IN THE COURT OF APPEALS OF MISSISSIPPI
No. 2009-CA-01324

PENNY PINCHERS — PLAINTIFF

V. — CIVIL ACTION NO. 2009-CA-01324

CYNTHIA SCOTT, PENNY PINCHERS and
WILLIAM B. JOHNSON d/b/a PENNY PINCHERS — DEFENDANTS

APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSISSIPPI
CLAY COUNTY CAUSE NO. 2007-0024

BRIEF OF APPELLEE

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IN THE COURT OF APPEALS OF MISSISSIPPI

PENNY PINCHERS **APPELLANT**

VERSUS **CAUSE NO. 2009-CA 01324**

LENETRA OUTLAW **APPELLEE**

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel for the Appellee, Lenetra Outlaw, hereby certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusals.

A. Parties:

Defendant-Appellant:	Penny Pinchers 804 Highway 50 West West Point, Mississippi 39773
Defendant-Appellant:	William B. Johnson 804 Highway 50 West West Point, Mississippi 39773
Defendant-Appellant:	Cynthia Scott 804 Highway 50 West West Point, Mississippi 39773
Defendant-Appellee:	Lenetra Outlaw 121 Mohawk Street Starkville, Mississippi 39759

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2. Whether the trial court correctly held that prior knowledge of propensities of the dog is not relevant in a premises liability case;
3. Whether the trial court correctly held that proof of actual or constructive knowledge of the condition is not required when the condition is created by the landowner; and
4. Whether the trial court correctly admitted Dr. Butler's testimony regarding causation of Outlaw's alleged injuries.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of Trial Court

Lenetra Outlaw filed this premises liability action on February 1, 2007, against Defendants Cynthia Scott, Penny Pichers and William B. Johnson d/b/a Penny Pinchers. (R. at 11-17).[1] The Complaint alleges that the retail grocery store and its employee were negligent by breaching their duty to keep the business premises reasonably safe business invitees. Specifically, the manager brought her dog to the premises and, while initially securing the dog in a location separate from customers, allowed the dog to escape, frighten and chase Plaintiff. Additionally, Defendants failed to warn customers of the dog's presence on the business premises. (R. at 11-17). The Complaint further alleges that these acts or omissions on the part of the defendants caused Plaintiff to suffer a serious bodily injury and incur significant damages. (R. at 11-17).

Upon completion of discovery, Defendants sought summary judgment. In doing so, Defendants relied solely upon "dog bite" cases in support of their contention that the chain of events involving the dog did not constitute a breach the duties owed to Plaintiff as a business invitee. (R. at 42-82, 83-92). Outlaw responded to the motion by highlighting the fact that notice of the propensities of the dog is absolutely irrelevant in a premises liability case such as this. (R. at 103-154.). The Circuit Court of Clay County denied the Defendants' Motion for Summary Judgment holding that "there is 'some modicum of material evidence' in that Sophie, the miniature dachshund puppy, was not in a location secured away from Penny Pincher's customers". (R. at 206-208).

[1] Citations to the Record will be denoted as (R. at Page Number). Citations to the Transcript will be denoted as (T. at Page Number). Citations to the Exhibits will be denoted as (E. at Page Number).

The trial of this matter began on April 8, 2009. The jury returned a verdict in favor of Lenetra Outlaw and determined that her total damages attributable to the accident are $130,000.00. (R. at 376-377). The jury assessed 70% of the fault to Defendants and the remaining 30% of fault to Plaintiff Outlaw. Accordingly, the Judgment in favor of Plaintiff Outlaw is in the amount of $91,000.00. (R. at 376-377).

Defendants filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial on May 1, 2009. (R. at 36-391). On July 14, 2009, the Circuit Court of Clay County denied post-trial relief. (R. at 428). On August 10, 2009, Defendants perfected their appeal to this Court. (R. at 429).

