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Introduction

May it please the Court. Upon review of Appellee's Responsive Briefs, two of the most elegantly bound volumes ever seen by this writer, there appear to be very few items of substance therein. To the extent permitted by the number and complexity of issues involved, Appellant will avoid prolixity. It may, however be the case that statements in Appellant's Principal Brief may need clarification. To minimize verbiage in this reply, appellant seeks oral argument.

As an example only of the possible need for clarification, Appellee accuses Appellant of charging Hon. Henry Lackey with prejudice, Appellant, by counsel, would hasten (again) to deny any personal attack on his Honor, having already praised his integrity, his service, and the pleasure of his company. Conversely, Appellant will arduously attack any opinion, ruling, or interpretation perceived to be in error by even such a congenial and fine Judge.

Neither, for the most part will Appellant seek to impeach Appellees' briefs. One exception is the blatant mis-statement at p.5 of Appellees' Response that "[o]ther witnesses testified that Plaintiff called Jones 'a black bitch'."

The truth is that only the owner of J&B Enterprises made such a claim based as he admitted on hearsay. Every other witness questioned had no knowledge of any such "slurs", including Mr. Newcomb, the Supervisor over the Holly Springs' restaurant. TR.292. See also TR. 183. Could the otherwise uncorroborated testimony of the owner of J&B, Mr. Byrd, not infer his ratification of the acts of his insulted employee?

Hence Appellant seeks to be brief. She will reply to two (2) briefs in this single memo. Nor does Appellant believe, as others may, that by a profusion or repetition of words either wisdom or truth is produced. It is therefore, the intention of appellant to produce truth, in search of this court's wisdom.

ARGUMENT

I. PLEADINGS

For the first time Defendants raised an issue as to the sufficiency of Plaintiff's pleadings on the morning of trial in chambers, in a motion ore re tenus for summary judgment. The summary judgment motion was invalid and was based on an attempt to invoke a statute of limitations long since waived. (See Appellants Main Brief, pp. 15-17). Appellant asserts that any pleading issues are waived by the mutual consent of the parties, (proven by the record), to try the issue of assault and battery by Ms. Jones on Ms. Parmenter.

The specific paragraphs contested in the complaints are:

"XIII

That Plaintiff's cause of action arises in tort as a result of injuries and damages proximately caused by the Defendants, ..., in Holly Springs, Mississippi, on or about August 11, 2000." [Emph. added].

The Complaint continues al XVII to assert liability against J&B Enterprises "for the actions of the employee Kesha Jones under the doctrine of Respondeat Superior." The Complaint then alleges negligence "[i]n addition to said responsibility [under Respondeat Superior]."

Appellant has briefed this issue at pp. 9-10, Appellant's Chief Memo. The only useful addition to be added here is the excellent analysis of "notice pleading" promulgated by this court at Bluewater Logistics, LLC, v. Williford, 55 So. 3d 148, 157-59 (Mss. 2011).

Agency principles, intentional tort, and negligence are all properly plead in this case. Pertinent affirmative defenses were waived. All three categories of cause of action were litigated by agreement al the trial of this case, so objections were again waived. To the extent the court relied on the pleadings to direct a verdict, it plainly erred.

II-CAUSES OF ACTION, ELEMENTS, AND PROOF

In Appellant's Chief Memorandum the law of each cause of action, and the elements thereof are sufficiently laid out. However, reference to the record for proof of each element, while generally laid out, is not consistently clear. This reply must further reference that proof.

There are three basic categories of cause of action alleged and tried by agreement, even if over an occasional objection as to particulars. The three categories are intentional tort, attributable to Defendants by Ms. Jones' scope and course of employment; ancillary agency claims as to both assault and negligence; and "pure" negligence claims against corporate or business Defendants.

A. Intentional Torts

The primary issue here is whether the non-assertion of a statute of limitations, and the failure to timely raise the issue until trial, seven years after pleading, is a waiver of that defense. Appellant's Brief in Chief establishes Ms. Parmenter's position on that issue.

