

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Appellate Case No. 2017-000025

Rebecca Jackson,

Appellant,

v.

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

Respondents.

RETURN TO OUTBACK'S PETITION FOR
WRIT OF CERTIORARI

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S.C. SUPREME COURT

RICHARD W. SIMMONS, II
J. TYLER LEE, JR.
MELISSA G. MOSIER
JOHN P. MEADORS
SARAH W. GUTHRIE
AMANDA N. PITTMAN

February 3, 2017

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

VIA HAND DELIVERY

Rebecca Jackson vs.
OSI Restaurant Partners LLC, 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

Appellate Case No. 2017-000025

Dear Mr. Shearouse:

Enclosed you will find for filing an original and eight copies of Mrs. Jackson's Return to Outback's Petition for Writ of Certiorari, together with Proof of Service, in this matter. Please return two clocked copies of the same to me via courier. If you have any questions, please do not hesitate to call.

Sincerely yours,



Melissa G. Mosier

cc: Christian Stegmaier, Esquire
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Rules

South Carolina Rules of Civil Procedure, Rule 564

Statement of Issues for Review

- I. Did the Court of Appeals correctly hold that Outback owes Mrs. Jackson, an invitee, a duty of care to protect her against a danger that Outback created when it put a rounded, uneven and unmarked curb ramp in its parking lot?
- II. Did the Court of Appeals correctly hold that Mrs. Jackson presented at least a scintilla of evidence that the rounded, uneven and unmarked curb ramp was a dangerous condition?
- III. Has Mrs. Jackson provided at least a scintilla of evidence that a rounded, uneven and unmarked curb ramp was the proximate cause of Mrs. Jackson's fall?
- IV. Was summary judgment premature on whether Outback knew or should have known that the curb ramp posed an unreasonable risk of danger to invitees?

Statement of the Case

Mrs. Jackson dispenses with a full statement of the case to instead briefly discuss milestones towards the current posture of this matter. App. 87-90. Mrs. Rebecca Jackson filed a premises liability action on June 7, 2012 alleging that she is an invitee owed a duty of care, and that Outback created a hazard on its property when it knowingly permitted a rounded, uneven ramp to remain on the premises in a foreseeable pedestrian path. App. 222, ¶¶13, 15, 16. Mrs. Jackson further alleges that Outback had actual or constructive notice of the dangerous condition presented by the ramp. App. 222¶¶14,15,16. In addition to common law negligence, Mrs. Jackson alleges the violation of industry standards as evidence of the breach of a duty of care owed to her. App. 223. Mrs. Jackson alleged that the condition of the ramp caused her to fall and suffer injuries. App. 222 ¶ 18.

On February 28, 2014 Outback filed a Motion for Summary Judgment indicating that Mrs. Jackson's entire theory of liability is based on a violation of codes and industry standards that do not apply. App. 580-584; App. 394-398.

While Outback's Motion for Summary Judgment remained pending, Mrs. Jackson filed a Motion to Compel on March 24, 2014. App. 470-482. Included in her motion, Mrs. Jackson sought to discover incident reports generated by Outback but apparently maintained by their insurer, Wells Fargo. App. 470-71. Incident reports are expected to reveal prior incidents of falls outside of the Outback.

At the hearing on Outback's Motion for Summary Judgment on April 7, 2014, Mrs. Jackson raised the matter of her outstanding Motion to Compel, but the hearing quickly turned towards the merits of Outback's Motion for Summary Judgment. App. 235-36.

Outback admits that it created the ramp alleged to have caused Mrs. Jackson's injuries. App.241, ll. 1-9. Despite this, Outback argued that the subject ramp is not dangerous as a matter of law. *Id.* at 12-17. To support this theory, Outback argued in the alternative: first, since Mrs. Jackson is not disabled, she lacks standing to use a violation of ANSI A117.1 to demonstrate negligence; alternatively, any deviation from ANSI A117.1 was negligible. App. 241-42. Outback also argued that because neither the Standard Building Code nor ANSI A117.1 require curbs to be painted, the court should disregard any argument as to whether yellow paint would have called more attention to the ramp. App. 242-43

In reply, Mrs. Jackson urged that as a person having undergone bilateral knee replacements, she chose to navigate through a wider space rather than between cars. App. 246, ll. 1-2. R. App. 255, ll. 2-8. And that since the ramp was not painted and was covered up by cars, Mrs. Jackson was unable to appreciate that the sidewalk transitioned to a ramp that was fifty five percent too steep on the top and seventeen percent too steep on the sides.

App. 255, ll. 10-16.