B. Undisputed Facts

Plaintiff Lenetra Outlaw ("Plaintiff") seeks damages for bodily injuries suffered while on the business premises of Defendants. (R. at 11-17). Specifically, on August 16, 2006, Plaintiff was a customer in Defendants' retail grocery store in West Point, Mississippi. (T. at 140). Plaintiff had been a customer of Penny Pinchers for approximately two years prior to the incident which forms the basis of this litigation. (T. at 140). On the date of the incident, as Plaintiff walked past the check-out counter to begin her shopping, suddenly and without warning, she was startled by a dog barking and scampering behind her. (T. 144-146). The dog, it was later learned, was owned by Defendant Cynthia Scott, who was the on-duty manager of Penny Pinchers. (T. at 108). At that time Penny Pinchers was owned by Defendant William B. Johnson, who was aware of and approved the dog's presence at his place of business. (T. at 107).

On August 16, 2006, the dog had been allowed to escape from a make-shift enclosure as a result of the failure of the store's employee(s) to secure the enclosure. (T. at 109-111). This enclosure was nothing more than a piece of pegboard which was

flush against the floor. (T. at 109-111). Defendants admit that there was no beware of dog sign nor any other indication to Plaintiff, prior to her entering the store, that the dog was present in the store. (T. at 111).

Plaintiff, who is generally afraid of dogs, was surprised, startled and frightened when she heard both the barking and the scampering behind her and she attempted to get away from the pursuing animal. (T. at 144-146). In her effort to do so, and while trying to look over her shoulder to locate the dog, she collided into and tried to climb onto a freezer situated near the rear of the store. (T. at 146-147). Once the dog was secured, Plaintiff attempted to continue shopping but quickly realized that she was injured, and informed Defendant Cynthia Scott of the injury. (T. at 118-119). As it turns out, the sequence of events caused a prosthetic device, which had been implanted in Plaintiff as a part of hip replacement surgery, to become non-functional and lead to extremely painful suffering by Plaintiff. (T. at 149-150). It was necessary for Plaintiff to immediately undergo surgery by having a new device implanted. The surgery was performed by Dr. Allen Butler, an orthopaedic surgeon in Starville, Mississippi. As a result of the injury and required surgery, Plaintiff Outlaw was subjected to costly and time consuming physical therapy among other damages. (T. at 124-135).

Plaintiff filed the Complaint herein alleging a negligence cause of action on a theory of premises liability. (R. at 11-17). Plaintiff does not now claim, nor has she ever claimed, that the dog actually bit her. (T. at 11-17). Instead, Plaintiff has alleged that the failure to properly restrain the dog such that it was allowed to bark at and chase her as well as the failure to warn Plaintiff, a business invitee, of the presence of dog constitute a breaches of the duties owed to her and are a proximate cause of her substantial damages. (R. at 11-17).

SUMMARY OF THE ARGUMENT

The lower court was justified in its denial of Defendants' Motion for Directed Verdict and its denial of Defendants' Motion for Judgment Notwithstanding the Verdict. This case involves the failure of a retail grocery business to keep its premises reasonably safe for its customers and of its failure to warn. With permission of the owner, the manager Cynthia Scott brought her dog to the premises, failed to keep the dog in a location separate from unsuspecting shoppers, and failed to warn shoppers of the dog's presence. These acts and omissions ultimately lead to the Plaintiff suffering serious bodily injury and incurring significant damages.

It is important to note that there are no significant factual disputes. The pertinent issue before this Court is which analytical framework applies—premises liability or dog bite jurisprudence. Defendants, in an earlier Motion for Summary Judgment, and through their post-trial motions unsuccessfully relied upon irrelevant and easily distinguishable "dog bite" case law in support of their contention that the chain of events involving the dog did not serve to breach the duties owed to Plaintiff as a business invitee. In their attempt to shift the focus away from premises liability law, they discuss theories related to notice of the propensities of the dog and whether or not the dog at issue was capable of biting anyone. Of course, relevant premises liability case law does not include a notice component when the condition is created by the premises owner, as is the situation in the instant matter. Therefore, this basis for Defendants' Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict is fatally flawed and without merit.

The trial court also correctly held that Dr. Butler's testimony via deposition was admissible. Dr. Butler clearly stated throughout his deposition that the events at Penny

Pinchers lead to the revision surgery which he performed. Also, Dr. Butler's reliance upon the history provided by Plaintiff regarding the events giving rise to her injury is the usual and customary practice of physicians. Indeed, statements made to physicians for the purpose of medical diagnosis or treatment are excluded from the hearsay rule because of their likely inherent trustworthiness given the important circumstances under which such statements are made.

