

IN THE MISSISSIPPI SUPREME COURT

KERRI PARMENTER

APPELLANT

VS.

CAUSE NO.: 2010-ca-01251

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

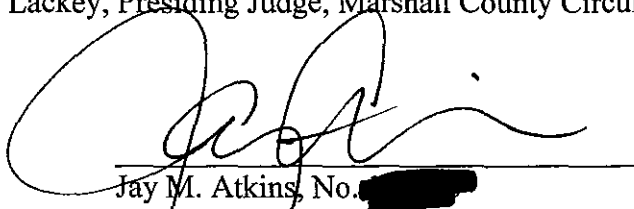
APPELLEES

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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).

SUMMARY OF THE ARGUMENT

This brief shall address only those matters relevant to the trial court’s order granting summary judgment to Defendant McDonald’s Corporation.

Plaintiff alleges that the trial court erred by granting summary judgment to Defendant McDonald’s Corporation. McDonald’s Corporation did not control the day-to-day operations of the subject franchise and had no role in employment decisions. The actions of Kesha Jones in her confrontation with Plaintiff did not further the interests of this Defendant. Finally, Plaintiff failed to prove that McDonald’s Corporation had any duty to hire employees, train employees, or provide security at the subject franchise restaurant. For these reasons, summary judgment was

appropriate. The order of the trial court should be upheld and the appeal of the Plaintiff-Appellant denied.

LAW & ARGUMENT

I. THE TRIAL COURT CORRECTLY APPLIED THE APPLICABLE LAW IN GRANTING SUMMARY JUDGMENT TO DEFENDANT MCDONALD'S CORPORATION.

Plaintiff argues that she raised material issues of genuine fact regarding whether McDonald's Corporation cloaked Kesha Jones in sufficient apparent authority to render it liable for Jones' actions. Plaintiff argues that these alleged issues of genuine fact should have precluded the trial court from granting summary judgment to Defendant McDonald's Corporation.

A. Standard for Summary Judgment

Mississippi Rule of Civil Procedure 56, which governs summary judgment, provides in part that a court is to grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c). Thereafter, Rule 56(e) explains that a non-moving party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or [otherwise], must set forth specific facts showing that there is a genuine issue for trial." Miss. R. Civ. P. 56(e).

The Mississippi Supreme Court sought to clarify those circumstances in which summary judgment is appropriate. In Wilbourn v. Stennett, Wilkinson & Ward, 687 So.2d 1205 (Miss. 1996), the Supreme Court expressly adopted the line of cases from the United States Supreme Court which included Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

In Anderson, the U.S. Supreme Court held that “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Anderson, 477 U.S. at 249. In addition, the Court noted that “the mere existence of a scintilla of evidence in support of the [non-moving party’s] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party].” Id. at 250.

On the same day that it issued its decision in Anderson, the U.S. Supreme Court also issued an opinion in Celotex. In interpreting the Celotex decision, the Mississippi Supreme Court has stated as follows:

[W]hen a party, opposing summary judgment on a claim or defense as to which that party will bear the burden of proof at trial, fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law.

Galloway et al v. The Travelers Ins. Co., et al, 515 So.2d 678, 684 (Miss. 1987). If the Defendant can negate any essential element of the plaintiff’s prima facie case, then summary judgment in favor of the defendant is proper after the plaintiff has been given a reasonable opportunity to substantiate his claim.

B. Respondeat Superior

In her Complaint, Plaintiff alleged that McDonald’s Corporation was liable under the doctrine of respondeat superior, as well as other negligence claims relating to hiring practices and security. (R. 4). Plaintiff does not assert that Jones was an employee of McDonald’s Corporation or had any actual authority to act for McDonald’s Corporation. Instead, Plaintiff alleges only that Jones had apparent authority to act for McDonald’s Corporation.

The doctrine of respondeat superior is a form of vicarious liability. However, respondeat superior requires a showing that the purported agent acted in the course and scope of her

employment with intent to act for his master's purposes. Akins v. Golden Triangle Planning & Dev. Dist., Inc., 34 So. 3d 575, 587 (Miss. 2010). Plaintiff failed to establish this element of her claim against McDonald's Corporation. Plaintiff did not plead a claim for any other form of vicarious liability.

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 Cotton Warehouse Co. v. Pool*, 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.

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

When an individual is not an actual agent of the employer, a master-servant relationship may still exist under the doctrine of apparent authority. Apparent authority consists of three elements: "(1) acts or conduct of the principal indicating the agent's authority; (2) reliance thereon by a third person, and (3) a change of position by the third person to his detriment." Summerall Elec. Co., Inc. v. Church of God at Southaven, 25 So.3d 1090, 1096 (Miss. Ct. App. 2010).

