IN THE COURT OF APPEALS OF MISSISSIPPI

PENNY PINCHERS	**APPELLANT**
VS	**2009-CA 01324**
LENETRA OUTLAW	**APPELLEE**

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel for the Appellant, Penny Pinchers, 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.

PARTIES

Penny Pinchers
8047 Highway 50 West
West Point, Mississippi 39773
Defendant and Appellant

William B. Johnson
804 Highway 50 West
West Point, Mississippi 39773
Defendant and Appellant

Cynthia Scott
804 Highway 50 West
West Point, Mississippi 39773
Defendant and Appellant

Lenetra Outlaw
121 Mohawk Street
Starkville, Mississippi 39759
Plaintiff and Appellee

ATTORNEYS

B. Wayne Williams, MSB [redacted]
Paul N. Jenkins, Jr., MSB # [redacted]
P.O. Box 496
Tupelo, Mississippi 38802
Telephone: (662) 844-2137
Facsimile: (662) 842-3863
Attorneys for Appellant

Orlando R. Richmond, Sr.
Chynee A. Bailey
1020 Highland Colony Parkway
Suite 1400
Ridgeland, Mississippi 39157
Attorneys for Appellee

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

This the 15th day of March, 2010.

Paul N. Jenkins, Jr.

IN THE COURT OF APPEALS OF MISSISSIPPI

PENNY PINCHERS	**APPELLANT**
VS	**2009-CA 01324**
LENETRA OUTLAW	**APPELLEE**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND OTHER CITATIONS:

APPELLANT'S STATEMENT OF THE ISSUES

COMES NOW, Appellant, Penny Pinchers, (hereinafter "Penny Pinchers"), by and through undersigned counsel, pursuant to M.R.A.P. 10(b)(4) and files its Statement of Issues:

1. Whether the Trial Court erred in denying Penny Pincher's Motion for Judgment Notwithstanding the Verdict.

2. Whether 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.

3. Whether 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.

4. Whether the Trial Court erred in allowing Dr. Butler to testify as to causation of Outlaw's alleged injuries.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of Trial Court

On February 1, 2007, Appellee Lenetra Outlaw (hereinafter referred to as "Outlaw") filed suit against Cynthia Scott, Penny Pinchers and William B. Johnson d/b/a Penny Pinchers. [R-11-17][1]. ("Penny Pinchers") Outlaw alleged failure to maintain the premises of the store in a reasonably safe condition, negligent failure to warn of a known danger, and failure to properly confine or restrain the dog as to prevent having susceptible customers frightened and so as to prevent the risk of aggressive behavior by the dog toward customers against Penny Pinchers. [R-11-17]

After three years of litigation, Penny Pinchers filed their motion for summary judgment and memorandum in support of same on January 20, 2009. [R-42-82 and 83-92] The Circuit Court of Clay County denied Penny Pinchers' motion for summary judgment and motion to dismiss individual Cynthia Scott and reserved it's ruling on Penny Pinchers' motion to strike Outlaw's experts on March 20, 2009. [R-206-208] (Filed March 25, 2009.) Trial regarding this matter commenced on April 8, 2009. [T-1] The jury returned a verdict in favor of Lenetra Outlaw on April 9, 2009. [R-353] A Final Judgment was entered by the Circuit Court of Clay County in favor of Lenetra Outlaw on April 23, 2009. [R-359-360] Thereafter, Penny Pinchers' filed their Motion for Judgment Notwithstanding the Verdict, or, in the alternative, Motion for New Trial on May 1, 2009. [R-361-391] A hearing was held on Penny Pinchers' post trial motions on July 14, 2009, and, at that time, the Court entered an Order denying Penny Pinchers' Motion for Judgment Notwithstanding the Verdict and Motion for New Trial. [R-428]. Penny Pinchers filed their Notice of Appeal to this Court on August 10, 2009. [R-429-430]

---

[1] Citations to the RECORD will be as follows: [R-Page Number]. Citations to the Transcript will be as

B. Statement of the Facts

On August 16, 2006 Lenetra Outlaw, [T-140] entered the Penny Pinchers grocery store located at 804 Hwy 50 West, West Point, Mississippi. Inside the store were Cindy Scott, the manager of the store, Ivy Mann, a customer, and Anita Reeves, an employee of Penny Pinchers. [T-112] Also located within the store was "Sophie", Ms. Scott's four (4) month old four (4) pound miniature Dachshund puppy. [T-113 & T124 PHOTO OF SOPHIE]