Mrs. Jackson urged that the building code adopted in Sumter specifically incorporates ANSI A117.1 by reference. App. 257, ll. 18-22. Mrs. Jackson further argued that the ramp should have been constructed in accordance with ANSI A117.1. App. 258, ll. 14-24.

Referencing her expert's human factors report and showing photographs to the circuit court, Mrs. Jackson further urged that paint would have helped call the ramp to her attention. App. 256, ll. 2-5; App. 265, ll. 2-12. And unlike Outback's expert, Alan Campbell, both of her experts actually visited the scene, perceived the ramp first hand and measured the ramp without relying on a trainee engineer. App. 532. App. 286, ll. 10-21. App. 287, ll. 2-6.

At the conclusion of the hearing the circuit court granted Mrs. Jackson fifteen (15) days to supplement her Memorandum in Opposition to the Defendants' Motion for Summary Judgment. In Mrs. Jackson's timely-filed Supplemental Memorandum of Law, she again raised prematurity of Outback's Motion for Summary Judgment. App. 521-22. She also reiterated her status as an admitted invitee who is owed a duty of care. *Id.* at App. 523-24. Further, she pointed out that during oral argument, Outback conceded that it created the ramp at issue in the case, and that as a result Mrs. Jackson need not prove notice of the specific hazard that caused her injury. *Id.* at App. 524.

On May 15, 2014 the parties received e-mail notification of the Court's decision to grant summary judgment in Outback's favor. Following a motion to alter or amend, Mrs. Jackson appealed this decision and the Court of Appeals agreed that indeed, an invitee is

owed a duty of reasonable care. App. 1-3. Outback petitioned for rehearing and rehearing *en banc* and the essential basis of the decision remained unchanged – an invitee is owed a duty of care. App. 4-24; App. 76-78. The Court of Appeals declined to reach Outback’s additional sustaining ground of proximate cause. Outback’s Petition followed.

Argument

On appeal from an order granting summary judgment, the appellate court reviews all ambiguities, conclusions and inferences arising in and from the evidence in a light most favorable to the non-moving party below. *South Carolina Rules of Civil Procedure*, Rule 56(c); *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 134, 638 S.E.2d. 650, 654, (2006).

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

I. The Court of Appeals correctly held that Outback owes Mrs. Jackson, an invitee, a duty of reasonable care.

Mrs. Jackson respectfully directs the Court to her final briefs for full recitation of her arguments and highlights a few points as to each issue presented. App. 91-110; App. 150-158.

Going all the way back to 1851, South Carolina has recognized that a business owes a customer the duty of reasonable care for her safety. *Ed. Freer and Wife v. G&H Cameron*, 38 S.C.L. (4 Rich.) 228 (1851). Outback concedes that Mrs. Jackson was its invitee at all times relevant to this case. App. 190 at n.6. Therefore, the Court of Appeals correctly held that the trial court erred in finding no duty of care was owed to Mrs. Jackson, an invitee.¹

A person owes an invitee the duty of exercising reasonable or ordinary care for her safety and is liable for any injury resulting from the breach of this duty. *Graham v. Whitaker*, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984). To recover damages for injuries caused by a dangerous or defective condition on a restaurant's premises, a plaintiff must show either (1) that the injury was caused by a specific act of the defendants which created the dangerous condition; or (2) that the defendants had actual or constructive knowledge of the dangerous condition and failed to remedy it. *Anderson v. Racetrac Petroleum Inc.*, 296 S.C. 204, 371 S.E.2d 530 (1988).

Because Outback admits creating the alleged danger posed by the built up curb ramp at issue, Mrs. Jackson need not prove that Outback knew of the specific hazards posed by the ramp. For well over one hundred years South Carolina has recognized the obligation of business owners to use reasonable care for its

¹ The circuit court granted summary judgment on the sole basis that the Outback did not owe an invitee a duty of care. The circuit court expressly withheld a ruling on proximate cause. App. 196.

customers. In this case, Outback owes Mrs. Jackson, an invitee, a duty of care because it created the danger.

The Court of Appeals correctly reversed the circuit court's grant of summary judgment consonant with the well-settled law of this State, and Mrs. Jackson respectfully urges this Court to deny Outback's Petition on this basis.

II. The Court of Appeals correctly held that Mrs. Jackson created genuine issues of material fact showing that the ramp Outback built was a dangerous condition.

