**IN THE STATE COURT OF BIBB COUNTY**
**STATE OF GEORGIA**

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| **MONTY FEBUARY AND GERDA FEBUARY,** | : | |
| **Plaintiffs** | : | **CIVIL ACTION FILE** |
| **vs.** | : | **NO. 42642** |
| **AVERITT PROPERTIES, INC. AND AVERITT EXPRESS, INC.,** | : | |
| **Defendants** | : | |

**BRIEF IN SUPPORT OF DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT**

DEFENDANTS Averitt Properties, Inc. and Averitt Express, Inc. (collectively "Averitt") submit this brief in support of their Renewed Motion for Summary Judgment and show the Court as follows:

## INTRODUCTION

Averitt initially moved for entry of summary judgment on November 11, 1997. On December 11, 1997 the plaintiffs filed their brief in opposition to Averitt's motion for summary judgment, and in conjunction with this filed the affidavit of their expert, Russell C. Poss. Their expert testified in his affidavit that the loading ramp plaintiff Monty Febuary fell from violated the Life Safety Code, Standard Building Code and OSHA regulations. Relying on this affidavit, the court concluded a question of fact remained regarding whether Averitt had negligently designed, constructed, or

maintained the subject ramp, and denied Averitt's motion for summary judgment.

Since the denial of its motion for summary judgment Averitt has retained an expert and deposed the plaintiffs' expert. The deposition testimony of the plaintiff's expert reveals that his December 5, 1997 affidavit is at best misleading and disingenuous. In his deposition he admitted that the ramp was not in violation of either the Life Safety Code or the Standard Building Code. This revelation is especially troubling given that his testimony establishes that he knew the subject ramp was not in violation of the applicable building codes when he executed his December 5, 1997 affidavit for submission to this court. His deposition testimony also demonstrates that he lacks the minimum qualifications to give an expert opinion on the applicability of OSHA regulations. The only colorable allegations of negligence in this matter were supported solely by the Poss affidavit. Now that Poss has reversed himself, this is a straightforward "static condition" case, and Georgia law bars the plaintiffs' claims.

The record establishes that Monty Febuary successfully negotiated the ramp twice 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. *Hannah v. Hampton Auto Parts, Inc.,* A98A1051 (September 16, 1998); *Echols v. Whiskers Foods and Spirits, Inc.*, 229 Ga. App. 240 (1997). Furthermore, the plaintiffs' claims are barred under the plain view doctrine because photographs of the subject ramp establish that the alleged dangerous static condition was readily discernible to plaintiff Monty Febuary. *Echols, supra.* See

also *Farmer v. Wheeler/Kolb Management Co.*, 224 Ga. App. 834 (1997); *Cowan v. Waffle House*, 217 Ga. App. 273 (1995). Therefore, the record evidence establishes that Averitt is entitled to summary judgment.

## STATEMENT OF FACTS

On October 19, 1995 Febuary drove his pickup truck to the Averitt facility to pick up supplies that had been delivered there for use in his business, Cable Direct of Georgia. Febuary Dep., pps. 6, 7, 23, 25; Williams Dep., p. 22. At the Averitt facility Ronnie Williams, the warehouse dispatcher, instructed Febuary to drive his truck through the gate and around to the back of the warehouse facility. Febuary Dep., p. 25; Williams Dep., pps. 22-23. Febuary then drove his truck around to the back of the facility and backed up the loading ramp. Febuary Dep., p. 25. The ramp graduated to the level of the warehouse floor, approximately 38 to 40 inches above the level of the surrounding asphalt lot. Skalko Dep., p. 25; Williams Dep., p. 36.

