANSI A117.1 requires changes in elevation greater than ½ inch to be transitioned with a ramp.

16. The deviations from the ANSI A117.1 standard requirements make the subject curb ramp a defective and hazardous walkway and is considered a contributing factor of Ms. Jackson's fall.

17. In my opinion, the subject curb ramp should be removed and installed properly to meet the ANSI A117.1 standard.

18. The International Property Maintenance Code ("IPMC") states in section 301.2 "Responsibility. The owner of the premises shall maintain the structures and exterior property in compliance with these requirements ..." Section 302.3 states, "Sidewalks and driveways. All sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions."

19. The subject curb ramp at the Outback Steakhouse was not properly maintained in a hazard free condition as required by the IPMC and is in violation of the IPMC.

20. The ASTM F1637 Standard Practice for Safe Walking Surfaces is an industry standard that states in Section 5.2.4 "Changes in level greater than ½ inch (12 mm) shall be transitioned by means of a ramp or stairway that complies with applicable building codes, regulations, standards or ordinances, or all of these."

21. Section 5.7.1 of ASTM F1637 states, "Exterior walkways shall be maintained so as to provide safe walking conditions."

22. The subject curb ramp at the Outback Steakhouse in Sumter, South Carolina was not constructed in accordance with the ASTM F1637 standard and is in violation of this industry standard.

23. ANSI A117.1 states in Chapter 1 "The specifications in Chapter 3 through 9, Sections 1002 and 1004 of this standard make sites, facilities, buildings and

elements accessible to and usable by people with such physical disabilities as the inability to walk, difficulty walking, reliance on walking aids, blindness and 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."

24. Because the "Purpose" section of ANSI A117.1 specifically addresses those with difficulty interpreting and reacting to sensory information, a person who may not be able to safely react to a fall hazard is covered by the requirements of the ANSI A117.1 standard.

25. On a busy day with the handicap parking places full, the layout of the Outback Steakhouse has handicap parking spaces along the front of the restaurant perpendicular to the sidewalk with the only marked pathways to walk into the parking lot from the sidewalk was up or down one of the three curb ramps.

26. The curb ramps are likely to be used by anyone entering or exiting the building from/to the parking lot as they are marked pathways going up or down from the parking lot to the sidewalk or vice versa. They are not designated for handicap use only.

27. It is foreseeable and expected that any customer would walk up or down a curb ramp at the front of the Outback Steakhouse, and the curb ramps should have been constructed to meet ANSI A117.1.

28. The subject curb ramp at the Outback Steakhouse should not have been constructed in the fashion it was as it violated the Standard Building Code, ANSI A117.1 and ASTM F1637.

Bryan R. Durig, Ph.D., P.E.

SWORN to be subscribed before me

this 10th day of April, 2014.

Notary Public of South Carolina

My Commission Expires: 2nd April 2018

EXHIBIT H

APPLIED BUILDING SCIENCES INC.

December 16, 2013

Christian Stegmaier
Collins & Lacy, PC
1330 Lady Street, 6th Floor
Columbia, SC 29201

Re: Jackson v. Outback
ABS Job No. 980.1342
2480 Broad Street
Sumter, SC 29150

Dear Mr. Stegmaier:

Pursuant to your request, I performed an engineering and human factors investigation into the fall reportedly experienced by the plaintiff on June 7, 2009. The fall occurred at the Outback Steakhouse in Sumter, SC. As part of our investigation, personnel from Applied Building Sciences (ABS) have reviewed case documents, applicable codes and standards, and performed a site visit. The site visit was performed in your presence on November 19, 2013.

The fall reportedly occurred as the plaintiff was stepping down from the sidewalk onto the far right curb ramp (as seen when facing the restaurant) as she left the restaurant after eating lunch (Photo 1). This fact is corroborated by photos of the plaintiff on the ground in front of the ramp on the day of the incident. The subject ramp is a built-up curb ramp that extends into the parking lot between two handicap spaces (Photo 2). At the time of our site visit, the edge of the curb was painted yellow. However, photos show that this paint was not present when the incident occurred. According to the plaintiff, she stepped down from the sidewalk onto a flared side to her right and then stumbled to the ground attempting to grab the adjacent car as she fell. Photos show cars parked on either side of the subject curb ramp when the incident occurred.

1890 Milford Street – Charleston, South Carolina 29405 – Tel 843.724.1456 – Fax 843.724.1458
1416 Chapin Road – Chapin, South Carolina 29036 – Tel 803.345.3833 – Fax 803.345.2823
120 Greenwich Road – Charlotte, North Carolina 28277– Tel 704.749.3545 – Fax 704.362.3178

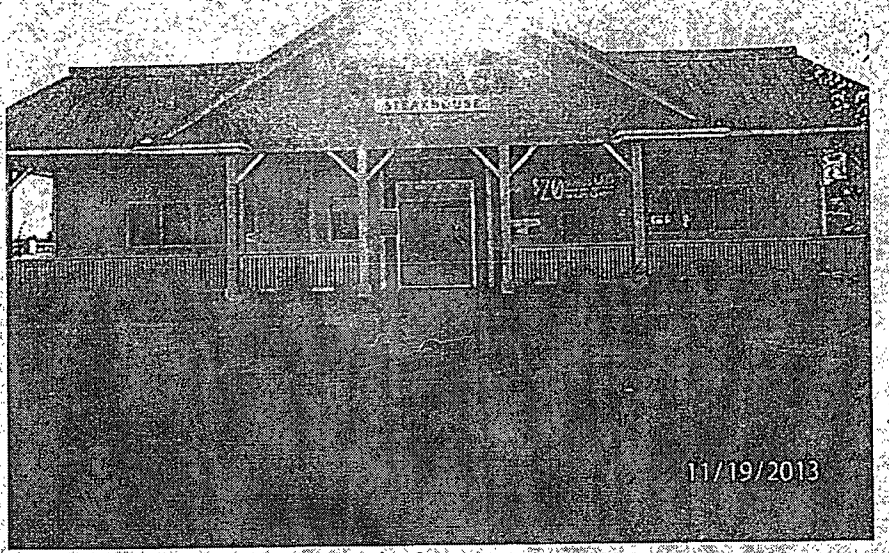


Photo 1 – The fall reportedly occurred at ramp number 3.

Photo 2 – Overview of the subject curb ramp.

According to Sumter County tax records, the building was constructed in 1999. Therefore, the applicable building code at the time of construction was the 1997 Standard Building Code (SBC). The 1997 SBC references CABO/ANSI A117.1-1992, *Accessible and Usable Buildings and Facilities* (herein referred to as ANSI A117.1). According to the ANSI A117.1 commentary, a curb ramp is "a unique type of ramp construction suited for use at curbs between sidewalks and vehicular ways." The slope of the curb ramp was measured to be approximately 12.9% near the top of the ramp and 10.8% near the bottom of the ramp. According to ANSI A117.1, the maximum allowable slope for a ramp is 8.3%. The commentary states that this requirement is primarily to allow safe negotiation of the ramps by wheelchair users. The flared side of the curb ramp where the plaintiff reportedly stepped as she fell was measured to have a slope between approximately 10.9% and 11.7% near the top of the ramp. ANSI A117.1 allows for flared sides with slopes up to 10.0%. The difference between the actual slope and the code specified slope is negligible and would not be perceptible by a pedestrian.

ANSI A117.1 allows the use of built-up curb ramps, such as those found at Outback, that extend outward from the curb. Built-up curb ramps are not to protrude into parking space access aisles. The code commentary states that this last provision is because side flares that extend to front doors of cars can endanger mobility impaired and wheelchair pedestrians when boarding a vehicle. Neither of these concerns applied to the plaintiff at the time of the incident as she was not boarding a vehicle and was not mobility impaired or a wheelchair user.