One of the illogical conclusions to be drawn from Defendants position on this issue is that in order to lay a foundation for Dr. Butler's testimony, he would be required to perform some independent investigation by going to Penny Pinchers to view the scene, taking measurements and speaking with witnesses. Surely, if the history of the injury provided to Dr. Butler by Plaintiff Outlaw was inconsistent with the nature of the injury and her past medical history, Dr. Butler certainly could have testified to such an opinion based upon his education, training and experience.

The reality is that it is beyond dispute that Plaintiff walked in the store. It is beyond dispute that Defendant Cynthia Scott personally witnessed the collision into the freezer precipitated by the dog on the loose. There is no dispute that Plaintiff was taken from the store in an ambulance and in tears. It is a fact that surgery was performed on an emergent basis. The result is that this issue is a non-starter for Defendants in that there is indisputable and overwhelming evidence of causation quite apart from Plaintiff Outlaw's recitation of the facts or Dr. Butler's reliance on the history provided to him.

Accordingly, the rulings by the lower court on these issues was proper, and the verdict of the jury is fully supported by the evidence consistent with the jury's fact-finding role.

ARGUMENT

1. Standard of Review for Judgment Notwithstanding the Verdict

The standard of review for the denial of a directed verdict and a judgment notwithstanding the verdict is the same. *Ala. Great S. R.R. Co. v. Lee*, 826 So. 2d 1232, 1235 (Miss. 2002). This Court will consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Id.* at 1235 (quoting *Steele v. Inn of Vicksburg, Inc.*, 697 So. 2d 373, 376 (Miss. 1997). "If the evidence is sufficient to support a verdict in favor of the non-moving party, the trial court properly denied the motion." *Henson v. Roberts*, 679 So. 2d 1041, 1044-1045 (Miss. 1996). In other words, this Court considers "whether the evidence, as applied to the elements of a party's case, is either so indisputable, or so deficient, that the necessity of a trier of fact has been obviated." *White v. Stewman*, 932 So. 2d 27, 32 (Miss 2006).

2. Defendants Failed to Maintain a Reasonably Safe Business Premises

> Under Mississippi law, a negligence claim consists of four elements: (1) a duty to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damage resulting to the interests of another. *Wal-Mart Stores, Inc. v. Littleton*, 822 So. 2d 1056, 1058 (Miss. Ct. App. 2002).

With respect to a negligence cause of action on a theory of premises liability, a plaintiff may espouse one of three theories in support of a claim of negligence. They are: (1) that defendant's own negligence created a dangerous condition which caused plaintiff's injury; (2) that defendant had actual knowledge of a condition which defendant itself did not cause, but defendant failed to adequately warn plaintiff of the danger faced as an invitee; or (3) that, based upon the passage of time, defendant should have known of the dangerous condition caused by another party if defendant had acted

reasonably imputing constructive knowledge of the condition to the defendant. *K-Mart Corporation v. Hardy*, 735 So. 2d 975 (Miss. 1999). When a dangerous condition is created by the premises owner's own negligence, the plaintiff is not required to offer evidence tending to show that the owner had either actual or constructive knowledge of such condition. *Hardy*, 735 So. 2d 975 citing *Douglas v. Great Atlantic & Pac Tea Co.*, 405 So. 2d 107, 110 (Miss. 1981); *Jerry Lee's Grocery, Inc. v. Thompson*, 528 So. 2d 293, 295 (Miss. 1988); *Winn-Dixie Supermarkets v. Hughes*, 156 So. 2d 734, 736 (Miss. 1963).

In analyzing premises liability, a court must first look to whether the injured party, at the time of the injury, was an invitee, licensee, or trespasser. *Estate of White ex rel White v. Rainbow* Casino-*Vicksburg P'ship*, 910 So. 2d 713, 718 (Miss. Ct. App. 2005). It is beyond dispute that Lenetra Outlaw, the Plaintiff, held the status of invitee at the time of the injury. After determining the status of the injured party, the Court must next look to the duty owed to that party by the premises owner. *Id.* The owner or operator of a business premises owes to an invitee the duty to exercise reasonable care to keep the premises in a reasonably safe condition and, if the owner or operator is aware of a dangerous condition which is not readily apparent to the invitee, he is under a duty to warn the invitee of such condition. *Jerry Lee's Grocery, Inc. Thompson*, 528 So. 2d 293, 295 (Miss. 1988).