Febuary's truck was parked on the loading ramp with its rear tailgate inside the dispatch door. Williams Dep., pps. 25-26; See photos, attached hereto as Exhibit A. At first, Febuary remained seated in his pickup 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 warehouse. Febuary Dep., pps. 23-24, 30. Febuary and Mr. Williams then proceeded to load a fairly large cargo of boxes into the back of Febuary's pickup truck. Febuary Dep., p. 25; Williams Dep., pps. 27-28. The load was large enough that the plaintiff felt it should be tied down. Febuary Dep., p. 26; Williams Dep., pps. 28-29. 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. Febuary Dep., pps. 23-24, 26, 30. At this point he fell off the loading ramp. Febuary Dep., p. 26. He guesses that he tripped over or fell off the raised ledge that runs the length of the loading ramp, but cannot recall specifically where he fell or what he tripped over. Febuary Dep., pps. 26, 29, 31-32. Williams, who witnessed the fall, saw Febuary step onto the ramp's raised ledge as he walked along the driver's side of his truck. When he reached the driver's side window, he leaned over and reached into the driver's compartment. Williams Dep., p. 30. Febuary 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 the ramp. This lawsuit arises out of the injuries that Mr. Febuary alleges he sustained in this fall.

The plaintiffs have alleged that Averitt negligently constructed, maintained, and operated its warehouse facility in Macon, Georgia. There is no evidence that the Averitt facility was designed, constructed, maintained, or operated in a negligent manner at the time of this incident.

## ARGUMENT AND CITATION OF AUTHORITY

### I. THERE IS NO EVIDENCE THE RAMP AT THE AVERITT FACILITY WAS IN VIOLATION OF THE LIFE SAFETY CODE OR STANDARD BUILDING CODE.

On December 11, 1997 the plaintiffs tendered the affidavit of their expert, Russell C. Poss, who opined that the subject ramp violated the Life Safety Code and Standard Building Code. His affidavit testimony was based on the premise that if the ramp was

used as a "means of egress" then it violated the cited building codes.[1] Poss aff., paras. 9-13. However, Poss never considered the ramp to be a portion of the "means of egress" as defined in either the Life Safety Code or Standard Building Code. Poss Dep., pps. 37-39. It is clear that at the time Poss gave his affidavit he knew or should have realized that the Averitt ramp was in compliance with the applicable building codes.

Q. I'll ask it a different way. Let me ask you this: Whether or not a ramp comprises part of a means of egress under the Standard Building Code is not determined by whether or not that ramp is designed only for vehicular traffic?

A. I agree.

Q. And would you agree with that same statement under the provisions of the Life Safety Code?

A. Yes.

Q. Now, in paragraph 12 [of the affidavit] you state, "If the intended use of the ramp included pedestrian travel for means of egress, then the above standard building code and life safety code would have also been violated since the ramp did not contain guardrails." Sitting here today, do you

[1] The term "means of egress" has a specific meaning in both the Life Safety Code and Standard Building Code. Under both of these codes the term "means of egress" applies only to designated exits. The fact the subject ramp was used as a means in and out of the facility does not mean that it constitutes a "means of egress" as defined in the each Code. Skalko Dep., pps. 29-32. At the Averitt facility there are two exits that are considered "exits" for the building that comply with the applicable code sections for "means of egress." Skalko Dep., pp. 25; Skalko Opinion Letter.

know whether that ramp comprises a part of a means of egress at the Averitt facility?

A. I did not do a complete study of the building or the plan of the building and that sort of thing. I was asked to look at the ramp itself, and I did not look at it as a part of the means of egress.

Q. You did not look at the ramp --

A. I didn't consider it part of the means of egress.

Q. Well, if the ramp is not part of the means of egress, then would the Standard Building Code and Life Safety Code referenced in your affidavit, would those portions have been violated since the ramp did not contain guardrails?

A. No.

Poss Dep., pps. 38-39.

A question of fact cannot be established through semantics and conjecture. Clearly, it was disingenuous and misleading for Poss to represent to the court that the Averitt ramp violated the cited building codes "if the ramp comprised part of the means of egress" when he knew that it was not part of the means of egress. Poss Dep., pps. 37-39. By now conceding that the subject ramp does not violate either the Standard Building Code or Life Safety Code, there is no record evidence to support the plaintiffs earlier contention that the subject ramp was defectively designed or maintained without guardrails. Poss Dep., p. 40.

