IN THE MISSISSIPPI SUPREME COURT

KERRI PARMENTER **APPELLANT**

V. **CAUSE NO. 2010-CA-01251**

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

Appellant's Chief Memorandum of Law and Authorities.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed person have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

Kerri Paramenter, Plaintiff/Appellant
Dana Churchill, Former Plaintiff
Reid Wamble, Esq. Counsel for Dana Churchill
Hon. Kent Smith, Plaintiff's original Attorney
Hon. Amanda Whaley Smith, Plaintiff's original attorney
Smith Whaley, P.L.L.C., Plaintiff's original attorney
Stewart Guernsey, Esq., Plaintiff's Substitute Council
Stewart Guernsey, J.D., MDiv, LLC, Plaintiff's Substitute Counsel
Carnelia Fondren, Esq. of Counsel to Plaintiff
Fondren Law Firm, of counsel to Plaintiff
Hon. Henry Lackey, Circuit Judge

McDonald's Corporation of American, Defendant/Appellee
McDonald's of Mississippi, Inc. Former Defendant
Byrd Enterprises, Inc. Former Defendant
James Byrd d/b/a McDonalds of Holly Springs, former Defendant
J&B Enterprises, Inc. Substituted Defendant/Appellee
Leiter, Williams, Dooley and Napolitan, Pllc, Counsel for all Defendant/Appellees
Launa Gray Brubaker, Esq. Counsel for all Defendants/Appellees
Paul Blake, Esq. Counsel for J&B Enterprises, Inc and all Appellees
Jay M. Atkins, Esq., Counsel for J&B Enterprises, Inc. and for all Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITES

Case or Authority: **Page #:**
CASES:

Statement of Issues

AMENDED AND CONSOLIDATED STATEMENT OF ISSUES ON APPEAL

1. **Did the trial court err by granting summary judgment to McDonalds, Inc?**

2. **Did the trial court err by granting a directed verdict when substantial evidence of agency principles, Defendant's liability, and Plaintiff's damages were plead and elicited by Plaintiff?**

3. **Did the trial court err by permitting an affirmative defense which had long since been waived and denying precedential value to a recently published opinion of the Mississippi Court of Appeals dealing with the precise issue of waiver?**

4. **Did the trial court err by placing the burden of allocation of the affirmative defenses of comparable negligence or pre-existing damages on plaintiff?**

5. **Did the trial court err by certifying a treating physician as an expert and then discrediting and decertifying him sua sponte?**

6 **Did the numerous and cumulative errors and omissions made by the court required reversal?**

Statement of the Case

Kerri Parmenter, Plaintiff/Appellant, walked into McDonalds Restaurant in Holly Springs on August 11, 2000, after waiting outside in the "drive thru" line for a length of time she believed to be excessive. After the "drive thru" window she was asked to pull forward. After a further delay, Ms. Parmenter went into the McDonalds to check on her food. After still further delay, Plaintiff requested to see the manager. The employee who was asked to get the manager was Kesha Jones, listed al R. 105 as a cashier. (Her job title is later sworn to be "cook" by the owner of the franchise in question). (TR. 129). However, the Supervisor of the Holly Springs Restaurant testified that Ms. Jones was "cross-trained" to be a cook or a cashier. He didn't know what her job title was, but he assured the Court that she was capable of performing either job. (TR. 287). This discrepancy and several others will be discussed at more length in the Argument, to spare proclivity herein). After requesting the assistance of the manager, Ms. Parmenter watched as Ms. Jones "went back around the counter, fumbled through the utensil bin and got the big spatula and come [sic] back around the counter." R.105. Ms. Jones returned to the customer area, (the "other side" of the counter) where she struck Plaintiff, in the face, R.105. It should be noted that (R.105) is a portion of Defendant's McDonalds Statement of Undisputed Facts filed with their Summary Judgment Motion and later adopted by all Defendants as a "joint memorandum of law." R, p.205.

After the Complaint was filed on August 11, 2003, the Record shows an extensive history of Motions, Responses, Discovery and hearings leading to the First Trial Setting of April 1, 2008. CD-13, (Volume 1 of Records). Thereafter, the Court uniformly granted continuances to all Defendants, finally beginning trial on May 11, 2010. T.R. 1, (Volume

5). Plaintiff on Appeal seeks review, of two orders in particular: the Order Sustaining Motion For Summary Judgment, filed on 12/21/07. This order concerned McDonalds Corp., (of America), and is recorded at R. 421-22, (Vol.4). The second order is the Order Granting Defendants Motion For Directed Verdict, entered on June 3, 2010. (R. 452-53, Vol. 4). Finally, to the extent that the Court relied on Plaintiff's Motion For Summary Judgment made in chambers on May 11, 2010, (Tr. 2-3, Vol. 4) and found at (Tr. 336-37, Vol. 7), Plaintiff objected to the implicit orders incorporated in the Order granting directed verdict. (R. 452-53, Vol. 4).

Additionally, Ms. Parmenter relies on multiple, serial, and repeated errors made by the trial court which, taken together implicate a bias by the trial court and a need for remand. When conjoined with the major, reversible errors named, Plaintiff asserts that the "minor" errors require reversal and remand.

A final, personal note from this writer is in order. Despite the errors which Plaintiff vigorously asserts, Hon. Henry Lackey, Circuit Judge, remains a friend. His ready smile and unquestioned integrity have been a model to this writer since the late 1970s. Despite the regrettable errors asserted herein, counsel regrets Judge Lackey's necessary retirement and hopes to continue a friendship of forty years.

