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I. SUMMARY OF ARGUMENT

Lenetra Outlaw ("Outlaw") has not proven and did not prove at the trial of this matter that: 1) Sophie, the four month old dachshund puppy could be considered a dangerous condition which existed at Penny Pinchers on the date in question; 2)Penny Pinchers had notice (if Sophie could be considered a dangerous condition) of the dangerous condition; and 3) the damage which Outlaw alleged to have suffered was related to the alleged incident at Penny Pinchers.

A. THE TRIAL COURT COMMITTED ERROR IN NOT FINDING THAT OUTLAW FAILED TO PROVE THAT THE FOUR MONTH OLD DACHSHUND, SOPHIE, CONSTITUTED A DANGEROUS CONDITION ON AUGUST 16, 2006.

The existence of a dangerous condition is the first element the Plaintiff must prove in a premises liability case. ***Delmont v. Harrison County Sch. Dist.***, 944 So. 2d 131, 133 (Miss. App. Ct. 2006). ("[P]roperty owner cannot be found liable for the plaintiff's injury where no dangerous condition exists.") Outlaw did not prove that a dangerous condition existed. In effect, the trial court allowed the jury to find liability under a premises liability theory without first having to prove a dangerous condition. Outlaw has tried to minimize and dismiss the issue of Outlaw having to prove that Sophie, a four month old miniature dachshund puppy, was a dangerous condition. Outlaw simply argues that because the puppy was allowed onto the premises by Penny Pinchers and that because Outlaw claims she was injured or was caused to be injured by the barking of this puppy that this set of circumstances circumvents the need for Outlaw to prove a dangerous condition.

The record in this case is absolutely devoid of any evidence, proof, innuendo, or even rumor that Sophie demonstrated any reason for Penny Pinchers to have believed that Sophie constituted any problem or danger to anyone. Outlaw did not and cannot prove that there was any reason for Penny

Pinchers to have any concern that Sophie constituted a dangerous condition. Outlaw, through the trial court's error in not requiring Outlaw to prove that Sophie was dangerous or exhibited dangerous propensities in the past, was not required to prove the very first element of a premises liability case – that of the existence of a dangerous condition as stated by this very Court. ***Delmont v. Harrison County Sch. Dist.***, 944 So. 2d 131, 133 (Miss. App. Ct. 2006).

Outlaw wishes to ignore the fact that the condition that she complains is a puppy. The case law in Mississippi is clear that dogs [puppies]are not *per se* dangerous conditions. ***Poy v. Grayson***, 273 So. 2d 491 (Miss. 1973). In other words, there must be something specific about Sophie at issue which makes this particular four month old "wiener dog" puppy dangerous. The Court in ***Poy*** expounded as follows: "[t]here [must] be some proof that the animal has exhibited some dangerous propensity or disposition prior to the attack complained of, and, moreover, it must be shown that the owner knew or reasonably should have known of this propensity or disposition and reasonably should have foreseen that the animal was likely to attack someone." ***Id.*** at 494. Without this basic proof Outlaw cannot prove that Sophie created a dangerous condition, which is the first element required to be proven in a premises liability case. ***Delmont v. Harrison County Sch. Dist.***, 944 So. 2d 131, 133 (Miss. App. Ct. 2006).

It is well-settled law that for an owner to be exposed to liability for an attack by his animal there must be proof that *prior to* the attack the animal had exhibited some dangerous propensity and that the owner either knew or should have known of the dangerous propensity and reasonably foreseen that the animal was likely to attack someone. ***Poy v. Grayson***, 273 So. 2d 491 (Miss. 1973). Outlaw has admitted that she has no knowledge of the prior propensity of Sophie. Outlaw in her Responses to Requests for Admissions [R-73-74] and through her own testimony at trial [T-190-191] admitted that she could not prove that Sophie had ever exhibited any dangerous propensity or shown

any aggressive behavior.