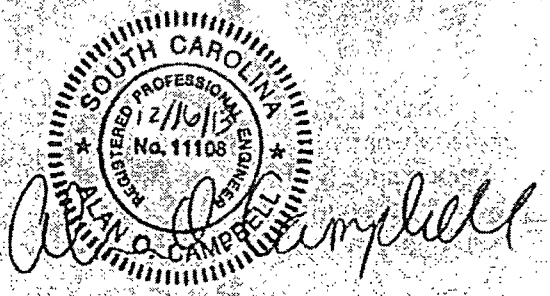
In addition to the walking surface, there are many factors that may contribute to a fall such as eyesight, footwear, distractions, personal health, and the use of prescription or illicit drugs/alcohol among other things. In the case of the subject incident, the plaintiff was wearing high heels which make it more difficult for the wearer to balance and recover from missteps. High heels of the type worn by the plaintiff can provide unstable footing, especially those with narrow ankle straps like those shown in the plaintiff's photos. This condition may also have been exacerbated by the previous knee replacements. The plaintiff claims that she fell because she could not see that the side flare was uneven due to the lack of contrast between the sidewalk and the ramp. However, ANSI A117.1 does not include requirements for markings on a curb ramp. The transition from sidewalk to ramp would have been visible within her field of view.

In summary, although the slope of the side flare slightly exceeded code limits, an able-bodied individual should have had no trouble navigating the slope of the side flare. The other code violations mentioned in this report are not applicable to the plaintiff's situation nor are they contributing factors to the fall. The cause of her fall was likely a result of her simply stumbling and failing to recover due to her choice of footwear.

This report has been prepared based on information available at the time and in accordance with generally accepted engineering and human factors consulting practices and standards. ABS reserves the right to make revisions should additional information become available that affects our observations and conclusions.

If you have any questions regarding my opinions, feel free to call me.

Sincerely
APPLIED BUILDING SCIENCES, INC



Bobby Funcik, EIT

Alan O. Campbell, PE

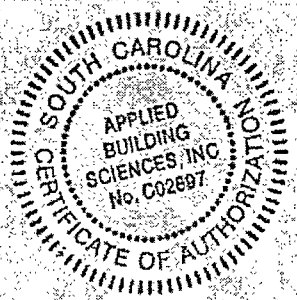


EXHIBIT I

OUTBACK
STEAKHOUSE
3.76

EXHIBIT J

RM Hunt, Ltd.

5833 Revington Drive, Peachtree Corners, GA 30092 USA
Tel: 770.356.8846 Fax: 770.448.6996
Russ@RMHunt.com

4/2/2014

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

RE Jackson v OSI Restaurant Partners

Dear Ms. Mosier:

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

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

Qualifications

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

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

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

Items Reviewed in Connection with this Case

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

Description of the Accident

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

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

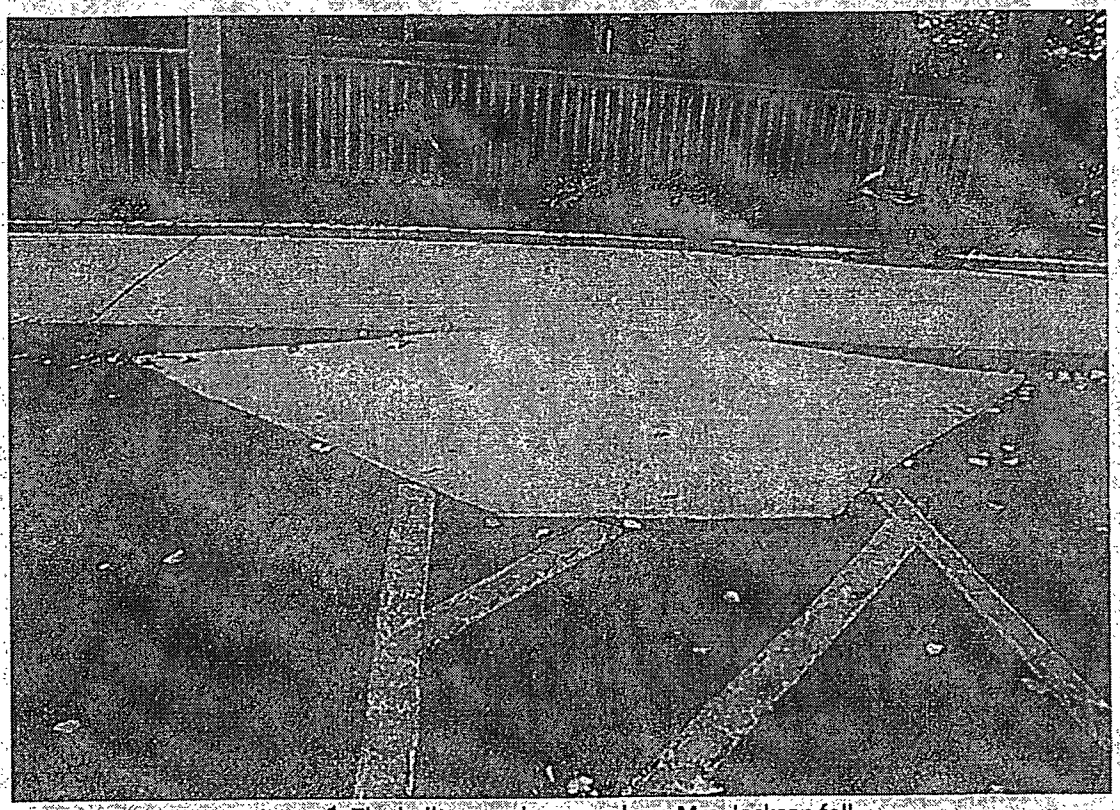


Image1: The built-up curb ramp where Mrs. Jackson fell.

