THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC Court of Appeals

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Unpublished Opinion No. 2016-UP-408 (Filed September 14, 2016)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. 2014-001861

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.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies the Petition for Rehearing[1] was made and ruled upon by the Court of Appeals on December 7, 2016.

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[1] Petitioners filed a Petition for Rehearing (Panel) and Petition for Rehearing En Banc. The Panel granted the petition, dispensed with further briefing, and issued a substituted opinion on December 7, 2016. Counsel for Petitioner inquired about the pending Petition for Rehearing En Banc. By correspondence dated January 4, 2017, the Court advised the Petition for Rehearing En Banc was made moot in light of the panel's order granting the Petition for Rehearing. (App. 181-82).

STATEMENT OF ISSUE FOR REVIEW

I. Did the Court of Appeals Err By Reversing the Circuit Court's Grant of Summary Judgment to Petitioner By Holding Respondent Presented at Least a Scintilla of Evidence the Subject Curb Ramp Was a Dangerous Condition?

II. Did Respondent Present a Scintilla of Evidence to Create a Genuine Issue of Material Fact That Any Alleged Dangerous Condition Proximately Caused Respondent's Injuries and Damages?

STATEMENT OF THE FACTS

The instant case is a premises liability matter involving an alleged static defect and sounds in negligence. Respondent Rebecca Jackson ("Respondent") maintains that at 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[2] and tripped and fell on the ground." (App. 221). Respondent alleges Petitioners 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 Property, L.L.C., Private Restaurant Master Lessee, L.L.C., each d/b/a Outback Steakhouse, 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 the condition itself. (App. 222).

Respondent's dangerous condition theory was premised upon violation of certain codes. Specifically, Respondent pled:

> 17. The [Petitioners], acting together as agents and servants of one another, violated their duty to use reasonable care to protect [Respondent] 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 above mentioned in the following particulars:
>
> ....
>
> g. In failing to maintain the exterior of the property in compliance with the International Property Maintenance Code.
>
> ....
>
> j. In failing to take remedial measures to make the ramps come into compliance with the International Property Maintenance Code.

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[2] Also identified as a "handicap ramp" and a "handicap access ramp[]" by Respondent in her Amended Complaint. (See, e.g., App. 223).

(App. 222-23).

The parties conducted extensive discovery, including Respondent deposing Petitioners' premises liability and human factors expert,[3] Alan O. Campbell, PE, RRC, of Applied Building Sciences, Inc. At his deposition, Campbell rendered numerous opinions under oath, including:

- Respondent was not disabled or possessed a mobility disability (as defined by the Americans with Disabilities Act) at the time of the subject fall. (App. 293, 323, 325, 328).
- ANSI 117.1 is not applicable in the instant case as it pertains to Petitioner. (App. 293).[4]

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[3] Campbell is the only human factors expert that provided competent sworn testimony containing an opinion in the instant case. (App. 280, 383-84, 412, 414.16). Respondent's liability expert, Dr. Bryan Durig, provided an affidavit following the April 7, 2014, summary judgment argument (dated April 10, 2014), that contains some testimony that could be considered human factors/biomechanical in nature concerning sensor perception (see, e.g., App. 555); however, Dr. Durig's opinion concerning these matters should not be considered by this Court due to his affidavit not establishing any expertise on his part concerning competency to render opinions concerning human factors/biomechnical science. See Rule 56(e), SCRCP ("Supporting an opposing affidavit shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated."); see also Logan v. Wachovia Bank, N.A., Op. No. 2009-UP-092 (S.C. Ct. App. filed May 7, 2009) (granting defendant's summary judgment on plaintiff's defamation cause of action due to plaintiff failing to appropriately comply with the requirements of Rule 56(e), SCRCP: "Under the South Carolina Rules of Civil Procedure, an affidavit supporting summary judgment must be made on personal knowledge, must be admissible, and must show the affiant's competency to testify."). Dr. Durig did not enunciate competency in his affidavit in any specific science or specialty, including human factors and biomechanics.

[4] Campbell also 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?