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

Both Mrs. Jackson's and Outback's experts² agree that the Standard Building Code applies to the ramp at issue in this case, and that the Standard Building Code adopts ANSI A117.1 by reference. App. 297, ll. 7-9. *See also* App. 553-555; 557-560. Both Mrs. Jackson and Outback's experts agree that ANSI A117.1 provides minimum standards for the proper construction of the subject

² Outback claims that its expert offered the only competent sworn testimony in this case. Pet. Br. 11. However, Mrs. Jackson timely submitted Durig's affidavit as Exhibit G to the trial court within the allotted time to supplement her opposition to the motion for summary judgment. App. 553-555. Outback argues that Durig, a professional engineer, is not competent to provide his opinions, but Outback's expert is also a professional engineer. *Compare* App. 553 and 560. *See also* App. 160-180.

ramp. App. 315, ll. 14-19. App. 330, ll. 17-24. In other words, the ramp at issue was designed and constructed to comply with ANSI A117.1. App. 400, ll.7-22.

Outback's expert agrees that pedestrians commonly walk on ramps. App. 305, l. 13 – p. 306, l. 5. App. 310, l. 15 – 311, l. 2. Outback's expert also agrees that "it's entirely foreseeable [Mrs. Jackson] would have likely used one of the ramps." App. 361, ll. 19-21. App. 380, ll. 13-16.

Not only is it foreseeable that Mrs. Jackson would use one of Outback's ramps, but according to Outback's own expert it is also foreseeable that she could get hurt using one of the ramps. App. 361, ll. 19-21. App. 335, l. 7- p. 336, l. 6. Outback's engineer even admitted that he would recommend addressing the ramps because they pose a liability to the Outback and everyone using the ramps at that location. App. 334, l. 6 – 335, l. 2. Not only that, Outback's expert testified that the current condition of the subject ramp could cause someone to fall. App. 335 l. 7 - p. 336 l. 6.

Where the experts diverge in opinion is this: Mrs. Jackson's expert, 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. Outback's expert, Campbell, opines that violation of the standards set forth in ANSI A117.1 did not contribute to Mrs. Jackson's fall, instead stating that many other factors are the more probable cause of her fall: Mrs. Jackson's choice of footwear, possible intoxication, eyesight, distractions, or drug use. App. 293, ll. 18-22. This all creates a jury issue.

Although he never walked on or laid eyes on the ramp himself, Outback's expert opines that Mrs. Jackson would not have been able to detect that the subject ramp was over two times too steep according to the ANSI standard. Pet. Br. 19. *See also* 309, ll. 10-11. A jury could choose not to believe Outback's expert and call upon their collective experiences instead to decide that a rounded ramp that is partially covered up by cars is unreasonably dangerous, and the more likely cause of Mrs. Jackson's fall. *See App.* 547.

The experts' competing testimony demonstrates that there are genuine issues of material fact as to whether the subject ramp presented an unreasonably dangerous condition, and Mrs. Jackson has presented at least a scintilla of evidence that the ramp was in fact a dangerous condition. For this reason as well, Mrs. Jackson urges this Court to deny Outback's Petition.

III. Mrs. Jackson has presented at least a scintilla of evidence that the rounded, uneven and unmarked ramp was the proximate cause of her fall.

Not only does Mrs. Jackson argue that the ramp was too steep according to the ANSI standard, but from the outset Mrs. Jackson has alleged that the lack of yellow paint to warn of the transition from sidewalk to ramp poses a hazard. App. 222 ¶17; App. 263, ll. 3-15. *See also* App. 539, 541, 543, 545, 547. Mrs. Jackson argues that painting the ramp provides a reasonable, inexpensive warning to her and others of the presence of the ramp. *Id.*

ANSI A117.1 does not require paint to distinguish a curb from a ramp.

App. 316, ll. 1-4. A jury could find Outback negligent for choosing not to paint the ramp to call attention to its presence. Outback's expert testified that if called upon during construction of the subject ramp, he may have even advised Outback to use paint to warn of the ramp's presence. *See* App. 316, ll.1-23 (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 Form. A: There is not restriction or 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 ... Would I tell them to add paint? Maybe, maybe not, I don't know."

Outback's 30(b)(6) witness, testified that the curb was painted after Mrs. Jackson's fall in an effort to enhance the visibility of the curb. App. 621, ll. 18-25. But according to Outback's expert, the transition from sidewalk to ramp would have been visible from Mrs. Jackson's field of view. App. 293, ll. 12-17. App. 557-560. This disagreement also creates a jury issue, because a reasonable jury could conclude that a properly marked ramp could have prevented Mrs. Jackson's fall, and that Outback's decision not to mark the ramp breached the duty of care owed to Mrs. Jackson.