Analysis

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

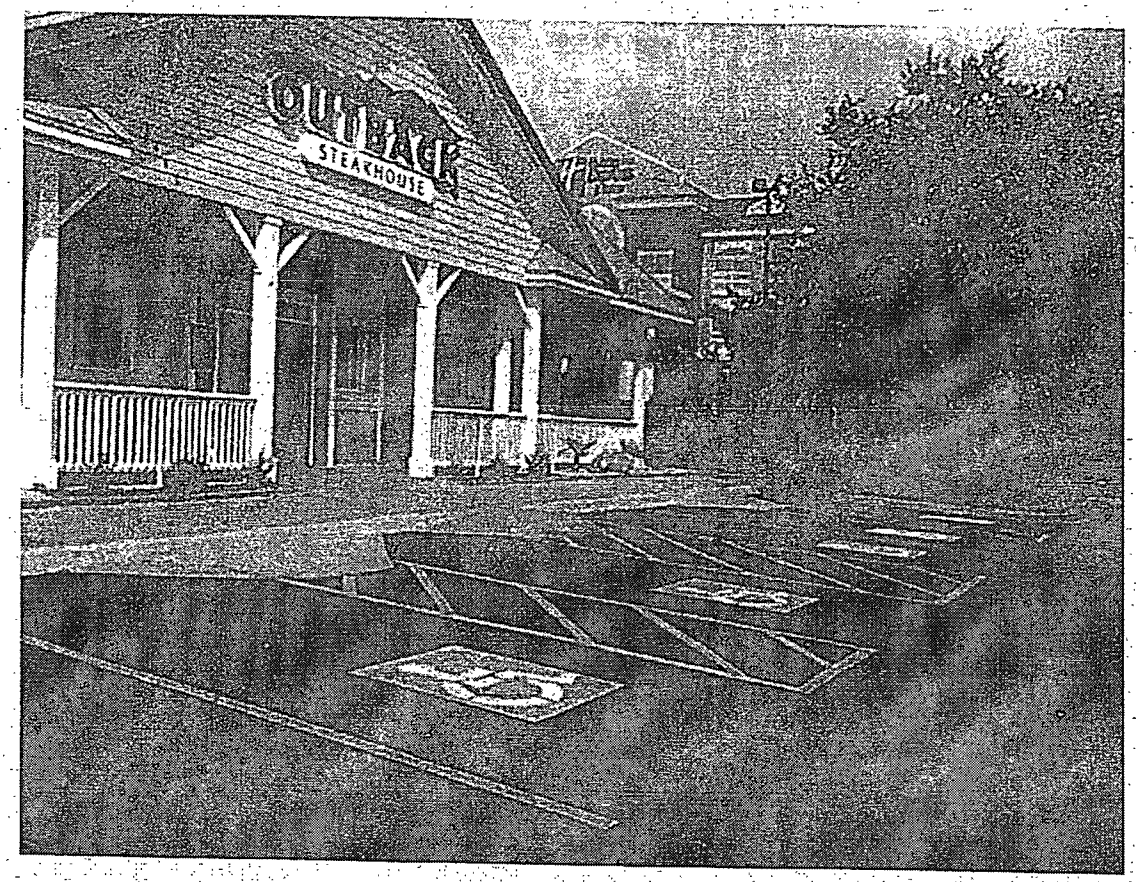


Image 2: Three ramps leading to the restaurant

Ramp Measurements

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

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

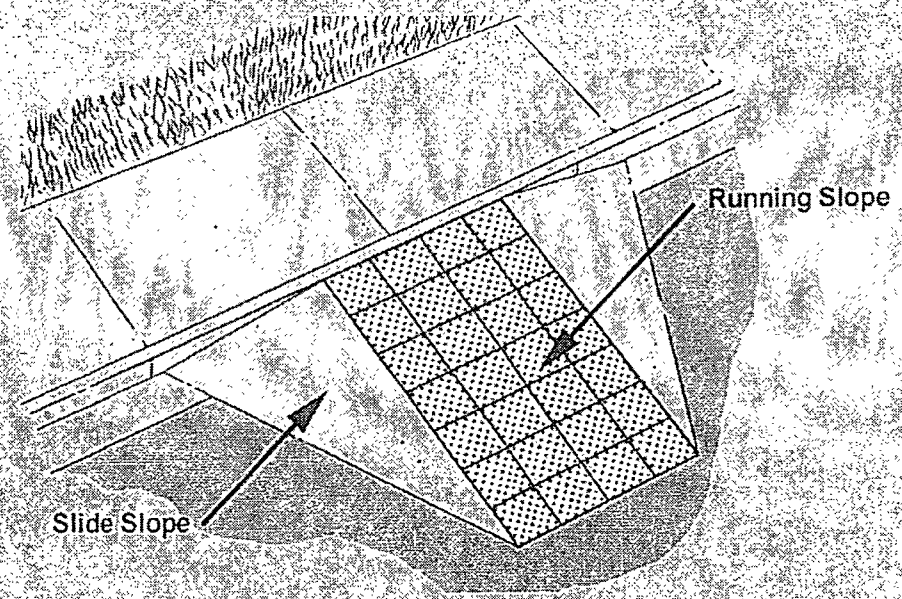


Image 3: Built-up curb ramp from ADA.Gov

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

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

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

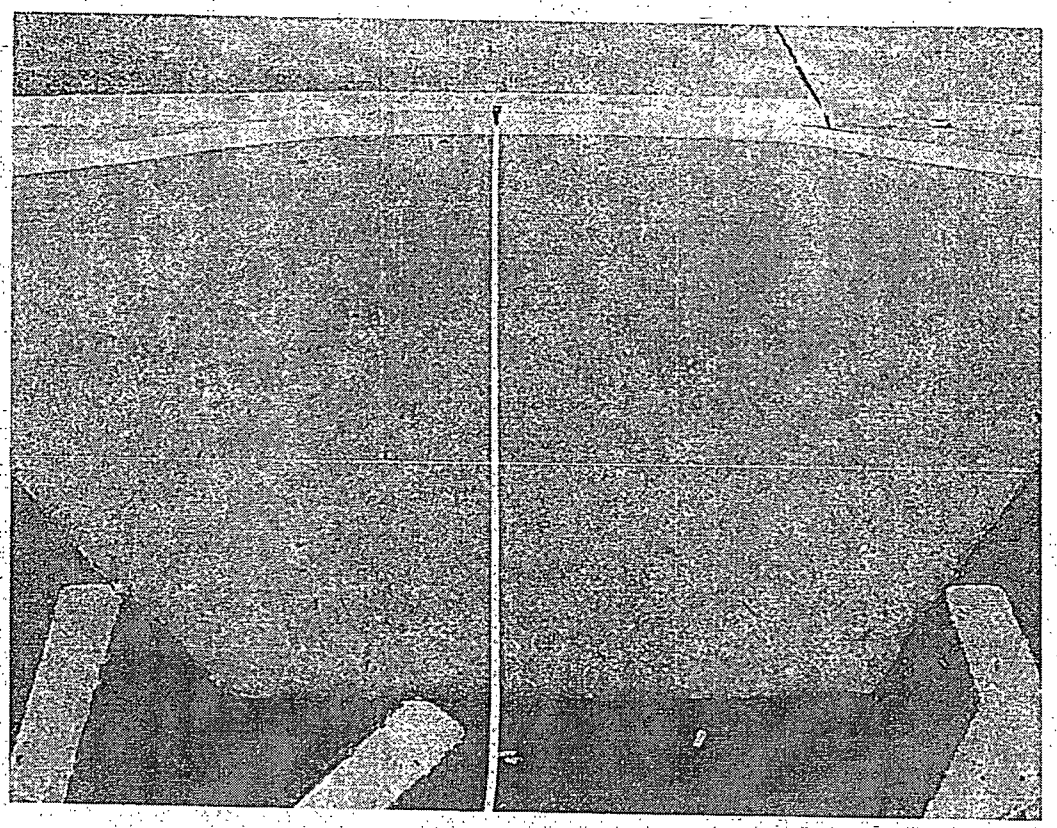


Figure 4: Subject curb ramp

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

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

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

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

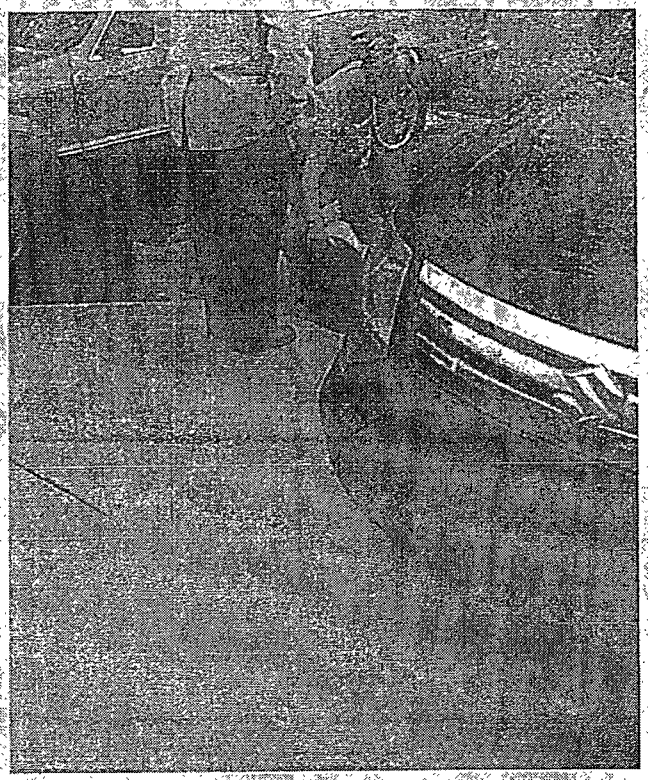


Image 5: Photo showing cars parked on curb ramp.

Cross-Slope

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

Dynamics of a Misstep

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

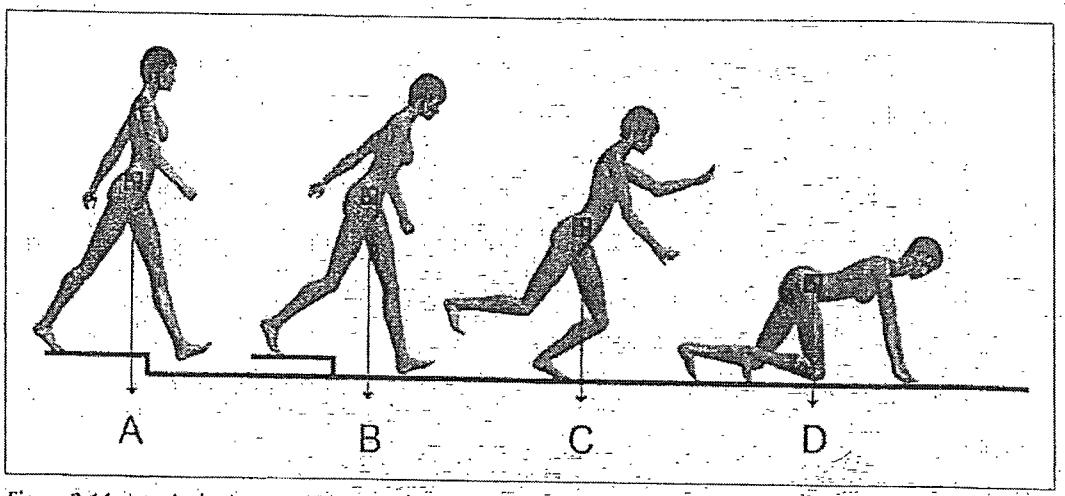


Figure 2.14. A typical misstep. (a) The victim has just encountered the misstepping hazard, which in this case is represented by an unexpected lower elevation in the walking surface. (b) The unexpected foot fall on a lower level walking surface causes the victim's body to pitch forward in an uncontrolled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

Figure 6: Dynamics of a misstep

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

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

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

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

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

Regarding the third point, the fact that the standard does not require markings does not mean the transition from sidewalk to ramp was conspicuous. The fact that it is visible to one who is looking for it does not mean that the transition will be seen by the unsuspecting pedestrian who is typically looking forward, for navigation purposes and not down for foot placement. The purpose of such markings is to call attention to a potential hazard. This point is at the crux of this matter; Mrs. Jackson did not see that she was about to descend a steeper than expected slope.