Summary of Argument

Ms. Parmenter, by counsel, asserts that the trial court erred by granting summary judgment to McDonalds (of America), Inc. There are four specific arguments to be made by Plaintiff: 1) McDonalds does control the operation of the franchise by its Operations Manual; 2) J & B Enterprises, Inc., despite the loud and frequent disclaimers of its owner, is bound by a Franchise Agreement with McDonalds to follow the manual; 3) "McDonalds" stamped on the uniform or every employee of J & B Enterprises, creates an "apparent agency"; and 4) collateral estoppel should adhere due to the finding of the same trial court, (different Judge), regarding the identical issue.

The trial court misconstrued Plaintiff's pleadings under a harsher "fact finding" standard than Mississippi's "liberal notice pleading" standard. Viewing the Complaint herein objectively, it meets the elements of pleading as to agency principles of "apparent agency;" "actual agency," assisted by the implements and policies of J & B and McDonalds as added to the course and scope of its employees assigned tasks and "cross training"; "estoppel" to deny agency; and "ratification" of its agents' acts; as well as the pleadings of negligence in security and management.

Despite clearly asserted case law to the contrary, the trial court erred in permitting an unwritten Motion for Summary Judgment, a statue of limitations defense long since waived as to intentional torts, and agency principles related thereto, and the granting of a Motion to Amend, purportedly justifying the waived affirmative defense. Each of these errors is plain.

Ms. Parmenter attacks the "decertification" of her treating physician as an expert in "Family Medicine," as well as the discrediting of the doctor as a fact witness. While

there is no authority which has been raised as to this "reverse gate-keeping", nor any authority in Mississippi law which Plaintiff can find, the removal of the "fact" testimony from the jury's role as fact-finder is patently erroneous and reversible. The discrediting of Dr. Cooper is outside of the trial judge's role, especially after an initial certification.

The affirmative defense of allocation/apportionment of fault and damages must be proved by the pleader. The wrongful assignment of this burden to the Plaintiff, who admittedly made no effort to establish any such allocation/apportionment, relying on MRCP 8, common law, and case law, is patently erroneous and cannot stand.

Plaintiff will further point out numerous intermittent errors by the court which; combined with the reversible errors cited above require reversal in light of His Honor's duties of preparedness, non-bias, and fairness. Included, but without limitation as to argument in this Memorandum, are: 1) the courts extraordinary statement of December 19, 2007, (R421, Vol. 4), that the alleged assault in the case was merely "the use [of] this instrument....with which all mothers of young children are acquainted." 2) the trial courts overruling of an agreement made between counsel for the parties; (Tr. 11, Vol. 5); 3)the Hon. Judge's acknowledgment that he had not read "the complete file," (Tr. 3, Vol. 5); 4) the Judge's acknowledgment of a "hearing" disability, (Tr. 48,Vol 5); 5) the Judge's further difficulties in hearing the evidence;(Tr. 149 Vol. 5); 6) the Judge's refusal to allow into evidence the reading of an IME already in the Court Records at (R. 368-375); and 7) granting the defendant's motion for directed verdict despite facts and inferences from which a reasonable juror could rule in plaintiff's favor; (Tr. 216, Vol. 6).

Argument of Kerri Parmenter

1. **Did the trial court err by granting summary judgment to McDonalds (of America) Corporation?**

Yes, the trial court erred in granting summary judgment to McDonalds despite material issues of fact presented by Plaintiff and despite a prior order of the same court as to the same issue. The trial court disregarded the questions raised by Plaintiff as to the right of McDonalds to control the daily operation of its franchise by its Operation of its Franchise Agreement with J&B Enterprises, Inc. The Court ignored stated questions as to the "apparent authority" of J&B employees to act for McDonalds, and the trial Court ignored Plaintiff's arguments re collateral estoppel, in toto.

Ms. Parmenter will first examine the argument regarding control of J&B employees by the McDonalds' Operating Manual and the Franchise Agreement. See (R. 273, el seq, Vols. 3 and 4). The Franchise Agreement, p. 1, clearly states that the "essence of this Franchise is the adherence by Licensee to Standards and policies of McDonalds providing for the uniform operation of all McDonalds' restaurants within the McDonalds' System." (R. 306, Vol. 3). Further, "...the Restaurant shall be operated in conformity to the McDonalds System through strict adherence to McDonalds' standards and policies as they exist now and as they maybe from time to time modified." (1d). The Franchise incorporates the Manual at p.2. (Id). McDonalds, at p.8 of the Franchise (Id.), reserves the right to "enter and take possession of the Restaurant" for any material breach of the Franchise Agreement. The lease, Exhibit "A" to the Franchise Agreement, requires operation of the restaurant "strictly in accordance with the terms and provisions of the Franchise Agreement. "(Id). If nothing else, the above requirements clearly express the

control of McDonalds' Franchisees' daily operations. Combined with detrimental reliance and the reasonableness of Plaintiff's reliance on the "appearance of authority" granted by McDonalds. See Eaton v. Porter, 645 So. 2d 1326, 1325 (Miss. 1994); McFarland v. Entergy, Docket # 2003-CT-00538 SCT (Miss. 2005), Plaintiff 26. See along Monts v. Moran Industries, Inc., 1995 WL 1945471 al *2 (N.D. Miss 1995). Any disputation between McDonalds and Plaintiff as to "course and scope" of duties of employees is properly a jury question. Eagle Motor Lines, Inc. v. Mitchell, 78 So.2d 482, 485. Further, "[w] here the injurious act complained of is not so separated by time and logical sequence from the business of the master as to make it a separate and independent transaction, the master is not relieved of liability. Where the whole transaction, as here consumers only a few moments and has all the features constituting one continuous and unbroken occurrence, a master is not relieved of liability because the servant stopped outside of his authority." This rule applies equally to an act or J&B as agent or "apparent agent" of McDonalds as to employees of J&B as their real or "apparent agency." Such a question is properly left to the jury. Indianola Cotton Oil Co. v. Crowley, 83 So. 409, 410 (Miss. 1920). These are specific factual disputes alleged by Plaintiff and material to the determination of all issues herein.