In its motion for summary judgment, Defendant McDonald's Corporation cited to a number of jurisdictions which have addressed the liability of a parent corporation for the actions of employees of a franchisee. In Allen v. Choice Hotels Int'l, 942 So. 2d 817 (Miss. Ct. App. 2006), plaintiff was robbed entering his hotel room and ultimately killed by the perpetrators. *Id.*

at 820. Plaintiff's estate sued franchisor, franchisee, and manager of the hotel. The court noted that "a franchise relationship is far different from a contract of employment where the rules of master/servant are typically applied. Id. at 821. Therefore, the franchisor will be held "vicariously liable only when it had the right to control the specific instrumentality or aspect of the business that was alleged to have caused the harm." Id. at 822

The franchisor utilized an "eighteen-page franchise agreement grant[ing] the franchisee, R.C.P. Enterprises, use of 'the system.' The agreement defines 'the system' as 'a plan and system for providing to the traveling public lodging of a high standard of service, courtesy, and cleanliness, utilizing distinctive identification schemes, standards, specifications, and Proprietary Marks and information.'" Id. at 824. The franchisor also provided an employee manual and conducted random inspections of the hotel. Id. at 824-25.

The court held that the franchise agreement "is meant to provide a system of uniformity for Choice franchisees. ... In other words, the franchisee is operating a hotel that is designed to look like other Comfort Inns, so that customers feel as though they are not staying in a completely different hotel." Id. at 825. Because the franchisor did not control the day-to-day operations of the business, the franchisor was not liable to the plaintiff for the alleged injury.

In O'Banner v. McDonald's Corporation, 670 N.E. 2d 632 (Ill. 1996), the plaintiff allegedly slipped and fell at a McDonald's restaurant. Thereafter, the plaintiff sued McDonald's Corporation and certain "unknown owners." Id. at 633. The trial court granted summary judgment in favor of McDonald's Corporation and the plaintiff appealed.

On appeal, the Illinois Supreme Court in O'Banner acknowledged that Illinois follows principles of "apparent agency". Id. at 634. However, the Court rejected the Plaintiff's claim that McDonald's Corporation was liable as the franchisor. Id. at 634-35. The Court explained

that “a principal can be held vicariously liable in tort for injury caused by the negligent acts of his apparent agent if the injury would not have occurred but for the injured party’s justifiable reliance on the apparent agency.” *Id.* at 634 (emphasis added). The Court then concluded that “[e]ven if one concedes that McDonald’s advertising and other conduct could entice a person to enter a McDonald’s restaurant in the belief that it was dealing with an agent of the corporation itself, that is not sufficient.” *Id.* at 635. *See also Theos & Sons, Inc. v. Mack Trucks, Inc.*, 729 N.E. 2d 1113 (Mass. 2000) (“the mere use of a trademark and other logos on the defendant is not sufficient to raise a genuine issue of material fact that the defendant cloaked [the franchisee] with apparent authority”); *Gonzalez v. Walgreen’s Company and The Travelers*, 878 F.2d 560 (1st Cir. 1989) (franchisee’s mere use of logo does not, by itself, create a genuine issue of material fact with respect to apparent authority).

In *Mobil Oil Corporation v. Bransford*, 648 So. 2d 119 (Fla. 1995), the plaintiff had entered a Mobil Mini Mart gas station in Florida. The facility was owned by Mobil Oil Corporation but was leased to an individual, Alan Berman. One of Mr. Berman’s employees allegedly attacked and injured the Plaintiff. Before trial, the trial court entered summary judgment in favor of Mobil Corporation, rejecting the plaintiff’s theories of vicarious liability and apparent agency. *Id.* at 120.

In rejecting the plaintiff’s theories of vicarious liability, the Florida Supreme Court in *Bransford* stated that “actual ownership of the premises is relevant only to the extent it may indicate some degree of actual or apparent control over the business. Mobil’s ownership here is irrelevant because the record indicates that Mobil had leased the property to another who possessed actual and superseding control over the premises; and there was nothing beyond

trademark symbols, Mobil products, and franchise support to indicate any apparent control by Mobil as to this plaintiff.” Id. at 121 (emphasis added).

The prevailing opinion is that the actions of an employee which may typically be attributed to her employer/franchisee are rarely attributed to the franchisor. The key element is that the franchisor does not maintain sufficient control over the day-to-day actions of the employee or the routine business of the franchisee, such that the employee’s actions are in furtherance of the franchisor’s business.

Defendant McDonald’s Corporation proved that it did not take any actions to indicate any authority for Jones to act for the corporation. In support of this position, this Defendant submitted the Affidavit of David Bartlett to show that it: 1) did not own or operate the subject franchise; 2) did not have the right to hire or fire employees; 3) did not sell, manufacture, process or prepare any product for sale at the restaurant business; 4) did not supply any product, nor does it own or operate a business which supplies any product, to the subject franchise; and 5) did not, nor did it have the right to, control any day-to-day activities necessary to carrying on the restaurant business at which Plaintiff allegedly suffered injury. (R. 115-16).

