IN THE MISSISSIPPI SUPREME COURT

KERRI PARMENTER — APPELLANT

VS. — CAUSE NO.: 2010-ca-01251

J&B ENTERPRISES, INC. AND MCDONALDS CORPORATION, INC. — APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record 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 disqualification or recusal.

1. Kerri Parmenter, Plaintiff-Appellant;
2. Dana Churchill, Former Plaintiff;
3. Smith Whaley, PLLC, Former Counsel for Plaintiffs;
4. Hill & Minyard, Former Counsel for Plaintiffs;
5. Stewart Guernsey, Esq., Counsel for Plaintiffs;
6. Fondren Law Firm, Counsel for Plaintiffs;
7. McDonald's Corporation, Defendant-Appellee
8. McDonald's Restaurants of Mississippi, Inc., Former Defendant
9. Byrd Enterprises, Inc., Former Defendant
10. James Byrd d/b/a McDonalds of Holly Springs, Former Defendant
11. J&B Enterprises, Inc., Defendant-Appellee
12. Leitner, Williams, Dooley, & Napolitan, PLLC, Counsel for Defendants-Appellees
13. The Honorable Henry L. Lackey, Presiding Judge, Marshall County Circuit Court

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STATEMENT OF THE CASE

On September 20, 2003, Plaintiffs Kerri Parmenter and Dana Churchill filed the Complaint in the Circuit Court of Marshall County alleging that an employee of the Holly Springs, Mississippi McDonald's franchise, Kesha Jones, struck the Plaintiffs with a hot kitchen utensil causing injuries. (R. 3). Plaintiffs alleged that Jones was an employee of McDonald's Corporation, McDonald's Restaurants of Mississippi, Inc., Byrd Management, Inc., J.B. Enterprises, James F. Byrd d/b/a McDonald's in Holly Springs, and XYZ Corporation. (R. 4-7).

Plaintiffs alleged that these employers are liable for the actions of Jones under the doctrine of respondeat superior. (R. 4-7). Plaintiffs further alleged that Defendants each negligently hired Jones, negligently failed to train Jones, negligently supervised the premises, and negligently failed to provide adequate security. (R. 4-7). Plaintiffs did not name Jones as a party in the case. (R. 1-8). Plaintiff did not raise any allegations of assault, battery, or any other intentional torts in the Complaint. (R. 1-8). In their Answer, Defendants admitted that Jones was an employee at the Holly Springs McDonald's franchise, but denied that she was employed by any of the named Defendants. (R. 31). Defendants also raised the affirmative defense that Plaintiff failed to state a claim upon which relief may be granted. (R. 32-33).

McDonald's Restaurants of Mississippi, Inc. was dismissed by Consent Order on December 19, 2003. (R. 75). Defendants James Byrd and J.B. Enterprises were dismissed by Agreed Order on December 6, 2007. (R. 417-418). J&B Enterprises, Inc. was substituted as a party for Byrd Management, Inc. by Agreed Order on December 12, 2007. (R. 419-420).

On May 16, 2007, Defendant McDonald's Corporation filed its Motion for Summary Judgment asserting that it did not control the daily operations of the local franchise. (R. 102). McDonald's asserted that it had no duty to hire, train, or supervise employees or to provide

security on the premises. (R. 110-16). Furthermore, Plaintiffs could not prove that its reliance on the McDonald's logos, versus ownership by the franchisee, led to her alleged damages. (R. 114-15). Finally, McDonald's argued that Jones was not acting in the course and scope of her employment with the franchisee at the time she left her position, walked to the back of the store to retrieve a spatula, returned to the front of the store, walked around the counter, and struck Ms. Parmenter. (R. 116-23).

Plaintiff filed her response to this motion on December 5, 2007. (R. 320-375). Plaintiff argued that Jones had apparent authority to act for McDonald's Corporation because of the logos, uniforms, and menu in the franchised restaurant. (R. 327). Plaintiff relied upon her own deposition testimony to show that she chose to visit the Holly Springs McDonald's franchise based upon the corporate reputation, not the reputation of the individual franchise. (R. 322-23).

Plaintiff also argued that the Operations and Training Manual and the Franchise Agreement between Defendants gave McDonald's control over the day-to-day actions of J&B Enterprises. (R. 331). Plaintiff acknowledged that James Byrd testified that J&B Enterprises controlled the day-to-day operations of the restaurant, not McDonald's Corporation. (R. 331, 353-54). Plaintiff did not present any evidence or testimony of representatives of McDonald's Corporation to rebut Byrd's testimony. In fact, the only evidence offered to prove Plaintiff's allegation was the broad text of the agreement and policy manual. (R. 331-34).

Finally, Plaintiff argued that McDonald's, through its franchisee, had reason to know of the alleged violent propensities of Jones. (R. 332). Plaintiff did not produce any evidence of any criminal record or violent history of Jones. Plaintiff instead alleged that Jones had "'gang' tattoos and associations." (R. 332). Plaintiff did not cite to any evidence substantiating gang involvement on behalf of Jones. (R. 332-34). Plaintiff cites to one portion of Byrd's deposition

to support her outlandish claim. (R. 332). Byrd stated that he did not notice the alleged tattoos on Jones' neck. (R. 354). He further stated that he would not know what the tattoos may mean. (R. 354).

The trial court held that McDonald's Corporation had no right to hire or fire employees or control the day-to-day operation of the franchise. (R. 422). McDonald's Corporation "shares in the success of the business in that the higher the gross receipts the more McDonalds receives and of course is concerned with the results of the franchisees' efforts but not with the details of the work of the individual employees." (R. 422). The Trial Court granted Defendant McDonald's Corporation's Motion for Summary Judgment on December 21, 2007. (R. 421-22).

Trial of this case began on May 11, 2010. (Trans. 1). The only remaining parties in the case on the date of trial were Plaintiff Parmenter and Defendant J&B Enterprises, Inc. (Trans. 1). Plaintiff presented her case-in-chief, relying on the testimony of Plaintiff Parmenter, Ms. Parmenter's daughter, adverse testimony of the owner of J&B Enterprises, adverse testimony of the supervisor for J&B Enterprises, adverse testimony of two employees of Defendant J&B Enterprises, and testimony of Plaintiff's expert, Dr. Robert Cooper. (Trans. i-ii, 68, 122, 155, 180, 246, 286, and 316).

After Plaintiff rested, Defendant moved the court for a directed verdict for J&B Enterprises. (Trans. 321-22). The Court granted Defendant J&B Enterprises' motion holding: 1) Plaintiff failed to present any evidence that Defendant knew or should have known of Jones' violent propensity; 2) Plaintiff failed to present evidence that Jones' action occurred in the course and scope of her employment; 3) Plaintiff failed to present any evidence that Jones was not properly trained; 4) Plaintiff failed to prove that Defendant's policies and practices were improper, much less that such policies caused or contributed to Plaintiff's alleged damages; 5)

Plaintiff failed to present any medical evidence to a reasonable degree of medical certainty that Plaintiff's injuries were caused by or contributed to by Defendant; 6) Dr. Cooper was not qualified to provide expert opinions as to the cause of his diagnosis of Post Traumatic Stress Disorder; 7) Plaintiff did not properly plead a claim for respondeat superior for the alleged intentional torts of Jones; and 8) to the extent a claim for respondeat superior for the alleged intentional torts of Jones were plead, such claim is barred by the applicable statute of limitations. (R. 452-54).