The elements of assault and battery are found al fn 2 to Howard v. Wilson, 2010-IA-01181-SCT (MSSC, 2011):

"An assault occurs when a person (1) acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such contact, and (2)

the other person is thereby put in such imminent apprehension.... A battery goes one step beyond an assault in that a harmful contact actually occurs." [Internal cites omitted].

The evidence of assault and battery runs seriatim through the pleadings and the testimony. The elements are conceded by a McDonalds in their Brief at pp. 4-5 (which concession is keyed to the record).

Howard, however has much more to say about this case. Its facts are similar except that Plaintiff proceeded on a negligence only theory of the case. In the clearest terms, without the assault being plead, the negligence claims must fail. Secondly the Howard Defendant, Wilson, properly raised the affirmative defense of statute of limitation.

By implication, the nature of this lawsuit, "arises in tort as a result of injuries and damages proximately caused by the Defendants." Complaint XIII. Further, the Defendants in paragraphs XIV-XIX, assert that the corporate Defendants are liable "for the actions of the Employee Kesha Jones."

The cause of action for assault and battery is established. A timely motion to dismiss on the grounds of the statute of limitations would have, undoubtedly, resulted in dismissal. Such a motion was made a full seven (7) years after Defendant's Answer, and was made in the context of an unwritten "Motion for Summary Judgment." Try as Defendants might, they cannot escape the invalidity of an ore tenus Motion for Summary Judgment or the waiver of this limitations issue. These affirmative defenses, as well as the defense of allocation, are sufficiently briefed in Appellants' Main Brief.

Further, even Defendants have admitted scrapes and contusions, justifying medical expenses, (at least by implication), J&B's Response Brief, p.5. Dr Cooper set his cumulative bill al approximately $7000.TR. 87. Plaintiff testified to loss of substantial wages as a direct result of this incident.TR. 204. Dr. Cooper asserted PTSD as a proximate result of the assault by Jones. (Trans.81). Dr. Cooper's fees were only a fraction of Plaintiff's damages.

B. Agency Principles

Almost every question relating to agency principles requires a jury decision Hence, all Appellant must show is testimony, taken in the light most favorable to her, which is not so lacking that a reasonable juror could not find for her on the basis of the evidence or any inference which might support her claim.

1.) Respondeat Superior, (Simple)

Simply put, Respondeat Superior, in its simplest form, requires (1) an act by an agent or servant; (2) detrimental to a third party; (3) within the course and scope of her employment. As shown above, elements one and two are confessed. The question therefore is, was Kesha Jones acting within the scope of her employment?

Apparently the most recent test for course and scope is found at Akins v. Golden Triangle Planning & Development District , 34 So. 3d 375, 580 (Miss. 2010). The test includes:

"13. The trial court relied on the test in Commercial Bank v. Hearn, 923 So. 2d 202 (Miss. 2006), for determining whether an employee was acting within the scope of employment. In Hearn, this Court defined an employee's conduct as being in the scope of employment if:

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master, and

(d) if force is intentionally used by the servant against another, the use of force is not unexpectable."

The testimony was clear that Ms. Jones was "cross-trained" as a cook, implicating her anger due to being confronted with her failure to timely deliver Plaintiff's food, TR. 287. Unlike Adams v. Cinemark, 831 So. 2d 1156 (Miss. 2002), on which Defendants place almost all of their argument re"course and scope," in the instant case, as a "cross-trainee" Ms. Jones never left her station. Nor did she "clock out" The Defendant in Adams did not use a tool of her trade in the assault as Ms. Jones did.

The beginning of this single and continuous action, (al least within the restaurant), was when Plaintiff approached Ms. Jones who was near the counter. The testimony from Mr . Byrd substantiates that Ms. Jones was within her duties to satisfy the customer as a cashier or "team member." TR. 131. Finally, if intentional force is used it must be foreseeable to the master. Again the testimony of J&B employees is important. Mr. Newcomb testified that were frequently angry about errors in their orders, inter alia.TR. 288-289.. Witness Kinkle implied foreseeability of violence within such a context. TR. 198. But the most convincing evidence of foreseeability is that the McDonald's Manual, (all previously briefed), has elaborate instructions on how to deal with irate customers, concluding with "get the manager," who is trained to deal with such matters. Ms. Jones' refusal to get the manager created not so much a foreseeability of violence, but the inevitability of it. See Response Brief, pp. 4-5. It is foreseeable that any person not trained to deal with angry customers could create a dangerous condition in such a circumstance.