> **REQUEST FOR ADMISSION NO. 20:** **Admit that you are not aware of anyone that the subject dog, Sophie, chases, barked at, bit or growled at prior to the incident you allege in your Complaint.**
> **RESPONSE: Admitted.**
> **REQUEST FOR ADMISSION NO. 21:** **Admit that you are not aware of any evidence that the subject dog, Sophie, ever chased, barked at, bit or growled at anyone prior to the incident you allege in your Complaint.**
> **RESPONSE: Admitted.**

[R-73-74]

In her proffered testimony, Ms. Outlaw testified as follows:

> **Q. Ms. Outlaw, you do not know if Sophie, Cindy Scott's dog, had ever barked at a customer prior to August 16th, 2006, did you?**
> **A. No.**
> **Q. You do not know that prior to August 16, 2006, whether or not Sophie had ever chased a customer, do you?**
> **A. No.**
> **Q. And you do not know that prior to August 16, 2006, that Sophie had ever gotten outside of her containment, do you?**
> **A. No.**
> **Q. You also do not know – have any knowledge whatsoever about the character of disposition of Sophie prior to August 16th, 2006, do you?**
> **A. Huh-uh (no).**

[T-190-191]

Outlaw offered no evidence that Sophie had demonstrated a dangerous propensity at any time, much less prior to the August 16, 2006 incident. Under Mississippi law, the general rule applies, specifically, Sophie's presence did not create a dangerous condition and Outlaw cannot prove the first element required by a claimant in a premises liability case.

Outlaw inaccurately argues that ***Vaughn v. Ambrosino***, 883 So. 2d 1167 (Miss. 2004) supports her position that the propensity of a dog is irrelevant in a premises liability context when a dog is involved. Outlaw contends that the ***Vaughn*** Court did not address the propensity issue in the *Vaughn* opinion, this is not true. The ***Vaughn*** court, in fact, directly mentioned that Vaughn (the

housekeeper who was injured when Annabelle – the Ambrosino's family dog- bumped into the ladder and knocked Vaughn off) had knowledge of Annabelle. **-Vaughn had served as the Ambrosino's housekeeper for two years, and was familiar with both the house and Annabelle -** ***Vaughn v. Ambrosino***, 883 So. 2d at 1172.

This Court directly made mention of this important fact that the housekeeper had knowledge of [the propensity, disposition] of the Ambrosino's dog, Annabelle. Outlaw's assertion that propensity of Sophie is irrelevant given the dicta and ultimate ruling by this Court in *Vaughn* is inaccurate as this Court specifically pointed out that knowledge of Annabelle's propensity was an important fact to be considered in premises liability case in which a dog was involved. Therefore, despite what Outlaw contends in her brief, the ***Vaughn*** Court did examine the issue of propensity in affirming the jury's decision in favor of the homeowner.

Outlaw must prove the existence of a dangerous condition in order to prove any cause of action based on premises liability. Outlaw has not offered any evidence to demonstrate that Penny Pincher's knew or should have known that Sophie, a four month old miniature dachshund puppy, was dangerous. Outlaw, on the one hand, asserts that Sophie barked and scampered in her direction and, on the other hand, quotes the trial court's assertion that the propensity of Sophie was irrelevant as Sophie did not "bite" or inflict the damage Outlaw alleges. These two positions are contradictory. The only condition complained is the presence and actions of Sophie – a four month old puppy. Despite Outlaws assertions and the trial courts holdings, the intertwining of a dog being the nexus of a complaint of dangerous condition in a premises liability context requires Outlaw to prove that the dog was a dangerous condition as a prerequisite to proving a premises liability case.