On July 16, 2010, Plaintiff filed a Notice of Appeal as to the trial court's Order Granting Defendant's (J&B Enterprises) Motion for Directed Verdict and the trial court's Order granting summary judgment as to Defendant McDonald's Corporation. (R. 455). On March 10, 2011, Plaintiff filed her initial brief in this Appeal.

STATEMENT OF FACTS

On August 11, 2000, Plaintiff Kerri Parmenter, another adult, and four children entered the drive-thru lane of the subject restaurant in Holly Springs. (Trans. 157-158). Plaintiff ordered her food, paid at the cashier window, and was asked to pull forward to wait on her food. (Trans. 158). After waiting longer than she wished, Plaintiff exited her car and went inside. (Trans. 158-59).

Plaintiff approached the cash register and asked how much longer it would take to get her ordered food. (Trans. 159). Employee Kesha Jones told her that she was preparing the food. (Trans. 159). Several minutes later, Plaintiff asked for her food or for a refund. (Trans. 159). Jones refused to notify a manager. (Trans. 262). At that point, Jones left the kitchen and counter area, walked around the counter into the lobby, and engaged in a verbal confrontation with

Plaintiff. (Trans. 159-60). Plaintiff admittedly stated, "Bitch, you need to get out of my face." (Trans. 160). Other witnesses testified that Plaintiff called Jones "a black bitch." (Trans. 139).

The initial confrontation ended as Jones left the lobby and returned to the kitchen. (Trans. 160). Jones went into the kitchen, grabbed a spatula, and walked back around the counter into the lobby. (Trans. 160). Plaintiff stood her ground and did not run or try to leave the restaurant. (Trans. 268). Jones then began striking Plaintiff with the spatula. (Trans. 160). Jones struck Plaintiff on the cheek, head, and arm. (Trans. 160).

After the fight began, Plaintiff's cousin, Dana Churchill, entered the restaurant and intervened in the fight. (Trans. 161, 273). Jones then scuffled with both Parmenter and Churchill. (Trans. 161). Plaintiff alleges that the door at the restaurant was locked at some point during the fight. (Trans. 274). She never tried to open the door, but learned that it was locked at some point upon reports from her children. (Trans. 274). Neither Plaintiff nor her witnesses could testify whether a restaurant employee locked the door. (Trans. 273-75).

Plaintiff introduced the testimony of Dr. Cooper, whose sole board certification is in bariatric medicine (weight management). (Trans. 71). Dr. Cooper testified that Plaintiff suffered from post-traumatic stress disorder as a result of the altercation with Jones. (Trans. 81). Dr. Cooper treated Plaintiff's alleged post-traumatic stress disorder by "once a month [] spend[ing] 15 minutes with [Plaintiff] and prescrib[ing] her medications." (Trans. 106). Dr. Cooper diagnosed anti-anxiety medications such as Xanax and anti-depressants such as Zoloft to treat Plaintiff after the subject incident. (Trans. 88).

However, Dr. Cooper admittedly did not take a social history of Plaintiff prior to his diagnosis of post-traumatic stress disorder. (Trans. 77). Dr. Cooper did not have any of

Plaintiff's medical records predating the subject incident and never examined any prior medical records for Plaintiff's numerous mental health conditions. (Trans. 73, 77, 78).

If Dr. Cooper had performed a proper history, he might have discovered that, prior to Plaintiff's altercation with Jones, Plaintiff experienced numerous unfortunate incidents which affected her mental health. Plaintiff was raised by her father, who was an abusive alcoholic who experimented in illegal drugs. (Trans. 217). Plaintiff's mother was killed in an accident in which she was a pedestrian struck by an automobile. (Trans. 221). Plaintiff was forced to identify her mother's body. (Trans. 221). Her father later died of AIDS. (Trans. 225). Plaintiff cared for him for sixth months prior to his death. (Trans. 225).

Plaintiff was forced to drop out of high school in 1988 at age 16 due to her pregnancy. (Trans. 217-18). Plaintiff subsequently underwent two abortions before the age of twenty. (Trans. 218). One of Plaintiff's daughters was molested while the girl lived with her grandmother. (Trans. 220).

Plaintiff has been diagnosed with cervical cancer. (Trans. 225). Plaintiff abused alcohol for over a decade. (Trans 218-19). She also used marijuana and methamphetamine. (Trans. 225). Plaintiff was separated from her husband for multiple years prior to the subject incident. (Trans. 222).

Plaintiff spent one night in jail for matters not relevant to the present case. (Trans. 224). While in jail, Plaintiff suffered a panic attack. (Trans. 224). She laid down on the floor and kicked the wall throughout the night. (Trans. 224).

Dr. Cooper was unaware that Plaintiff was prescribed Zoloft, an anti-depressant, on March 6, 2000. (Trans. 96-97). Dr. Cooper was unaware that Plaintiff was prescribed Paxil, an anti-depressant, on May 16, 2000, three months before the subject incident. (Trans. 93, 97, 101).

Dr. Cooper was unaware that Plaintiff was taking Elavil, an anti-depressant, until September 22, 2000 under the prescription of another physician. (Trans. 100-101). He also testified that it was "interesting" that Plaintiff's treating medical providers did not prescribe her Xanax for her long-standing history of "anxiety or panic attacks" prior to the subject incident at the restaurant in August 2000. (Trans. 104-05).

The only objective injuries Plaintiff sustained in the altercation were bruises and small cuts on her face and arm. (Trans. 163). Plaintiff took off from work the day after the attack. (Trans. 165). When she returned to work, she told her manager that she had been struck with a spatula. (Trans. 165). Her co-workers than began calling her "spatula head." (Trans. 165). Plaintiff claims she had difficulty at work as a result of the fight. (Trans. 204-05). However, she was terminated from her job thirteen months after the fight only because of her employer's nepotism policy. (Trans. 205, 223).

Following the subject incident, Plaintiff worked for a housekeeping service and worked as a clerk at Family Dollar. (Trans. 225-26). She is seeking social security disability based upon prior back injuries and problems relating to diabetes. (Trans. 227). After the subject incident, Plaintiff met and later married her current husband Lee Day. (Trans. 223).

SUMMARY OF THE ARGUMENT

Plaintiff raises a number of issues in her appeal that she alleges amount to reversible error by the trial court. These issues range from basic questions of law to the hearing ability of the trial judge. Plaintiff's shotgun approach to this appeal fails to identify any actual error by the trial court. This brief addresses only the issues directed to Defendant J&B Enterprises, Inc.

Plaintiff alleges that the trial court erred by granting a directed verdict to Defendant J&B Enterprises. Plaintiff's claim for liability under the doctrine of respondeat superior was properly

dismissed. Plaintiff did not properly plead liability for the intentional torts of Jones. Thus, the Court properly allowed Defendant to amend its answer to include the affirmative defense of the one-year statute of limitations. This defense conclusively defeats Plaintiff's claims for vicarious liability for the intentional acts of Jones. Even if the defense does not apply, Plaintiff failed to prove that Jones acted in the course and scope of her employment when she struck Plaintiff with a spatula.

Plaintiff alleges that Defendant J&B Enterprises negligently hired Jones, negligently failed to train Jones, negligently supervised the premises, and negligently failed to provide adequate security. Plaintiff failed to introduce any evidence that Defendant knew or had reason to know of violent tendencies of Jones. Plaintiff simply failed to meet the basic elements of these claims.