Regarding the fourth point, there is no evidence that Mrs. Jackson simply stumbled because of her shoes or fell for any of the other reasons experts suggests such as the use of drugs or alcohol. There is, however, clear evidence that the curb ramp at issue was not constructed according to generally accepted standards and this is, more likely than not, what caused Mrs. Jackson to fall.

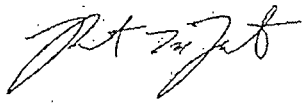
Opinions

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

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

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

Sincerely,



Ruston M. Hunt, Ph.D.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF SUMTER)	THIRD JUDICIAL CIRCUIT
Rebecca Jackson,)	CIVIL ACTION NUMBER: 2012-CP-43-707
)	
Plaintiff,)	
)	
vs.)	**DEFENDANTS' MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT**
)	
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.)	

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 have moved this Honorable Court for an order granting them summary judgment in the above-referenced case.

In their motion, dated February 28, 2014, Defendants bottomed and premised their pursuit of summary judgment upon several grounds. Since the filing of the subject motion, Defendants have refined their arguments to center on the following:

- The International Property Maintenance Code Does Not Apply as a Recognized Standard of Care in the Instant Case;
- ANSI Standards Do Not Apply to Plaintiff as a Recognized Standard of Care in the Instant Case; and
- The 2006 International Building Code Does Not Apply as a Recognized Standard of Care in the Instant Case.

FACTS/PROCEDURAL BACKGROUND

The instant case is a premises liability matter involving alleged static defect and sounds in negligence. Plaintiff maintains that on or about 1:30 p.m. on June 7, 2009, as she and her husband exited the Outback Steakhouse restaurant at 2840 Broad Street in Sumter, she was "unable to appreciate the change in elevation in the [exit] ramp and tripped and fell to the ground." {Amended Complaint, ¶ 10}. Plaintiff alleges Defendants, 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. {Amended Complaint, ¶ 14 & 16}.

Plaintiff's dangerous condition theory is premised upon violation of code. 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, 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.

{Amended Complaint, ¶ 17}

The parties have conducted extensive discovery, including Plaintiff deposing Defendant's premises liability and human factors expert, 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;[1]
- ANSI 117.1 is not applicable in the instant case as it pertains to Plaintiff;[2]

---

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

[2] Id. at p. 22, ll. 5-11. 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?
>
> 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.

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.

- 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 is negligible and would not be perceptible by a pedestrian to the point of causing a fall.[3] Moreover, with regard to transition from curb to ramp, ANSI 117.1 does not include requirements for striping or markings on a curb ramp.[4]

- 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.[5]

- 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.[6]

- 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.[7]

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

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

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

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

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

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

> 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;[8]

(3) resulting in damages to the plaintiff; and

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

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

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.

[8] 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, Defendants 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."). Defendants maintain the same can be argued as it pertains to establishing the proximate cause of Plaintiff's purported fall. 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.").

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." Additionally, Defendants assert Plaintiff cannot establish the condition of the subject ramp was the proximate cause of her fall and subsequent alleged injuries.

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

A. International Property Maintenance Code Does Not Apply

Based on Plaintiff'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 http://www.llr.state.sc.us/pol/bcc/index.asp?file=GENERAL_CodesInEffect.htm (last visited April 4, 2014) (citing S.C. Code Ann. §6-9-60, as amended, which states "permissive codes" may be used as needed by a local jurisdiction, but the codes must first be adopted by ordinance before enforcement can begin. The permissive codes are the ... 2003 International Property Maintenance Code ...").[9] In the instant case, Defendants are unaware of the International

[9] See Exhibit B.

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, Defendants asseverate that no such duty exists. Thus, summary judgment is warranted in the instant case.

B. ANSI Does Not Apply to the Plaintiff 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."

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, Defendants 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 Plaintiff 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, 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.

Defendants' argument concerning the lack of applicability of ANSI as a standard of care for non-disabled persons is supported by additional case law. For example, 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 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, 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 Plaintiff relies upon the 2006 International Building Code as a basis for relief, Defendants assert Plaintiff is in error. Defendants maintain the 2006 International Building Code does not apply because the subject ramp was an existing structure that were not altered during the time between their original installation in 1999[10] and the date of the incident involving Plaintiff.[11] Section 101.2 of the 2006 International Building Code demonstrates the

[10] See Sumter County Plat Book 99 at p. 322; see also Deposition of Rich Adams, Rule 30(b)(6) deponent (Exhibit C) at p. 15, ll. 11-15.

[11] 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.

Deposition of Rich Adams, Rule 30(b)(6) deponent, p 15., ll. 16-22

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:

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.

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 http://www.llr.state.sc.us/pol/bcc/index.asp?file=GENERAL_CodesInEffect.htm (last visited April 4, 2014) (stating the last version of the International Building Code considered "mandatory" for new construction is the 2003 version of the code).[12] Accordingly, Defendants assert the 2006 International Building Code does not govern disposition of the instant dispute.

Mr. Adams: No, ma'am.

Id. at p. 18, ll. 23-25-p. 19, ll. 1-2.

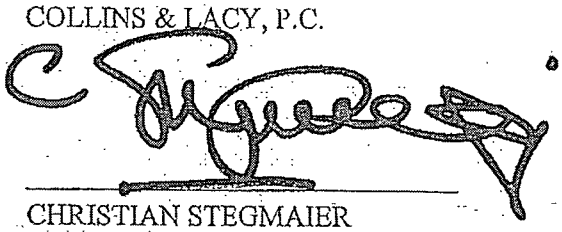
Adams further testified that nothing structurally had been done to the subject ramp during his tenure as managing partner at the location. Id. at p. 19, ll. 3-22-p.20, ll. 1-23.

[12] See Exhibit B, supra.

CONCLUSION

For the foregoing reasons, Defendants aver Plaintiff has not satisfied the negligence analysis in this static defect premises liability suit. Based on this failure of proof, Defendants respectfully request this Court grant their motion for summary judgment in instant case.

Respectfully submitted,
COLLINS & LACY, P.C.

By: 

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DEFENDANTS' MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

Columbia, South Carolina
April 4, 2014

EXHIBIT A

draft of the report?

A: I did. I reviewed the details from her deposition as to how she fell. Also reviewed Bryan Durig's report.

Q: Did you also review Charles Smith's deposition?

A: I did not.

Q: Okay. Were you aware that his deposition was taken?

A: I didn't go through it. Mr. Funcik may have gone through it. I'm not aware of who he is or what he did.

Q: Okay. I was just going to ask you if you knew who Charles Smith was?

A: No.

Q: Okay. Anything else that you reviewed in drafting or I guess revising the report that provides your opinions in this case that comes to your mind?

A: No.

Q: Okay. It seems to me when I look at your report, or your and Mr. Funcik's report, that you essentially reach four conclusions, okay. Number one, although the built-up curb ramp does not meet ANSI A117.1 standards, the difference was, and I quote, negligible and

would not be perceptible by a pedestrian.

A: Correct.

Q: Is that fair?

A: (Nods head affirmatively.)

Q: Point number two that you make in your report is ANSI A117.1 standard does not allow built-up curb ramps to extend into parking areas but this should not apply to Mrs. Jackson because she was not, and I quote, mobility impaired or a wheelchair user.

A: Correct.

Q: Point number three in your report says ANSI A117.1 does not require markings on a curb ramp and, and I quote, the transition from sidewalk to ramp should have been visible within her field of view.

A: Correct.