Although Defendants correctly recite the appropriate standard of care for invitees in their brief, Defendants' entire analysis thereafter is based upon irrelevant dog bite case law. The body of cases that addresses dog bites has incorporated within it a requirement that the owner have actual or constructive knowledge of the dangerous propensities of the dog. *Mongeon v. A & V Enterprises, Inc.*, 697 So. 2d 1183 (Miss.

1997); *Poy v. Grayson*, 273 So. 2d 491 (Miss. 1973). Unfortunately for Defendants, this line of cases has absolutely nothing to do with premises liability. Incredibly, Defendants are utilizing the fact that their failure to safeguard the Plaintiff on their business premises involved an unrestrained dog, as a red herring to attempt to incorporate a line of cases which would require notice of certain propensities of the dog. This analysis is confusing, misleading and wrong.[2]

Plaintiff, as an invitee, was owed the highest duty of care by the owner, possessor or operator of the business--to maintain the premises in a reasonably safe condition and to warn of dangerous conditions which were not readily apparent to the Plaintiff. The jury correctly concluded that the dog's surprising and unrestrained presence in Penny Pinchers on August 16, 2006, was a breach of that duty of care. The dog escaped from its make-shift pegboard enclosure and startled and frightened the Plaintiff who had shopped in the store on numerous occasions but had never seen this dog. Additionally, Plaintiff, who was terrified of dogs, had no knowledge of this dog's medical history or the fact that it was supposedly incapable of biting. The situation which she confronted was one in which a barking dog was unexpectedly present in a grocery store and chased her. In her attempt to get away from the dog, Plaintiff was severely injured.

The Mississippi Supreme Court has previously analyzed a claim of premises liability involving the alleged failure to restrain a dog. *Vaughn v. Ambrosino*, 883 So. 2d 1167 (Miss. 2004). Vaughn, a housekeeper, was injured when the homeowners' dog ran into a ladder upon which she was standing to perform her job, causing Vaughn to

[2] In fact, under Defendants' analysis, there could be no recovery in a situation in which a shopper in a grocery store is mauled by a dog without provocation, whose presence was unannounced, so long as it cannot be proven that the dog exhibited any previous acts of aggression.

fall and sustain injuries. *Id.* Vaughn claimed that the homeowners should have either restrained the dog or warned her that the dog might run into the ladder. Notably absent from the Court's opinion is any reference to a need for the plaintiff to establish dangerous propensities of the dog at issue in that matter or any other analysis whatsoever specific to dog bite or aggression cases. Neither is any such requirement applicable in the instant matter.

The evidence produced at trial was that Defendants created an unreasonably dangerous condition by allowing the dog to be in the store, letting the dog escape from its enclosure, along with the facts that the dog barked and scampered after Plaintiff and their failure to warn Plaintiff of the dog's presence. This condition proximately lead to Plaintiff's injuries. The trial court did a superb job of explaining his reasoning for refusing to apply "dog bite" case law at the hearing on the Motion for Judgment Notwithstanding the Verdict.

> The big issue I think that is a legal issue is the dangerousness of the dog and premises liability issues. The animal itself was not the inflictor of the damages, i.e., it is not a dog bite case. And that was my distinction. This is not a case where the dog actually was the instrumentality of the injury. But the creation of the condition caused the injury. And that was the distinction as I saw it. (T. at 325).

The trial court was its correct in denying Defendants' Motions for Directed Verdict and for Judgment Notwithstanding the Verdict.