Even if Plaintiff had proven a claim, she failed to introduce sufficient evidence of damages. Plaintiff's only claimed damages are for mental health issues. She had numerous serious mental health problems prior to this incident. Plaintiff was prescribed essentially the same medicine after the accident that she was taking before the accident. Plaintiff produced only speculative evidence regarding her damages. Finally, Plaintiff failed to produce qualified and reliable expert testimony to support her claim for damages.

Plaintiff concludes her brief with a series of irrelevant, exaggerated claims regarding the trial judge's lack of preparedness, bias, and hearing disability. Plaintiff fails to demonstrate specific, tangible evidence of how any of these claims actually affected Plaintiff at trial.

For these reasons and the reasons given below, the order of the trial court should be upheld and the appeal of the Plaintiff-Appellant denied.

LAW & ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED A DIRECTED VERDICT TO DEFENDANT J&B ENTERPRISES, INC.

Plaintiff raises numerous arguments that attempt to attack the trial court's Order granting a directed verdict to Defendant J&B Enterprises, Inc. Plaintiff's argument can be summarized as follows: 1) Plaintiff properly pled the doctrine of respondeat superior for the intentional torts of Jones or met her burden to prove her case for negligence under respondeat superior; 2) Plaintiff presented evidence to support her claims for negligent hiring and training of Jones and negligent security; and 3) Defendant J&B Enterprises was liable to Plaintiff for the acts of Jones under either the doctrine of respondeat superior or under other theories of vicarious liability. These issues shall be addressed separately.

A. Standard for Directed Verdict

Pursuant to Mississippi Rule of Civil Procedure 50, a party may move "for a directed verdict at the close of the evidence offered by an opponent." Miss. R. Civ. P. 50(a). When deciding a motion for directed verdict, "the trial court must view the evidence most favorably to the non-moving party, and if by any reasonable interpretation, it can support an inference of individual liability which the non-moving party seeks to prove, the motion must be denied. Turner v. Wilson, 620 So.2d 545, 550 (Miss.1993). "When a motion for directed verdict is made and granted at the close of the plaintiff's case-in-chief, such is proper if the plaintiff's evidence is so lacking that reasonable jurors would be unable to reach a verdict in favor of that party." Fulton v. Robinson Indus., Inc., 664 So. 2d 170, 172 (Miss. 1995). On appeal, this court takes "a like view of the evidence when considering on appeal the charge that the Circuit Court erred in directing a verdict. Id. (quoting Turner, 620 So.2d at 550-51).

B. Plaintiff failed to prove her claim for liability under the doctrine of respondeat superior as to Defendant J&B Enterprises

In her Complaint, Plaintiff did not raise a cause of action against Kesha Jones. Plaintiff never pled liability by any party for the intentional torts of Jones. The trial court held that Plaintiff did not properly plead a claim for intentional tort under the doctrine of respondeat superior.

As stated in the Comment to Miss. R. Civ. P. 8, the purpose of Rule 8 is to provide notice of potential claims against a party. To that end, the Plaintiff must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Miss. R. Civ. P. 8. The Mississippi Supreme Court has held that intentional torts must be pled to put the defendant on notice of such claims.

In Duncan ex rel. Duncan v. Chamblee, 757 So. 2d 946 (Miss. 1999), plaintiff alleged gross negligence on behalf of a public employee. The Mississippi Tort Claims Act provides an affirmative defense that a public employee is not liable in tort if the employee acted in the course and scope of her employment. Id. at 949. The complaint only alleged gross negligence, not assault and battery. Id. at 950. Therefore, the complaint failed to properly put defendant on notice of the claim for an intentional tort. Id.

In the present action, Plaintiff's Complaint did not allege liability against J&B Enterprises under the doctrine of respondeat superior for an intentional tort of Jones. (R. 1-8). Defendant raised the affirmative defense of failure to state a claim upon which relief may be granted. (R. 32-33). However, Defendant did not raise the affirmative defense of the one-year statute of limitations as defendant did not have notice of a claim for an intentional tort. (Trans. 335-36).

Miss. Code Ann. § 15-1-35 states that all claims for assault and battery must be commenced within one year after the cause of action accrues. The incident between Plaintiff and Jones occurred on August 11, 2000. (R. 4). Plaintiff filed her Complaint on August 8, 2003 nearly three years after the incident. (R. 8). Had Plaintiff placed Defendant on notice of her claim for an intentional tort, Defendant would have raised the defense of the statute of limitations and would have been entitled to judgment on such claim.

However, Plaintiff did not raise such claims until trial. (Trans. 7-9; R. 453). Even on the day of trial, Plaintiff argued that Defendant was liable only for negligence in ratifying the intentional acts of Jones. (Trans. 8). Based on the conduct of Plaintiff at trial, Defendant sought leave from the trial court pursuant to Miss. R. Civ. P. 15 to amend its answer to assert the statute of limitations. (Trans. 336). The court acted within its authority in granting Defendant's motion to amend its Answer and dismissing Plaintiff's complaint.

Even if the Plaintiff properly pled the intentional tort or the statute of limitations, Plaintiff did not provide evidence sufficient to prove respondeat superior against Defendant J&B Enterprises. Under the doctrine of respondeat superior, "[t]he employer is responsible for the torts of its employee only when the torts are 'committed within the scope of the employment.'" Favre v. Wal-Mart Stores, Inc., 820 So.2d 771 (Miss. 2002) *citing* Odier v. Sumrall, 353 So.2d 1370, 1372 (Miss. 1978). "The test used in determining whether an employee's tortious act is within the scope of his employment is whether it was done in the course of, and as a means to the accomplishment of the purposes of, the employment and therefore in furtherance of the master's business." Id. For the employer not to be liable for the actions of an employee in an altercation, the employee in the altercation must have "abandoned his employment and was about some purpose of his own not incidental to the employment." Id. *citing* Odier, 353 So.2d at 1372

(*citing* Loper v. Yazoo & M.V.R. Co., 145 So. 743 (Miss. 1933); Canton Cotton Warehouse Co. v. Pool, 28 So. 823 (Miss. 1900)).

As a general rule, the "doctrine of respondeat superior has its basis in the fact that the employer has the right to supervise and direct the performance of the work by his employee in all its details, and this right carries with it the correlative obligation to see to it that no torts shall be committed by the employee in the course of the performance of the character of work which the employee was appointed to do." Gulledge v. Shaw, 880 So.2d 288, 295 (Miss. 2004) *citing* White's Lumber & Supply Co. v. Collins, 191 So. 105 (Miss. 1939).

However, when an employee is not acting in the furtherance of her employer's interests, the employer is not liable for her torts. "The inquiry is not whether the act in question ... was done ... while the servant was engaged in the master's business, nor as to mode or manner of doing it, ... *but whether, from the nature of the act itself as actually done, it was an act done in the master's business, or wholly disconnected therefrom by the servant, not as servant, but as an individual on his own account.*" Gulledge, 880 So.2d at 295 ((*citing* Holliday v. Pizza Inn, Inc., 659 So.2d 860, 864 (Miss. 1995) (*quoting* Canton, 28 So. 823 (Miss. 1900)).

> In determining whether a particular act is committed by a servant within the scope of his employment, the decisive question is not whether the servant was acting in accordance with the instructions of the master, *but, was he at the time doing any act in furtherance of his masters' business?* If a servant, having completed his duty to his master, then proceeds to prosecute *some private purpose of his own*, the master is not liable; but if the servant, while engaged about his master's business, merely deviates from the direct line of duty to accomplish some personal end, the master's responsibility may be suspended, but it is re-established when the servant resumes his duty.

