

Where the appellants have chosen to cite to the record, they have merely directed this Court and the appellees to the first page of a deposition, affidavit, or other document. The failure to cite specific page numbers has placed both this Court and the appellees in the unnecessary and onerous position of having to comb through the record to determine if the factual allegations contained in the appellants' brief are supported by the record.

The failure of the appellants to clearly support their factual basis for reversal with citations to the record prejudices the appellees. See Collins v. Newman, 237 Ga. App. 861 (1999). It prejudices the appellees by making it difficult for them to determine whether the record supports the appellants' factual allegations. Id. Additionally, the appellants' failure to cite to the record makes it harder for the appellees to present arguments in rebuttal. Id. The failure of the appellants to comply with Court of Appeals Rule 27 authorizes this Court to treat the appellants' enumerations of error as abandoned. Blackwell v. Goodwin, 236 Ga. App. 869 (1999). In the instant matter, this Court should treat the appellants' enumerations of error as abandoned based on their failure to comply with Court of Appeals Rule 27.

STATEMENT OF FACTS

Averitt is in the freight hauling business and operates a trucking terminal at 4721 Ivey Drive, in Macon, Georgia. (Vol. 2, R. at 425-428, 530-535). The terminal is used to handle the transfer of freight carried by Averitt trucks. (Vol. 2, R. at 425-428). In 1991, the Bureau of Inspections and Fees for Macon-Bibb County, Georgia issued a certificate

of occupancy for the terminal to Averitt Express. (Vol. 2, R. at 530-535). On its face, the certificate of occupancy indicated that Averitt's terminal complied with the minimum standards of all applicable building codes. (Vol. 2, R. at 530-535).

The Averitt terminal has a dock area with one loading ramp that was in place at the time the certificate of occupancy was issued. (Vol. 2, R. at 432, 442, 487). Between the date the ramp was constructed and the date of the incident, the ramp was not altered or changed. (Vol. 2, R. at 432, 463). Moreover, during that time period there were no incidents involving the use of the ramp. (Vol. 2, R. at 463). The only person who has ever fallen from this loading ramp is the appellant, Monty February. (Vol. 2, R. at 463). In sum, the record contains no evidence that Averitt was aware or should have been aware of any alleged regulatory violations concerning the loading ramp at its terminal. (Vol. 2, R. at 463, 530-535).

On October 19, 1995, Monty February drove his pick up truck to the Averitt facility to pick up supplies that had been delivered there for use in his business, Cable Direct of Georgia. (Vol. 1, R. at 137-138, 153-156; Vol. 2, R. at 440). At the Averitt facility, Ronnie Williams, the warehouse dispatcher, instructed February to drive his truck through the gate and around to the back of the warehouse facility. (Vol. 1, R. at 156; Vol. 2., R. at 440, 441). February then drove his truck around to the back of the facility and backed up the loading ramp. (Vol. 1, R. at 156). The ramp graduated to the level of

the warehouse floor, which was approximately 50 inches above the surrounding asphalt parking lot. (Vol. 2, R. at 273).

Febuary negotiated the ramp in his truck, and parked it on the loading ramp with its rear tailgate inside the dispatch door. (Vol. 2, R. at 443 - 444, 487). At first, Febuary remained seated in his pick up truck, but after a short while he stepped out of the driver's compartment on the driver's side and walked up the ramp into the Averitt terminal. (Vol. 1, R. at 154 - 155, 161). Febuary and Williams then proceeded to load a fairly large cargo of boxes into the back of Febuary's pick up truck. (Vol. 1, R. at 156; Vol. 2, R. at 445 - 446). The load was large enough that Febuary felt it should be tied down. (Vol. 1, R. at 158; Vol. 2, R. at 446 - 447). Febuary remembered that he had rope in his toolbox in the truck and walked back down the ramp over the same ground he had just covered walking into the warehouse. (Vol. 1, R. at 154-161).

The record does not support Febuary's assertion in his brief that he was asked by Williams or any other Averitt employee to get rope. (Vol. 1, R. at 157-159; Vol. 2, R. at 447). Williams merely inquired as to whether Febuary had rope, and then Febuary started down the ramp without any instructions from Williams. (Vol. 1, R. at 157).