Outlaw testified that when she entered the store and turned down a store aisle she heard barking coming from the area around the checkout counter. [T144-145]. Outlaw without ever seeing what was barking or exactly where this barking was coming from ran down the aisle toward the back of the store. [T144-145] Outlaw testified that she could hear the pattering of feet behind her as she ran blindly down the aisle. [T-144-145] Outlaw testified that the miniature Dachshund puppy was chasing her. [T145-146] The other witnesses at the store dispute that Sophie chased Outlaw. [T-114] Furthermore, Scott and the other witnesses described Sophie's "bark" as more of a "yelp" in an attempt to get her owner's attention, not an aggressive sounding bark. [T114 & T195]. Outlaw admits that Sophie did not bite her or touch her in any way. [T-179]

Outlaw testified that in an effort to get away from the barking of Sophie, the four month old miniature Dachshund puppy, she attempted to jump onto a chest type freezer. [T166] After jumping on the freezer Outlaw did not complain of any injury. In fact, Outlaw walked 15ft to another chest freezer where she had to reach down into the bottom of the freezer to get a five pound bag of catfish, then walked 38ft placed the five pound bag of catfish on the counter, then walked 15ft to another aisle where she picked up a four pound bag of sugar off of the bottom

---

follows: [T-Page Number]

shelf and then walked 15ft to the front counter with the sugar[2]. [T118; T127; T148-149 & T-186-187] Only when she reached the front counter and placed the sugar on the counter did she complain of any injury. [T-118, T127-129; T149].

Outlaw sued the owner[3] of the puppy and Penny Pinchers, alleging that Sophie, a (4) month old miniature dachshund puppy, constituted a dangerous condition and she was injured because of Penny Pinchers allowing Sophie on the premises. It is undisputed that prior to August 16, 2006, Sophie had never demonstrated any dangerous or aggressive propensities.[R-73-74] [T124-125; T129; T190-191].

This lawsuit was tried before a jury on April 8 and 9, 2009, in West Point, Clay County, Mississippi. [T-1]. After the close of Outlaw's case in chief, the trial court heard Penny Pinchers' Motion for Directed Verdict. [T-221-241] Penny Pinchers moved for Directed Verdict based on the fact that Outlaw had presented no evidence that any dangerous condition existed. Outlaw failed to present any evidence to demonstrate that Sophie had previously exhibited any dangerous propensities prior to the incident nor did Outlaw prove Penny Pinchers knew or should have known of these propensities. In fact, Outlaw, did not put on any proof that Penny Pinchers failed to warn her of any dangerous condition or that Penny Pinchers knew or should have known of the four month old puppy's "dangerous propensities", if any. The Court denied Penny Pinchers' Motion for Directed Verdict, despite the lack of evidence proffered by Outlaw. [T-236]

The jury rendered a verdict in favor of Lenetra Outlaw, for $130,000.00. The jury found Penny Pinchers and William B. Johnson d/b/a Penny Pinchers to be 70% liable and Lenetra

[2] It is important to point out that Outlaw had undergone a prior hip replacement in 1995 and a follow up procedure in 2005 [T-137] and that she was placed under certain restrictions of what she could and could not do. [T161-163] The picking up of the catfish and the sugar were both against her prior restrictions given to her by her doctor as result of her previous hip replacement.

[3] Outlaw dismissed the individual, Cindy Scott, prior to trial. [R-358 & T-87]

Outlaw 30% liable, resulting in a $91,000.00 verdict for Outlaw. [T302-303 & R353]

Following the trial, Penny Pinchers' filed its Motion for Judgment Notwithstanding the Verdict and Motion for New Trial. [R-361-391]. A hearing was held on these motions on June 14, 2009. [T-309-326]. The trial court denied these motions on July 14, 2009 [R-428]