Gulledge, 880 So.2d at 295 (*citing* Holliday, 659 So.2d at 864-865 (*quoting* Barmore v. Vicksburg, S. & P. Ry., 38 So. 210 (Miss. 1905)).

The Mississippi Supreme Court has previously dealt with an issue under the doctrine of respondeat superior that has quite similar facts to those in this matter. In Adams v. Cinemark USA, Inc., 831 So.2d 1156 (Miss. 2002), a patron brought an action against a movie theater for injuries she sustained when an employee working as a box office cashier struck her after refusing to admit the patron and two minors to an R-rated film. The box office cashier's duties that day included selling tickets to patrons and handling money. Id. The cashier refused admission to the Plaintiff, and Plaintiff asked to speak with a manager. Id.

After some time had passed, and the manager had not yet presented to speak with Plaintiff, Plaintiff and the cashier exchanged confrontational words and Plaintiff attempted to enter the theater without a ticket. Id. At that point, the cashier went through a set of double doors and confronted Plaintiff. Id. It was undisputed that the cashier struck Plaintiff and then choked her while they were outside of the theater near the double doors. Id. Plaintiff sued the defendant-employer alleging vicarious liability under the doctrine of respondeat superior for the tortious actions of the employee. Id. Plaintiff further alleged that the employer negligently hired, trained, supervised and retained the cashier employee. Id.

The trial court in Adams granted defendant-employer's motion for summary judgment stating that the employee-cashier "had abandoned her employment and was about some purpose of her own, not incidental to her employment and not done in the course of and as a means to the accomplishment of the purposes of her employment as a box office cashier." Adams at p. 1158. The Mississippi Supreme Court opined that plaintiff presented insufficient evidence to create a jury issue on respondeat superior liability and therefore affirmed the trial court's decision granting summary judgment as a matter of law in favor of the defendant-employer. Id. at 1161-1162.

Similarly, Jones was not engaged in furtherance of J&B Enterprises' interest at the time she struck Plaintiff. Jones was employed as either a cook or cashier at the Holly Springs McDonald's. Her exact job title is irrelevant to this issue. Plaintiff entered the restaurant and expressed a complaint to Jones. In such an event, employees of J&B Enterprises are trained to get a manager to take care of the situation. (Trans. 290). Jones stated that she refused to get a manager. (Trans. 262).

At that point, Jones departed from her employment and training. She walked away from her work station and entered the lobby of the McDonald's restaurant to confront Plaintiff. Plaintiff then either stated, "Bitch, you need to get out of my face" or called Jones "a black bitch." (Trans. 139, 160). Regardless of the exact words used, Jones was sufficiently agitated that she left the lobby, returned to the kitchen, grabbed a spatula, and walked back around the counter into the lobby. (Trans. 160). Jones then began striking Plaintiff with the spatula. (Trans. 160).

James Byrd, owner of J&B Enterprises, testified that his employees are trained to satisfy the complaints of an unhappy customer and, if such efforts are unsuccessful, to notify a manager. (Trans. 129). Ron Newcomb supervises all of Byrd's operations and is familiar with the policies of J&B Enterprises and trains the managers of J&B Enterprises' restaurants. (Trans. 293). He testified that in his 44 years of employment with J&B Enterprises, there has always been a manager on duty in every store at all times. (Trans. 302). Katina Daugherty, a former manager of J&B Enterprises, testified that Jones was trained properly according to J&B Enterprises' policies. (Trans. 253-54). She verified that Jones was trained to notify a manager if a customer's problems continue. (Trans. 254). If the customer enters the store cussing and threatening employees, then the employee should notify the police. (Trans. 254).

Daugherty testified that engaging in a fight with a customer violates an employee's training at J&B Enterprises. (Trans. 255). Jones' actions were outside the course and scope of her employment. (Trans. 255). Newcomb confirmed that employees are not trained that it is acceptable to fight a customer and that such actions are outside the course and scope of their employment. (Trans. 307). J&B Enterprises did not condone the actions of Jones. (Trans. 138, 307).

Jones' employment did not require her to enter the lobby to deal with a customer complaint. Even if Jones was acting in continuous event to her employment at that point, she clearly departed from her employment upon provocation from Plaintiff. Jones did not return to the kitchen to address Plaintiff's complaint, process a food order, or cook a hamburger. She went away to find something with which she could strike Plaintiff.

The trial court correctly determined that the Plaintiff did not produce evidence establishing a set of facts upon which Defendant J&B Enterprises was liable under the doctrine of respondeat superior for the actions of Jones. (R. 452).

C. Plaintiff failed to prove her claims for negligence against Defendant J&B Enterprises

Plaintiff alleged in her complaint that Defendant J&B Enterprises negligently hired Jones, negligently failed to train Jones, negligently supervised the premises, and negligently failed to provide adequate security. (R. 4-7). The trial court held:

> Plaintiff failed to present any evidence that Defendant knew or should have known of the violent propensity of its employee, Kesha Jones. Plaintiff failed to present evidence that the actions of Kesha Jones arose in the course and scope of her employment with Defendant. Additionally, Plaintiff failed to present any evidence that Kesha Jones was not properly trained in accordance with the Defendant's practices and procedures. Further, there is no evidence presented

that Defendant's policies, practices and procedures are improper or inadequate, much less that such caused or contributed to Plaintiff's alleged damages.

(R. 452).

To prove a claim for negligent hiring, a "plaintiff must prove the defendant had either actual or constructive knowledge of an employee's incompetence or unfitness before the employer will become liable for the negligent hiring or retention of an employee who injures a third party." Doe ex rel. Brown v. Pontotoc County Sch. Dist., 957 So. 2d 410, 417 (Miss. Ct. App. 2007).

Similarly, the remaining claims require that "a premises owner must employ reasonable care to protect an invitee from 'reasonably foreseeable injuries at the hands of another.'" Holmes v. Campbell Properties, Inc., 47 So. 3d 721, 725 (Miss. Ct. App. 2010) (quoting Newell v. S. Jitney Jungle Co., 830 So.2d 621, 623 (Miss.2002)). "An assault on the premises is reasonably foreseeable if the defendant had either: (1) 'actual or constructive knowledge of the assailant's violent nature,' or (2) 'actual or constructive knowledge an atmosphere of violence existed on the premises.' In assessing the 'atmosphere of violence' prong, relevant factors include 'the overall pattern of criminal activity prior to the event in question that occurred in the general vicinity of the defendant's business premises,' and 'the frequency of criminal activity on the premises.'" Id.

Plaintiff did not introduce any evidence at trial that Kesha Jones had a criminal record or had any violent tendencies. There was testimony that Jones was not a violent person. (Tran. 255). Plaintiff did not introduce any evidence of frequent criminal activity at the Holly Springs McDonald's restaurant. Plaintiff simply failed to meet her burden of proof for these claims.

Plaintiff's brief raises issues regarding an unsafe condition and improper training. Plaintiff asserts that the doors to the McDonald's restaurant were locked after the fight began.

Plaintiff failed to present any evidence at trial that any employee or agent of J&B Enterprises locked the door or that said employee or agent knew or should have known it was locked. (Trans. 274). However, assuming the door was locked by someone during this incident, there is no evidence that the locked doors caused or contributed to Plaintiff's injuries. By her own testimony, she did not attempt to flee the restaurant before or during the fight. (Trans. 268). Even if this condition was dangerous, it did not contribute to Plaintiff's injuries.