Q: And point number four in your report says the case of Mrs. Jackson fall -- Mrs. Jackson's fall was, and I quote, likely a result of her simply stumbling and failing to recover due to her choice of footwear.

A: Correct.

Q: Would you agree that these are your essential conclusions as of your December 16th, 2013

Q: Sure.
A: So, I mean, if we start down a slippery slope, I think it's much easier to stick to one standard. I understand you're probably trying to cover what Bryan Durig had to say, but I really don't think it matters. I think it's totally irrelevant.
Q: But to answer my question, Mr. Campbell, the 1992 version with regards to the standards you cite in your report, are the same in 1998, correct?
A: If your purpose sitting here today is to compare the two standards and for me to state that they are essentially the same, I don't have a problem with that.
Q: They are the same, correct?
A: I think I just said that, they are essentially the same. From that standpoint, that particular section, and those particular sections of that standard, yes.
Q: Yes, sir. Those sections that are in your report?
A: Those sections that address accessible route and curb ramps, yes.
Q: Yes, sir, okay. Now again, we went over how

those individuals with various disabilities ---

Q: Okay.

A: --- and impairments whether it be a mobility impairment, sensory impairment, whatever it may be.

Q: Uncoordinated according to that ---

A: There you go.

Q: --- purpose that you just said. But, like we just reviewed, the standard that we just talked about, when it comes to sides of curb ramps, says that curb ramps are located where pedestrians must walk across the ramp shall have flared sides. Do you agree that the text of that rule contemplates that pedestrians walk on ramps in the normal day-to-day life?

A: Sure they do.

Q: So, do you agree then that these ANSI A117.1 standards contemplate that pedestrians will walk on ramps?

MR. STEGMAIER: Object to the form.

A: They will from the standpoint of the fact that these ramps are within the foreseeable pedestrian path. So if you install one of these ramps whether it's for someone with a mobility impairment or not, it certainly needs

the general population is not correct.
Q: Now, these ANSI A117.1 standards are in fact national standards, correct?
A: They are.
Q: Okay. So when folks are building curb ramps and all the other apparatus, whatever you call them, that are addressed in these standards, the builders are encouraged to comply with these standards, correct?
A: For purposes of constructing a safe ramp for handicapped individuals, yes.
Q: And what would have applied at the time that this ramp was constructed was either the 1992 version or 1998 version of ANSI A117?
A: Restate that.
Q: Okay. The standard that would have applied to the ramp that we're here talking about today is ANSI A117, you're saying the 1992 version, correct?
A: 117.1.
Q: And 117.1, excuse me.
A: Correct.
Q: Okay. Now again, these are national standards that are put out there -- ANSI's been around since 1918, correct?

Q: So, for instance, ANSI A117.1 does not require paint to distinguish a curb from a ramp, correct?

A: That is correct.

Q: Would you still think it's advisable if you were consulting a business to use some paint to call a pedestrian's attention ---

MR. STEGMAIER: Object to the form.

A: There is no restriction or no limitation upon an owner or that owner to prevent them from using paint, but it's not required. I mean I think it's their call.

Q: Sure. It's not required but if you're called on to provide advice to a business owner, would you tell them, hey, it's worth some paint to call attention to a curb for instance? And bear in mind Plaintiff's Exhibit Two has paint after Ms. Jackson's incident.

MR. STEGMAIER: Object to the form.

A: The ramp is fine like it is. There's nothing wrong with them adding paint. Would I tell them to add paint? Maybe, maybe not, I don't know.

Q: Why wouldn't you tell them to add paint?

A: Why wouldn't I?

A: Because my understanding that she was not handicapped in anyway whatsoever.

Q: Okay. Now, why doesn't your report specifically say that ANSI A117 should not apply?

A: Because I already told you we were dressing Bryan Durig's report and his opinions. So we were addressing from the standpoint of A117, what was in Bryan Durig's report. If we want to go back and generate a report from a different perspective, then we would tell you that ANSI A117 should not apply. And I've already told Mr. Stegmaier that ANSI A117 should not apply to this condition.

Q: Because she's not in a wheelchair or using a walker?

A: That's my understanding. Now, obviously I'm not going to provide a diagnosis, you know, on her mobility and any impairments that she has, that's certainly up to a physician.

Q: Right.

A: But it's my understanding that she was not handicapped. And if she's not handicapped, does not fall within the protected class, then these standards do not apply.

designed for handicapped individuals. And if we were talking about a handicapped individual that fell on this ramp we'd probably be having a whole different conversation. But what I'm saying is that other than those handicapped individuals, this ramp was safe for the general population. And that's -- that is my opinion.

Q: So, only people who are disabled, okay, wheelchairs, walkers, canes, things like that, ought to receive the benefit of a ramp that complies with ANSI A117.1, is that what you're saying?

A: That is the group to which you would apply the standards of ANSI A117.1. If by chance we can somehow get into a condition of this ramp because it does not apply but would be considered dangerous then we'd have a different issue here. But the building code allows the construction of ramps with a slope of one to eight, which is twelve and a half percent for the general population.

Q: Did you cite that in your report?

A: I did not.

Q: Because -- does it apply?

A: The Standard Building Code, absolutely applies.

Q: Why is that not in your report if it's so important?

A: I think we've been through that, that the purpose of my report was to address those allegations by Bryan Durig. My report is not to be considered all inclusive.

Q: I asked you in the beginning of this deposition if there were any other opinions that you had in this case that were not in your report and you said no.

A: My interpretation was you were asking me were those the opinions that were in my report.

Q: Okay. So what other opinions do you intend to offer at trial?

A: I think -- let me look at the report real quick. I think it's inferred. And let's talk about it.

Q: Because you understand that the reason why we ask for a report is to figure out what your testimony would be at trial so now is the time to tell us.

A: It's here.

MR. STEGMAIER: Object to the form.

A: All right. Let's go down to the bottom of page three, in summary. Although the slope of the

side flares slightly exceeded code limits, an able-bodied individual should have had no trouble navigating the slope of the side flare. So whether I said specifically or not that a twelve and a half percent slope is acceptable, what we're saying here is that same opinion, that this slope, as constructed, is safe for individuals of the general population that are not handicapped. So, I mean -- and if there's any doubt we just addressed it much more explicitly.

Q: In your same report I think you recognized the fact that Ms. Jackson has had knee problems.

A: She has.

Q: So ---

A: But, I mean, like any other medical condition, I've had a broken arm but it's repaired. I'm not -- it's not been brought to my attention that as a result of her knee problems she is now considered to be handicapped, I'm not aware of that. I mean if she is, then we'll address this completely differently.

Q: Sure. So with knee problems depending on how extensive they were, she may fall into this class and your opinion may change is what

you're saying?

MR. STEGMAIER: Object to the form.

A: I'm not aware she's handicapped. I mean if somebody tells me she's handicapped, she's been handicapped, I think we've got something different to talk about. I understand she's not handicapped. The slopes of this ramp are reasonable and can be easily walked upon and navigated by an otherwise healthy individual. And that is my opinion.

Q: Whether you need an objective assessment of your plans during your project's developmental stage or need an emergency investigation conducted to identify and assess a new problem, you can count on our team to deliver an accurate and objective report detailing the problem as well as provide recommendations and assistance for solving the problem. That's a quote from your website. Does that ring a bell?

A: It sounds like it. It sounds like it's probably from one of the environmental pages.

Q: Oh, so it wouldn't apply to you going out to a construction site or to look at a site like this?

Q: And the running slope of the curb ramp where Ms. Jackson fell was 12.9 percent according to your measurements, correct?

A: I think that's correct.

Q: And according to ANSI A117.1, the 1992 version that you cite, the max allowable slope is 8.3 percent, correct?

A: One to twelve, correct.

Q: Okay. Now, do you also agree then, doing the quick math that the running slope of this ramp exceeds the max allowable slope by 55 percent?

MR. STEGMAIER: Object to the form.

A: 8.3, 12.9, yes, 55.

Q: Okay. In other words, using your own measurements, the running slope, the slope on the top of this ramp, is 55 percent too steep?

A: At the top.

Q: Is 55 percent a negligible amount to you?

A: It's imperceptible. Is it negligible, I think that would be getting into a subject term.

Q: You ---

A: Negligible regarding what?

Q: I used the term negligible because that's the term you used in your report.

A: From a -- yeah, from a perceptibility

standpoint it is negligible.