**II. PLAINTIFFS' EXPERT DOES IS NOT QUALIFIED TO OFFER**

**OPINIONS ON OSHA REGULATIONS.**

In this State nothing more is required to entitle one to give testimony as an expert than proof that one is educated in a particular trade or profession, or has derived knowledge from experience and study. *Inta-Roto, Inc. v. Guest*, 160 Ga. App. 75 (1981). However, in order to possess the expertise required to render an expert opinion, the witness must have some training, education, or experience in that field. *Johnson v. Knebel*, 267 Ga. 853 (1997). The record demonstrates that the plaintiffs' expert has no training, education, or experience with respect to OSHA regulations. Therefore, Poss is not qualified to give an expert opinion on OSHA regulations. *Inta-Roto, Inc., supra.*

The plaintiffs' expert is a high school graduate with only a few hours of college level course work. Poss Dep., pps. 5-8. Although he has taken courses at both Macon College and Georgia College, he has never obtained a degree from either of these institutions of higher learning. Poss Dep., p. 8. He has no engineering or design experience, and has never sat for the engineer-in-training test. Poss Dep., pps. 8, 47. Notwithstanding his lack of engineering and design experience, Averitt acknowledges that he has the minimum qualifications to offer an opinion on the Life Safety Code and Building Code due to his course work and employment as a building inspector. Poss Dep., pps. 12-14. However, he has no coursework or work experience interpreting the applicability of federal OSHA regulations. Poss Dep., pps. 14, 18-19. This was clearly established during his deposition.

Q. Now, did your job with the City of Macon require you to be familiar with OSHA regulations?

A. No, it did not.

Q. And your job with the City of Macon did not require you to enforce OSHA regulations?

A. That's correct.

Q. Have you worked for OSHA?

A. No, I have not.

Q. Have you ever been asked to enforce OSHA regulations?

A. No, I have not.

Q. Have you taken any courses on OSHA regulations?

A. No, I have not.

. . . . .

Q. Have you been retained by any engineering firm to review documents or plans to see if they are in compliance with OSHA regulations?

A. No, I haven't.

Q. Have you been retained by any architectural firm to review plans or other documents to see if they are in compliance with OSHA regulations?

A. No.

Q. When have you been asked to render an opinion on the applicability of OSHA regulations other than in this case?

A. Legally or just --

Q. On any other occasion.

A. I can't recall a specific case, but it's something that comes up now and

again. Nothing -- it's not part of my review.

Poss Dep., pps. 14, 18-19. This testimony clearly demonstrates that the applicability of OSHA regulations is outside the scope of his expertise. Therefore, his opinions concerning OSHA regulations should be stricken from the record. See *Johnson*, *supra.*

Even if one assumes for the sake of argument that the plaintiffs' expert is qualified to render an opinion on OSHA regulations, his methodology is fatally flawed. The plaintiff's expert testified that OSHA regulation 1919.23(c)(1) applies only to open-sided floors, platforms, and runways that are more than 48 inches off the floor. Poss Dep., p. 42. In forming his opinion that the ramp violated this OSHA regulation he assumed that the ramp graduated to a height of 66 inches. Poss Dep., p. 42. This assumption was premised on information received from plaintiff's counsel. Poss Dep., p. 42. However, there is no record evidence that establishes that the subject ramp graduates that height. Instead, the record establishes that the ramp graduates to a height of approximately 38 to 40 inches. Skalko Dep., p. 25; Williams Dep., p. 36.[2] Even assuming the plaintiffs' expert is qualified to testify about OSHA regulations, this undisputed record evidence establishes that the cited OSHA is inapplicable.