STANDARD OF REVIEW

A motion for judgment notwithstanding the verdict tests the legal sufficiency of the evidence supporting the verdict, not the weight of the evidence. ***Tharp v. Bunge Corp.***, 641 So. 2d 20, 23 (Miss. 1994). In considering a motion pursuant to Rule 50(b), a court must consider the evidence in the light most favorable to the party against whom the motion is made, giving that party the benefit of all favorable inferences there from. ***Mongeon v. A & V Enterprises, Inc.*** 697 So. 2d 1183 (Miss. 1997). The court should consider the evidence offered by the non-moving party and the uncontradicted evidence offered by the moving party. ***Corley v. Evans***, 835 So. 2d 30, 41 (Miss. 2003). In other words, where the evidence shows that Lenetra Outlaw has failed to make a prima facie showing of the elements of her claim, judgment notwithstanding the verdict is proper. ***Bankston v. Pass Road Tire Center, Inc.***, 611 So. 2d 998 (Miss. 1992). Accordingly, a motion for judgment notwithstanding the verdict is proper where the non-moving party's evidence is so lacking that reasonable jurors would be unable to reach a verdict in favor of that party. ***C & C Trucking Co. v. Smith***, 612 So. 2d 1092 (Miss. 1992); ***Turnbough v. Steere Broadcasting Corp.***, 681 So. 2d 1325 (Miss. 1996).

SUMMARY OF THE ARGUMENT

The Court erred in not granting Penny Pincher's motion for directed verdict [T-221-241] or Penny Pincher's motion for judgment notwithstanding the verdict. [R-361-391].

The case before this Court is an unusual but simple case of premises liability. The unusual twist comes from the fact that the alleged unreasonably dangerous condition is a four month old miniature dachshund puppy named Sophie. Outlaw must prove: 1.) that a dangerous condition existed, and 2.) Penny Pinchers had notice of the dangerous condition. ***Downs v. Choo*, 646 So. 2d 84, 86 (Miss. 1995).**

I. 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 trial court erred in allowing the jury to find that Sophie constituted a dangerous condition without the necessary proof. Outlaw has argued that this matter is essentially a premises liability claim and not a dog bite case and, as such, the "dog law" established in Mississippi has no relevance. Penny Pinchers disagrees. This is a case which involves allegations of injuries caused by a four month old miniature dachshund inside the Penny Pinchers store. The issues being dealt with here are not inanimate objects of a spill or a box out of place, the "condition" being complained of is a four month old puppy. Mississippi "dog law" must apply in this premises liability case, at a minimum, in setting the threshold of what Outlaw must prove to establish a dangerous condition.

Outlaw has succeeded, with the trial court's rulings, to circumvent the requirement to prove that a dangerous condition even existed. "[A] property owner cannot be found liable for the plaintiff's injury where no dangerous condition exists". ***Delmont v. Harrison County Sch. Dist.***, 944 So. 2d 131, 133 (Miss. Ct. App. 2006). Outlaw has argued that she only has to show that Sophie was brought onto the premises by Penny Pinchers manager and that she alleges that Sophie caused her injury, in order to meet her burden of proof. Outlaw put on no proof to even allow the jury to decide whether Sophie was a dangerous condition, much less whether or not

Penny Pinchers knew or should have known that Sophie was a dangerous condition. Outlaw has admitted in her request for admissions [R-73-74], as well as in her trial testimony, [T-183-186 &T190-191] that she has ZERO knowledge of whether Sophie had ever exhibited any actions that would indicate she would do something to harm anyone.[4] The Plaintiff has admitted the following:

> **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]

[4] During cross examination of the Plaintiff, counsel for the defendant attempted to question Ms. Outlaw regarding her knowledge of the dangerous propensity of Sophie. Plaintiff's counsel objected to the same and the Court sustained the objection on the basis of relevance. [T-183-186]. However, to preserve the record, defense counsel proffered Ms. Outlaw's testimony on her knowledge of the dangerous propensity of Sophie. [T-190-191].

If this would have been a dog attack case, the case would end here, as there would be no proof to circumvent the "one bite rule" which has been held to be valid in Mississippi for many years. Mississippi case law is clear that a dog is not dangerous *per se*. ***Poy v. Grayson*, 273 So. 2d 491 (Miss. 1973).** In order to establish liability on the keeper of Sophie, Outlaw MUST establish that Sophie had shown dangerous propensities prior to the August 16, 2006 incident. ***Poy v. Grayson*** at 494. Outlaw admitted that she could not do so. [R-73-74] [T-190-191]. Therefore, Outlaw cannot prove that Sophie was dangerous or that Sophie being in the store constituted an unreasonably dangerous condition.