- Assuming, arguendo, ANSI 117.1 is to be considered in the instant case, any deviation regarding slope in either the top of the subject ramp or at its flared sides is negligible and would not be perceptible by a pedestrian to the point of causing a fall. (App. 292-93, 346, 349). Moreover, with regard to transition from curb to ramp, ANSI 117.1 does not include requirements for striping or markings on a curb ramp. (App. 293, 316, 367-68).

- 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 Respondent. (App. 325-27, 328, 382).

- The subject accident occurred immediately after Respondent stepped off the curb and onto the curb access ramp, which was within the applicable requirements of the Standard Building Code, the governing codes as it pertains to Respondent. Respondent was not walking on the curb access ramp at the time of her fall. (App. 391).

- The proximate cause of Respondent's fall was likely a result of her simply stumbling and failing to recover due to her choice of footwear, which were high heels with a thin strap. (App. 293, 412-15).

After a period of extended discovery, Petitioner moved for summary judgment upon two grounds: (1) Respondent could not prove the existence of an applicable/colorable/recognized

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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.

(App. 303-304) (emphasis added); (see also App. 307, 353-54).

duty of care, which was breach by Petitioners; and (2) the absence of competent expert testimony from Respondent regarding proximate cause. (App. 467-68).

Following oral argument and a review of the memoranda and other supporting documentation respectively submitted by the parties, the Circuit Court granted summary judgment to Petitioners, holding Respondent could not prove the existence of a colorable duty of care, which was breached by Petitioners. (App. 202-12).

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

On appeal to the Court of Appeals, Respondent maintained the Circuit Court erred in granting summary judgment in favor of Petitioners, arguing the grant of summary judgment was premature and Respondent presented evidence of a dangerous condition. Respondent made reference to the expert report of Ruston Hunt to support her contention. Specifically, Hunt opined that the cross-slope at the point where Respondent stepped exceeded the limit recommended by the Federal Highway Administration. Of note, Respondent never filed an affidavit of Ruston Hunt prior to the hearing on Petitioners' motion for summary judgment.

The Court of Appeals heard arguments on May 4, 2016. On September 14, 2016, the Court of Appeals issued an unpublished opinion, holding Respondent presented at least a scintilla of evidence the curb ramp upon which she fell was a dangerous condition. The Court of Appeals referenced Hunt's opinions, finding Hunt's opinions created an issue of fact whether the curb ramp was a dangerous condition. (App. 78). The Court of Appeals ultimately reversed the grant of summary judgment and remanded the matter.

Petitioners filed a Petition for Rehearing (Panel) and Petition for Rehearing En Banc. Petitioners averred Respondent failed to present any evidence of a violation of an applicable standard or code. Petitioners further maintained the court improperly considered the opinions and statements of Hunt, as such opinions and statements were inadmissible hearsay evidence. (App. 4-26).

The Court of Appeals granted the Petition for Rehearing (Panel) and issued a subsequent opinion which was substituted for the court's original September 14, 2016 opinion. The Court of Appeals again held Respondent presented at least a scintilla of evidence the curb ramp upon which she fell was a dangerous condition. However, the Court did not make any reference to the opinions and statements of Hunt, seemingly agreeing with Petitioners that reliance upon the same was erroneous. However, the Court upheld its previous disposition, and reversed and remanded the case. (App. 3).

STATEMENT OF THE CASE

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

Respondent filed this action on April 16, 2012, in Sumter County Court of Common Pleas, alleging she sustained injuries from a fall while exiting Petitioners' Outback Steakhouse Sumter location. (App. 221). Respondent alleges that due to an improperly sloped curb access ramp, she fell and injured her back, right buttock, right hip, left ribs, pelvis and other body parts. (App. 221). She seeks both actual and punitive damages. (App. 224).

After a period of extended discovery, Petitioners moved for summary judgment upon two grounds: (1) Respondent could not prove the existence of applicable/colorable/recognized duty of care, which was breached by Petitioners; and (2) the absence of competent expert testimony from respondent regarding proximate cause. (App. 467-68).