Finally, in the context of course and scope, we do not know why Ms. Jones returned to the kitchen. One inference would be that she hoped the food was done and she could "get the troublesome customer" on her way. Perhaps she was looking for the manager as appropriate, and being unable to find him/her, she became frustrated (predictably) and assumed responsibility for this "customer service." The Manual foresees these difficulties. J&B foresees them no less (at least by inference, justifying submission to the jury)

2) Ancillary Agency Doctrines

The Akins court, op cit, most concisely in its footnotes, but throughout the opinion, points to ancillary agency doctrines. The ancillary principles asserted by and never objected to until the day before trial include:

a) **"Aided by the existence of the Agency relationship,"** even if not in the course and scope of duty."

> Testimony of Ms. Jones' "assistance by the existence of the agency relationship" was certainly placed into evidence. First, the spatula, otherwise described by some witnesses, made the attack possible. While another implement might have been used to equal effect, it is certain that any weapon or utensil used by Ms. Jones would have had to come from the restaurant, which she never left. Further the locking of the door aided Ms. Jones in keeping irate relatives out of the fight. This locking of the door was certainly an effort to serve the interests of the master, though it violated safety, security, and common sense factors. TR. 90-291.

b) Apparent Authority

Adams addresses apparent authority as well. Apparent authority indicates that if an agent has apparent authority (McDonald's on her shirt; her position by the cash register) and the Plaintiff relies on it (clearly the case here) then a principle escapes no liability for fraud of the agent. Id, p. 584

In the case al bar, Ms. Jones represented that she would assist Plaintiff. TR. 159. Plaintiff had no reason, (given the McDonald's shirt, etc.) to disbelieve her and relied on Ms. Jones' representation. The promise was untrue and resulted in detriment to Plaintiff. See commentary to MRCP 9.

All of this was testified to by Mr. Newcomb, TR. 291.. Other corroborative testimony can be found at TR. 133-34, in the testimony of the Restaurant Franchisee/ Owner, Mr. Byrd.. One final note, apparent agency has no requirement of Ms. Jones actions being in the master's interest. Id. 584.

c) Ratification

Mississippi law also establishes an a posteriori version of Respondeat Superior. If the principle takes such acts after the event complained of that he "justify the belief by a person of reasonable prudence ordinarily familiar with business practices that the agent had authority to perform that particular act and such person had acted to his prejudice or detriment in reliance on his belief of the agent's authority." Mississippi Model Jury Instruction #609-1..

The testimony supporting ratification includes, but goes well beyond the failure of J&B to discipline Ms. Jones. Mr. Newcomb effectively testified that she should have been disciplined, if Plaintiff's testimony were true, TR. 292.The frank admission (or at least suggestion) was that the reason for the failure to discipline was fear of an employee law suit. Id.

Additionally, Mr. Byrd testified to the effect that his employee should not be subjected to racial slurs or assault. TR139. He believed that Ms. Parmenter had assaulted Ms. Jones, so took her part. TR. 123. It is undoubtedly true that racial slurs and assault are not acceptable in any context, but he was the only witness who ever made any such allegation, and the majority of his employee witnesses denied the slurs. Mr. Byrd was not present of the incident. His employee advocacy is certainly a dramatic ratification of Ms. Jones' acts if the existence of the slurs is believed by the jury. It would be, if believed, a mitigation of her actions, if not a proper response. But it is an undeniable ratification by the ultimate Master of J&B, its owner.