Finally where "identical issues," i.e.-"apparent authority," "course and scope of duty" are ruled on in prior cases, the prior rulings constitute collateral estoppel. Mayor of Ocean Springs v. Homebuilder's Assn, 932 So. 2d44,59 (Miss. 2006).

For reasons unknown to Plaintiff, the learned trial judge declined to address even one of these material issues in dispute. MRCP 56. For this reason, and because the issues were presented in Plaintiff's Response to McDonald's Motion for Summary for Directed

Verdict), this case must be reversed and remanded for hearings regarding McDonald's liability and damages attributable thereto. Judge Howorth of the same court had previously denied summary judgment based on the same issues. (R. 289, Vol. 3).

2. **Did the trial court err by granting a directed verdict when substantial evidence of agency principles, Defendant J&B Enterprise breach of duties, Plaintiff's resultant injuries and the probable cause of those injuries by Defendant's breaches were properly plead and evidence elicited thereto by Plaintiff?**

Yes, the trial court committed plain error by granting directed verdict in favor of J&B Enterprises and against Plaintiff. The standards for granting a Directed Verdict are found al MRCP 50 and the Comment thereto. The Comment asserts. "The rule enables the court to determine whether there is any question of fact to be submitted to the jury and whether any verdict other than the one directed would be erroneous as a matter of law....This provision requires that the motion for a directed verdict state the specific grounds therefore..."

"Rule 50 (a) also provides " ....the court should look solely to the testimony on behalf of the opposing party; if such testimony, along with all inferences which can be taken therefrom, could support a verdict for that party, the case should not be taken from the jury." See Fox v. Smith, 594 So. 2d 596 (Miss. 1992), for the proposition that a directed verdict should not be used to dispose of a case where questions of fact are raised in the proof at trial since questions of fact are for a jury. See also Fulton v. Robinson Industries, 55 4 So. 2d 170 (Miss. 1995), asserting that all evidence must be considered in

the light most favorable to the non-moving party, giving that party the benefit of all favorable inferences that could reasonably be drawn therefrom. Also Regency Nissan, Inc. v. Jenkins, 678 So 2d 95 (Miss. 1996), which adds that when contradictory evidence exists, the court must defer to the jury.

Much of the argument made in Issue 1, SUPRA, overlaps with this argument. Many of the same allegations against McDonalds, Inc., are asserted in testimony against J&B, much of it adverse testimony.

For the first time in their unwritten renewed request for Summary Judgment, Defendant claims that Plaintiff's pleadings are not adequate to assert a charge based on agency principles. This is simply wrong. See MRCP 8 (a). At Section XVII, the Complaint alleges that "J.B. (sic) Enterprises" is liable to Plaintiff. It also alleges, negligence on behalf of J&B in four particulars:

1) Negligent hiring of Kesha Jones;

2) Negligent training of personnel;

3) Negligent supervision and control of the premises and

4) Negligence in failing to provide adequate security.

All defendants specifically denied all allegations of negligence, and generally denied any other claim. While they asserted an affirmative defense of "failure to state a claim," they did not assert a statute of limitations defense, although the Complaint clearly asserts intentional tort, attributable to defendants under agency principles, (i.e. Respondent Superior). Further, intermittently throughout the pre-trial litigation, Ms. Parmenter asserted Respondent Superior and related agency principles.

For example, at (R290, Vol. 3), Plaintiff in Response to J & B's initial (and later "renewed") motion for summary judgment, specifically asserts assault and battery as "the subject of this litigation." She specifically claims that, based on testimony by Mr. Byrd, the owner of the franchise, Kesha Jones was acting within the course and scope of her employment. She does not relate whether this implicates her apparent authority, whether J & B's liability is the by Mr. Byrd's ratification, or because J & B is estopped from denying course and scope. There is a strong implication of Ms. Jones' assault being aided by her employment; specifically, Mr. Byrd's testimony that the spatula is an instrument used in cooking or "grilling". Each of these theories was "noticed" by the filing of jury instructions on the first day of trial. They are well within the ambit of the pleading of the Complaint. And each was re-asserted in oral argument on the directed verdict motion.

At (Tr. 324-25, Vol. 7); Plaintiff asserts that the case includes an intentional tort aspect, as well as, negligence. The argument regarding "course and scope" where the employee is "aided by the existence of the agency relationship," is bolstered by citation to Jones v. B. L. Development Corp.; 940 S0. 2d 961 at Plaintiff 20; (Tr. 325, Vol. 7). Plaintiff, by counsel, referred to her jury instructions for support of her claims of estoppels and ratification. (Id.)