The Circuit Court heard Petitioner's motion for summary judgment on April 7, 2013. (App. 202). Upon consideration of the parties' respective memoranda and supporting materials, as well as the parties' respective arguments, the Circuit Court elected to grant summary judgment to Petitioners based upon a finding there was no recognized legal duty owed to Respondent, which was breached by Petitioners. (App. 202-12).

The Court advised the parties of its decision to grant summary judgment by email on May 15, 2014. The final order, as reviewed and executed by the Circuit Court, was filed by the Sumter County Clerk of Court on May 28, 2014. (App. 202).

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 Respondent filed a Rule 56(f) affidavit and an accompanying brief in support of the desired

relief. (App. 483-89). Petitioners' 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, Respondent timely filed a Rule 59(e), SCRCP motion to alter or amend, which was essentially premised upon the same grounds as enunciated within her Rule 56(f) affidavit and memorandum.[5] (App. 461-66). The Circuit Court denied Respondent's Rule 59(e) motion. (App. 187-201).

Respondent timely appealed the Circuit Court's decision to the Court of Appeals. After briefing and oral argument, the Court of Appeals entered a decision on September 14, 2016, reversing the Circuit Court. See Jackson v. OSI Restaurant Partners, LLC, Op. No. 2016-UP-408 (S.C. Ct. App. filed Sept. 14, 2016).

Petitioners then filed a Petition for Rehearing (Panel) and Petition for Rehearing En Banc. The Court of Appeals granted the Petition for Rehearing (Panel), dispensed with further briefing, and on December 7, 2016, filed a substituted opinion.

This Petition for Writ of Certiorari follows.

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

STANDARD OF REVIEW

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

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

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

Our appellate courts have further stated that when a plaintiff is faced with a motion for summary judgment, the plaintiff cannot defeat the motion by relying upon the mere allegations of her complaint, but must disclose the facts the plaintiff intends to rely on by affidavit or other proof. Shupe v. Settle, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994); Dyer v. Moss, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985). A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment. Germann v. New York Life Ins. Co., 286 S.C. 34, 331 S.E.2d 385 (Ct. App. 1985). Where the plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no

factual showing in opposition to a motion for summary judgment, the Circuit Court is required under Rule 56 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

In its disposition of the case at bar, the Circuit Court held that: (1) the premises safety standard that was actually pled, which was alleged to have been violated (International Property Maintenance Code), did not apply; and (2) ANSI 117.1 also did not apply as a governing standard.[6]

The Court of Appeals reversed the Circuit Court, finding Respondent presented evidence the slope of the side flares exceeded code limits and the running slope of the ramp exceeded the allowed slope of 12.5% for the general population. (App. 2-3). Accordingly, the Court of Appeals held Respondent presented at least a scintilla of evidence the curb ramp upon which she fell was a dangerous condition; therefore, the Circuit Court erred in granting summary judgment to Petitioner. (App. 3).

Respectfully, the Court of Appeals erred in reversing the Circuit Court's order granting summary judgment in favor of Petitioners. Petitioners aver: (1) Respondent has failed to articulate a recognized standard of care breached by Petitioners; (2) Petitioners' expert provided the **only** competent sworn testimony establishing that any alleged breach of any duty was negligible **and did not** proximately cause Respondent's injuries and damages; (3) to the extent

[6] Because the determination that Respondent failed to establish an applicable standard governing Petitioner's duty owed to her, the Circuit Court did not address whether any alleged breach of duty proximately caused Respondent's injuries and damages.

the Court of Appeals considered Ruston Hunt's report, the Court erred in its consideration of inadmissible hearsay evidence; and (4) as an additional sustaining ground, there is an absence of evidence that any alleged breach proximately caused Respondent's injuries and damages.

I. Duty of Care Requires Articulation of a Recognized Standard

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

> (1) a duty of care owed by Petitioner to Respondent;
>
> (2) breach of that duty by a negligent act or omission;[7]
>
> (3) resulting in damages to the Respondent; 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 landowner's premises, the plaintiff must demonstrate either:

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[7] 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, Petitioners 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.").