Plaintiff argues that Jones was not properly trained because she was trained in customer service and engaged in a fight. In Holmes, the plaintiff was assaulted by the employee of a car wash with a baseball bat. Holmes, 47 So. 3d 721, 723. The court held that engaging in assault did not equate to improper training. Id., 47 So. 3d at 726. The employer did not need to train the employee not to strike a customer with a baseball bat to rely on the employee's common sense.

In the present case, there are no allegations that Jones thought she was properly using a spatula when she struck Plaintiff. Jones did not strike Plaintiff while attempting to operate the cooking equipment. Jones was in the lobby. Similarly, Defendant did not train Jones to assault customers. James Byrd testified that his employees are trained to satisfy the complaints of an unhappy customer and, if such efforts are unsuccessful, to notify a manager. (Trans. 129). Ron Newcomb testified that in his 44 years of employment with J&B Enterprises, there has always been a manager on duty in every store at all times. (Trans. 302). Katina Daugherty testified that Jones was trained properly according to J&B Enterprises' policies. (Trans. 253-54). She verified that Jones was trained to notify a manager if a customer's problems continue. (Trans. 254). If the customer enters the store cussing and threatening employees, then the employee should notify the police. (Trans. 254).

Jones was trained to get a manager to resolve customer disputes. Jones refused to get a manager. Instead, she relied on her own instincts to verbally assault Plaintiff. She then left the verbal confrontation, retrieved a blunt object, and struck Plaintiff. This incident clearly did not result from a failure by J&B Enterprises to train Jones. This incident resulted from an inability of Jones to use basic common sense. Thus, the trial court properly granted a directed verdict to Defendant J&B Enterprises.

D. Plaintiff failed to plead agency principles

In her brief, Plaintiff argues that Defendant J&B Enterprises is liable to Plaintiff on the basis of apparent authority and ratification. If these principles apply, the defendant would be directly liable to Plaintiff as if Defendant J&B Enterprises had committed the acts. Plaintiff did not assert prior to trial that Defendant J&B Enterprises was liable to Plaintiff for assault. Plaintiff only sought liability under the doctrines of respondeat superior and the previously-identified claims for negligence. Therefore, these issues were not considered by the trial court and should not be considered on appeal. Chasez v. Chasez, 935 So. 2d 1058, 1062 (Miss. Ct. App. 2005).

To the extent that Plaintiff asserts that Defendant J&B Enterprises ratified Jones' actions such that she was operating within the course and scope of her employment, Plaintiff is misguided. In Hatley v. Hilton Hotels Corp., 308 F.3d 473, 476 (5th Cir. 2002), plaintiff alleged that defendant was liable for intentional acts of sexual harassment by defendant's employee. Id. The court held that "the only evidence of ratification was that Bally's did not fire the harassers-a fact that is insufficient on its own to establish ratification." Id. (citing Craft v. Magnolia Stores Co., 138 So. 405, 406 (Miss. 1931)).

In Craft, the employee of defendant acted on his own to swear out a warrant against plaintiff alleging that plaintiff stole a dress. Craft, 138 So. at 406. The employee then went to the plaintiff's home and accused her of stealing the dress. Plaintiff sued the employer for slander. Id. at 405. The court held,

> Having reached the conclusion that the act of Harrison was unauthorized so far as the master was concerned, and that he was at the time acting upon his own initiative for purposes of his own and not in the performance of any duty expressed or implied which he owed the master, it then follows that the retention of Harrison in its employ with knowledge of his tortious act would not render the principal or master liable. *See* Wells v. Robinson Bros. Motor Co., 153 Miss. 451, 121 So. 141.
>
> The cases relied on by appellant are discussed and disposed of in the Wells Case, supra. The mere fact that such employee is retained in the master's employ, and mere silence on the master's part relative to the slander, is not sufficient evidence that the master adopted the act, nor does it lead to the inference that he assumes responsibility for the servant's slander of another. In the case at bar there was no ratification.

Id. at 407 (emphasis added).

Plaintiff did not introduce any evidence that Defendant J&B Enterprises affirmed Jones' acts. Defendant cooperated with the police investigation and waited for the result of the police investigation to discipline Plaintiff. (Trans. 138). This was due to the reported racial slurs used by Plaintiff. (Trans. 136). Defendant J&B Enterprises relied on this procedure to avoid potential liability for a discrimination claim by Jones. (Trans. 301, 307). Testimony proved that Defendant did not condone or ratify Jones' acts. (Trans. 307). The police investigation into Jones' acts revealed that there was not enough evidence to charge either Plaintiff or Jones for their roles in the altercation. (Trans. 310). Based on the disputed nature of the cause of the altercation and the potential for liability, Defendant J&B Enterprises did not terminate Jones' employment. (Trans. 310).

Plaintiff cites to Autry v. State, 698 So.2d 84 (Miss. 1997) and Carter v. Hurst, 234 So.2d 616 (Miss. 1970) to support her argument. In Autry, defendant argued that service of process on his alleged agent was insufficient because he had not authorized the agent to act on his behalf. Autry, 698 So.2d at 87. The notice required defendant to either return the principal amount owed or pay a forfeiture. Id. While disputing the case, defendant paid the forfeiture bond. The court held that this affirmative act ratified the acts of the agent. Id. In Carter, a co-executor signed a contract for the sale of land on behalf of an estate. Carter, 234 So.2d at 619-620. He arguably had the consent of the other co-executor of the other co-executor. Id. However, the court held that there was no ratification of the first co-executor's acts because she did not purport to act on behalf of the other co-executor when he signed the contract. Id. at 620. He acted only on behalf of the estate. Id. at 620.

Plaintiff did not introduce any evidence that Defendant J&B Enterprises took any affirmative action to approve of Jones' actions. Furthermore, there is no evidence that Jones acted on behalf of J&B Enterprises when she left the area behind the counter and struck Plaintiff. Plaintiff's cited case law is not on point in this case.

Plaintiff did not introduce any evidence that Defendant J&B Enterprises approved, condoned, or ratified Jones' conduct. The proof at trial showed that internal investigations and police investigations revealed ambiguity regarding the cause of the altercation. Thus, Plaintiff could not prove that Defendant J&B Enterprises ratified the conduct of Jones.

II. THE TRIAL COURT DID NOT ERR IN ALLOWING DEFENDANT J&B ENTERPRISES TO ASSERT THE AFFIRMATIVE DEFENSE OF THE STATUTE OF LIMITATIONS.

As discussed above, the trial court allowed Defendant J&B Enterprises to amend its answer to assert the affirmative defense of the statute of limitations based on Plaintiff's failure to

properly plead an intentional tort against Jones or Defendant J&B Enterprises. In her third issue on appeal, Plaintiff argues that Defendant J&B Enterprises waived the right to assert the affirmative defense of the statute of limitations.

Plaintiff cites to cases following the authority dictated in MS Credit Ctr., Inc. v. Horton, 926 So. 2d 167, 180 (Miss. 2006). In Horton, the defendant failed to timely assert its right to arbitration. Id. at 180. The court held, "[a] defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver." Id. (emphasis added).

In the present case, the affirmative defense of the statute of limitations would not have terminated the litigation. Plaintiff's claims that Defendant J&B Enterprises negligently hired Jones, negligently failed to train Jones, negligently supervised the premises, and negligently failed to provide adequate security were not subject to the one-year statute of limitations. Therefore, litigation would have continued. No party was prejudiced by extended litigation.