Williams testified in his deposition:

Q. Tell me what happened next. Did you then say, “You need to tie this down” or “Do you have anything to tie it down”?

A. I didn’t ask that, no.

Q. Was there any conversation between you about tying the freight down.

A. No.

Q. What happened? You just saw him start walking back towards the truck?

A. No. I pulled the bill out to have him sign it. Of course, we had to get the bill signed.

Q. Sure.

A. And he said something about getting a rope to tie it down with and walked towards the truck.

(Vol. 2, R. at 447). In addition, Febuary testified that it was his habit to tie down loads and that he would have tied the load down anyway regardless of what was said by Williams. (Vol. 1, R. at 159).

Q. Would you have tied it down anyhow, regardless of what Mr. Williams told you?

A. It would have to be tied down.

Q. So you knew you had to do that anyhow?

A. That's why I carry rope in the tool box.

(Vol. 1, R. at 159).

At this point, February fell off of the loading ramp. (Vol. 1, R. at 157 - 158). February guesses that he tripped over or fell off of the raised ledge that runs the length of the loading ramp, but cannot recall specifically where he fell or what he tripped over. (Vol. 1, R. at 157-163). Williams, who witnessed the fall, saw February step onto the ramp's raised ledge as he walked along the driver's side of his truck. (Vol. 2, R. at 448). When February reached the driver's side window of his truck, he leaned over and reached into the driver's compartment. (Vol. 2, R. at 448). He then stood up and turned back towards the warehouse door, but as he -began to walk back towards the warehouse he lost his balance and fell off of the ramp. (Vol. 2, R.at 448-450). This lawsuit arises out of the injuries that Mr. February alleges he sustained in this fall. (Vol. 1, R. at 4).

STATEMENT OF PROCEEDINGS

On October 1, 1996, Monty and Gerda February filed their complaint for damages. (Vol. 1, R. at 4). Subsequent to the filing of their complaint, Averitt filed its responsive answer on November 6, 1996, and initiated discovery. (Vol. 1, R. at 10, 16, 26). Approximately one year later, Averitt moved for summary judgment. (Vol. 1, R. at 52).

On December 11, 1997, February filed his response to Averitt's motion for summary judgment, and along with his response filed the affidavit of Russell C. Poss, II, his building code expert. (Vol. 1, R. at 79, 89). Poss implied by way of his affidavit that

the loading ramp February fell from was not in compliance with the Life Safety Code, Standard Building Code, or OSHA regulations. (Vol. 1, R. at 89). Before Averitt could retain an expert or depose Poss, the trial court entered its order denying Averitt's motion for summary judgment. (Vol. 1, R. at 96).

Following the denial of its motion for summary judgment on February 4, 1998, Averitt retained the services of Stephen V. Skalko, a professional engineer and former Director of the Bureau of Inspection in Macon, Georgia. (Vol. 2, R. at 488, 491, 494). Averitt retained Skalko to inspect the ramp at its facility to determine whether it complied with the applicable building codes. (Vol. 2, R. at 511, 512). Skalko concluded that the Averitt ramp was in compliance with the applicable building codes. (Vol. 1, R. at 257). The parties then deposed their respective experts.

At Poss' deposition, he acknowledged that Averitt's expert (Skalko) was correct, and recanted his earlier affidavit testimony implying that the Averitt loading ramp violated the Life Safety Code and Standard Building Code. (Vol. 1, R. at 235-237). Poss had testified in his affidavit that the Averitt ramp violated the cited building codes "if the ramp comprised part of the means of egress" as defined by the Life Safety Code and Standard Building Code. (Vol. 1, R. at 89). However, Poss' deposition revealed that he was engaging in disingenuous word play, and that at the time he submitted the affidavit to the court he knew the ramp was not part of the "means of egress", and further conceded that the lack of guardrails on the ramp did not violate either the Standard Building Code

or Life Safety Code. (Vol. 1, R. at 234-238). It also became clear that Poss did not have the minimum qualifications to render an expert opinion on the applicability of OSHA regulations to the subject ramp. (Vol. 1, R. at 211- 216).