All of these agency theories, as well as the assault and battery claim, have been supported by proper testimony, and certainly by the inferences form that testimony. Jury questions are legion, it is admitted. But if there is enough to create a fact question, Directed Verdict must be reversed and the case remanded.

d) Estoppel

Estoppel is the a priori version of ratification. The elements are:

1) belief and reliance on some representation;

2) a change of position as a result thereof; and

3) detriment or prejudice caused by the change of position.

Lucas v. Baptist Memorial Hospital North Mississippi, 997 So 2d 226, 234 (Miss. C.A. 2008).

The record shows that Plaintiff believed and relied on the representation that her often delayed order would be prepared shortly by Ms. Jones. TR. 159. She came into the

restaurant instead of staying in her car, TR. 158-59. This change of position caused susceptibility to attack. TR. 160. Damages resulted, as shown herein.

In sum, all of these questions should have gone to the jury. This case must be reversed for retrial on the agency principles which flow from Respondeat Superior, which were properly plead, and about which testimony was given, supporting, if not proving outright, the elements of the various forms of Respondeat Superior.

c) Negligence causes

Ms. Parmenter believes that these issues, especially as to negligent security and negligent supervision and management have been adequately briefed in her main brief. She will not repeat the proof and argument.

III. EXPERT TESTIMONY AND ADMISSIBILITY OF DOCUMENTS

These issues will be supplemented only:

A) The court erred in De-Certifying Dr. Cooper's expertise and effectively striking his testimony.

This writer certifies to the court that he has searched the case law of all states, the case law of all federal district and circuit courts, as well as the law of the U.S. Supreme Court, and finds no authority in any forum authorizing decertification of a previously certified expert. The bulk of the law deals with certification of experts under the Daubert standard. In the case at bar, Dr. Robert Cooper was certified as an expert in Family Practice.

The "authority" cited by counsel opposite to assert that decertification is proper does not stand for that principle. It simply points out that in limited circumstances, an expert may exceed the scope of his expertise.

Such was not the case herein. In fact and indeed, Dr. Cooper's diagnosis and assertion of proximate cause of damages were corroborated by Defendants' expert, Dr. Trudi Porter. It is therefore particularly disingenuous of Defendants and harmful error by the court to object to and prohibit the reading of Dr. Porter's in the record initial analysis and diagnosis of Plaintiff. It is plain error or, alternatively, abuse of discretion not to permit the reading under MRE 803 (3) and (4), regardless of Dr. Porter's availability, vel non.

At the risk of repetition, the uncontroverted testimony of Dr. Cooper was that PTSD and affective disorders are within the realm of a family practitioner. TR. 76 . Defendants' argument for decertification is defense counsel's voir dire, which the judge overruled. See DEFENDANTS' RESPONSE, pp. 26-28.

Finally, as to waiver of affirmative defenses and the impropriety of MRCP 56 and/or MRCP 15 to avoid these waivers has been sufficiently briefed. This cause must be reversed and remanded for retrial.

IV. SUMMARY JUDGEMENT FOR McDONALDS

With one exception, this issue too has been adequately briefed.

With one exception, this issue too has been adequately briefed. In response to McDonalds' Motion for Summary Judgment, Plaintiff asserted collateral estoppel or "issue preclusion" on the question of McDonald's liability through agency principles/Respondent Superior to any allegedly injured Plaintiff. See Record Volume 3, pp. 324, et seq.

In her principal brief before this Court, Parmenter raised the issue again at pp.6-8. Now, Plaintiff argues collateral estoppel for the third time as to McDonalds' agency relations with the Holly Springs restaurant.

Conversely, Defendant McDonalds Corp. has never addressed this issue or cited any authority to rebut Plaintiff's claim that McDonalds was collaterally estopped from denying their position of Respondeat Superior.

The failure of McDonalds Corp. to cite authority opposing collateral estoppel implicates a procedural bar to this Courts consideration of a defense against collateral estoppel. Broadway Inn Exp. v. Advanced Const. Technologies Ltd, 29 So 3d 104, 107 (Miss App 2010) citing to Ruff v. Estate of Ruff, 989 So. 2d 366, 372 (Miss. 2008). See also MRAP 28(b).