Furthermore, Plaintiff cites Hutzel v. City of Jackson, 33 So. 3d 1116, 1121 (Miss. 2010), for the proposition that Defendant waived its right to the affirmative defense. Hutzel states that an affirmative defense is not waived if the defendant has a reasonable explanation for its delay. Id. As previously demonstrated, the delay was due to Plaintiff's failure to properly plead an intentional tort. Therefore, the trial court properly held that Defendant J&B Enterprises did not waive its right to assert the affirmative defense of the statute of limitations.

At the conclusion of this issue, Plaintiff devotes several paragraphs to an issue involving written notice for a motion for summary judgment involving Defendant J&B Enterprises. Defendant J&B Enterprises clearly made a motion for a directed verdict, not a motion for

summary judgment. (Trans. 335). The trial court entered an Order Granting Defendant's Motion for Directed Verdict. (R. 452-53). Plaintiff's argument does not bear any relation to the trial court's Order and is wholly irrelevant.

III. THE TRIAL COURT DID NOT PLACE ANY BURDEN OF ALLOCATION ON PLAINTIFF AND, THUS, DID NOT ERR.

The trial court held in its Order granting a directed verdict in favor of Defendant J&B Enterprises that Plaintiff could not prove her alleged mental damages resulting from the subject incident. (R. 453). The trial court held, "in light of the lack of expert proof on the issue, this Court finds that it would be impossible for the jury to allocate damages, and any effort to do so would be mere speculation." (R. 453). Plaintiff's mental health prior to the subject incident was such that no fact-finder could discern whether Plaintiff suffered a new injury in the subject incident minus excessive speculation. (R. 453).

"The burden of proving damages rests upon the plaintiff." Evans v. Clemons, 872 So. 2d 23, 29 (Miss. Ct. App. 2003) (citing Adams v. U.S. Homecrafters, Inc., 744 So.2d 736, 740 (Miss.1999)). "Damages must be established with sufficient certainty as to remove them from the realm of mere speculation or conjecture." Id. "A party will not be barred from recovering because he cannot provide a perfect measure of his damages." Id. "To a great degree, most damage assessments unavoidably contain a measure of conjecture. The question then is whether the judgment is based upon excessive speculation." Evans, 872 So. 2d at 29.

Prior to Plaintiff's altercation with Jones, she experienced numerous unfortunate incidents which affected her mental health. Plaintiff was raised by her father, who was an abusive alcoholic who experimented in illegal drugs. (Trans. 217). Plaintiff's mother was killed in an accident in which she was a pedestrian struck by an automobile. (Trans. 221). Plaintiff

was forced to identify her mother's body. (Trans. 221). Her father later died of AIDS. (Trans. 225). Plaintiff cared for him for sixth months prior to his death. (Trans. 225).

Plaintiff was forced to drop out of high school in 1988 at age 16 due to her pregnancy. (Trans. 217-18). Plaintiff subsequently underwent two abortions before the age of twenty. (Trans. 218). One of Plaintiff's daughters was molested while the girl lived with her grandmother. (Trans. 220).

Plaintiff has been diagnosed with cervical cancer. (Trans. 225). Plaintiff abused alcohol for over a decade. (Trans 218-19). She also used marijuana and methamphetamine. (Trans. 225). Plaintiff was separated from her husband for multiple years prior to the subject incident. (Trans. 222).

Plaintiff spent one night in jail for matters not relevant to the present case. (Trans. 224). While in jail, Plaintiff suffered a panic attack. (Trans. 224). She laid down on the floor and kicked the wall throughout the night. (Trans. 224).

As a result of the fight, Plaintiff had bruises and small cuts on her face and arm. (Trans. 163). Plaintiff took off from work the day after the attack. (Trans. 165). When she returned to work, she told her manager that she had been struck with a spatula. (Trans. 165). Her co-workers then began calling her "spatula head." (Trans. 165). Plaintiff claims she had difficulty at work as a result of the fight. (Trans. 204-05). However, she was terminated from her job thirteen months after the fight due to her employer's nepotism policy. (Trans. 205, 223).

Following the subject incident, Plaintiff worked for a housekeeping service and worked as a clerk at Family Dollar. (Trans. 225-26). She is seeking social security disability based upon prior back injuries and problems relating to diabetes. (Trans. 227). After the subject incident, Plaintiff met and later married her current husband Lee Day. (Trans. 223).

Plaintiff attempted to introduce the expert testimony of Dr. Robert Cooper. (Trans. 68). Dr. Cooper's qualifications will be addressed in the discussion of issue 4. However, even if Dr. Cooper's medical opinions were valid, they do not support Plaintiff's claim of damages. Dr. Cooper diagnosed Plaintiff with post-traumatic stress disorder and diagnosed medication for anxiety. (Trans. 103-04). Dr. Cooper acknowledged that Plaintiff was diagnosed with anxiety and depression prior to the subject incident with Jones. (Trans. 104). Plaintiff was taking medication for these conditions prior to the subject incident with Jones. (Trans. 104). Dr. Cooper testified that it would be impossible to identify the extent of damages Plaintiff suffered as a result of the subject incident with Jones. (Trans. 111-12).

Plaintiff did not introduce any reliable evidence to allow the fact-finder to determine damages with sufficient certainty. Plaintiff had an extensive list of unfortunate events that led to numerous mental health problems. After the accident, Plaintiff was treated for the same conditions. No witness conclusively testified that Plaintiff suffered any damages as a result of the subject incident. Any award of damages would be mere speculation. Therefore, the trial court correctly held that Plaintiff did not meet her burden of proof.

IV. THE TRIAL COURT DID NOT ERR BY HOLDING THAT DR. COOPER WAS NOT PROPERLY QUALIFIED TO PROVE RELIABLE EXPERT TESTIMONY.

Plaintiff alleges that the trial court erred by initially allowing her expert, Dr. Robert Cooper, to testify as an expert and later finding that Dr. Cooper's testimony was unreliable. Plaintiff alleges that this "is not the judge's role."

A. Dr. Cooper was not qualified to testify as an expert witness.

At trial, Plaintiff introduced Dr. Robert Cooper as her expert witness. (Trans. 68, 71). Dr. Cooper is board certified in bariatric medicine (weight control) with a fellowship in family practice. (Trans. 71). Dr. Cooper is not board certified in psychiatry or psychology, nor was he

familiar with the standard of care of these two specialties. (Trans. 72, 74-76). Dr. Cooper did not take a social history of Plaintiff prior to his diagnoses of post-traumatic stress disorder. (Trans. 77). Dr. Cooper does not have any of Plaintiff's medical records predating the subject incident and never examined any prior medical records for Plaintiff's numerous mental health conditions. (Trans. 73, 77, 78).

The trial court initially accepted Dr. Cooper as an expert in family practice. (Trans. 79). During his testimony, Dr. Cooper diagnosed Plaintiff with post-traumatic stress disorder arising from her fight with Jones. (Trans. 81). Defendant objected to this testimony on the grounds that Dr. Cooper was not qualified to testify to the standard of care of a psychologist or psychiatrist and had failed to provide a foundation for his testimony. (Trans. 82). Dr. Cooper did not know of Plaintiff's previous mental health diagnoses or medications prior to the subject incident. (Trans. 96-97).

The trial court held that Dr. Cooper was not familiar with the standard of care of someone trained in psychiatry or psychology and was qualified to testify to the cause of Plaintiff's alleged post-traumatic stress disorder. (Trans. 341). The court further held that Dr. Cooper's failure to provide a foundation for his opinions rendered them unreliable. (R. 453).

"The standard of review for the admission or suppression of evidence, including expert testimony, is an abuse of discretion." Utz v. Running & Rolling Trucking, Inc., 32 So.3d 450, 457 (Miss. 2010).