Petitioners further maintain the same can be argued as it pertains to establishing the proximate cause of Respondent's purported fall due to the sciences of biomechanics and human factors being injected into the dispute. See, e.g., Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010) ("[E]xpert testimony is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge."). See Petitioners' additional sustaining ground argument supporting affirmance of the Circuit Court's grant of summary judgment, infra, at p. 22.

(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).

Petitioners' motion for summary judgment was not premised solely on the argument that Petitioners did not owe a duty to Respondent; rather, Petitioners maintain Respondent could not satisfy the well-stated negligence analysis due to the fact that, inter alia, respondent could not demonstrate the subject curb access ramp was in fact "dangerous" or "defective" via recognized standards governing the dispute.

The Court of Appeals cited Elledge v. Richland/Lexington Sch. Dist. Five, 352 S.C. 179, 186, 573 S.E.2d 789, 793 (2002) for the proposition that "the general rule is that evidence of industry safety standards is relevant to establishing the standard of care in a negligence case." (App. 2). However, notwithstanding the above-stated rule, Respondent cannot prove the existence of applicable/colorable/recognized duty of care, which was breached by Petitioners.

A. The International Property Maintenance Code Does Not Apply

Based on Respondent'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).[8] See also http://www.llr.state.sc.us/pol/bcc/index.asp?file=GENERAL_CodesInEffect.htm (last visited January 2, 2015) (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 ....").

In the instant case, Petitioners are unaware of the International Property Maintenance Code being adopted by ordinance as "mandatory" by either the City of Sumter or County of Sumter for purposes of enforcement. Accordingly, based on Respondent's express allegations found within her amended complaint concerning duty and breach are based upon an alleged violation of the International Property Maintenance Code, Petitioners asseverate that no such duty exists. Thus, summary judgment was warranted in the instant case.

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

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

[8] In Kauffman, a South Carolina dispute in federal district court, a hotel guest brought a premises liability action against a Lowcountry 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.

applicability of ANSI 117.1 standards to Appellant, a non-disabled person at the time of the fall.[9]

To the extent that Respondent relies upon ANSI 117.1 as a basis for recovery in her case, such pursuit lacks legal efficacy. Although it is true that ANSI 117.1, which relates to exterior accessible routes for people with physical disabilities, may have been adopted or referenced in various building codes, Petitioners 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 Respondent 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, Respondent 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 Petitioners.

Indeed, the only reputable/admissible testimony regarding applicable standards was provided by Petitioners' expert, Alan O. Campbell, who testified at his deposition that ANSI 117.1 was inapplicable to respondent, a non-disabled person at the time of the fall. (App. 293).

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

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

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

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

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

Id. at 17 (emphasis added); see also Miller v. New York City Hous. Auth., 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. Respondent, 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. The 2006 International Building Code Does Not Apply

To the extent Respondent relies upon the 2006 International Building Code as a basis for relief, Petitioners assert Respondent is in error. Petitioners maintain the 2006 International Building Code does not apply because the subject ramp was an existing structure that was not altered during the time between its original installation in 1999[10] and the date of the incident involving Respondent.[11] Section 101.2 of the 2006 International Building Code demonstrates

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[10] (See App. 617).

[11] In his deposition as the Rule 30(b)(6) deponent for Petitioners, 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.

(App. 617)

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.

the 2006 International Building Code does not apply to existing structures unless alterations are performed. Further, the 2006 International Building Code is not recognized as mandatory for purposes of enforcement in South Carolina. See also http://www.llr.state.sc.us/pol/bcc/index.asp?file=GENERAL_CodesInEffect.htm (last visited January 5, 2015) (stating the last version of the International Building Code considered "mandatory" for new construction is the 2003 version of the code).[12]

Petitioners maintain the 2006 International Building Code does not apply because the subject ramp was an existing structure that was not altered during the time between its original installation in 1999 and the date of the incident involving respondent. Indeed, Petitioners' Rule 30(b)(6), SCRCP, deponent testified that to the best of his knowledge, the subject ramp is original, and was installed the same month of construction of the building in June 1999. (App. 617). He further testified that no alterations were done to the subject ramp since the original installation. (App. 618-19). Therefore, Petitioners assert the 2006 International Building Code does not govern disposition of the instant dispute.