Next, Plaintiff argues regarding negligence. Counsel refers to the testimony of J&B Supervisor Ron Newcomb as to two specific dangers created by the operation of the restaurant on August 21, 2000, (Tr. 326, Vol 7), referencing (Tr. 290-91 Vol. 6) locked doors creating a danger and operating against the mandatory policy, (Tr. 286, 290, Vol. 6). At (Tr. 291, Vol. 6), Mr. Newcomb testifies to one element of apparent authority, at

(Tr. 287, Vol. 6) he testifies to another. The entirety of Ms. Parmenter's testimony and of Dr. Cooper's testimony regards the third and final element. That is, Mr. Newcomb testifies to J&B's authorization by cross- training of Ms. Jones and to the reasonableness of assuming the has authority to assist the customer. As to negligence, he establishes both a duty and a breach of duty as to management and security. He touches on ratification by inaction, (Tr. 292, Vol. 6), which is significantly embellished by Mr. Byrd (Tr.131,138-9, Vol 5) and Ms. Kinkle, a former employee, at (Tr. 198, Vol. 6). Mr. Byrd further testifies to elements of apparent authority at (Tr. 143, Vol. 5) and (Tr. 134, Vol. 5).

As suggested above, the agency principles asserted by Plaintiff, and the elements of each principle, are:

1)"apparent authority"-citing Section 219 (2)(d) of the Restatement (Second) of Agency:

a) a master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

b) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existences of the agency relation.

See also Jones v. B.L. Dev. Corp, 940 So. 2d 961, 967 (Miss. App. 2006), Farragher v. City of Boca Raton, 526 U.S. 775 (1998).

The first portion of (2) (d) outlines the elements of "apparent authority."while the second clause offers an alternative route. There is certainly a fact question as to whether Ms. Jones "purported to act or speak on behalf of the principal." There is also a fact question as to whether she "was aided in accomplishing the tort by the existence of the agency relationship". While later cases require "reasonable reliance," "acts of the

employer" creating the apparent authority; and detrimental reliance, Summerall Electric Co. v. Church of God al Southaven, 2008-CA-02120-COA, Para. 25, et seq, (MSCA, 2010), the facts testified to as cited above, imply these added requirements as well.

Apparent authority is a question reserved for the jury. O.W.O. Investments, Inc. v. Stone Inv. Co. Inc, 32 So 3d 439, 447 (Miss. 2010).

2) Ratification- Plaintiff cites to Autry v. State , 689 So.2d 84, (Miss.1997):

¶10 Further , assuming arguendo that Autry is correct in his assertion that service of process was improper because Byers was not his authorized agent for that purpose, Autry ratified Clay Byers as his "agent" for service of process by his payment of the forfeited bond. "The subsequent acts of the principal may be equivalent to prior consent to the delegations of authority." 3 C.J.S. & 264 (1973). "Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." Carter v. Hurst 234, So.2d 616, 620 (Miss. 1970). See also Gulf Refining Co. v. Travis, 201 Miss. 336, 29 So.2d 100, 104-05 (1947). [Emph. Added].

Finally, the question of ratification of an agent's acts is not to be taken from the jury. Allen v. Ritter, 235 So. 2d 253 (Miss 1970), cited at Royal Oil Co., Inc. v. Wells, 500 So. 2d 439, 447 (Miss 1986).

3) Estoppel is the a priori equivalent of ratification. It is closely akin to apparent authority. As set out in Lucas v. Baptist Hospital Memorial Hospital North Mississippi, Inc. 997 So 2d 226, 234 (Miss. C.A., 2008) set out the elements of estoppels as "(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." These principles apply

to a "representation" of agency, as shown in the instant case by Kesha Jones' geographical position near the cash register, her uniform, and her "cross-training." While estoppel is raised as an "agency principle" herein, it should also apply to Defendant's attempt to amend their Answer and/or Motions to Dismiss and for summary judgment. More on that below.

The only grounds argued for the directed verdict are that the instant case falls into the fact pattern of Adams v. Cinemark U.S.A., 831 S0.2d 1156, (TR.323, Vol.7). Plaintiff distinguishes Adams at (TR.325, Vol.7). Next, defendant argues that the employers must be responsible for the acts of the employee for respondent superior to apply. (TR.327, Vol.7). This, of course, puts the cart before the horse. If respondeat superior applies, then the employer is responsible for the acts of the employee.

Next, respondeat superior wasn't properly pled, says defendant. Defendant never instructs the court of the specific deficiencies in the complaint. "Improper pleading" is repeated several times. "...but if it had been properly pled, then that means that their contention is that we're responsible for the intentional conduct of Kesha Jones." Id.ab327-28. Precisely what plaintiff has asserted. Appellant agrees.

Then, defendant makes a "technical, straight up statute of limitations argument." (TR.328, Vol.7)."... It's not properly pled. If it is properly pled it's barred by the one-year statute of limitations...." IBID, not a drop of analysis is offered regarding "waiver."

Next, defendant addresses negligence. The sole point in negligence analysis is a want of evidence regarding the propensity of Kesha Jones for violence. (TR.329, Vol.7). This argument of course, totally ignores plaintiff's point that the McDonald's Manual, has a complete section regarding dealing with upset customers. Does McDonalds not

foresee such events? Of course they do. That is why they require that such matters be turned over to a manager. Is this not an inference of foreseeabilty?

Assuming arguendo that Ms. Jones' actions were not foreseeable and that the proof leads to no such inference, what about ratification? What about "apparent agency, aided by the existence of the agency?" Was she within the scope and course of her duties? Whether she was acting within the course and scope of duties is a jury question. Indianola Cotton Oil Co. v. Mills 83 S0 409 (Miss.1920), Interstate Co. v. McDaniel, 173S0.165,166 (Miss 1937). If a tortious act is a part of one continuous occurrence, the master is not relieved of liability. Was the incident one continuous occurrence, making it within the course and scope of Ms. Jones' duties?