Rule 702 of the Mississippi Rules of Evidence 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 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.

Miss. R. Evid. 702. Under Rule 702, expert testimony is admissible if it is relevant and reliable. Miss. Transp. Comm'n v. McLemore, 863 So.2d 31, 34 (Miss.2003). "Further, the trial judge is considered the gatekeeper and determines the value of the expert testimony. As the gatekeeper, the trial judge ensures that any expert testimony is relevant and reliable." Utz, 32 So. 3d at 457.

In Gilbert v. Ireland, 949 So. 2d 784, 791 (Miss. Ct. App. 2006), plaintiff allegedly suffered from post-traumatic stress disorder after a car accident. Plaintiff's expert diagnosed PTSD despite not having medical records or testimony of plaintiff's condition prior to the accident. Due to plaintiff's extensive mental health problems prior to the accident, the doctor's testimony was not reliable and should have been excluded. Id. at 791-92.

Trial courts have the discretion to initially allow an individual to testify as an expert and later strike that individual's qualifications due to unreliable testimony which belie the individual's professional qualifications. Bullock v. Lott, 964 So. 2d 1119, 1132 (Miss. 2007).

The trial transcript clearly demonstrates that Dr. Cooper did not demonstrate sufficient training to show that he was familiar with the requisite qualifications to testify to the cause of post-traumatic stress disorder. Dr. Cooper's only board certification is in weight management. During voir dire, Defendants' counsel questioned Dr. Cooper's qualifications:

Q: Sir, my question is simply: Do you feel that you are qualified to testify to the standard of care of a psychologist today? Do you understand my question?

A: If you would like to have a psychologist testify, I think you should bring in a psychologist as a witness.

Q: Are you telling me that you cannot testify?

A: I am not a psychologist.

Q; My question, sir, is simple. Can you testify? Do you feel that you are qualified to testify to the standard of care of a psychologist?

A: Why would I?

Q: Wow. Can you answer yes or no and then explain?

A: No. I'm not a psychologist.

Q: So the answer to my question is no?

A: Yes, if you are asking me if I'm a psychologist, no, I'm not.

Q: That's not really what I'm asking you; but I'll live with that and move forward. Can you testify to the standard of care of a psychiatrist? Do you believe you are qualified?

A: No.

(Trans. 75-76).

Despite this lack of qualification, Dr. Cooper unequivocally testified regarding issues requiring expert psychological or psychiatric testimony. On direct examination, Plaintiff's counsel asked, "What is the difference, if there's any difference, between post-traumatic stress and general anxiety, generalized anxiety disorder?" (Trans. 83). Dr. Cooper responded, "Often psychiatric diagnoses overlap and particularly the anxiety, the stress, and the panic attacks that might come along could occur. In other words, someone could be anxious that had post-traumatic stress disorder; and there's depression that occurs with it too. All these can overlap." (Trans. 83).

Even if he was qualified, Dr. Cooper did not review the medical records documenting Plaintiff's extensive mental health problems and could not have properly formed a basis for his "expert opinion." He simply relied on Plaintiff's statements that she did not have a history of mental health problems:

Q: At some point you began to treat her for a mental illness; is that correct?

A: That's correct.

Q: At that point where you realized you were treating her for a mental illness did you get her medical records from the Byhalia Medical Clinic?

A: At the time I did not realize there was such a long detailed history; so, no. Usually you don't. I mean I didn't know that she had been to the Byhalia clinic.

Q: There you go. You didn't know she had been because you didn't ask her; is that right?

A: It would be difficult, yes, to ask them.

Q: Good. We're moving forward. At any time point did you ask her about any social experience she had, family or otherwise, prior to August 11 of 2000? Did you take a history of this is all I'm asking.

...

A: I asker her if there was a history of mental illness.

Q: She said?

A: She did not indicate that there was.

Q: She told you no?

A: Yes, or she did not answer that where the area was. It was assumed no if you didn't put that, so that would be a no.

Q: Really what happened is you looked at the patient intake form that she completed and saw that there was no check about prior history, and that's all you did. Isn't that right?

A: What would you expect me to do?

Q: Sir, I'm just asking you if you did or you didn't. Is that all you did?

A: Yes. ...

(Trans. 76-77). Dr. Cooper's failure to perform a proper history seriously undermined his qualifications as an expert witness in this matter.

Dr. Cooper diagnosed post-traumatic stress disorder, but the only care he provided was to "once a month [] spend 15 minutes with [Plaintiff] and prescribe her medications." (Trans. 106). Dr. Cooper diagnosed anti-anxiety medications such as Xanax and anti-depressants such as Zoloft to treat Plaintiff after the subject incident. (Trans. 88). However, Dr. Cooper did not know that Plaintiff "received treatment for anxiety, depression, and nerves from the Mount Pleasant Family Health Clinic from the years of 1998 to a couple of months before this incident." (Trans. 96).

Dr. Cooper was unaware that Plaintiff was prescribed Zoloft, an anti-depressant, on March 6, 2000. (Trans. 96-97). Dr. Cooper was unaware that Plaintiff was prescribed Paxil, an anti-depressant, on May 16, 2000, three months before the subject incident. (Trans. 93, 97, 101). Dr. Cooper was unaware that Plaintiff was taking Elavil, an anti-depressant, until September 22, 2000 under the prescription of another physician. (Trans. 100-101). He also testified that it was "interesting" that Plaintiff's treating medical providers did not prescribe her Xanax for her long-standing history of "anxiety or panic attacks" prior to the subject incident at the restaurant in August 2000. (Trans. 104-05).

Dr. Cooper did not have the proper qualifications to testify to a condition he classified as a "psychiatric diagnosis." He testified that he did not know the standard of care of a psychologist or psychiatrist. His diagnosis of post-traumatic stress disorder was made without taking a proper patient history and without knowledge that Plaintiff was already being treated for the same condition before the subject incident. Dr. Cooper's expert testimony was fatally unreliable and the trial court correctly disregarded his "expert testimony."

B. Plaintiff's testimony exceeded that allowable as a lay witness.

Plaintiff also argues that Dr. Cooper's testimony should still be accepted as lay testimony in lieu of expert testimony. There is no rule prohibiting a treating physician from testifying as a lay person about the facts and circumstances surrounding the care and treatment of the patient. Griffin v. McKenney, 877 So. 2d 425, 439-40 (Miss. Ct. App. 2003). However, the physician cannot testify to the significance of the condition. Id. In Foster v. Noel, 715 So.2d 174, 183 (Miss.1998), "the court held that a treating physician rendered improper expert testimony when he opined that the patient's condition of depression was exacerbated by the defendant's alleged false arrest. That testimony was improper because it informed the jury of the significance of the condition to the case." Griffin, 877 So. 2d at 439-40.

Dr. Cooper is a family physician whose only board certification is bariatrics, the practice of weight control. (Trans. 71). Dr. Cooper testified that he diagnosed Plaintiff with post-traumatic stress disorder. (Trans. 80-85). Dr. Cooper testified that Plaintiff's post-traumatic stress disorder was caused by the subject incident between Plaintiff and Jones. (Trans. 81). Dr. Cooper also testified that Plaintiff was unable to function in public, hold employment, and other problems arising from PTSD and the subject incident with Jones. (Trans. 84-86, 102-103).