Based on Poss' deposition testimony, Averitt renewed its motion for summary judgment on December 18, 1998. (Vol. 1, R. at 104). February then submitted the affidavit of a second OSHA expert, David L. Williams, which contained similar language to the Poss affidavit and implied that the ramp at the Averitt facility needed guard rails due to its height above grade. (Vol. 2, R. at 274). However, in his deposition Williams acknowledged that under OSHA regulations the Averitt ramp was not required to have guardrails by virtue of its height. (Vol. 2, R. at 376- 377). After the second round of discovery, and after reviewing all of the record evidence in this matter, the trial court granted the Defendants' renewed motion for summary judgment. (Vol. 2, R. at 536).

On appeal, Febuary has abandoned any claim that Averitt's ramp was not in compliance with the applicable building codes, instead contending that the ramp violated OSHA regulations.

PART II

ARGUMENT AND CITATION OF AUTHORITY

This is a straightforward "static condition" case, and Georgia law clearly bars the appellants' claims. The record evidence establishes that on the date of the incident Monty Febuary had successfully negotiated the same side of the ramp moments before the

incident complained of. The controlling law in this state holds that when a person has successfully negotiated an alleged dangerous condition on a previous occasion, that person is presumed to have knowledge of it and cannot recover for a subsequent injury resulting therefrom. Mechanical Equipment Co. v. Hoose, No. A99A1452 (October 7, 1999); Herrin v. Peeches Neighborhood Grill and Bar, Inc., 235 Ga. App. 528 (1998); Hannah v. Hampton Auto Parts, Inc., 234 Ga. App. 392 (1998); Echols v. Wisker's Food and Spirits, Inc., 229 Ga. App. 240 (1997); Riley v. Family Dollar Stores Swainsboro, Georgia, Inc., 208 Ga. App. 461 (1993), See also Backer v. Pizza Inn, Inc., 162 Ga. App. 682 (1982).

The decision by the Supreme Court of Georgia in Robinson v. Kroger Co., 268 Ga. 735 (1997), did not alter or emasculate this rule, but instead reemphasized the fundamental basis for an owner or occupier's liability -- that party's superior knowledge. Herrin, supra. Under the "static condition" doctrine, February cannot establish Averitt's superior knowledge of the alleged dangerous condition and, therefore, the trial court correctly granted Averitt's motion for summary judgment.

The standard set forth in Robinson does not require a different result. In Robinson, the Supreme Court stated: "[I]n order to recover for injuries sustained in a slip-and-fall action, an invitee must prove (1) that the defendant had actual or constructive knowledge of the hazard; and (2) that the plaintiff lacked knowledge of the hazard despite the exercise of ordinary care due to the actions or conditions within the

control of the owner/occupier. However, the plaintiff's evidentiary proof concerning the second prong is not shouldered until the defendant establishes negligence on the part of the plaintiff -- i.e., that the plaintiff intentionally and unreasonably exposed self to a hazard of which the plaintiff knew or, in the exercise of ordinary care, should have known." Robinson v. Kroger Co., 268 Ga. at 748-749.

"Robinson also confirmed that under Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991), a defendant moving for summary judgment need no longer affirmatively disprove the nonmoving party's case; instead the burden on the moving party may be discharged by pointing out by reference to the record that there is an absence of evidence to support the nonmoving party's case. Although Robinson readjusted this burden with regard to the second element of the cause of action (whether plaintiff lacked knowledge of hazard despite ordinary care), the burden remained the same with regard to the first element. Where defendant points to an absence of evidence on the first element, plaintiff must present evidence the defendant had superior actual or constructive knowledge of the hazard, or else suffer summary judgment." Hardee's Food Systems v. Green, 232 Ga. App. 864, 865 (1998). The evidence affirmatively establishes that Averitt did not have superior actual or constructive knowledge of the alleged hazardous condition and, therefore, the appellants cannot satisfy the first prong under Robinson. Therefore, the trial court was correct in granting Averitt summary judgment.

A. THE RECORD EVIDENCE AFFIRMATIVELY ESTABLISHES THAT AVERITT HAD NO ACTUAL OR CONSTRUCTIVE KNOWLEDGE THAT ITS LOADING RAMP CONSTITUTED A HAZARDOUS CONDITION.