Accordingly, Respondent has failed to demonstrate a cognizable standard applicable to a duty owed by Petitioners. Accordingly, the Court of Appeals erred in finding Respondent presented a scintilla of evidence to create a genuine issue of fact that Petitioners breached an applicable standard of care.

Mr. Adams: No, ma'am.

(App. 618-19).

Adams further testified that nothing structurally had been done to the subject ramp during his tenure as managing partner at the location. (App. 619-20).

[12] (See App. 613-15).

II. The Court of Appeals Overlooked or Misapprehended Petitioners' Expert's Testimony that Any Deviation from ANSI 117.1 Was Not a Proximate Cause of the Subject Accident

In their defense, Petitioners retained Alan O. Campbell, PE, RRC, of Applied Building Sciences, Inc., a South Carolina-based premises liability and human factors expert. Campbell was disclosed as an expert and subsequently deposed. At his deposition, Campbell rendered several opinions under oath, including, inter alia:

- Assuming, arguendo, ANSI 117.1 is to be considered in the instant case, any deviation regarding slope in either the top of the subject ramp or at its flared sides is negligible and would not be perceptible by a pedestrian to the point of causing a fall. (App. 292-93, 346, 349). Moreover, with regard to transition from curb to ramp, ANSI 117.1 does not include requirements for striping or markings on a curb ramp. (App. 293, 316, 367-68).

- The subject curb access ramp was safe for the general non-disabled population and comports with the 1997 Standard Building Code as it relates to non-disabled persons such as Appellant. (App. 325-27, 328, 382).

- The subject accident occurred immediately after Appellant stepped off the curb and onto the curb access ramp, which was within the applicable requirements of the Standard Building Code, the governing code as it pertains to Appellant. Appellant was not walking on the curb access ramp at the time of her fall. (App. 391).

- The proximate cause of Appellant's fall was likely a result of her simply stumbling and failing to recover due to her choice of footwear, which were high heels with a thin strap. (App. 293, 412-15).

In its opinion, the Court of Appeals stated, "[Petitioners'] expert admitted the slope of the side flares exceed code limits." (App. 2). However, Petitioners maintain the Court overlooked the totality of Campbell's testimony. While Campbell testified that assuming, arguendo, the ANSI standards applied to Respondent, any deviation to **the slope was negligible and would not be perceptible by a pedestrian to the point of causing a fall**. Respondent failed to produce

credible/admissible evidence to the contrary to create a genuine issue of material fact.[13]

III. Expert Report Does Not Satisfy Rule 56 of the South Carolina Rules of Civil Procedure

In its Opinion filed September 14, 2016, the Court of Appeals stated:

> [Respondent's expert, Ruston Hunt, stated the cross-slope at the point where [Respondent] stepped exceeded the limit recommended by the Federal Highway Administration by more than 200%. Thus, even without consideration of American National Standards Institute (ANSI) A117.1 Standards, [Respondent presented evidence the ramp deviated from industry standards. Hunt noted a trip hazard existed "at the point at which the top of the curb ramp meets the sidewalk." He opined, "In [Respondent's] situation, the unexpected step hazard, even if it was only one or two inches, would have been further exacerbated by the slope of the side of the ramp.

In analyzing Hunt's report as part of the record, the Court of Appeals held Respondent has presented at least as scintilla of evidence the curb ramp upon which she fell was a dangerous condition.

In their Petition for Rehearing, Petitioners averred the Court erred in considering Hunt's report because the report contained inadmissible, unsworn hearsay testimony.

In its substituted opinion, the Court of Appeals made no reference to Hunt's report, including any findings or opinions.

However, to the extent the Court of Appeals relied on Hunt's report, and/or to the extent Respondent may rely on Hunt's report in this Appeal, Hunt's report and the opinions contained therein are inadmissible and are improper to consider for summary judgment.

In her briefing to the Court of Appeals, Respondent sought the Court's consideration of Hunt's supposed statements via a written report submitted in supplemental briefing in opposition to summary judgment, as it related to both duty and proximate cause.