Such a procedural bar compels the estoppel of Summary Judgment in McDonalds' favor. Hence, this appeal must result in reversal and remand as to the liability of McDonalds' Corp. for its franchise in Holly Springs.

Plaintiff is compelled to admit that the law of collateral estoppel or issue preclusion is complex, with appellate decisions on multiple sides of the issue in Mississippi's appellate courts. The silver lining for Plaintiff is that the complexity of the body of law on collateral estoppel takes the procedural bar outside of the "plain error" exception to the bar found at MRAP 28(a)(3).

On this basis alone and/or in combination with Plaintiff's other assignments of error regarding the Summary Judgment granted to McDonalds Corp., Plaintiff requests reversal and remand as to McDonalds liability. Plaintiff will illustrate the validity of this request for estoppel under Mississippi law.

In Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971), the High Court permitted the use of collateral estoppel on an issue previously decided against the Plaintiff Foundation by a different Defendant. This doctrine was labeled "non-mutual collateral estoppel."

In Mississippi, a seminal case on collateral estoppel is Jordan v. McKenna, 573 So. 2d 1371,1375 [1990). The basis of collateral estoppel listed in Jordan , Id. is:

Notwithstanding recent ferment around its periphery, see McCoy v. Colonial Baking Co., Inc., 572 So. 2d 850 (Miss. 1990), collateral estoppel's core has been settled in this state for years. For example, [W]here a question of fact essential to a judgment is actually litigated and determined by valid and final judgment, that determination is conclusive....[against the party against whom it was made] in a subsequent suit on a different cause of action.

Garraway v. Retail Credit Company, 244 Miss. 376, 385, 414 So. 2d 727, 730 (1962); Dunaway v. W.H. Hopper & Associates, Inc., 422 So. 2d 749, 751 (Miss. 1982); Magee v. Griffin, 345 So. 2d 1027, 1032 (Miss. 1977). The unsuccessful party is precluded from relitigating the fact so found. Offensive use of collateral estoppel by one such as Marie is likewise allowed, at least in core cases such as this. Parklane Hoslery Co. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed. 2d 552 (1979). [Emph. Added].

CONCLUSION

This case has now been fully briefed. Plaintiff/Appellant admits, as shown by Appellees, that there is conflicting evidence in the record. From that conflicting evidence, multiple inferences may be drawn. Plaintiff might have lost the case if it were submitted to the jury. Conversely, a reasonable juror could also find that J&B Enterprises and/or McDonalds Corp. were liable for their agent's real or apparent authority through Respondeat Superior or related agency principles. Damages were provided by Dr. Cooper's fact testimony inter alia, about his fees, and proximate cause could be inferred from the testimony of Plaintiff, Dr. Cooper, and other witnesses.

The same reasonable juror could similarly find Defendants negligent as to security and management. Even negligent training and hiring of Ms. Jones could be inferred.

Hence, the standard for directed verdict was not met. The verdict was error and must be reversed and remanded as to J&B and McDonalds. Plaintiff/Appellant so prays.

CERTIFICATE OF SERVICE

I, Carnelia Pettis-Fondren, one of the attorneys for Kerri Paramenter, Appellant herein, do hereby certify that I have this day served true copies of the above and foregoing Appellant's Reply Brief, Memorandum of Law and Authorities, Record Excepts, and an electronic disk of the same, postage pre-paid to the following persons at their usual business addresses:

Paul Blake, Esq.
80 Monroe Avenue
Suite 800
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Hon. Henry Lackey,
Retired Circuit Judge
Post Office Drawer T
Calhoun, MS 38916

1st day of August 2011
Date

Carnelia Fondren
Carnelia Fondren

CERTIFICATE OF SERVICE

Appellants' Reply Brief to be filed by deposit in the U.S. Mail, first class or more expeditiously pre-paid, or hand delivery together with all ancillary documents required MRAP 28 (c) and 25 (m), electronic disk in PDF or Adobe format.

So certified thisi the 1st day of August, 2011.

Carnelia Fondren
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