Mrs. Jackson timely provided the circuit court with a report from her human factors expert stating that the construction of the ramp and lack of paint or markings was the most likely cause of Mrs. Jackson's fall. App. 564-573. Outback filed a Motion to Strike, attempting to exclude Mr. Hunt's report. App. 163-166.

The circuit court never ruled on the additional sustaining ground of proximate cause. App. 190.³ App. 564-573. On review, the appellate court also declined the invitation to reach the additional sustaining ground of proximate cause, which was a reasonable exercise of discretion. *See I'on, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). The Court of Appeals ultimately denied Outback's Motion. App. 180. As set forth more fully in her Return to Outback's Motion to Strike, the Hunt report calls further attention to the need for a jury to weigh the facts and decide the more likely cause of Mrs. Jackson's fall – the ramp itself or, as the Outback says, her choice of footwear, possible intoxication, eyesight, distractions, or drug use. App. 170-172; App. 557-560; App. 293, ll. 18-22.

In conclusion, Mrs. Jackson's evidence by itself creates factual issues for a jury to decide. A jury could disregard all or some of the experts and use their own common sense to determine that a rounded ramp, the same color as the adjoining sidewalk, with cars parked on top of it, is unreasonably dangerous, and the more likely reason for Mrs. Jackson's fall and resulting injuries.

IV. Mrs. Jackson has submitted ample evidence showing genuine issues of material fact exist for trial, but if not, it is because the circuit court granted summary judgment before she was given ample opportunity to discover facts to show that the curb ramp was dangerous.

³ Should this Court decide to take up the additional sustaining ground, Mrs. Jackson urges this Court to also consider Mr. Hunt's report. App. 170-72. App. 180.

Merchants owe their business invitees a duty to inspect and remedy dangers of which it either knew or should have known. *Graham v. Whitaker*, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984). At the summary judgment hearing Mrs. Jackson introduced photographs⁴ of the ramp at issue to the circuit court judge. App. 265, ll. 2-12. App. 539-547. The photographs handed to the circuit court judge showed cars on top of the ramp thus obscuring its presence, and also show a rounded walking surface on top of the ramp. The only condition that has changed with respect to the ramps at issue is the bright yellow paint applied after Appellant's fall. App. 262, l. 17 - p. 263, l. 15; App. 562; App. 621, ll. 13-25.

Mrs. Jackson is entitled to further explore Outback's knowledge regarding the safety of the ramp, but summary judgment was granted despite a pending motion to compel for additional discovery. App. 461-66; 470-482. Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001). In addition, the movant must also show that further inquiry into the facts is not desirable to clarify the application of the law. *Evening Post Pub. Co. v. Berkley County School Dist.*, 392 S.C. 76, 79, 708 S.E.2d 745, 747 (2011). In other words, if the parties agree on the facts but disagree on the conclusions or inferences to be drawn from the facts, summary judgment is inappropriate, and should not be granted. *Koester v. Carolina Rental Center, Inc.*, 313 S.C. 490, 443

⁴ She introduced color photographs at the hearing and also when supplementing her brief in opposition to Outback's motion for summary judgement. See App. 539-547.

S.E.2d 392 (1994).

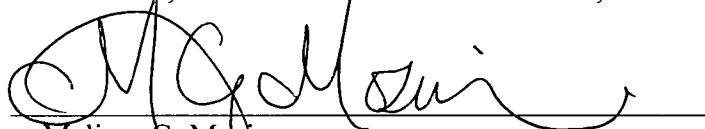
Mrs. Jackson reiterates her desire to conduct further discovery to illuminate the extent to which Outback knew or should have known that the curb ramp posed an unreasonable risk of harm to its invitees, and respectfully urges this Court to deny Outback's Petition on this basis as well.

Conclusion

For any one of the foregoing reasons, Mrs. Jackson respectfully requests that this Court deny Outback's Petition, affirm the Court of Appeals' reversal of the grant of summary judgment, and remand this case to the circuit court for a trial on the merits.

Respectfully submitted,

McWHIRTER, BELLINGER & ASSOCIATES, P.A.

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

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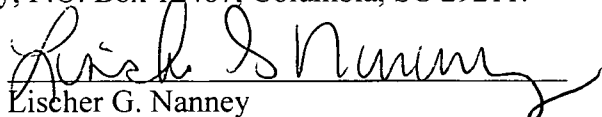
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Respondents.

Proof of Service

I certify that on February 3, 2017, I have served Mrs. Jackson's Return to Outback's Petition for Writ of Certiorari by mailing the same to the attorneys of Record, Christian Stegmaier and Kelsey J. Brudvig, of the law firm of Collins & Lacy, P.O. Box 12487, Columbia, SC 29211.



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