To dispute this affidavit, Plaintiff offered her own deposition testimony and the deposition testimony of James Byrd. (R. 320-375). Plaintiff argued that the Franchise Agreement demonstrated that McDonald’s Corporation controlled the day-to-day operations of the franchise based on references to “manuals” in the Agreement. (R. 327, 331, 345-46). Plaintiff did not cite any actual manual which she alleges controlled the actions of Jones. In the portions of his deposition cited by Plaintiff, James Byrd testified that McDonald’s did not own the subject location and the Franchise Agreement did not dictate the day-to-day operations of the franchise. (R. 350, 353).

The trial court agreed with Defendant's argument and found that 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).

In Allen, the franchisor presented deposition testimony of a corporate representative who insisted that the franchisor did not control the hotel's daily operations. Id. at 825. Plaintiff presented no sworn testimony to contradict or dispute this testimony. Id. at 825. Instead, plaintiff relied solely on the corporate employee handbook to show control. Id. at 825. The court held that "the opposing party may not rest upon mere allegations or denial of his pleadings, but must set forth specific facts by affidavit or otherwise to show that there is a genuine issue for trial. M.R.C.P. 56(e). Therefore, [plaintiff] failed to present a genuine issue of material fact as to whether Choice exercised control over the day-to-day operation of the Comfort Inn." Allen, 942 So. 2d at 825 (Miss. Ct. App. 2006)

Even at the present course of litigation, Plaintiff has failed to produce evidence which supports a finding that Jones acted in the interests of McDonald's Corporation. In her appellate brief, Plaintiff's sole argument is that the McDonald's Operating Manual and the Franchise Agreement allow McDonald's to control the daily operations of franchise locations. (Appellant's Brief at 6-8). Plaintiff cites to broad statements in the Franchise Agreement that generally require a franchisee to act in conformity to McDonald's national standards. (Appellant's Brief at 6). However, Plaintiff does not cite any language in these agreements that grant McDonald's Corporation the right to hire or fire employees or the right to control the day-to-day operations of the franchise.

Pursuant to the Franchise Agreement, McDonald's Corporation does retain the right to enter and take possession of the franchise. Despite the assertions of Plaintiff, this does not amount to control of the daily operations of the franchise. Such action is only allowable in the event the franchisee fails to operate the restaurant in a "good, clean, wholesome nature," declares bankruptcy, fails to promptly pay the franchisor, etc. (R. 316).

Throughout the course of litigation, Plaintiff did not take the deposition of a corporate representative of McDonald's Corporation. Plaintiff did not subpoena any corporate representative to trial. Plaintiff has failed to cite any actual manual or policy that would apply in the subject incident. Instead, Plaintiff relied on broad, generalized statements contained in the Franchise Agreement. Lacking evidence, Plaintiff relies merely on inferences and strained interpretations. Plaintiff had four years to produce evidence in this case prior to the court's order granting summary judgment and has had over three more years to produce additional evidence. Plaintiff failed to meet her burden of proof.

As Judge Lackey held, Plaintiff could not demonstrate any evidence to show that Jones acted in the furtherance of McDonald's Corporation's interests. Plaintiff's failure to support this critical element with any evidence should result in affirmation of the trial court's order granting summary judgment to Defendant McDonald's Corporation.

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

Plaintiff 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. Beyond Plaintiff's waiver, her argument is without merit. Judge Lackey stated that Jones used the spatula "in a fashion contrary to its intended use of for which it was designed, but a use in which

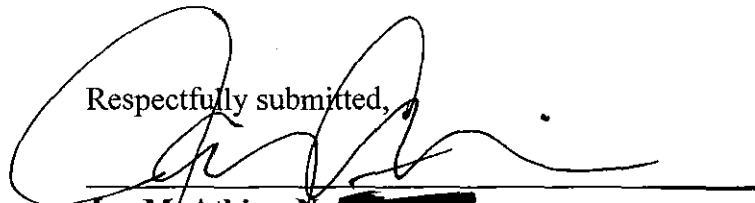
all mothers of young children are acquainted.” (R. 421-24). Plaintiff argues that this language reveals that Judge Lackey was biased against Plaintiff and was flippant about child abuse.

Judge Lackey simply used colloquial terms to describe someone being struck with a spatula. Judge Lackey’s descriptive phrase reveals that the spatula was not a specialized instrument to be found in a McDonald’s kitchen, but a routine utensil. Finally, twisting this phrase regarding spanking a child into support for child abuse is over-dramatized and inappropriate. Plaintiff fails to identify any relevant issue and falls woefully short of an issue of reversible error on these grounds.

CONCLUSION

Plaintiff-Appellant Kerri Parmenter failed to prove any reversible error on behalf of the trial court. Defendant McDonald’s Corporation was not the employer of Kesha Jones and is not liable for her actions under the doctrine of respondeat superior. 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

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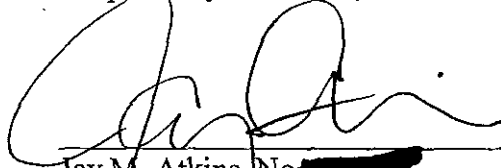
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MCDONALDS CORPORATION, INC.

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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