3. Penny Pinchers and Scott Failed to Warn Lenetra Outlaw

As an invitee, Lenetra Outlaw was clearly entitled to be warned of the presence of the dog at Penny Pinchers. Regrettably, Defendants did not afford her any warning whatsoever. Defendants have admitted that no beware of dog signs or other indication was provided to customers that the dog was present on the premises. Cynthia Scott testified as follows at trial regarding this topic:

A. And on August 16th of 2006, do you remember when she [Outlaw] came into the store?

B. Yes, sir.

Q. Did you greet her or did she greet you?

A. I certainly did.

Q. Okay. And when she came into the store on August 16th of 2006, would she have seen a "Beware of Dog" outside?

A. No, sir.

Q. When she entered into the store, was there a "Beware of Dog" sign in the store?

A. No, sir.

Q. Okay. And when you exchanged pleasantries with her, did you say there's a dog in the store to provide her some warning?

A. No, sir.

Q. So then as we sit here today, it's a fact that you provided no warning whatsoever to Ms. Outlaw about the presence of Sophie in the store; is that correct?

A. That's correct.

(T. at 111-112)

Additionally, Plaintiff had no prior knowledge that the dog was present in the store, as she had shopped there on numerous occasions without ever seeing a dog. Accordingly, Plaintiff was neither expressly nor constructively notified that a dog was located on the premises of Penny Pinchers. Because of Plaintiff's general fear of dogs, she testified at trial that she would not have entered the store had there been a visible a

"Beware of Dog" sign. She would have requested that her father enter the store instead. (T. at 143-144).

As stated hereinabove, no proof of the landowner's knowledge of the condition is necessary where the condition is created by the owner's negligence or the negligence of someone under his authority. *Hardy*, 735 So. 2d 975 citing *Douglas*, 405 So. 2d at 110; *Hughes*, 156 So. 2d at 736. Contrary to Defendants' assertion, no prior knowledge that this dog would escape from its enclosure, bark at or chase customers is necessary. Defendants' rationale would essentially have this Court require notice to the business owner, as opposed to the business owner warning the invitee of hidden dangers which were not open and obvious as required by law.[3]

The trial court was its correct in denying Defendants' Motions for Directed Verdict and for Judgment Notwithstanding the Verdict.

4. Dr. Butler's Testimony Was Properly Admitted

Defendants have also proposed that Dr. Butler's testimony regarding causation failed to satisfy the standards of the Mississippi Rules of Evidence. Rule 702 of the Mississippi Rules of Evidence reads as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[3] An invitee may not recover for failure to warn of an open and obvious danger. *Vaughn v. Ambrosino*, 883 So. 2d 1167, 1170 (Miss. 2004). However, the Mississippi Supreme Court has emphasized that the open and obviousness of a particular danger is not a complete defense to an invitee's allegations that a defendant was negligent in creating or failing to repair a dangerous condition on the premises. *Mayfield v. Hairbender*, 903 So. 2d 733, 736 (Miss. 2005).

In *Miss. Transportation Comm'n v. McLemore,* 863 So. 2d 31 (Miss.2003), the Mississippi Supreme Court adopted a modified *Daubert* standard "for assessing the reliability and admissibility of expert testimony." 863 So. 2d at 35, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 597 (1993). The *McLemore* Court articulated the modified Daubert standard as follows:

> Under Rule 702, expert testimony should be admitted only if it withstands a two-pronged inquiry. First, the witness must be qualified by virtue of his or her knowledge, skill, experience or education. Second, the witness's scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in in issue. *McLemore*, 863 So. 2d at 35.

Regarding this Court's standard of review, "the admission of expert testimony is within the sound discretion of the trial judge." *Id.* at 34. Therefore, the decision of a trial judge will stand unless it is concluded that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion. *Id.*

5. Dr. Butler Clearly Related Lenetra Outlaw's Injuries to the Incident at Penny Pinchers on August 16, 2006

Defendants would have this Court ignore Dr. Butler's repeated testimony during his deposition that the event causing the need for the revision of the acetabular component occurred at Penny Pinchers.[4] The following excerpts from Dr. Butler's deposition, read fairly, illustrate his opinion on the issue of causation.[5]

> Ms. Bailey: And I meant to have this understanding with you at the beginning of the deposition but can we have this understanding from this point forward that if I ask you any questions that require a medical opinion that you will make those opinions to a reasonable degree of medical certainty?

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[4] The entire deposition of Dr. Butler can be found in the exhibits folder of the record at pages 114 through 146.