**III. AVERITT IS ENTITLED TO SUMMARY JUDGMENT.**

It has long been the law of this State that a plaintiff is precluded from recovering for injuries arising from a static condition when the plaintiff has successfully negotiated

[2] Even the plaintiffs represented to the court in their brief in opposition that the ramp only graduated to a height of three and a half to four feet. Plaintiffs' Brief In Opposition To Defendant's Motion For Summary Judgment, p. 2.

the static condition on a previous occasion. *Hannah v. Hampton Auto Parts, Inc.*, A981051 (September 16, 1998); *Echols v. Whisker's Food & Spirits, Inc.*, 229 Ga. App. 240 (1997); *Wiley v. Family Dollar Store Swainsboro, Ga., Inc.*, 208 Ga. App. 461 (1993). See also *Backer v. Pizza Inn, Inc.*, 162 Ga. App. 682 (1982). In addition, under the plain view doctrine recovery is barred when the alleged defect is readily discernible. *Echols, supra; Tanner v. Larango,* 232 Ga. App. 599 (1998); *Farmer v. Wheeler/Kolb Management Co.*, 224 Ga. App. 834 (1997).

All that must be established under the "static defect" doctrine is the successful negotiation of the alleged dangerous condition. *Echols, supra.* In *Echols* the plaintiff was injured in a restaurant after she fell down a step that she alleged was not observable because of poor lighting, no warning signs, and the color of the carpet. *Id.* The record evidence demonstrated that the plaintiff had successfully negotiated the step in order to reach her dinner table. *Id.* When she began to leave the restaurant she fell down the same step she had previously ascended, injuring herself. *Id.* The trial court granted summary judgment and the Court of Appeals affirmed on the basis that recovery was barred by the fact that the plaintiff had previously negotiated the step. *Id.* In the instant matter, it is undisputed that Monty Febuary negotiated the static condition before the incident in question. Therefore, Averitt is entitled to summary judgment.

The *Echols* court also affirmed the grant of summary judgment on the basis that the existence of the step was readily discernible under the plain view doctrine. The court took pains to note that the static condition giving rising to the plaintiff's claim was not a defect that the plaintiff might not have been aware of, such as a tear in a floor mat

or a sheet of black ice. *Id.* Instead, the static condition complained of was a step. In *Farmer v. Wheeler/Kolb Management Co.* the Court of Appeals also rejected a plaintiff's contention that a clearly visible condition was hard to detect. In *Farmer* the plaintiff tripped and fell over a concrete bumper located in a parking lot owned by the defendants. She contended that the bumper blended in with the surrounding asphalt, but the *Farmer* court rejected her claims based on the photographic evidence, which showed the bumper was clearly visible. *Farmer, supra.*

In the instant matter the plaintiff fell off a forty-inch high concrete ramp. The danger, a sharp drop-off, was readily discernible. The photographic evidence in the record clearly reveals that the plaintiff must have recognized the potential hazards once he began backing his pickup truck up the ramp. In fact, based on the position of his truck it is inconceivable that he would not have appreciated the situation once he got out of his truck and walked back into the warehouse. This case does not involve a static condition obvious only upon close inspection, but rather involves a static condition that should have been readily discernible to the plaintiff.

The recent Supreme Court decision in *Robinson v. Kroger Co.,* 268 Ga. 735 (1997) does not change the outcome of this case and require this court to allow this matter to go before a jury. *Tanner v. Larango*, 232 Ga. App. 599 (1998). In *Tanner* the plaintiff tripped over a moss-filled crack in a sidewalk. The plaintiff acknowledged that she had seen the moss, and photographic evidence revealed the static condition, a gap in the sidewalk, was plainly visible. Therefore, the plaintiff's act of stepping on the gap was an act of voluntary negligence. *Id.* As in *Tanner*, Monty Febuary put himself in a situation

where the potential hazards were readily discernible. He arrived at the Averitt facility on a bright, sunny day. The ramp and its potential hazards were visible to him both as he backed his vehicle up the ramp, and as he stepped out of his truck. His failure to appreciate the potential hazards in the instant matter constituted voluntary negligence, and under *Tanner* his voluntary negligence renders *Robinson* moot.

Wherefore, for the foregoing reasons these defendants respectfully request the court grant their renewed motion for summary judgment.

This _____ day of December, 1998.

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_____
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**CERTIFICATE OF SERVICE**

I, Joseph H. Chambless, 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, Attorney of Record for Plaintiff, 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:

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This _____ day of December, 1998.

_____
Joseph H. Chambless