Q: Now, perceptible meaning visually?

A: Sensory.

Q: Okay, so her foot. As to her foot she would not have been able to perceive a 55 percent more steep ramp?

A: Upon stepping from a level surface onto that slope, she would not be able to perceive the difference in slope, correct. She does not have the sensory ability to discern the difference.

Q: And you say sensory-wise meaning when she stepped on it?

A: Correct.

Q: How about -- and you say visually she would not have been able to perceive a 55 percent too steep slope either?

A: There's no way.

Q: Now, the sides of the ramp, the flared sides, they also exceed the maximum allowable slope as well, correct?

A: Minimally.

Q: In fact, you measured the slope at 10.9 percent and it also measured 11.7 percent near the top of the side of the ramp, correct?

A: Correct.
Q: And according to the standard that you've cited, the maximum allowable slope on the flared side of the curb ramp is actually 10 percent?
A: One to ten, correct.
Q: So, using your measurements, the slope of the sides of this ramp exceed the maximum allowed slope by 17 percent?
A: Correct.
Q: Is 17 percent a negligible amount to you?
A: It is.
Q: And negligible how so?
A: From a sensory and perception standpoint.
Q: So her ability to see the difference, she would not have been able to perceive the difference, correct?
A: No.
Q: Between a ramp that complied with ANSI A117.1 or one that didn't?
A: Correct.
Q: And you're also saying though that with regards to when she stepped on it, she wouldn't have been able to tell a difference with a ramp that's 17 percent too steep?

A: Correct.
Q: Okay.
A: And from a visual perception standpoint it would be incomprehensible to her anyway. I think she, unless I'm totally mistaken, I'm sure she had no clue whatsoever what a handicap ramp slope should be. So, we evaluate our walking surfaces based on our visual and sensory perception, so. And obviously you have sensory feedback from your feet and from your body, you know, proprioception and even from your vision, and it has to be a fairly extreme variation in order to perceive that condition.
Q: Right. Do you think 55 percent is a pretty extreme variation?
A: From the standpoint of sensory perception, no.
Q: Okay. Just to make sure I'm clear, using your own measurements, the running slope on the top of the ramp and the flared sides are both too steep according to the ANSI A117.1 standard?
A: They are.
Q: Okay. Now, let's say hypothetical, and you can tweak this hypothetical to your liking to make it fair.
A: Okay.

a deck out on the lake for a business, let's say. If the deck is built so that it will handle 50 percent less weight than what it should hold, that's a problem, correct?

A: Well, it could be. Sooner or later it's likely going to be a problem.

Q: Likely to be a problem?

A: Yes.

Q: Okay. We've talked about your first point, okay. I want to talk about the second point in your report. It says that even though ANSI A117.1 doesn't allow built-up curb ramps to extend into the parking spots, that this should not apply to Mrs. Jackson because she was not mobility impaired or a wheelchair user. Now, I think you disagree with me that ANSI A117.1 is intended to accommodate all levels of mobility, or do you agree with me?

A: No, I don't disagree with that. I mean it's foreseeable that this ramp is going to be used by the general population.

Q: Okay. So you agree with me that it's created to accommodate persons of all mobility?

MR. STEGMAIER: Object to the form.

A: But for Ms. Jackson, was it necessary to design

this ramp in accordance with ANSI A117.1 to prevent her from falling, absolutely not. That's where we're going to disagree.

Q: Okay. So the ANSI A117.1 standards apply, they don't apply to her?

A: No. The intent of ANSI A117.1 is to design these ramps for handicapped individuals, not for the general population. Or not for this ramp to meet that standard for the general population to be safe as well because the general population can adapt to ramps with much steeper slopes.

Q: But it's foreseeable, is it not, that this Outback had these ramps constructed for handicapped folks, correct?

A: Yeah, based on the striping and layout design, I would say that is reasonable, yes.

Q: And it's also foreseeable that they were constructed for use by just regular pedestrians, able-bodied?

A: Sure. But was it unsafe for those able-bodied pedestrians, absolutely not.

Q: Let me get to my next question. Now, you would expect that the Outback would have constructed ramps that comply with ANSI A117.1 for the

to fall down. And the fact that we had a space with a car that partially protruded onto a flared slope, did that cause her to fall down? Absolutely not, that's a nonissue here.

Q: Uh-huh.

A: But, you know, we can talk about it.

Q: If called on for advice by Outback, would you tell them that their parking lot needs some work?

MR. STEGMAIER: Object to the form.

A: Yeah. Based on what I know here today and the questions that you've asked and what I see, I mean if you ask me to go from working for Mr. Stegmaier as my client in a forensic project to go into the consulting world and evaluate this parking lot, yeah, I would probably have some recommendations. That's not why I've been -- why I've been called or have I even begun to put together those opinions.

Q: I understand. I want to move on to your third point and it's that the ANSI A117.1 doesn't require markings on a curb ramp and that, and I quote, the transition from sidewalk to ramp would have been visible from Mrs. Jackson's field of view. Earlier you've agreed that ANSI

A117.1, those are minimum standards, correct?
A: They are. Minimum requirements, minimum standards.
Q: Okay, minimum standards, minimum requirements. Businesses can do more than what ANSI A117.1 requires if it chooses to do so?
A: They can but there is absolutely no requirement to do that.
Q: Do you agree that paint can help call attention to a curb?
A: Paint -- the purpose of paint on curbs is to provide a visual cue so they can help.
Q: So it can help guide someone's attention to a curb?
A: They can. Or they can provide a slipping hazard. So, but from the standpoint of a visual perspective, they can make it more obvious through contrast, yes.
Q: There is special paint to protect against slip hazards, correct?
A: There is.
Q: So you can, to the extent possible, remove the slip hazard when it comes to the paint on the curb, right?
A: Well, you need to ask the people that we've had

was there.

Q: Other than a 55 percent and a 17 percent max -- going over the max allowable slope?

A: Sure. It exceeds the industry standards for handicapped ramps, yes.

Q: Well, these are built-up curb ramps, they're not handicap ramps necessarily?

A: It's a curb ramp for handicapped individuals with Bryan Durig's opinion that it was constructed with the intent of complying with ANSI A117.1. So, I mean, if we want to be that specific about it.

Q: Right. But again, going back to, and I think you agreed with this, the language of the standard talks about pedestrians walking across the ramp, correct?

A: Sure, it does. But does that create a dangerous condition for able-bodied pedestrians that are part of a general population, absolutely not. It's well within the applicable requirements of the building code.

Q: And do you -- in generating your report, don't cite any of the -- well, except for the very beginning, cite the SBC. Is there any other type of document that you plan to prepare for

think that's going to happen. They're going to look at that ramp, they're going to evaluate it and determine if it's too steep for them to walk upon or not.

Q: You agree though that when someone begins walking on a ramp they may not be able to make that decision, oh this is too steep, I better get off of this ramp?

A: She had no idea. My understanding is that -- is that the ramp is a nonissue other than the one point where she stepped down. So she stepped off the sidewalk onto the ramp. My understanding that is when she fell, when she immediately stepped down. She's not walking on the ramp, she's stepping down. So, the ramp where she stepped was well within the applicable requirements of the building code.

Q: Do you agree with me, Mr. Campbell, that the steeper a ramp is the more likely it is to pitch someone forward?

A: Sure. That's gravity.

Q: Do you agree that that is highly likely what happened to Mrs. Jackson?

A: We don't know if she pitched forward or if she turned her ankle and fell, sideways or both. We

then make one 90 degree turn and then come over to the ramp and make another 90 degree turn. It's highly unusual. Most likely, she's gonna come out the front door and probably -- and you said it earlier, the shortest path, which is normal, that is the foreseeable pedestrian path, probably at about a 30 degree angle which is almost a straight line. I'm going to disagree with you on that one. There's no way she was making a 90 degree turn.

Q: Sure. And what -- whatever amount of degrees it is, she's turning onto this ramp, correct?

A: She's stepping onto the ramp, yes.

Q: Okay.

A: I don't know. There's probably some angle of turn.

Q: Let's move on to your last point then so we can begin to wrap this up, Mr. Campbell. The last point of your report is that Mrs. Jackson's fall was likely a result of her simply stumbling and failing to recover due to her choice of footwear, and those are your words. What evidence do you have to base this conclusion off of?