[5] Plaintiff admits that Dr. Butler had some difficulty relaying his opinions, likely due to his inexperience providing deposition testimony. At the time of this deposition, he had only given one prior deposition.

Deponent: Sure.
[E. at 126, Lines 7-12.]

Q: In your opinion what caused the loosening of Ms. Outlaw's component which prompted the revision in August of 06?

Mr. Doss: Object to form.

Q. You can answer.

A. It's a combination of the very little in-growth on the cup and then that acute jump onto the freezer.

Q: When you say 'it's a combination,' you would agree that she was not having any—or she had not made any of the complaints of that type of pain prior to her visit at the emergency room on the date of---that she jumped on the freezer?

A. I would.

Mr. Doss: Object to form.

Q. Would you be able to in any way place a percentage on the cause of whether---Let me rephrase that. Would you be able to state whether it was the—what portion would be the jump onto the freezer and what portion would be the growth or the lack of bony growth?

A. I mean, that's difficult but with very little in-growth on the cup---That cup is made to have bone grow into it. That's how it becomes stable over time. I think at some point in time it was probably going to fail anyway. From the history given by the patient, that incident as most likely what caused it to happen but it was kind of a---
[E. at 135, Line 25 through Page 136, Lines 1-20.]

Q: Is it your opinion to a reasonable degree of medical certainty that had Ms. Outlaw not been running and tried to jump on the freezer that hip replacement that you performed in August of 2006 would not have been necessary?

Mr. Doss: Object to form.

A. I think with minimal bone in-growth on that cup, something was going to have to be done eventually. It was just the matter of the incident that caused it to loosen.
[E. at 136, Lines 5-12.]

Q: The question is can you testify to a reasonable degree of medical certainty that the incident, if any, at Penny Pinchers caused her to have this revision that you performed?

A: It would be reasonable that she jumped and landed onto a cooler and acutely loaded her hip. With a cup with only 20% in-growth that could have caused it to come loose.
[E. at 160, Lines 17-22.]

Q: But at the time, Doctor, based on 20% in-growth, I mean, any number of things could have at any point in time—She could have bumped her leg at any point in time and caused this problem. Is that right?

A. I would say that is correct.

Mr. Doss: That's all.

Ms. Bailey: One final question.

Q: But she just happened to bump her leg at the particular point in time at Penny Pinchers which acutely caused the pain which led to the revision?

A: That was her—

Mr. Doss: Object to form.

A: That was her presenting complaint when she saw me in clinic.
[E. at 161, Lines 8-21.]

It is important to note that Outlaw has never attempted to relate her limp to this accident. She was asked during cross examination at trial why she walked with a limp. Her testimony in response was that she walked with a limp because of her rheumatoid arthritis and Perthes Parkers disease. (See T. at 160). Therefore, the fact that Dr. Butler is unable to relate her limp to the incident at Penny Pinchers is of no consequence. Also, notable is the fuss that Defendants have made over Dr. Butler's testimony regarding pain. A closer look at the question posed to Dr. Butler reveals that he was asked whether any pain that Outlaw had today (on the date of his deposition) was related to the incident at Penny Pinchers. (See. E. at 160.) His deposition was taken on December 2, 2008, which was well over two years after the Penny Pinchers incident.

The above testimony of Dr. Butler causally relates Plaintiff's need for the revision surgery to the incident at Penny Pinchers, as well as the pain she experienced immediately afterward. The fact that Plaintiff Outlaw had previous medical issues and a fear of dogs does not help Defendants escape liability for their negligence. Instead, Defendants must take Plaintiff as they find her. Surely, individuals who have undergone hip surgery (thousands upon thousands of people) and who have a fear of dogs (thousands perhaps millions of people) are entitled to shop in a reasonably safe business premises and to receive proper warnings just like any other invitee.

The Motion for Judgment Notwithstanding the Verdict as to this issue should be is without merit.

6. Reliance Upon Plaintiff's History Is Proper

Defendants have also argued that Dr. Butler's opinions as to causation do not meet the standards because he performed "no independent analysis as to how the accident occurred but only recited as to what the Plaintiff presented to him as the history of this cause of her alleged injuries".