And what about negligence? Defendant would grant that if there is no evidence of Ms. Jones' violent propensities, there is no negligent hiring...unless, there is evidence of incompetency. See Hamilton Bros. Co. v. Weeks, 124 S0.798 (Miss.1929). But there are still negligence in training, negligence in provision of security, and negligent management. Surely the testimony of defendant's own Supervisors can be used to create inferences. See Mr. Newcomb's testimony ab (TR.289-92, 294-96, Vol.6), and (TR.301-05-307-09, 311-12, Vol.7) in each of these passages, Mr. Newcomb explained why policies and problems were in running a restaurant, and the course and scope of each employee's duties. Surely, there was inference of forseeability in his testimony. How about p.312, Q. "So it was within the scope of her employment to try and resolve [Ms. Parmentes'] problem? A: If she was approached with it, yes."

3) **Did the trial court err by permitting an affirmative defense which had long since been waived and denying precedential value to a recently published opinion of the Mississippi Court of Appeals dealing with the precise issue of waiver before the court?**

Yes, the trial court committed plain error by permitting the issue of the statute of limitations, long since by Defendant to be "amended in." Further, the trial court failed give precedential value to the decision of a higher court.

To the extent that Issue 4 is an "Affirmative Defense" issue, the law and authorities cited in this section are equally relied on as to allocation of burden of proof and apportionment of fault. While obviously a different issue, the nature of affirmative defenses as laid out in MRCP 8 is common to both.

The trial court committed a series of patent errors regarding Defendant's "statute of limitations" defense. It must be noted that: 1) intentional tort is specifically plead at paragraph XIII. of the Complaint, (R. 4, Vol 1): "That Plaintiff's cause of action arises in tort as a result of injuries and damages proximately caused by the Defendants...." As to the specific Defendant, J&B Enterprises, see section XVII, (R.6, Vol.1), cited SUPRA. While Defendants deny the allegations at both sections in their Answer, (R. 40-1, Vol.1), the phrase "statute of limitations" is nowhere found in their Answer or their various Motions to Dismiss or for Summary Judgment. Nor does the phrase arise after extensive discussion of intentional tort was asserted in Plaintiff's Response to J&B Enterprises' Motion for Summary Judgment, (R. 290-319, Vol.3). Plaintiff reasonably relied on Defendant's waiver of this issue. It was clearly waived by Defendant long before the date of trial.

MRCP 8 specifically requires that "a party shall set forth affirmatively...statute of limitations...and any other matter constituting an avoidance or affirmative defense." While the Commentary makes clear that this is an "inclusive, but not limiting" list, it clearly names "statute of limitations." Plaintiff fairly believed that the issue was finally waived by the court's denial of summary judgment to J&B. (R. 423-24, Vol. 4).

Plaintiff cited to the trial court the case of Lopez v. McClellan, 2008-CA-01857, (Ms. C.A., 2010), then the most contemporary case on summary judgment, requiring adherence to MRCP 56. While Defendant sought to "wiggle out" by claiming they weren't re-arguing summary judgment, merely seeking to amend, (presumably their Answer) to assert the statue of limitations. This, of course, is a bald attempt to avoid the waiver of "statute of limitations" effected long before the motion to "amend."

Plaintiff, by counsel, also cited to E. Miss. State Hospital v. Adams, 947 So. 2d 887 (Miss. 2007) in which the Supreme Court found waiver where the affirmative defense was raised in the Answer, but not actively pursued. The Court found that the defense was waived. Also cited was Hudsel v. City of Jackson, 33 So. 3d 1116(Miss. 2010), where the Court decided that failure to plead an affirmative defense, absent a reasonable explanation for the failure, constitutes waiver. Hence, the trial court was on notice of the facts and the law, but went through contortions to allow an unpled affirmative defense. This is not the law of the state of Mississippi. It is plain, reversible error and requires reversal and remand.

Additionally, the Court sought to avoid stare decisis by disregarding the Lopez decision since, in the learned Circuit Judge's opinion, it was not "final", although the Supreme Court could have reviewed the decision on certiorari. Writ of Certiorari is

reserved primarily for a case in which the Court of Appeals has failed to follow its own or the Supreme Court's prior decision. The trial court was obliged to follow Lopez, not to find a way around it. This, too, is plain, reversible error and offends the high office to which a trial court is appointed.

4. Did the trial court err by placing the burden of allocation of the affirmative defenses of comparable negligence or pre-existing damages on plaintiff?

This question is more clearly stated in an abbreviated form: Did the trial court err by placing the burden of proof of apportionment of damages on plaintiff?

Yes, the trial court committed plain, palpable error by placing the burden of proof of apportionment of damages on plaintiff. Apportionment of damages, first, is an affirmative defense, which defendant herein pleads vaguely, but sufficiently. See Eckman v. Moore, 876 50.2d975, 989 (Miss. 2004), citing Pearl Public School District v. Groner, 784 50.2d 911, 916 (Miss. 2001) to show "apportionment is an affirmative defense that must be plead and proved. This court has held that it is fundamental that the burden of proof of affirmative defenses rests squarely on the shoulders of the one who expects to avoid liability by that defense."

The affirmative defense of apportionment could only benefit defense. Therefore, it is J & B's burden to prove. Since they put on no proof prior to directed verdict, they obviously did not prove the defense of apportionment. The reversal of burdens of proof of apportionment requires reversal of the trial court's order and remand for retrial.