If the trial court's ruling were to stand a plaintiff would only have to prove that a defendant owned the dog that a plaintiff makes some complaint of and that would be enough to send the question of liability to a jury. The standard imposed on Penny Pinchers in this case was the strict liability standard imposed on person's keeping wild animals - not four month old miniature dachshund puppies. ***Yazoo & M. V. R. Co. v. Gordon***, 184 Miss. 885, 186 So. 631, 632 (1939); ***Byrnes v. City of Jackson***, 140 Miss. 656, 105 So. 861, 863 (1925); ***Phillips v. Garner***, 106 Miss. 828, 64 So. 735, 736 (1914). Mississippi law does not support the decision by the trial court in imposing this strict liability standard on keepers of domestic animals nor does it impose a strict liability standard on business owners and the judgment against Penny Pinchers should be reversed and rendered in favor of Penny Pinchers. . "[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)

II. The Trial Court erred in not finding that Outlaw failed to prove that Penny Pinchers had actual knowledge or constructive knowledge of Sophie creating a dangerous condition.

This Court's inquiry should end as Outlaw cannot prove that Sophie demonstrated a dangerous propensity prior to the August 16, 2006 incident. Therefore, without this evidence to establish, at least a question of dangerous propensity, Outlaw cannot prove a dangerous condition. Without some dangerous condition to complain of Outlaw cannot prove that Penny Pinchers had knowledge of this "dangerous condition".

Outlaw is required after establishing that a dangerous condition existed (which she cannot) to establish evidence to prove that Penny Pinchers knew or should have known of the existence of this dangerous condition. ***Downs v. Choo*, 646 So. 2d 84, 86 (Miss. 1995).**

Outlaw put on no proof at trial to demonstrate that Penny Pincher's had any knowledge or should have had any knowledge that Sophie was a danger. [T-190-191] In fact, the testimony and pleadings filed by Outlaw indicate that she has no evidence to demonstrate any knowledge by Penny Pinchers that this four month old miniature dachshund had ever exhibited any prior dangerous propensity. There is NO proof of any failure to warn of any such dangerous condition. [T-190-191]

Given Outlaw's failure to legally establish these prerequisites required in a premises liability case, much less, a dog liability case, this Court should reverse the trial court and grant Penny Pinchers' motion for judgment notwithstanding the verdict.

III. The Trial Court erred in allowing Dr. Butler to testify as to causation of Outlaw's alleged injuries.

Dr. Allen Butler's testimony should have been precluded under Mississippi Rules of Evidence 403 and 702. Dr. Butler's testimony also failed the meet the legal certainty

requirements of the *Daubert* test . ***Mississippi Transportation Commission v. McLemore***, 863 So. 2d 31 (Miss. 2003).

Dr. Butler, the orthopedic surgeon who operated on Outlaw, is not qualified to render an opinion on causation as there were multiple factors which could have contributed to the hip replacement. [R-389-390]. Furthermore, Dr. Butler's causation opinion was based only on the incomplete history given to him by Outlaw. [R-384] Butler did not do any independent analysis to be able to render a valid opinion as to the cause of the symptoms he was presented by Outlaw. This does not arise to the level in which Butler should have been allowed to testify as a jury could give a medical doctor undue weight. ***Cuevas v. Copa Casino***, 828 So.2d 851 (Miss. App., 2002). For this additional reason, this Court should find that the trial court erred and reverse and render in favor of Penny Pinchers.

ARGUMENT

I. 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.

Lenetra Outlaw would be considered an invitee under Mississippi law. An invitee is one who enters onto another's land with the purpose of such visit being that each party will be benefitted. ***Wright v. Caffey*, 123 So.2d 841 (Miss. 1960)**. A business invitee enters onto another's property at the express or implied invitation of the property owner or business owner for the mutual advantage of each party. ***Id.* at 474, *citing*, *Nowell v. Harris*, 68 So.2d 464, 467 (1953)**. The duty owed by the property owner to the invitee is one of *reasonable care*. A property owner is *not an absolute insurer of another's safety* but is charged with the duty of

reasonable care to keep the premises in a reasonably safe condition. ***Wilson v. Allday*, 487 So.2d 793, 795 (Miss. 1986)**. Further, the owner is required to warn the invitee of any *dangerous conditions* which are not readily apparent and which the owner knows of, or should know of, in his exercise of reasonable care. ***Id*; *see also*, *Downs v. Corder*, 377 So.2d 603 (Miss. 1979); *J.C. Penney Co. v. Sumrall*, 318 So.2d 829 (Miss. 1975); *Jackson Ready-Mix Concrete v. Sexton*, 235 So.2d 267 (Miss. 1970).** The owner is only required to use reasonable care to maintain the property in a reasonably safe condition and to warn the invitee of any hidden dangers. ***McGovern v. Scarborough*, 566 So.2d 1225 (Miss. 1990)**.