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[13] Insomuch as Respondent relies on Ruston Hunt's report in creating a genuine issue of material fact regarding any alleged violation of the ANSI standards, Petitioners reassert that it is improper for the Court to consider Hunt's report containing unsworn statements. <u>See</u> Argument, <u>infra</u>, Section III.

As an initial matter, Petitioners note they objected to the injection of Hunt's purported statements into the appeal via a motion to strike filed with the Court of Appeals following Respondent's filing and serving of her initial brief, which included arguments centered on Hunt's purported statements. (App. 160).

In her Final Brief, Respondent relied upon portions of Hunt's report in an attempt to establish a scintilla of evidence that the subject ramp deviated from industry standards. Specifically, Respondent asserted, in relying on Hunt's report, that the cross-slope of the ramp exceeds the limit recommended by the Federal Highway Administration and, therefore, was a violation of industry standards. (App. 99).

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

Moreover, there is no sworn testimony provided by Hunt in which the Court can consider in establishing the standard at the summary judgment stage. See Rule 56(e), SCRCP ("When a motion for summary judgment is made and supported as provided by this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."); see also Hall v. Fedor, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) ("Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence."); Rule 802, SCRE ("[H]earsay is not admissible except as provided by these rules or by other rules

prescribed by the Supreme Court of this State or by statute."); Hall, 349 S.C. at 175, 561 S.E.2d at 657 (holding "materials used to support or refuse a motion for summary judgment must be those which would be admissible in evidence").

Hunt's report is hearsay testimony and therefore is inadmissible and must not be considered by the Court. See Rule 802, SCRE; Hall, 349 S.C. at 175, 561 S.E.2d at 657. Indeed, Respondent had an opportunity to present to the trial court a sworn affidavit by Hunt pursuant to Rule 56(e), SCRCP, prior to the hearing on Petitioner's motion for summary judgment. Hunt produced his report on April 2, 2014. Petitioner's motion was heard on April 7, 2014. The order granting summary judgment was signed on May 23, 2014, and filed on May 28, 2013. Arguably, at the very least, Respondent had a three-day window ahead of the scheduled argument in which to produce an affidavit. Respondent's lack of timeliness in securing an affidavit now precludes her from relying on any unsworn statements contained in Hunt's report.

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

Therefore, Petitioners maintain that any reliance upon Hunt's report by Respondent or any consideration of the same by the Court is improper.

IV. The Absence of Evidence Demonstrating Violation of Any Recognized Standard was Proximate Cause of Plaintiff's Fall

Petitioners raised two grounds in support of the grant of summary judgment: (1) the absence of colorable duty of law, which was breached; and (2) absence of evidence demonstrating proximate cause. The Circuit Court granted summary judgment as to the duty issue; therefore, Respondents prevailed. The Circuit Court elected not to reach the issue of

proximate cause; the Court of Appeals did the same. (App. 3).

Though neither the Circuit Court nor Court of Appeals reached the proximate cause issue, Petitioners are not precluded from raising this argument as an additional sustaining ground: "The appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record." Rule 220(c), SCACR; see also I'On v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (holding a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court."). Thus, this Court can, at its discretion, review Petitioners' proximate cause argument, and if it finds it is proper and fair to do so, rely on the additional argument to affirm the Circuit Court's judgment. See id.

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

In the instant case, Respondent contends that Petitioners' curb access ramp was constructed and maintained in violation of, inter alia, ANSI 117.1. Respondent elicited expert testimony stating the same, which is clear recognition by Respondent that matters concerning construction and maintenance of curb access ramps in the commercial context is outside the ken of the ordinary juror. The sciences of human factors and biomechanics and establishing whether deviation from a standard for a walking surface would cause a non-disabled person to fall is

another subject matter necessitating expert witness testimony.[14] See, e.g., Holland v. Morbark, Inc., 407 S.C. 227, 754 S.E.2d 714 (Ct. App. 2014).

