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Unpublished Opinion No. 2016-UP-408 (Filed September 14, 2016)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

PETITIONERS' REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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LAW/ANALYSIS

I. The Duty Owed to Respondent is Premised Upon Industry Standards

Respondent avers that a "business owner owes a customer the duty of reasonable care for her safety," and that because Petitioners have conceded that Respondent was an invitee, she was owed the duty of exercising reasonable or ordinary care. Respondent further avers Petitioners are liable for any injury resulting from the breach of this duty. (Respondent's Return to Petition for Writ of Certiorari at p. 5). In short, Respondent premises her argument that the Circuit Court erred in granting Petitioners summary judgment on "the sole basis that [Petitioners] did not owe an invitee a duty of care."[1] (Id. at p. 5, n. 1).

Respondent has misconstrued or misapprehended the Circuit Court's holding. The Circuit Court did not simply hold that an invitee is not owed a duty of care; rather, the Circuit Court held that Respondent could not demonstrate the subject curb access ramp was in fact "dangerous" or "defective" via recognized standards governing the dispute.

The extent of Petitioners' duty owed to Respondent is found within the applicable industry safety standards. Respondent must prove the existence of an applicable/colorable/recognized duty of care. Stated succinctly, the duty of care requires an articulation of a recognized standard. See Elledge v. Richland/Lexington Sch. Dist. Five, 352 S.C. 179, 186, 573 S.E.2d 789, 793 (2002) ("[T]he general rule is that evidence of industry safety standards is relevant to establishing the standard of care in a negligence case.").

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

[1] Respondent has misconstrued the Circuit Court's holding. The Circuit Court did not simply hold that an invitee is not owed a duty of care; rather, the Circuit Court held that Respondent failed to articulate and prove a cognizable duty owed to her pursuant to any applicable standards.

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.

(App. 222-23).

Petitioners do not contest that an invitee is owed a duty by a business owner of exercising reasonable or ordinary care for her safety. See Sims v. Giles, 343 S.C. 708, 541 S.E.2d 857 (Ct. App. 2001). However, Respondent has misapprehended South Carolina jurisprudence, which expressly requires a plaintiff to establish the **standard of care** in a negligence case, to which **evidence of industry safety standards is relevant**. Elledge, 352 S.C. at 186, 573 S.E.2d at 793 (2002).

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.

Accordingly, the Court of Appeals erred in reversing the Circuit Court's grant of summary judgment in favor of Petitioners.

II. No Industry Standard or Code Applies to Respondent

Respondent avers that due to the competing opinions of each party's respective expert, a genuine issue of material fact exists as to whether the subject ramp presented a dangerous condition. Specifically, Respondent focuses her argument on the differing opinions regarding the American National Standards Institute (ANSI) A117.1.[2]

Respondent predicates her argument on several statements made by her expert, Brian Durig, as it relates to the construction of the subject ramp. Specifically, Respondent's expert opined that the subject ramp was not in compliance with ANSI 117.1. (Respondent's Return to Petition for Writ of Certiorari at p. 7).

However, Respondent's expert failed to provide an opinion as to whether ANSI 117.1 applies to Respondent, a non-disabled person. Respondent maintains Durig provided sworn testimony regarding the ANSI standards. However, Durig's affidavit lacks an opinion on whether the ANSI standards apply to Respondent. On the other hand, Petitioners' expert provided sworn testimony that the ANSI standards do not apply to Respondent. (App. 293).

The issue before the Circuit Court and Court of Appeals was not whether the subject ramp deviated from the ANSI standards; rather, the issue before each court, respectively, was, inter alia, whether ANSI applied to Respondent in the instant case.