Further, the deference required to be given to a non-moving party in a directed verdict proceeding would certainly require that the issue go to the jury. When, as the judge properly found, there is no proof of apportionment, then the defendant is "hoist

with their own petard." As to the law, the burden of proof to show apportionment is on the defendant. Absent such a showing, all damages should apply to defendant. It is only defendant, not plaintiff, who can be faulted. And defendant never had an opportunity-(certainly as a result of their own voluntary motion)-to prove apportionment.***

5. Did the trial court err by certifying a treating physician as an expert and then discrediting and decertifying him sua sponte?

Yes, the trial court committed reversible error by sua sponte decertifying plaintiff's treating physician as an expert who the court had insisted on treating as an expert ab initio, and further discrediting his testimony, which is not the judge's role.

At the beginning of Dr. Robert Cooper's testimony, counsel for Ms. Parmenter sought to introduce Dr. Cooper as a treating doctor (TR.70, Vol.5). The court indicated a belief that a treating doctor should be certified as an expert, (TR .70-1, Vol. 5), so plaintiff tendered the doctor. After extensive voir dire by defense counsel, and brief questioning by plaintiff's counsel, the trial court certified Dr. Cooper as an expert in the field of family medical practice. (TR 79, Vol. 5).

Plaintiff has strenuously searched the record for a motion regarding decertification. There is none. Except for a few words by the trial court at (TR.341, Vol. 7), there is no mention of "decertification" of Dr. Cooper. The comments are referred to as "rambling" by the judge.

Plaintiff asserts that the court has no authority to decertify an expert sua sponte. The case law supports deference to a treating physician and harmless error analysis when the treating doctor opines without certification as an expert. There is certainly no Mississippi authority to decertify a treating physician, certified as an expert in his field.

Neither is there any authority for discrediting a treating physician's testimony. The weight and credibility given to a witness is the role of the jury, not the judge. As a reason for reversal, the discrediting of a treating doctor by the court is reversible.

As to one other issue, the trial court would not permit the reading in the jury's presence of a purported independent medical exam by a defense expert, which evaluation was already in record. Plaintiff confesses, in the cool recesses of time passed, that there was no need to read Dr. Porter's entire deposition into the record. But the initial evaluation would have raised the issue of apportionment, perhaps giving some clarity there, as well as dismissing any of the jury's lingering doubts about plaintiff's credibility. It also would have quenched the judge's thirst for psychological expertise. For the discussion of reading the IME and/or the deposition into the record, see (TR.149-54, vols. 5 and 6). For the 1ME in question, see (R.369-375, Vol.3).

The trial court presented plaintiff with numerous, Hobson's choices in this matter and throughout the litigation herein. As to the current issue, the initial dilemma was whether to assert Dr. Cooper as a fact witness or an expert. Following the Court's direction, counsel tendered Dr. Cooper as an expert, to which the court certified.

It is well within the authority of case law to use Dr. Cooper's testimony in either way. As this Court found in APAC v. Johnson, 15 70.3d 465, 471-72 (Miss. C.A., 2009) a witness may testify as a fact witness under MRE 701 or under MRE 702 as an expert. In Griffen c. McKinney, 877 70.2d 425, 438 (π 46) (Miss C.A. 2003), the court found no error in permitting a doctor to testify as a "lay expert". It did limit the doctor to opinions "rationally based on the perception of the witness." Dr. Cooper never strayed from these bounds.

Going a step further, the MS Supreme Court ruled in Foster v. Noel, 715 So.2d 174, 183 (Para. 54) (Miss. 1998) that any error was harmless in permitted a treating physician to opine about his treatment, especially where there is bolstering evidence from other witnesses.

Neither can this writer find any authority permitting "decertification" of an expert, particularly sua sponte. It gives the appearance of seeking a desired result. It is unseemly.

But there is ample law as to the roles of judge and jury. The comments to MRCP 50 begin: "simply stated, it is the law in Mississippi that questions of fact are the jury and questions of law are for the court." Cantrell v. Lusk, 73 70 885(1917). It is a rule as old as our state that the jury alone determines the weight and creditability of a witness. See Solanke v. Ervin, 21 50.3d 552, 568 (Miss. 2009), and internal cites there listed; Solanki also states the standard for directed verdict as de novo on appeal and at trial, the judge must "look solely to the testimony on behalf of the party against whom a directed verdict is requested. He will take such testimony as true along with all reasonable influences which can be drawn from that testimony which is favorable to that party, and if it could support a verdict for the party, the direct verdict should not be given. If reasonable minds might differ as to this question, it becomes a jury issue." Id., ab 556, The Court goes on to say "{a} motion for directed verdict shall state the specific grounds therefore." Id at 557.

Numerous inferences could be drawn from such testimony. How about p.312: "Q:...it's because arguments can happen between customer and staff who aren't properly trained to be a manager [that a manager must be present at all times].

A: Right. "Inference: Ms. Jones, not being properly trained, was likely to get into a fight with an irate customer or consider p.308:

Q: if someone was acting outside the scope of their duty would they not be fired by McDonald's?

A: it depends on the seriousness of it. We might talk to them and suspend them for a week to let them think about what they did. It just depends on the seriousness of the situation.

Q: But there should have to be some sort of discipline?

A: yes. Inference: Either the assault on Ms. Parmenter wasn't serious or Ms. Jones should have been punished.

These small inclusive but not limiting, examples of significant substantial differences as to the import of testimony from one witness are intended not to show that plaintiff is right, but that there are genuine fact issues to be decided in this case. If this Court agrees that there are legitimate differences among reasonable people as to the inference to be adopted or as to the interpretation relevant to any issue asserted by plaintiff, then the Court must reverser and remand. If such different inferences or fact testimony are found then the esteemed trial judge has encroached on the role of the jury as to the weight, credibility, and worth of Dr. Cooper's testimony whether it be lay testimony or expert.