Dr. Cooper clearly crossed the line into expert testimony. The only substantive portions of Dr. Cooper's testimony concerns causation of Plaintiff's alleged case of PTSD and her alleged damages. Dr. Cooper admitted that he took no meaningful history of Plaintiff. (Trans. 96-97). Removing testimony of the causation of Plaintiff's alleged PTSD and the significance of this diagnosis, the only remaining lay testimony from Dr. Cooper is comments from Plaintiff regarding the incident. This testimony merely reflects the testimony given by Plaintiff. If the

court strikes the impermissible portions of Dr. Cooper's testimony, then Plaintiff cannot prove any damages resulting from the subject incident with Jones.

C. Plaintiff did not meet its evidentiary burden to introduce the deposition or records of Trudi Porter.

Plaintiff argues that the trial court erred by not allowing introduction of the deposition of Trudi Porter. Trudi Porter is a clinical psychologist retained by Defendant to perform a psychological evaluation of Plaintiff. (R. 369; Trans. 152-53). Plaintiff did not name Porter as an expert witness. (Trans. 149). Plaintiff did not subpoena Porter to trial. (Trans. 150).

Plaintiff sought to introduce Porter's deposition at trial. (Trans. 148). Defendant objected on the grounds of hearsay for unavailability and failure to name Porter as an expert witness. (Trans. 148). Plaintiff responded only that the rules of evidence allow the use of depositions at trial. (Trans. 151).

Miss. R. Civ. P. 32(a) states,

> "At the trial or upon the hearing of a motion of an interlocutory proceeding, any part or all of a deposition, **so far as admissible under the rules of evidence** applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:
>
> ...
>
> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than one hundred miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) that the witness is a medical doctor or (F) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be so used.

M.R.C.P. 32 (emphasis added).

Miss. R. Evid. 804(b) states: "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> (1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Miss. R. Evid. 804. To qualify for this exception, the moving party must establish that the witness is unavailable. The only applicable means in this case is that the witness was "absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means."

If no subpoena is issued, neither M.R.C.P. 32 nor Miss. R. Evid. 804 apply. Smith v. City of Gulfport, 949 So. 2d 844, 848 (Miss. Ct. App. 2007). Proof "other than counsel telling the court that the witness was unavailable" is required to show that these rules apply. Id. at 849. Furthermore, psychologists are not medical doctors and do not qualify under the exception in M.R.C.P. 32(a)(3). Baine v. State, 604 So. 2d 249, 254 (Miss. 1992).

In the present case, Plaintiff did not subpoena Porter to trial. (Trans. 150). Plaintiff offered no proof regarding the location of Porter other than rumor. (Trans. 149-150, 152, 154). Plaintiff could not prove that Porter was unavailable. (Trans. 149-150, 152, 154). Thus, the trial court properly excluded Porter's deposition.

Plaintiff also sought to introduce the report of Porter. (Trans. 151). Plaintiff alleged that Porter performed a Physical and Mental Evaluation under M.R.C.P. 35. (Trans. 151-52). No motion or Order for the evaluation was ever filed or entered. (Trans. 152-53).

Plaintiff did not offer any evidence to authenticate Porter's report. (Trans. 151-154). "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what it proponents claims." Miss. R. Evid. 901(a). When a witness did not prepare the records, did not maintain original possession of the records, and could not verify the accuracy of the records, then that witness cannot authenticate the document. Bower v. Bower, 758 So. 2d 405, 415 (Miss. 2000). Plaintiff did not offer any witness or evidence to authenticate the report. Therefore, Porter's report was not admissible.

Plaintiff argues that this report should have been admissible under Miss. R. Evid. 803(4), which states:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, regardless of to whom the statements are made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances substantially indicating their trustworthiness. For purposes of this rule, the term "medical" refers to emotional and mental health as well as physical health.

Id. Plaintiff seemingly argues that this rule is sufficient to introduce the medical opinions of Porter.

If applicable, Rule 803(4) would only apply to the statements made by Plaintiff for purposes of diagnosis. Comment to Miss. R. Evid. 803(4). Plaintiff has not identified how these statements of Plaintiff differed from Plaintiff's testimony at trial. The statements and opinions of Porter would remain hearsay. As discussed above, Porter was unavailable and Plaintiff could not provide any certified records. Therefore, Porter's records were properly not allowed into evidence at trial.

V. PLAINTIFF FAILS TO IDENTIFY ANY GROUNDS FOR REVERSAL OF THE TRIAL COURT'S ORDER.

Plaintiff's final argument is the proverbial "kitchen-sink" argument. Plaintiff names a host of proffered errors ranging from bias to the trial judge's hearing ability to errors of law. There is no central theme tying these matters together, so Defendant will attempt to address these matters as they are raised by Plaintiff.

Plaintiff first asserts that Judge Lackey failed to meet his duty of diligence by failing to read the entire record on the first morning of trial. Matters not objected to at trial and raised for the first time on appeal are waived. Chasez, 935 So. 2d at 1062. Plaintiff did not object to Judge Lackey's preparation prior to trial. Plaintiff did not ask Judge Lackey to continue the trial or recuse himself. Therefore, Plaintiff waived this alleged issue.

Even if this issue was not waived, the current record before this court consists of 471 pages. Judge Lackey did not state what portions of the record he reviewed prior to trial or what portions he did not read. (Trans. 3). In a perfect scenario, trial courts would know every word of every pleading filed by parties to a case. The present case contained numerous motions and pleadings that were resolved prior to trial. The Complaint was filed in 2003 and was pending for seven years by the date of trial. Judge Lackey's admission is certainly not surprising, particularly in light of the case load on trial judges. Plaintiff has failed to demonstrate what material documents Judge Lackey failed to review prior to trial. Plaintiff has failed to show how she was damaged by the unidentified, non-reviewed documents. Plaintiff has failed to demonstrate reversible error on these grounds.

Plaintiff next argues that Judge Lackey was biased against her based on language in the Order granting summary judgment to Defendant McDonald's Corporation. Once again, Plaintiff did not ask Judge Lackey to recuse himself. Therefore, Plaintiff waived this alleged issue.

CONCLUSION

Plaintiff-Appellant Kerri Parmenter failed to prove any reversible error on behalf of the trial court. Jones acted beyond the course and scope of her employment. Therefore, Defendant J&B Enterprises was not liable under the doctrine of respondeat superior. Finally, Plaintiff failed to meet its burden of proof regarding her allegations of negligence against Defendant J&B Enterprises.

For these reasons and the reasons given above, the orders of the trial court should be upheld and the appeal of the Plaintiff-Appellant denied.

Respectfully submitted,

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IN THE MISSISSIPPI SUPREME COURT

KERRI PARMENTER	APPELLANT
VS.	CAUSE NO.: 2010-ca-01251
J&B ENTERPRISES, INC. AND MCDONALDS CORPORATION, INC.	APPELLEES

CERTIFICATE

The undersigned counsel of record certifies that the he has this date forwarded true and correct copies of the **BRIEF OF THE DEFENDANT/APPELLEE J&B ENTERPRISES, INC. and BRIEF OF DEFENDANT/APPELLEE McDONALD'S CORPORATION, INC.** to the Honorable John Gregory, P. O. Box 466, Okolona, MS 38860, who has taken over the cases of Presiding Circuit Court Judge Henry L. Lackey (retired).

Respectfully submitted,

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CERTIFICATE OF FILING

I, Jay M. Atkins, attorney for Defendant-Appellees, McDonald's Corporation and J&B Enterprises, Inc., certify that I have this day deposited in the United States mail first class with postage prepaid and addressed to the Clerk four copies of the Brief for Appellees.

This the 13th day of June, 2011.

BY: _____
Jay M. Atkins