[2] Notably, in her Complaint, Respondent pled violations of the International Property Maintenance Code. (See App. 222-23). Respondent appears to have abandoned her argument regarding a violation of the International Property Maintenance Code; rather, she focuses her argument on the premise that the deviations from ANSI A117.1 standards renders the ramp at issue defective and hazardous. Petitioners maintain the ANSI standards do not apply to Respondent, Likewise, as more fully addressed in their Petition for Writ of Certiorari, the 2006 International Building Code does not apply. (See Petition for Writ of Certiorari at p. 17).

Respondent fails to cite to case law or otherwise for the proposition that the ANSI standards apply to Respondent, a non-disabled person at the time of the fall.[3] Petitioners maintain, as supported by case law, that the ANSI standards do not apply to Respondent. See e.g Wisner v. United States, 154 F.R.D. 39 (N.D.N.Y. 1994).

Furthermore, while Petitioners do not dispute that ANSI 117.1 may have been adopted or referenced in various building codes as articulated by Respondent, Petitioners maintain that alleged violations of ANSI standards alone may not serve as predicates for a private cause of action. Cf. Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001); see also Miller v. New York City Hous. Auth., 29 Misc. 3d 1214(A), 918 N.Y.S.2d 399 (Sup. Ct. 2010).

Accordingly, because Respondent has failed to establish any standard or code applicable to a duty owed by Petitioners, Respondent has failed to articulate any cognizable standard applicable to a duty owed by Petitioners. Therefore, the Court of Appeals erred in reversing the Circuit Court's grant of summary judgment in favor of Petitioners.

III. Respondent Has Failed to Present Evidence of Proximate Causation

Respondent avers that her human factors expert Ruston Hunt provided competent evidence that the construction of the ramp and lack of paint or markings were the most likely causes of Respondent's fall.

A. Respondent's Expert Report is Inadmissible

Respondent avers that she "timely provided the circuit court with a report from her human factors expert [Ruston Hunt] stating that the construction of the ramp and lack of paint or markings was the most likely cause of [Respondent's] fall." Respondent appears to rely heavily

[3] As fully articulated in Petitioners' Petition for Writ of Certiorari, "disability" and being "disabled" is a legal term of art and is not a status that can be unilaterally applied by Respondent.

on Hunt's report for the proposition that the lack of yellow paint to warn of the transition from sidewalk to ramp poses a hazard. (Respondent's Return to Petition for Writ of Certiorari at p. 8). However, Hunt's report and the opinions contained therein are inadmissible and are improper to consider for summary judgment. 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."). Respondent failed to timely provide an affidavit from Ruston Hunt.

Respondent further avers that a reasonable jury could conclude that a properly marked ramp could have prevented Respondent's fall and, therefore, Petitioner breached the duty of care owed to Respondent through their decision to not paint the subject ramp. However, Plaintiff has failed to provide competent, admissible evidence that Petitioners had a duty to paint the subject ramp. Indeed, Respondent admits ANSI 117.1 does not require paint to distinguish a curb from a ramp. (Respondent's Return to Writ of Certiorari at p. 8). Further, any reliance on Hunt's report for this argument is misplaced as the report constitutes inadmissible hearsay evidence.

B. Any Deviation from ANSI 117.1 Was Not a Proximate Cause of the Subject Incident

While Respondent maintains Hunt opined that the construction of the ramp contributed to Respondent's fall, Petitioners' expert Alan Campbell provided the only competent, sworn testimony regarding proximate causation.

The Court of Appeals overlooked the totality of Campbell's testimony. Specifically, in its opinion, the Court of Appeals stated, "[Petitioners'] expert admitted the slope of the side flares exceed code limits." (App. 2). However, Campbell's complete testimony was 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**.[4]

Accordingly, because the Court of Appeals misapprehended or overlooked the totality of Petitioners' expert's testimony, including his opinion that any deviation from the ANSI standards was not the proximate cause of Plaintiff's fall, and because Hunt's report is inadmissible and must not be considered by the Court, summary judgment should be granted in favor of Petitioners.