One significant piece of testimony, found at (R.369. 75, Vol.3), is psychological evaluation by defendant's expert, Trudi Porter. Dr. Porter, a Doctor of psychology and an attorney, evaluated Ms. Parmenter in this evaluation and had three major findings: 1) Ms. Parmenter was not malingering; 2)a diagnoses of PTSD, (as made by Dr. Cooper),

was probably correctly; and 3) there were numerous stressors in her life, causing apportionment of causation to be quite difficult. Obviously, the report "cuts both ways."

On the one hand, findings 1 and 2 support plaintiff's case. On the other hand, finding 3 tends to bolster Judge Lackey's finding of "impossible to apportion damages." Of course, defendant is entitled to instruct the jury as to apportionment, as may plaintiff but plaintiff has found no direct authority in Mississippi to support directed verdict based on "difficulty" or "impossibility of apportionment."

In any event, plaintiff sought first to read Dr. Porter's deposition , then to introduce the evaluation, and read it into the record. (TR.148-154, Vols. 5 and 6). Defendant objected on the ground of hearsay as to the deposition. Plaintiff south to introduce it on the basis of unavailability, Dr. Porter having moved to Memphis. Judge Lackey sustained defendant's objection despite plaintiff's citation to MRE.

Then plaintiff moved to introduce her briefer report, asserting that it was a Rule 35 IM.E. in its original intent, as evidenced by Dr. Porter's introduction. Since she had not been subpoenaed, the judge disallowed her written report, already in the record. (TR.154, Vol.6).

Plaintiff did cite the Mississippi Rules of Evidence, though not specifically. On the basis of M.R.E.803 (4), the judge erred patently to plaintiff's detriment. On the basis of this error alone, this Court should remand for new trial. It certainly appears from the Directed Verdict that the judge went back and read the report. However, after erring on admissibility of Dr. Porter's report, it seems especially unfair to use the one negative point in the report to stand while the positive points, (from plaintiff's perspective, which is the standard here), are not put in evidence.

No doubt defendant will point out that the Judge had already "confessed" that he had not read the file. (TR.3, Vol.5). Perhaps great minds do think alike and the judge independently arrived at Dr. Porter's conclusion. Unfortunately, he did not also arrive at Dr. Porter's first two points as well. This case must be reversed and remanded for a new trial.

6. Did the numerous and cumulative errors made by the Court amount to reversible error?

Yes as shown above and herein, the trial courts decision must be reversed. This case should have gone to the jury, which is the major error discussed above. See (R.273, Vol 2, through R. 346, Vol. 3, which are hereby incorporated as fully as if copied herein). Appellant continues to assert each and every error contained hereinabove.

But there are numerous errors not contained in the above list. Some are per se reversible. Some might otherwise be harmless error or, at least, "less harmful" error in and of themselves. But in the context of the material differences between the testimony adduced, the case and statutory authorities, and the ruling of the court, partially argued by defendant, the other errors become far more important.

Plaintiff will assert deficiencies in the rulings of the trial Court as related to the high standards expected of judges. These deficiencies are not pointed out for any purpose except to show this Honorable Court what plaintiff was "up against". As alluded above, the trial court frequently created conundrums for plaintiff and obstacles to the fair trial to which Ms. Parmenter was entitled.

Nothing contained herein in any way mitigates this writer's respect, admiration, and friendship for Judge Lackey. To err is, indeed, human. However for a judge to err is, often, reversible.

The omissions and errors alleged are, most particularly in the realm of Canon 3 of the Code of Judicial Conduct, particularly in the area of (non-suspect category) bias, and maintenance of professional competence. This writer, (certainly not a judge) is well familiar with memory and hearing problems, and confesses numerous biases not containing suspect category elements or implications. Though somewhat younger than Judge Lackey, this writer acknowledges the impact of increasing age as a primary cause of these problems.

We begin with Judge Lackey's "confession" SUPRA that he had not read the entire file on the first morning of trial. This implicated the duties of diligence and competency as a judge, found at Canon 3, C(1). The second order, again alluded to SUPRA, implicates bias which is neither racial nor sexual, etc, (suspect category bias, of which Judge Lackey is utterly innocent). In the case at bar, the order granting summary judgment to McDonalds, (R.421-422, Vol.4), in which the court makes the following comment: "It appears the employee took serious exception to plaintiff's inquiry, [about fixing her order] retreated to the recessed of the restaurant, retrieved a long cooking instrument in a fashion contrary to its intended use or for which it was designed, but a use in which all mothers of young children are acquainted."

Once again, this writer has often been guilty of using such sardonic humor, almost without exception to the detriment of his client. Such verbiage is counter-productive at least.

At worst, it implicates a bias based on facts unknown to this writer. It has never been anything but abuse under law, in this writer's experience, when an implement is removed from hot grease and applied to a person's face and upper body. Child abuse has never been the subject of myrth in Mississippi. It is a plague with no humorous elements, and indicates a horrible and cynical bias never before observed anywhere in the rulings of Judges, Justices and Chancellors in the state.

(TR.48, Vol.1) the judge reasserts hearing "disability" questionably challenging his capacity to serve. Other "hearing disability" comments can be found at (TR.177,Vol.6); et al.