In the case at bar, Petitioners' liability expert, Alan O. Campbell, an expert in, inter alia, human factors and biomechanics provided testimony in his deposition, stating, assuming, arguendo, ANSI 117.1 is to be considered in the instant case, any deviation in standard regarding slope in either the top of the subject ramp or at its flared sides was negligible and would not be perceptible by a non-disabled pedestrian to the point of causing a fall.[15]

Appellant, however, did not elicit competent sworn testimony from any expert stating differently. While Dr. Durig's affidavit testimony reveals an averment that "[t]he deviations from the ANSI A117.1 standard requirements make the subject curb ramp a defective and hazardous walkway and is considered a contributing factor to [Respondent's] fall," Dr. Durig's affidavit is defective on its face due to it lacking any testimony demonstrating his competency to render opinions concerning, inter alia, human factors/biomechanical science. See Rule 56(e), SCRCP ("Supporting and opposing affidavits ... shall show affirmatively that the affiant is competent to testify to the matters stated."); cf. 27 S.C. Jur. Medical & Health Professionals § 34 ("Expert testimony relied upon to establish proximate cause must include a statement of professional opinion that the injuries complained of most probably resulted from the alleged negligence of the defendant. This so called 'most probable' rule is needed because of the highly technical nature of malpractice actions.") (footnotes omitted).

The absence of competent contra expert testimony concerning whether the violation of a standard being the proximate cause of Respondent's alleged fall precludes Respondent from escaping from disposition at the summary judgment stage. Thus, summary judgment was

[14] See notes 3 & 13 , supra.

[15] (App. 181-293, 303-04, 307, 316, 323, 325-28, .46, 349, 353-54, 367-68, 382, 391, 412-15).

warranted upon the additional sustaining ground that there was an absence of a qualified opinion illustrating a tenable causal connection between Petitioners' purported negligence and Respondent's injury.

CONCLUSION

For the foregoing reasons, Petitioners aver Respondent has not satisfied the negligence analysis in this static defect premises liability suit. Based on this failure of proof, the Court of Appeals erred in reversing the Circuit Court's grant of summary judgment in favor of Petitioners. Petitioner respectfully request this Court reverse the Court of Appeals, and affirm the previous grant of summary judgment in their favor in the instant case.

Respectfully submitted

COLLINS & LACY, P.C.

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PETITION FOR WRIT OF CERTIORARI

Columbia, South Carolina
January 6, 2017

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SC Court of Appeals

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. 2014-001861

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.

PROOF OF SERVICE

Counsel for Petitioners 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 certifies they have served Petitioners 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's Petition for Writ of Certiorari on all parties by depositing a copy of it in the United States Mail, postage prepaid, on January 6, 2017, addressed to the following attorneys of record:

COUNSEL SERVED:

L. Lisa McPherson, Esquire
Melissa Garcia Mosier, Esquire
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and

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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January 6, 2017

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January 6, 2017

VIA HAND-DELIVERY
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

RECEIVED
JAN 09 2017
SC Court of Appeals

Re: ***Rebecca Jackson v. Outback Steakhouse***
Appellate Case No. 2014-001861
Claim No. 005269-029531-GB-01
C&L File No. 001613-00102

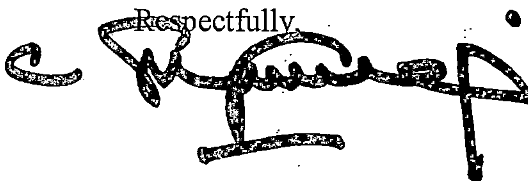
Dear Mr. Shearouse:

Please find enclosed for filing the original and seven (7) copies of Respondent's Petition for Writ of Certiorari, together with the Proof of Service, in the above-referenced matter. Please return a clocked copy of same to me via my courier.

Also enclosed are two (2) copies, one bound and one unbound, of the Appendix.

Thank you for your time and attention. Should you have any questions, please do not hesitate to contact me.

Respectfully,



Christian Stegmaier

CBS:net
Enclosures
cc: L. Lisa McPherson, Esquire (*via U.S. Mail*)
Melissa Garcia Mosier, Esquire (*via U.S. Mail*)

and

The Honorable Jenny Abbott Kitchings (*via U.S. Mail*)
Clerk, South Carolina Court of Appeals

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