A: Well, if we go back to Templer, and if you're

not familiar with Templer, he's probably somebody who's dedicated I would say probably most of his entire life, although he was a professor, to researching falls, researching stairs, researching ramps, researching those -- those particular relevant conditions that apply to those and apply to ramps, falls and stairs. So if you go back to various references, and one of his contributing factors to falls is footwear. And then if you look at her footwear, it appears to be somewhat of a tall heel with a narrow strap. Beyond that, I would defer to probably an orthopaedic surgeon or a physical therapist to see if they would recommend that she should wear shoes of that type. But we can get into the biomechanical analysis of the -- of the support of those shoes and if they're safe or unsafe.

Q: Are you offering any kind of biomechanical opinion in this case?

A: Regarding -- regarding the safe slope and slopes that can be negotiated by individuals of the general population without mobility impairments, yes.

Q: And you've been qualified to provide testimony

in this area before?

A: I've been qualified to offer biomechanics opinions regarding one, negotiating a safe slope on a ramp, I don't think that's ever specifically come up.

Q: Okay. And what's your -- you'll have to help me because the CV on the website was just not as in depth as I was hoping it was going to be which is why I asked you to bring your case list and all those kinds of things. But what's your background when it comes to biomechanics?

A: I'm not sure which CV you have, there are two Cvs. But I've had classes in engineering mechanics, physics, structural engineering, biomechanics, human factors, physiology.

Q: Okay. Have you completed a degree in biomechanics?

A: I have a -- I have taken industrial engineering classes in occupational biomechanics. I've got a master's degree in applied -- in applied psychology with a concentration in human factors so I've taken those classes that cover those subject areas and I'm a registered professional engineer.

Q: Okay. And you said you got a degree with

regards to the human factors?
A: I did.
Q: When did that occur?
A: 2012.
Q: Okay. And I thought it had to be fairly recent. Okay. Because -- the reason why I ask is your -- this report does not state that you're giving a biomechanical type of opinion, it just says engineering and human factors.
A: Biomechanics is part of human factors.
Q: Okay. So, we're really talking apples to apples, same thing?
A: Should be.
Q: Okay. Now, other than Plaintiff's Six, have you seen any other photographs of the shoes that Mrs. Jackson was wearing?
A: Sure.
Q: Okay. And do you have any knowledge if she was comfortable wearing high-heeled shoes?
A: Haven't spoken with her.
Q: Okay. Do you -- would it be helpful to you to know whether or not she was comfortable wearing high-heeled shoes?
A: I mean I don't have any doubt what her answer would be, I expect she was gonna say she was

EXHIBIT B

Today's Date: Friday, April 4, 2014

Licensure Information

Licensee Lookup (https://verify.llronline.com/LicLookup/BCO/BCO.aspx?div=67)
Licensure with the Board (index.asp?file=licensure.htm)
Applications and Forms (index.asp?file=pub.htm)
Fees (index.asp?file=fees.htm)
Education (index.asp?file=ce.htm)
FAQ (index.asp?file=faq.htm)
Renew Your License (http://llr.sc.gov/index.asp?file=inc/Boards.htm)
Change Your Address (https://eservice.llr.sc.gov/SecurePortal/Login.aspx?ReturnUrl=%2fSecurePortal%
Application Status (https://eservice.llr.sc.gov/SecurePortal/Login.aspx?ReturnUrl=%2fSecurePortal%2fl
Print copy of your license (https://eservice.llr.sc.gov/PocketCard/)

Publications

Publications (index.asp?file=news.htm)
Related Links (index.asp?file=links.htm)

Complaint/Board Order Information

Board Orders (index.asp?file=finalorders.htm)
File a Complaint (index.asp?file=complaint.htm)
What Can I Expect When a Complaint Is Filed Against Me? (/AboutUs/MediaCenter/pldocs/ComplaintPr

Board Information/Laws and Policies

Laws/Policies (index.asp?file=laws.htm)
FOIA Requests (/AboutUs/MediaCenter/index.asp?file= main.htm)
(/aboutus/mediacenter/)Minutes (index.asp?file=Minutes/minutes.htm)
Board Members (index.asp?file=BoardMembers.htm)
Agendas (index.asp?file=Agendas.htm)
Board Meeting Calendar (index.asp?file=cal.htm)
(/aboutus/mediacenter/)

Contact Us (/Aboutus/index.asp?file=contact.htm)

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Advice Attorney

South Carolina Building Codes Council

Building Codes in Effect for South Carolina

Every city and county in South Carolina that does not legally "Opt out" of the Code Enforcement Program, must enforce the mandatory building codes referenced in Section 6-9-50 (http://www.scstatehouse.gov/code/t06c009.htm) of the South Carolina Code of Laws (S.C. Code), after they are reviewed and adopted by the Building Codes Council (Council). Local jurisdictions are restricted from promulgating their own building codes, in whole or in part or adopting and enforcing building codes other than those referenced in Section 6-9-50 of the S.C. Code. Unless modified by the Council, all chapters (except the Administrative Chapter) of all codes must be enforced in their entirety.

Only the building codes listed below may be adopted by the Council and enforced at the local level. Any other code or codes used to regulate the construction or alteration of buildings or structures, including their systems or components, not listed below are not valid and cannot be legally promulgated, adopted or enforced by a local jurisdiction.

On May 25, 2004, the Council updated the mandatory and permissive building codes to be used within South Carolina. The Council established the implementation date for local jurisdictions as January 1, 2005 for all codes, with the exception of the International Residential Code and the International Fuel Gas Code. The implementation date

established for the International Residential and Fuel Gas Codes was July 1, 2005. All local jurisdictions must enforce the mandatory codes and may adopt and enforce the permissive codes at any time after the implementation of the mandatory codes.

Mandatory Building Codes adopted for current use in South Carolina and which must be enforced by local jurisdictions include the:

2003 International Building Code with S.C. modifications.
2003 International Fire Code with S.C. modifications.
2003 International Plumbing Code.
2003 International Mechanical Code.
2003 International Energy Conservation Code.
2003 International Residential Code with S.C. modifications.
2003 International Fuel Gas Code with S.C. modifications.
2002 National Electrical Code.

The 1998 ICC/ANSI A117.1, Accessible and Useable Buildings and Facilities, is adopted by the Accessibility Act (http://www.scstatehouse.gov/code/t10c005.htm)and mandatory for use in all jurisdictions within the state (see NOTE below).

The Building Energy Efficiency Standards Act (http://www.scstatehouse.gov/code/t06c010.htm) is adopted by statuteand mandatory for use in all jurisdictions within the state.

The codes are to be used in conjunction with the latest code modifications (index.asp?file=MODIFICATION_Main.htm) authorized by the Council. Only the modifications listed on this website are valid for use in the state. Building code modifications that have not received prior approved by the Council are invalid and cannot be adopted, employed or enforced by local jurisdictions.

As permitted by Section 6-9-60 of the South Carolina Code of Laws, 1976 as amended, "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;
2003 International Existing Building Code; and,
2003 International Performance Code for Buildings and Facilities.

The adoption of the mandatory and permissive codes does not include the chapters, sections or provisions addressing administrative policies or procedures. Administrative policies and procedures are the sole responsibility of each local jurisdiction. If the governing body of a local jurisdiction desires to use the administrative provisions in one or more of the adopted building codes, it must first adopt the chapters or sections by ordinance. In lieu of adopting the administrative provisions contained in the adopted building codes, the governing body of a local jurisdiction may develop specific administrative policies and procedures for the operation of its Building Inspection Department. If administrative policies and procedures are developed at the local level, they must be adopted by ordinance before they can take effect.

Appendixes to the mandatory and permissive codes may be used as needed by a local jurisdiction, but must first be adopted by ordinance before enforcement can begin.

The International Code Series was developed as a joint project by the Southern Building Code Congress, International, the International Conference of Building Officials and the Building Officials and Code Administrators, International (referred to as model code organizations) and replaced the Standard, National and Uniform Building Code Series. The 1997 Editions of the Standard, National and Uniform Codes (which were regional), and the 1995 Edition of the CABO One and Two Family Dwelling Code (which was national) were the last to be published. The International Building Code Series replaced those documents and provided a single set of National Codes. Simultaneously, the three model code organizations merged and created the International Code Council. All codes training and Code Enforcement Officer certification examinations for the State of South Carolina are now based on the International Code series.