It is axiomatic that under the first prong of Robinson a plaintiff must establish that the owner or occupier had superior actual or constructive knowledge of the hazard. Herrin, supra. However, a plaintiff cannot meet his burden merely by pointing to an alleged regulatory violation without establishing that the owner or occupier had superior actual or constructive knowledge of the regulatory violation. Id.

In Herrin, the plaintiff fell from a ladder that led to the roof of a restaurant. Although the plaintiff had safely negotiated the ladder on his way to the roof moments before his fall, he contended that the ladder constituted a hazardous condition because it was too close to the building. He submitted the affidavit of a professional engineer who stated that the ladder was in violation of American National Standards Institute standards (“ANSI”) and Occupational Safety & Health Administration (“OSHA”) standards because of the insufficient clearance between the ladder and the building. This Court

affirmed the trial court's grant of summary judgment because there was no evidence that the defendants had notice or should have known of the ANSI or OSHA violations. Id.

As in this case, the record in Herrin demonstrated that the defendants had every reason to believe that the ladder did comply with the relevant regulations. The ladder had been inspected and a certificate of occupancy had been issued by the city. In addition, there were no prior incidents to put the defendants on notice of the alleged regulatory violations. Moreover, the alleged regulatory violations could not create a question of fact since the defendant was presumed to have knowledge of the alleged defect once he had successfully negotiated the alleged dangerous condition. Id. See also Brantley v. Custom Sprinkler Systems, Inc., 218 Ga. App. 431 (1995)(summary judgment appropriate where plaintiff had equal or superior knowledge of condition created by alleged regulatory violation).

In the instant matter, the record evidence establishes that Averitt had every reason to believe that the ramp did comply with the relevant regulations. The ramp had been inspected by the county building inspector who had issued a certificate of occupancy indicating that the ramp was in compliance with all applicable building codes. (Vol. 2, R. at 530). Prior to Febuary's fall there were no incidents involving the ramp. (Vol. 2., R. at 463). In addition, the record clearly demonstrates that moments before his fall Febuary had safely negotiated the alleged dangerous condition and is presumed to have had knowledge of it as a matter of law. Herrin, supra. Therefore, under Robinson Averitt

has met its burden of proof on the first element by pointing to an absence of evidence demonstrating it had superior or actual knowledge of the alleged regulatory violations or dangerous condition.¹

¹ Contrary to the appellants' assertions in their brief, there is no evidence that guardrails were required pursuant to OSHA regulations. Moreover, the cited OSHA regulations are inapplicable since February was not an employee of Averitt. Dupree v. Keller Indus., 199 Ga. App. 138 (1991) (OSHA regulates obligations between an employer and its employees). In addition, it is unclear from the appellants' brief what OSHA regulations they contend are applicable since none are specifically referenced in their brief. However, since appellants reference both the Poss and Williams affidavits to support their contention that OSHA regulations required guardrails, and the only OSHA regulation that is common to both affidavits is 1910.23(c)(1), Averitt must assume that this is the regulation that appellants contend required guardrails. While appellants' second expert, Williams, opined in his affidavit that the lack of guardrails on the Averitt ramp violated OSHA regulation 1910.23(c)(1), he acknowledged in his deposition that this regulation only applies to those portions of ramps in excess of four feet. (Vol. 2., R. at 370-371). Further, OSHA regulations allow for *de minimis* variances of an inch or two where there is no direct relationship to safety or health. (Vol. 2., R. at 377-379). It is undisputed that the ramp graduates a height of 50 inches, and falls below 48 inches within several feet of the building. (Vol. 2, R. at 273, 377).

The cases relied on by the appellants in their brief do not require a different result as in each of those cases, unlike in this case, the plaintiff presented evidence demonstrating that the owner or occupier had superior actual or constructive knowledge of the alleged dangerous condition.