Another issue that resounds beyond harmless error is the sua sponte nature of the "impossible to apportion" part of the Courts order. Cited supra is the authority for the requirement of the moving party to state every ground for directed verdict. It was the judge's proposal, on a "rambl[e]", (TR.341, Vol.7), that "impossible to apportion" was a ground for directed verdict. Especially in the realm of mental and emotional damages, apportionment is always hard, if not impossible. This is reflected in the "eggshell skull" doctrine, based on the idea that a defendant takes his or her plaintiff as he/she finds the plaintiff. See inter alia, Triplett v. River Region Medical Corp., cause #2008-CA-01173-COA (MS.C.A., 2010). There also is the error of sua sponte calls from the bench, perhaps indicating bias. The sua sponte addition of "impossible to apportion," is certainly not commensurate with Lopez v. McLellan, op cit, MRCP 50 demands that the "moving party" raise every point relied on for directed verdict. Not so here. Reversal is required.

It is clear that Judge Lackey did not "like" this lawsuit. His sardonic ridicule in the Order Granting Summary Judgment was harmless error at least, perhaps reversible error of itself. His failure to read the "whole file" is stunning and uncharacteristically nonchalant. He was certainly not prepared for this trial. His sua sponte efforts on defendant's behalf are highly questionable. His wholesale belief of defendant's counsel, without authority cited, gave credence to defense counsel's apparent strategy of repeating an argument aggressively until the court agreed, without need of legal authority. Judge Lackey's ignoring of agency principles beyond principal agent, course and scope of duty, and express agency was shocking to plaintiff. His further embrace of an unpled "statute of limitation"s defense, via the mechanism of a motion to amend directly contradict every case in the canon regarding "waiver."" His non-application of the standards for directed verdict and his utter ignoring of the arguments from plaintiff on the agency principles argued in the summary judgment motions disputes implicate bias. Finally, his complete adoption of defendant's repeated, but unsupported argument implicates a higher standard of review by this Court.

Since this matter was not referred to the finder of fact, but was "poached" by Judge Lackey, this case should be reversed and remanded. In Mississippi law the role of judge and jury are well-defined. If a reasonable juror might have found for Ms. Parmenter on ratification, estoppel, "one continuous course of action," foreseeabilty grounded in the McDonald manual, negligent management or security. As to "negligent security or management" as a viable independent claim, see Doe v. Stegall, 757 S0.2d 201, (Miss.2000); as to "negligent management" as a jury question see Smith v. Illinois Cent.R.Co., 58 S0.2d 812 (Miss.1952).

Finally, there is the more basic "negligence" issue of proximate causation. As to Dr. Cooper's testimony regarding causation, as above, the doctor's "fact" testimony, (there were few, if any, "opinions" given by the doctor), is within the realm of the jury to weigh and determine credibility. Two, defendant introduced several years of Dr. Cooper's records as an exhibit. Those are properly before the jury as well. Third and finally, in arguments defendant pointed out (erroneously) that Dr. Copper had not testified, as an expert must, to a "reasonable degree of medical certainty." In fact, defendant, by counsel, asked Dr. Cooper about plaintiff's medication and the medication other doctors had prescribed (TR.104-05, Vol.5). Dr. Cooper's explanation of his answer, to a reasonable degree of medical certainty, included his diagnosis of plaintiff as having PTSD, caused by the events of August 11, 2000. (TR.105-06 Vol.5). Hence, the issue of proximate causation was repeatedly asserted by Dr. Cooper as a fact witness, and properly addressed by him as an expert, to a "reasonable degree of medical certainty." Beyond diagnosis, proximate causation, and a brief fact entry into plaintiff's damages for medical care, (TR.87,Vol.5), and, hence, an inference as to anguish, "mental damages," and pain and suffering, plaintiff would waive any "opinion testimony" by the good doctor, except as the jury might reasonably infer from his fact testimony.

While the court did not require both parties to submit "findings of fact and conclusion of law," the rationale of the total adoption of one party's "version" of facts and law leading to "heightened scrutiny" of the trial court's findings should apply in this case. It was Defendant who, at the judge's request, prepared the Order Granting Directed Verdict. That order included issues not raised in Defendant's Motion, and hence, not legitimate grounds for granting of the order.

CONCLUSION

It is in most cases the practice of Appellants to request reversal and rendering of the subject matter in controversy. Unfortunately, since this case was not allowed to go to the jury, such a remedy is not available. However, in the instant case, the plain errors made by the trial court require reversal and remand for a new trial. There is little doubt that the agency of Ms. Jones in her commission of an intentional tort was properly pled. The timeliness of the pleading was waived by Defendants.

While some of the specific negligence claims may properly have been taken from the jury, a multiplicity of agency theories were properly before the court with substantial evidence to support them, respondeat superior being chief among them, but including other similar theories enumerated supra. The trial judge's removal of the fact issues from the jury, including his extraordinary rulings regarding Ms. Parmenter's treating doctor, was plain error, requiring reversal.

Fact issues existed as to the right of McDonalds to control operations at the Holly Springs restaurant, as well. The prior order of the same court underlines the error of granting summary judgment to McDonalds.

Nor should the court have required Plaintiff to prove allocation or allocability of fault, as the defense was not Plaintiff's to prove. This, too, is plain error.

It is with regret that Ms. Parmenter requests reversal and remand for these and numerous lesser errors. But the regret is equaled by her fervor. Plaintiff is entitled to a full and fair trial of her case. She prays that this Court will reverse and remand to allow her full day in court. And Appellant prays for general relief.

CERTIFICATE OF SERVICE

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

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Hon. Henry Lackey,

Retired Circuit Judge

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3/10/11

DATE

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