Dr. R. Allen Butler, like any physician, is forced to rely upon the history and other information that is provided to him in order to properly diagnose and treat patients. In most instances the historian is actually the patient, unless the patient is unable to effectively communicate due to age or infirmity. The importance of statements for purposes of medical diagnosis is clearly understood in our jurisprudence which is why they are exceptions to the hearsay rule (See M.R.E. 803(4)).

Physicians also understand the importance of knowing the history when treating a patient. In his deposition Dr. Butler testified as follows:

Q: Dr. Butler, how important is knowing a patient's history to your treating a patient?

A.: Well, I mean, certainly it's important. We, on the first visit, take a very, you know, thorough history and do a physical exam but the history is based on what the patient tells us and any records I have available at the time. So that's what we have to go off of. (E. at 133).

As to the history that was provided in the emergency department, Dr. Butler testified as follows:

> At the time Ms. Outlaw was a 42-year old female with a history of rheumatoid arthritis. She had had a revision left total hip arthroplasty about four years prior to that by a surgeon in Tupelo.
>
> She presented to Oktibbeha County Hospital with pain in her left hip. She had been inside of a store and a dog was chasing her, and she ran from the dog and jumped on top of a freezer. It sounded like an ice cream box to get away from the dog; felt a pop and had pain in her hip at that time; was brought to the operating room at Oktibbeha County Hospital. Then I was consulted by the emergency department for evaluation of her left hip. So that's basically how she presented. (E. at 122-123).

It was also pointed out by Dr. Butler during his deposition that his initial examination was limited somewhat due to pain. Dr. Butler stated that Ms. Outlaw not only told him that she was in pain, but there were several exam findings which elicited pain in her groin (Stinchfield maneuver and the log roll maneuver). Finally, Dr. Butler testified that the type of pain which Ms. Outlaw reported was consistent with the injury she sustained. There is no question that 100% of the pain experienced by Ms. Outlaw at that time was attributable to the incident at Penny Pinchers.

Dr. Butler's reliance upon the history provided to him by Plaintiff was proper, and the Motion for Judgment Notwithstanding the Verdict should be denied as to this issue.

CONCLUSION

Defendants have failed to demonstrate that the evidence, as applied to the elements of Outlaw's case, is either so indisputable, or so deficient, that the necessity of a trier of fact has been obviated. In support of this argument, Defendants rely exclusively on allegations that the dog had not previously demonstrated dangerous propensities. If this were a non-premises liability dog bite case, Defendants' analytical framework would perhaps be appropriate. However, this is a premises liability case alleging creation of an unreasonably dangerous condition and failure to warn of that dangerous condition which proximately caused the damages to Plaintiff. Defendants were negligent as a result of their inattentiveness and allowing a dog to escape the enclosure they made for her. These negligent acts, in addition to the dog barking at and chasing Outlaw, lead to her injuries.

Defendants have also failed to show that Dr. Butler's testimony was admitted in error. After all, he was Plaintiff Outlaw's surgeon and is the most knowledgeable person regarding her injury and its cause. His testimony makes it clear that Plaintiff acutely loaded her hip during this incident at Penny Pinchers which caused the acetabular component of her hip prosthesis to loosen. This opinion by Dr. Butler is consistent, to say the least, with all of the other undisputed evidence in this matter.

Based on the testimony produced at trial, Defendants have failed to meet their burden and therefore this Court must affirm the jury's verdict.

Respectfully submitted,

LENETRA OUTLAW, PLAINTIFF

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CERTIFICATE OF SERVICE

I, Chynee A. Bailey, one of the attorneys for Plaintiff, do hereby certify that I have this day Emailed and mailed via United States mail, postage pre-paid, a true and correct copy of the above and foregoing Brief of Appellee to:

Honorable Lee J. Howard
Circuit Court Judge
Post Office Box 1344
Starkville, Mississippi 39760-1344

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This the 18th day of June, 2010.

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CHYNEE A. BAILEY

CERTIFICATE OF FILING

I, Chynee A. Bailey, certify that I have had hand-delivered the original and three copies of the Brief of Appellee and a CD containing same on June 18, 2010, addressed to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

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