In the present case, Penny Pinchers was required to keep the premises "reasonably safe" and to warn Outlaw of any "dangerous conditions" which were not readily apparent and of which Penny Pinchers had knowledge or should have had knowledge, in the exercise of reasonable care. ***Downs v. Choo***, 656 So. 2d 84, 86 (Miss. 1995). Penny Pinchers did not breach any duty, as there was no known dangerous condition in which Outlaw could complain of. 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.")

It is well settled that dogs 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.

The court in ***Mongeon v. A & V Enterprises, Inc.***, 733 So.2d 170 (Miss. 1997), is instructive on the issue of what exactly amounts to evidence of a dangerous propensity. In ***Mongeon***, the Plaintiff was attacked by two (2) black Labrador retrievers while in the common area of a trailer park where she resided. There was no dispute that the dogs were owned the defendants. The only issue was whether the defendant had actual or constructive knowledge of the dangerous propensities of the dogs. The ***Monegon*** court quoted ***Poy v. Grayson*** as 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. ***Mongeon*** was a premise liability issue in which the Supreme Court held that propensity must be proven to find liability against the land owners.

Therefore for Lenetra Outlaw to establish that Penny Pinchers was liable in this case, she must prove that *prior to* the August 16, 2006, incident, Sophie had demonstrated a "dangerous propensity" and that Penny Pincher's knew or should have known of this propensity. ***Id.*** There is no evidence that Sophie, the four (4) month old, four (4) pound "wiener" dog had ever demonstrated any behavior which could be considered a "dangerous propensity." Cindy Scott, Sophie's owner, testified that she had never observed Sophie chase, bark at, bite or demonstrate any dangerous propensity either before or after the August 16, 2006, incident. [T-124-125; T-129]. Ms. Scott testified as follows:

> **Q. Okay. And prior to August 16th, 2006, had Sophie ever barked at anyone in the store before?**
>
> **A. No, sir.**
>
> **Q. And prior to August 16th, 2006. Had Sophie ever chased any customers in the store before?**
>
> **A. No, sir.**
>
> **Q. And prior to August 16th, 2006, Mrs. Scott, had Sophie ever**

exhibited any action that you would have thought was dangerous to your customers?

A. No, sir.

Q. How long have you had Sophie prior to August 16th, 2006?

A. Since July the 9th, 2006.

Q. And, Mrs. Scott, Mr. Richmond talked about your barrier behind the counter. What was the reason you created that barrier? Why –

A. her –

Q. I'm sorry. I didn't mean to interrupt you.

A. Her protection.

Q. Why would she need protection?

A. Because she was so tiny at the time.

Q. What was her size on August 16th, 2006 if you know?

A. Four pounds one ounce.

[T-124-125]

Q. One final question, Mrs. Scott. Prior to August 16th, 2006, did you have any idea that Sophie could hurt, frighten, harm anybody coming into your store?

A. No, sir.

[T-129]

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 did not put forth any 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. ***Poy, supra***. To hold otherwise would place an impossible burden on dog owners. If Outlaw was allowed to just bypass the threshold questions related to the dangerous propensity of Sophie and recover just for the fact that a dog was present (without first establishing a dangerous propensity and the keepers knew of this dangerous propensity) would, in effect, place the same duty on a domestic dog owner as that of a keeper of wild animals. This would turn the legion of cases which deal with torts involving dogs on its head and put a strict liability burden on the keepers of domestic dogs. ***Yazoo & M. V. R. Co. v. Gordon***, 184 Miss. 885, 186 So. 631, 632 (1939); ***Byrnes v. City of Jackson***, 140 Miss. 656, 105 So. 861, 863 (1925); ***Phillips v. Garner***, 106 Miss. 828, 64 So. 735, 736 (1914). "[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)

Despite argument to the contrary, this lawsuit brought by the Plaintiff 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 Pinchers.