IV. Summary Judgment is Ripe for Review

Respondent avers that to the extent she has not presented a scintilla of evidence creating a genuine issue of material fact, she is entitled to further explore Petitioners' knowledge regarding the safety of the ramp. Stated succinctly, Respondent avers the Circuit Court's grant of summary judgment was premature.

However, neither the Circuit Court nor Court of Appeals agreed with Respondent. Rather, both courts addressed the merits of Petitioners' motion for summary judgment, albeit

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[4] Respondent has urged this Court to consider Durig's affidavit. However, Durig's opinion concerning matters that may be considered human factors/biomechnical in nature concerning sensor perception 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; see also Logan v. Wachovia Bank, N.A., Op. No. 2009 UP-092 (S.C. Ct. App. filed May 7, 2009). Durig did not enunciate competency in his affidavit in any specific science or specialty, including human factors and biomechanics.

Further, to the extent Respondent relies on Hunt's report to create a genuine issue of material fact regarding proximate causation, Hunt's report constitutes inadmissible hearsay evidence, and must not be considered by the Court.

Petitioners aver the Court of Appeals erred in reversing the Circuit Court and remanding the case.

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

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

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

Anderson v. Racetrac Petroleum, Inc., 296 S.C. 204, 205, 371 S.E.2d 530, 531 (1988).

Respondent argues that Petitioners admit creating the alleged danger posed by the built up curb ramp at issue and, therefore Respondent need not prove that Petitioners knew of the specific hazards posed by the ramp. Yet, Respondent argues that she has not been given ample opportunity to discover facts to show Petitioners were aware that the curb ramp was dangerous. As Respondent articulated in her Return, she need not prove Petitioners had knowledge of the alleged danger posed by the subject ramp as Petitioners have conceded they constructed/built the subject ramp.

Accordingly, the discovery relating to Respondent's request is unnecessary to the issues before the Court. Therefore, summary judgment is ripe and proper for review.

V. Arguments Unpreserved for Review

In her Return to Petition for Writ of Certiorari, Respondent "respectfully directs the Court to her final briefs for full recitation of her arguments and highlights a few points as to each issue presented. (Respondent's Return to Petition for Writ of Certiorari at p. 4). However, Petitioners aver that summary conclusions referencing other arguments articulated in other briefing either before this Court or before the Court of Appeals does not sufficiently preserve the arguments for

appeal. Accordingly, the only arguments preserved by Respondent are those within her briefing to this Court. See generally Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Every group of appeal sought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue.").

Accordingly, Petitioners respectfully request the Court only consider arguments briefed by Respondent in her Return to Petition for Writ of Certiorari.

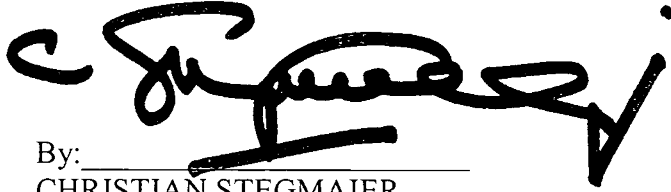
CONCLUSION

For the foregoing reasons, as well as those articulated in Petitioner's Petition for Writ of Certiorari, 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. Petitioners respectfully request this Court reverse the Court of Appeals, and affirm the previous grant of summary judgment in their favor in the instance case.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted

COLLINS & LACY, P.C.



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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 certify that 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 Reply to Respondent's Return to Petition for Writ of Certiorari on all parties by depositing a copy of it in the United States Mail, postage prepaid, on February 14, 2017, addressed to the following attorneys of record:

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Respectfully submitted,

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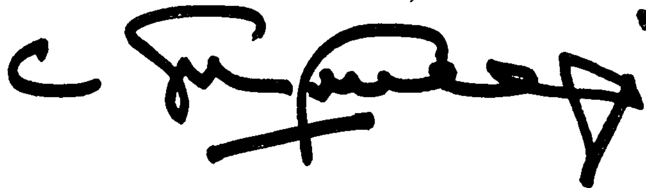

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