Appellants reliance on Hardeman v. Spires, 232 Ga. App. 694 (1998), for the proposition evidence of noncompliance with the applicable building code is sufficient to establish knowledge of the hazardous condition is misplaced. In Hardeman, the plaintiff was injured when she slipped on wet tile outside the door of the defendant's home. The evidence established that the lack of guardrails on the defendant's porch violated the applicable building code. However, the plaintiff met the first prong of the Robinson test by proffering evidence that the defendant was actually aware of the hazard her ceramic tile porch posed when wet. Id. The record established that the defendant had been specifically warned that the tile surface would become slick when wet and also knew of a prior slip and fall on the tile surface. Id.

Similarly, Flournoy v. Hospital Authority of Houston County, 232 Ga. App. 791 (1998), does not, as the appellants contend, hold that the first prong of the Robinson test can be satisfied merely with evidence that a ramp is not in compliance with the building code. In Flournoy, the plaintiff slipped going down a wet ramp that had been painted with a non-skid coating. The record evidence also established that the non-skid coating had become worn. The fact that the owner had painted the ramp with a non-skid coating

supported an inference that the defendant was aware of the potential hazard. Since the defendant had used the ramp continuously since it had been painted, the evidence also established that the defendant had actual or constructive knowledge of the worn nature of the non-skid coating. This evidence, and not the evidence that the ramp may have violated the building code, satisfied the first prong of the Robinson test.

Finally, appellants reliance on Davis v. GBR Properties, Inc., 233 Ga. App. 550 (1998), is misplaced because there is no evidence that the ramp at the Averitt terminal falls within the ambit of a regulatory scheme which creates a legal presumption of actual knowledge for violations of OSHA regulations. In Davis, the plaintiff slipped and fell on a handicapped-accessible ramp as she was leaving her doctor's office. While the plaintiff established that the ramp violated several ANSI standards, Justice Eldridge pointed out in his special concurrence that actual or constructive knowledge of noncompliance with the applicable ANSI standards was established under a regulatory scheme which created a legal presumption that the owner or occupier had actual knowledge of any static condition which was prohibited by the regulations. Davis, supra. Therefore, in Davis evidence of superior knowledge sufficient to satisfy the first prong of the Robinson test was established through a regulatory scheme that created a presumption the owner had actual knowledge of ANSI standard violations.

In the instant matter, the appellants cannot point to any evidence, such as prior incidents or warnings, that would establish Averitt had superior actual or constructive

knowledge of the alleged regulatory violations. In addition, the appellants have not pointed to any act that would create a legal presumption that Averitt had actual knowledge its ramp allegedly violated OSHA regulations. Therefore, the appellants cannot meet their burden of proof and satisfy the first prong of the Robinson test.

B. THE RECORD EVIDENCE ESTABLISHES THAT FEBUARY FAILED TO EXERCISE THE PRUDENCE AN ORDINARILY CAREFUL PERSON WOULD USE IN A LIKE SITUATION.

The record also clearly demonstrates that the appellants cannot satisfy the second prong of the Robinson test -- "that the plaintiff lacked knowledge of the hazard despite the exercise of ordinary care due to the actions or conditions within the control of the owner/occupier." Robinson, supra. Even in the post-Robinson era the law still presumes that where there is nothing to obstruct or interfere with one's ability to see a plain and palpable static condition, the owner or occupier of the premises is justified in presuming that a visitor will see it and realize the risk involved. Tanner v. Larango, 232 Ga.App. 599 (1998)(obvious shoe could get caught in gap in pavement). See also Wright v. JDN Structured Finance, Inc., No. A99A1538 (June 28, 1999)(summary judgment proper where curbing over which plaintiff tripped open and obvious). Therefore, Georgia continues to adhere to the well-settled law that where the alleged static condition is readily discernable summary judgment is proper. Echols v. Wisker's Food and Spirits, Inc., 229 Ga. App. 240 (1997)(step is static condition that is readily discernable); Farmer

v. Wheeler/Kolb Management Co., 224 Ga. App. 834 (1997)(concrete bumper is readily discernable).