II. 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.

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

Mississippi has adopted the federal amendment to Rule 702. In its comment to the Rule, the Mississippi Supreme Court recognized the "gatekeeping responsibility of the trial court" to ensure expert testimony is both relevant and reliable. ***Daubert v. Merrill Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993); ***General Elec. Co. v. Joiner***, 188 S. Ct. 512, 517 (1997); ***Kumho Tire Co., Ltd., et al. v. Carmichael, et al.***, 526 U.S. 137 (1999). The Mississippi Supreme Court specifically abandoned the ***Frye***[5] test and adopted the ***Daubert*** rule, as modified by ***Kumho***, and endorsed amended rule 702 in the opinion of ***Mississippi Transportation Commission v. McLemore***, 863 So. 2d 31 (Miss. 2003). The rules states:

> 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 date, (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.

Under M.R.E 702, expert testimony should be admitted only if it withstands a two-prong inquiry. First, the witness must be qualified by virtue of his or her knowledge, skill, experience or education. ***McLemore***, 863 So. 2d at 35 (*citing* ***Kansas City S. Ry. v. Johnson***, 798 So. 2d 374, 382 (Miss. 2001)); ***M.R.E. 702***. Second, the witness' scientific, technical or other

specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue. *Id.*

As stated, this Court is vested with a "gatekeeping responsibility". ***McLemore***, 863 So. 2d at 36 (*citing* ***Daubert***, 509 U.S. at 589). This Court must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning and methodology properly can be applied to the facts in issue. ***Id.*** (*citing* ***Daubert***, 509 U.S. at 592-93).

The party offering an expert's testimony bears the burden of demonstrating that its expert is qualified and his/her opinions are relevant and reliable. ***Moore v. Ashland Chem., Inc.***, 151 F.3d 269, 276 (5th Cir. 1998). The Plaintiff cannot meet her burden in this case. The relevancy and reliability required of expert testimony applies to all testimony involving specialized knowledge, and is not limited to scientific or technical testimony. ***Kumho***, 526 U.S. at 147. "[W]ithout more than credentials and a subjective opinion, an expert's opinion that 'it is so' is not admissible." ***Viterbo v. Dow Chemical***, 826 F.2d 420, 424 (5th Cir. 1987).

Dr. Butler cannot, to a reasonable degree of medical certainty, show that Ms. Outlaw's alleged pain and limp, for which she sought damages, 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.**

---

5 ***Frye v. United States***, 293 F.1013 (D.C. Cir 1923).

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?
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'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. Outlaw did not even give Dr. Butler the complete facts of how the accident occurred. Outlaw did not tell Dr. Butler about her performing actions, ie... picking up heavy items from low levels, after she ran down the aisle and attempted to jump on the chest freezer. [T-188-189]. 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***.

Furthermore, Dr. Butler solely relied upon the history provided by the Plaintiff as to the causation of her injuries. [R-384; Deposition of Dr. Butler, Page 25, lines 7-8] Dr. Butler also testified himself that the plaintiff had many other illnesses and pre-existing medical problems which were also factors in her injuries and that he could not, to a reasonable degree of medical certainty, say that any pain or limp complained of by the Plaintiff were caused by the alleged incident at Penny Pinchers. [R- 389-390, Deposition of Dr. Butler, Pages 45 - 47] 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).

Therefore for this additional reason, this Court should reverse and render the verdict in Penny Pinchers favor.

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. Therefore for the above mentioned reasons Penny

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

Respectfully submitted, this the 15th day of March, 2010.

WEBB, SANDERS & WILLIAMS, P.L.L.C.
363 NORTH BROADWAY
POST OFFICE BOX 496
TUPELO, MISSISSIPPI [redacted]802
(662) 844-2137
B. WAYNE WILLIAMS, MSB[redacted]
PAUL N. JENKINS, MSB[redacted]

BY: _____

CERTIFICATE OF SERVICE

This will certify that the undersigned attorney for Webb, Sanders & Williams, P.L.L.C., has this date delivered a true and correct copy of the above and foregoing ***Appellants' Brief*** to all counsel of record by placing a true and correct copy thereof in the United States Mail, postage prepaid, addressed as follows:

Honorable Lee J. Howard
Circuit Court Judge
P.O. Box 1344
Starkville, Mississippi 39760-1344

ATTORNEYS FOR OUTLAW:

Orlando R. Richmond, Sr., Esq.
Chynee A. Bailey, Esq.
Butler Snow O'Mara Stevens & Cannada, PLLC
Renaissance at Colony Park
1020 Highland Colony Parkway, Suite 1400
Ridgeland, Mississippi 39157

This the 15th day of March, 2010.

Paul N. Jenkins, MSB [redacted]