As has been mentioned before, dogs are not dangerous *per se*. ***Poy v. Grayson***, 273 So. 2d 491 (Miss. 1973). Outlaw must prove that Penny Pinchers knew or should have known that Sophie

was a danger in order to prevail. This requirement is necessary due to the law in this state as well as the practical effect to rule otherwise would have on well established precedent and the uncertainty a ruling such as this would have on the public, including dog owners, in general. If Outlaw was allowed to maintain a premises liability claim against Penny Pinchers, with no proof that Penny Pinchers knew that Sophie could cause a danger, such a ruling would disregard the decades of law dealing with dogs and liability of dog owners and would instead substitute the wild animal statute standard in its stead. ***Phillips v. Garner,*** 106 Miss 828, 64 So. 735 (Miss. 1941).[1] By holding the mere presence of a four month old puppy on the premises was sufficient to impose liability, the trial court in effect applied this standard in error. "Strict liability is not imposed on business owners in premises liability cases". ***Martin v. Rankin Circle Apartments***, 941 So. 2d 854, 864 (Miss. Ct. App. 2006) (citing ***Corley v. Evans***, 835 So. 2d 30, 41 (Miss. 2003). Outlaw cannot prove such as she has testified and admitted that she has no knowledge of Sophie prior to this incident and has no knowledge of what knowledge Penny Pinchers may or may not have had of Sophie prior to this incident. In addition, no other proof and/or affidavit on this issue was presented at trial.[2]

This lawsuit brought by Outlaw centers around the actions of Sophie, a four month old miniature dachshund puppy. Outlaw's admission that she has no knowledge or evidence of any previous dangerous propensity by Sophie and Outlaw's admission that she has no knowledge of Penny Pinchers having any knowledge or notice that Sophie could be a dangerous condition warranted a directed verdict and/or judgment notwithstanding the verdict in favor of Penny Pinchers. Therefore, Penny Pinchers requests that this Court reverse and render this case in favor of Penny

[1] This statute holds that owners of wild animals to be strictly liable for injuries and damages incurred as a result of the keeping a wild animal with no need to prove whether or not the keeper of the animal had any knowledge of whether the wild animal could be a danger.

[2] In fact, Outlaw's own actions at the scene demonstrated that Sophie was not dangerous as Outlaw testified that when she saw Sophie, she laughed because it was a small dog and not dangerous. [T-178].

Pinchers.

B. THE TRIAL COURT ERRED IN NOT FINDING THAT OUTLAW FAILED TO PROVE THAT PENNY PINCHERS HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF SOPHIE CREATING AN UNREASONABLY DANGEROUS CONDITION

The second prong of this analysis requires that IF Outlaw could prove that Sophie created an unreasonably dangerous condition then Outlaw must then prove that Penny Pinchers knew or should have known that Sophie being on the premises created an unreasonably dangerous condition. ***Downs v. Choo***, 656 So. 2d 84, 86 (Miss. 1995) Outlaw did not present any evidence at trial that Sophie had a dangerous propensity. [T-190-191 &R-73-74]. In fact, Outlaw admitted otherwise. [R-73-74]. All of the proof and testimony indicated that Sophie had never acted aggressively before. There was also no proof offered that Penny Pinchers knew or should have known that Sophie had acted aggressively before. There was no evidence or proof presented by Outlaw that Penny Pinchers should not have allowed Sophie on the premises or should have warned patrons of Sophie's presence. [T-124-125 & T-129].

Simply put, Outlaw did not establish that there was a dangerous condition on the premises and without this being first established this Court's should reverse and render in Penny Pinchers favor. ***Delmont v. Harrison County Sch. Dist.***, 944 So. 2d 131, 133 (Miss. App. Ct. 2006). Even if there could be some modicum of proof established by Outlaw that a dangerous condition existed, there is absolutely no proof that Penny Pinchers had any knowledge which would have given them some knowledge that Sophie was a danger. ***Poy v. Grayson***; ***Downs v. Choo***.