NOTE - Although other standards for building accessibility exist, the 1998 Edition of the ICC/ANSI A117.1, Accessible and Useable Buildings and Facilities, is the only accessibility document required by state law to be enforced by the local building officials. All plan reviews and inspections conducted by local Building Inspection Departments, therefore, will be based on ICC/ANSI A117.1. It is important to note, however, that other accessibility documents are also law and cannot be ignored. Legal action can be taken against a building owner, manager or any person involved in design or construction/renovation of a building or structure requiring accessibility, under one or more accessibility law. Before construction or renovation of a building or structure that requires accessibility, all applicable accessibility laws should be considered.

Additional accessibility laws that must be considered and the enforcement entities include the:

Americans With Disabilities Act (http://www.usdoj.gov/crt/ada/stdspdf.htm) (ADA), published and enforced by the US Department of Justice (DOJ).
Fair Housing Act Amendments (http://www.hud.gov/groups/disabilities.cfm) of 1988, published and enforced by the US Department of Housing and Urban Development (HUD).
South Carolina Fair Housing Law (http://www.state.sc.us/schac), published and enforced by the S.C. Human Affairs Commission.

Order copies (http://www.iccsafe.org/e/category.html) of the International Codes, the National Electrical Code or the ICC/ANSI A117.1 document.

Jurisdictions that have legally opted out of the code enforcement program at this time include the:
Town of Richburg;
Town of Ehrhardt;
Town of Pamplico; and,
County of Union.

Code Adoption History:
The following information is provided for research purposes and may used to verify the official dates for which local jurisdictions were or are required to enforce certain editions of the mandatory building codes.

Prior to June 13, 1997, local jurisdictions that desired to adopt building codes were permitted to do so by local ordinance. If a jurisdiction did adopt building codes, it was required to adopt only the codes authorized by the Building Codes Act. Once adopted, the jurisdiction was obligated to continue adoption of each new edition within one year after it was made available by the publisher. The implementation date for enforcement was established by the local jurisdiction.

Starting July 13, 1997, all local jurisdictions that did not legally "opt out" of the mandatory building code program were required to adopt building codes by local ordinance, after they were authorized by the Building Codes Council (council). The council, however, was required to establish the date of implementation for each of the adopted codes.

Starting July 2, 2003, the council was charged with the responsibility for adopting all mandatory building codes and establishing the date of implementation for the local jurisdictions.

Local jurisdictions presently are required to establish their own administrative provisions for the enforcement of building codes and the operation of their building inspection departments. Local jurisdictions also have the statutory authority to adopt the appendixes for the mandatory codes and the permissive codes as desired.

Adoption	Implementation Date	Codes Affected
May 24, 2000	July 1, 2001	2000 International Building Code
	July 1, 2001	2000 International Fire Code
	July 1, 2001	2000 International Plumbing Code
	July 1, 2001	2000 International Mechanical Code
	July 1, 2001	2000 International Fuel Gas Code
	July 1, 2001	2000 International Energy Efficiency Code
	July 1, 2002	2000 International Residential Code
May 26, 2004	January 1, 2005	2003 International Building Code
	January 1, 2005	2003 International Fire Code
	January 1, 2005	2003 International Plumbing Code
	January 1, 2005	2003 International Mechanical Code
	January 1, 2005	2003 International Energy Efficiency Code
	July 1, 2005	2003 International Residential Code
	July 1, 2005	2003 International Fuel Gas Code

Synergy Business Park

C

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The S.C. Department of Labor, Licensing and Regulation is pleased to provide various publications in portable document format (PDF). You will need Adobe Reader (http://www.adobe.com) to view and print these publications.

EXHIBIT C

cosmetically in the front, or on the exterior of the building, they'll let you know, "Hey, you know, the building is looking kind of dingy. You need to have it painted. Your parking lot is not looking so great. It's not dark enough. You need to go ahead and have that resealed." So, pretty much, in that respect, that would be it. Other than that, it would be just up to me to keep the premises up to date.

Q: Do you know when this building was originally built?

A: I believe it was June of 1999.

Q: And was it built as an Outback Steakhouse?

A: Yes, it was.

Q: 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?

A: To the best of my knowledge, they are originals, so I'm guessing the same month, but those are the original ramps.

Q: How has the work been done around the ramps? For instance, the parking lot, we were out there this morning, and it looks newly

looked at something?

A: June of 1999 is when we opened the doors, so as far as the actual construction, I don't know how long it took to build the building, but June of 1999 is when we were opened for business, so sometime prior to June of 1999, construction took place.

Q: And on what do you base your belief that the ramps were original to that construction?

A: As far as I know, nothing has been done.

Q: What have you done in preparation for your deposition today in terms of what -- who have you talked to, have you looked at anything, have you reviewed permits, any of that sort of thing other than talking to your lawyer?

A: No.

Q: Before the fall -- and when I say "the fall", I'm referring to Ms. Rebecca Ann Jackson's fall -- are you aware of any work having been done at any point since September of '07 to the ramps themselves, the three ramps?

A: No.

Q: Are you aware of any work that was done to them once y'all opened doors for business in June of 1999 up until the time you came in September of

'07?

A: No, ma'am.

Q: To your knowledge, have they been painted, sealed, anything at all done to those areas?

A: The only thing that's been done is a concrete ramp was put on the front porch right near the front entrance that carries all the way down to the middle handicap ramp. That's the only work that's been done to any of those ramps to my knowledge, and that's just to the one directly in front of the front doors, not to the one in question.

Q: Let me ask you if the bottom left picture reflects the area that you're talking about on that particular sheet?

A: Correct. The one in the bottom left-hand corner, that's the only work that's been done to the handicap ramps to my knowledge.

Q: Do you know about when that was done?

A: I want to say this was taken in '09. It was probably done either earlier that year or later of 2008.

MS. MCPHERSON: And let me mark this.

(Plaintiff's Exhibit Number 3 was marked for identification purposes.)

A: The yellow lines?
Q: Yes, the yellow lines.
A: April of 2011.
Q: And then, he repainted them or touched them up just several weeks ago?
A: Correct.
Q: Had there ever been yellow lines on that sidewalk area as shown in the photograph on Number 1 before April of 2011?
A: No.
Q: And so, I guess you would agree, those lines did not exist, the yellow lines, the day Ms. Jackson fell?
A: Correct.
Q: In fact, let me show you a group of photographs that are still part of Exhibit Number 1. We talked about 1-A. That's the front of the restaurant. Let's talk about 1-B. It looks to me like all of those are of the area that you talked about being stamped, that middle area?
A: Correct.
Q: And then, 1-C shows one of the ramps. Does that appear to be the ramp toward the right of the building if you're facing it and the same ramp where Ms. Jackson fell?

A: Yes.
Q: And the same question about 1-D?
A: Yes, it appears to be the same way.
Q: And 1-E?
A: Yes.
Q: And lastly, 1-F?
A: Yes, those all appear to be the same way.
Q: Do those photographs that I've just shown you, 1-B through F, fairly and accurately represent the condition, shape, placement of the ramp where Ms. Jackson fell?
A: Yes.
Q: I know that it's been serviced, for lack of a better term, since then, but is there anything about those photographs that looks different than the way it was when she fell?
A: No.
Q: Okay. You are the person, Mr. Adams, that had Mr. Smith come out and paint the yellow lines in April of 2011. Is that true?
A: Yes.
Q: Why did you do that?
A: Honestly, I did it just to pronounce the curb a little bit more to where it was easier to see coming up to the restaurant.

Q: What about coming out of the restaurant?

A: It would be the same. I would assume that someone coming to the restaurant would see it and know it coming back out of the restaurant.

MR. STEGMAIER: Ms. McPherson, just for the purposes of marking the record, because I don't want to interrupt to all these questions, I'm just going to make a running objection as to subsequent remedial remedies performed by Outback after the date of loss concerning the curb. I just want to mark it for purposes of the record, but I didn't want to interrupt your questions continually.

MS. MCPHERSON: I understand. Thank you.

Q: Why do you believe that it was important to, as put it, I think make it more pronounced or to mark that area along the curb with the yellow line?

A: Honestly, it came from a patron who came in a lot, and every time she came in, she would say that, you know, "I think that you should have something out there", this and that, and it didn't cost much more money in order to be able to do it, so I said "No problem".

Q: Do you remember, or can you estimate how much

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

February 12, 2015

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