The record evidence in the instant matter demonstrates that Febuary fell off a ramp that graduated to a height of fifty inches. The danger, a lack of rails guarding the sharp drop-off, was readily discernable to him at all times. Photographs taken on the day of the incident showing the location of his truck clearly reveal that Febuary must have recognized the potential hazards once he began backing his pickup truck up the ramp. (Vol. 1, R. at 121). Based on the position of his truck, it is inconceivable that he would not have appreciated the situation once he got out of the truck and walked into the warehouse. In short, this case does not involve a static condition obvious only upon close inspection, but instead involves a static condition that must have been readily discernable to Febuary. His failure to appreciate the potential hazards that were clearly visible to him constitutes voluntary negligence and renders Robinson moot. Tanner, supra. Therefore, the trial court correctly granted Averitt summary judgment.

The appellants contend that this case is controlled by this Court's decisions in Flournoy, Davis, and Aggeles v. Theater of the Stars, Inc., 235 Ga. App. 57 (1998). However, both Flournoy and Davis address situations in which a combination of alleged dangerous conditions not readily discernible to the plaintiff allegedly caused a fall. In the instant matter, the photographs establish that all potential risks were immediately obvious

to February. Likewise, appellants reliance of Aggeles is misplaced because this Court determined that the static condition doctrine did not apply to that matter.

In Flournoy, the plaintiff slipped on a wet, worn, non-skid surface. This Court specifically pointed out that the general rule that bars recovery as a matter of law when the plaintiff has previously negotiated the static condition was inapplicable because of a combination of dangerous factors. "The danger allegedly posed by the ramp resulted from a combination of the slope of the ramp, the fact that the non-skid coating had worn down, and the fact that the ramp was wet." Id. Therefore, it could not be established as a matter of law that the individual using the ramp would have appreciated the danger posed by the combination of elements. Id. Unlike in Flournoy, in the instant matter the undisputed photographic record clearly reveals that the risks posed by the ramp were clearly visible to February.

Similarly, in Davis the alleged dangers were not readily discernable to the plaintiff. In Davis, the record evidence revealed that guardrails extended only part of the way down the ramp, and that the slope of the ramp was too steep. This Court held that the dangers posed by these defects were not as obvious at first glance as those posed by a hole in the ground. Davis, supra. Unlike the ramp in Davis, the dangers posed by Averitt's ramp were not hidden from February, and should have been as obvious to him as the dangers posed by a hole in the ground. It strains logic to suppose that February could

have failed to appreciate the dangers posed by the ramp as he backed his truck up it, walked along it, and then walked back down it.

Finally, the appellants reliance on Aggeles is clearly misplaced. Aggeles involved a situation in which the plaintiff ascended one side of a stairwell, and then fell while descending the other side of the stairwell. This Court specifically noted that the plaintiff could not be charged with knowledge of the side she had not traversed so as to invoke the bar against recovery afforded by the rule that once a plaintiff has successfully negotiated a static condition she is presumed to have knowledge of it. In the instant matter, it is undisputed that Febuary traversed the same side the ramp moments before his fall. Therefore, Aggeles has no application.

WHEREFORE, for the foregoing reasons Averitt respectfully requests that this Honorable Court AFFIRM the grant of summary judgment.

This _____ day of October, 1999.

Joseph H. Chambless
Georgia Bar No. 119600

SIGNATURES ON FOLLOWING PAGE

David N. Nelson
Georgia Bar No. 537760

OF COUNSEL:

CHAMBLESS, HIGDON & CARSON
Suite 200 Ambrose Baber Building
577 Walnut Street
P.O. Box 246
Macon, GA 31298-5399
(912) 745-1181

CERTIFICATE OF SERVICE

I, David N. Nelson, Attorney of Record for Defendants, Averitt Properties, Inc. and Averitt Express, Inc., do hereby certify that I have this day served the within and foregoing document upon Mr. Burton Lee and Mr. Stephen M. Welsh, by mailing a true and correct copy thereof, properly addressed and with sufficient postage affixed thereon to ensure delivery to him at his address of record, to wit:

Mr. Burton Lee
Attorney at Law
P.O. Box 1017
Macon, Georgia 31202-1017

Mr. Stephen M. Welsh
Buzzell, Graham & Welsh LLP
563 Walnut Street
P.O. Box 1017
Macon, GA 31202-1017

This _____ day of October, 1999.

David N. Nelson
Georgia Bar No. 537760