Therefore, without this requisite proof established by Outlaw, this verdict must be reversed and rendered in favor of Penny Pinchers.[3]

C. THE TRIAL COURT ERRED IN ALLOWING DR. BUTLER TO TESTIFY AS TO CAUSATION OF OUTLAW'S ALLEGED INJURIES

Dr. Butler cannot, to a reasonable degree of medical certainty, testify that Outlaw's alleged injuries were caused by the incident at Penny Pinchers. In his deposition, Dr. Butler testified as follows:

> **Q: Doctor, based on your history and your examination and treatment of Ms. Outlaw, you can't testify to a reasonable degree of medical certainty that Mrs. Outlaw's limp, if any, today is caused by any injury she received at Penny Pinchers.**
>
> **MS. BAILEY: Object to the form.**
>
> **A: No.**
>
> **Q: In other words, you don't know whether any limp she may have today was caused by any incident at Penny Pinchers?**
>
> **MS. BAILEY: Object to the form.**
>
> **A: Correct.**
>
> **Q: Is that correct?**
>
> **A: Correct.**
>
> ***
>
> **Q: And any pain that she may have today, same question; can you testify to a reasonable degree of medical certainty that any pain she has today was caused by the incident at Penny Pinchers?**
>
> **A: No.**
>
> **Q: And, Doctor, based on a reasonable degree of medical certainty, as I understand it, you can't testify as to whether the revision that you performed was caused by an injury she may have received at Penny Pinchers?**
>
> **MS. BAILEY: Object to the form.**
>
> **A: I mean - - -**
>
> **MS BAILEY: That's a mischaracterization of his testimony.**
>
> **- - - based on her presenting complaint, it appears that the cup acutely loosened during this incident.**
>
> **Q: Okay, but that's not to a reasonable degree of medical certainty, is it?**
>
> **A: No response.**
>
> **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?**

---

[3] The Plaintiff has made an issue of a failure to warn Outlaw to the presence of Sophie, there is no duty requiring such as there was no known danger to warn anyone of. This issue is nothing more than a smoke screen to hide that the fact that Outlaw has no evidence to prove a dangerous condition. Necessarily, if Outlaw cannot prove a dangerous condition she cannot prove a danger that Penny Pinchers should have warned anyone of. This claim is without merit and should be reversed and rendered in favor of Penny Pinchers.

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 that could have caused it to come loose.
Q: And the 20% in-growth has a lot to do with it too, doesn't it?
A: It is a factor.
MS BAILEY: Object to the form.

***

Q: And the fact that she had rheumatoid arthritis also contributes to that. Is that correct?
A: That is a factor as well.
Q: And any - - - There could have been other injuries too that could have caused this other than the history she presented?
A: I mean, to my knowledge, this is how she presented so this is what I have to go on.
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.

See Deposition of Dr. R. Allen Butler, Page 45, lines 14 – 25; Page 46, Lines 1 – 25 and Page 47, Lines 1 – 12. [R-378-391]

Dr. Butler was unable to rule out other factors present in Outlaw's condition that could have caused and/or contributed to Outlaw's condition. In fact, as evidenced by Dr. Butler's deposition it is clear the Dr. Butler testified that other factors separate from the Penny Pinchers event could have caused and/or contributed to the injury Outlaw presented to Dr. Butler. The law in Mississippi is that if there are two or more conditions that could have caused the injury and one of them was not caused by the negligence of the defendant then the question should not be sent to a jury to speculate on the cause of the injury. ***Blizzard v. Fitzsimmons***, 10 So.2d 343 (Miss. 1942). Therefore given that Dr. Butler agreed that there were several factors which could have caused/contributed to Outlaw's injury as presented the trial court erred in allowing this question to go to the jury and not granting directed verdict and ultimately Penny Pinchers motion for judgment notwithstanding the verdict.

It should be noted by this Court that while Outlaw in her brief stressed the importance of Outlaw giving Dr. Butler a history of the injury, Outlaw did not give Dr. Butler a full complete and accurate history of the events at Penny Pinchers. Outlaw did not make any mention to Dr. Butler of

the fact that after she allegedly jumped on a freezer that she (against prior restrictions concerning her previous hip replacement [T-161-163] proceeded to lift a five pound bag of catfish from the bottom of a deep freezer or pick up a heavy bag (four pounds) of sugar from the bottom shelf, all after the alleged injury occurred. [T-188-189]. This information was important and necessary information that should have been provided to Dr. Butler and should have been told to him by Outlaw.

As Dr. Butler testified and Outlaw pointed out in her brief, the only information Dr. Butler had to make any determination of the cause of the injury was the incomplete history given to him by Outlaw. It is irrefutable that Outlaw did not provide Dr. Butler a complete picture of the circumstances surrounding her injury. Outlaw "cherry picked" the information she chose to give to Dr. Butler and only gave Dr. Butler the information Outlaw believed would support her lawsuit. Accordingly, Dr. Butler's testimony as to the causation of any injuries should have been precluded, as Outlaw's self serving history should not be the basis of a medical opinion upon which the trier of fact should put undue weight. ***Cuevas v. Copa Casino***, 828 So.2d 851 (Miss. App., 2002).

Dr. Butler's qualifications and testimony, regarding causation cannot meet the standards required by the *Mississippi Rules of Evidence* or the applicable case law cited above, as Dr. Butler is an orthopedic surgeon not a forensic doctor or a bio-mechanical expert. Dr. Butler did 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. Butler's testimony regarding causation should not have been permitted by the applicable rules and case law, and it was prejudicial bolstering of the Plaintiff's testimony by that of a medical doctor whom a jury may have given undue weight and in violation of ***Mississippi Rule of Evidence 403***. Therefore for this additional reason, this Court should find that the trial court erred in not granting Penny Pinchers directed verdict and

motion for judgment notwithstanding the verdict and motion for new trial and should accordingly reverse and render the verdict in Penny Pinchers favor.

II. CONCLUSION

Outlaw must prove that a dangerous condition existed. She could not and cannot prove that a dangerous condition existed. ***Delmont v. Harrison County Sch. Dist.*** In order to prove a dangerous condition existed here, Outlaw must establish that Sophie was a dangerous dog and this danger was known by Penny Pinchers. ***Downs v. Choo***, 656 So. 2d 84, 86 (Miss. 1995) Sophie is not dangerous *per* se. ***Poy v.* Grayson**. Outlaw must prove that Sophie is dangerous, which Outlaw cannot do. Outlaw cannot prove that Penny Pinchers had any indication or knowledge which would have informed them that Sophie was a danger. Outlaw has admitted in her request for admissions and her testimony that she has no knowledge of the prior propensity of Sophie. [R-73-74], [T-190-191]. The only fact Outlaw did prove was that Sophie was in the store on August 16, 2006. This is simply not enough to allow a jury to find liability on Penny Pinchers. The trial court erred in not granting Penny Pinchers' Motion for Directed Verdict or Motion for Judgment Notwithstanding the Verdict. The effect of the trial court's allowing this matter to proceed to a jury without Outlaw having to prove that a dangerous condition existed placed on Penny Pinchers a strict liability burden. In effect, the same burden placed on the keepers of wild animals. Mississippi has never held a dog owner to that standard and to not reverse and render in Penny Pinchers favor would create an impossible burden on dog owners and create a chilling effect of dog ownership. To allow this verdict to stand without Outlaw proving Sophie was dangerous and constituted a dangerous condition and not establishing that Penny Pinchers knew that Sophie constituted a danger would and turn the decades of established precedent dealing with dog ownership and premises liability on its head. Therefore for the above

mentioned reasons Penny Pinchers would ask this Court to reverse and render this matter in Penny Pincher's favor.

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CERTIFICATE OF MAILING

This is to certify that I, Paul N. Jenkins, Jr. , attorney for Appellants, has this day mailed via Federal Express, the original and three (3) copies of the Appellant's Reply Brief to Kathy Gillis, Clerk, Supreme Court of Mississippi at the address of said Court, 450 High Street, Jackson, Mississippi, 39201-1082.

This the 4th day of August, 2010.

PAUL N. JENKINS, JR., MSB# [redacted]

CERTIFICATE OF SERVICE

I hereby certify that I have mailed via U. S. Mail, postage prepaid, and via Federal Express, a true copy of the foregoing *Reply Brief of Appellants* to:

Honorable Lee J. Howard
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This the 4th day of August, 2010.

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