**IN THE SUPREME COURT OF MISSISSIPPI**

**Cause No.: 2006-IA-00831-SCT**

TREASURE BAY CORP. d/b/a TREASURE BAY CASINO and FIRE DOG, INC. d/b/a ADVENTURES BAR & GRILL — APPELLANTS

*versus*

SHEILA RICARD, Individually and on behalf of the Wrongful Death Beneficiaries of PHILLIP ROBINSON, Deceased — APPELLEES

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ON APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

Civil Action No.: CI-2002-00525(3)

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# BRIEF OF APPELLANT FIRE DOG, INC. d/b/a ADVENTURES BAR & GRILL

(ORAL ARGUMENT REQUESTED)

**Attorneys for Appellant Fire Dog, Inc.**
DONALD J. RAFFERTY (MSB #[redacted]
CYNTHIA D. BURNEY (MSB #[redacted]
Law Offices of Donald J. Rafferty, PA
2118 18th Street
Post Office Box 4252
Gulfport, Mississippi 39502
Telephone: (228) 868-5421
Facsimile: (228) 868-5422

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## CERTIFICATE OF INTERESTED PERSONS

I, the undersigned counsel of record, certify that the following listed persons or organizations have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court of Mississippi and/or Judges of the Mississippi Court of Appeals may evaluate any possible disqualification or recusal.

1. Fire Dog, Inc. d/b/a Adventures Bar & Grill, Appellant;
2. Treasure Bay Corp. d/b/a Treasure Bay Casino, Appellant;
3. Sheila Ricard, Appellee;
4. Joshua Dillmon, interested non-party;
5. Honorable Dale Harkey, Jackson County Circuit Court Judge;
6. Walter W. Dukes, Attorney for Treasure Bay;
7. Je'Nell B. Gustafson, Attorney for Treasure Bay;
8. Donald J. Rafferty, Attorney for Adventures;
9. Cynthia D. Burney, Attorney for Adventures;
10. Thomas P. Calhoun, III, Attorney for Ricard;
11. Jackye C. Bertucci, Attorney for Ricard; and

12. J. Adam Miller, Attorney for Joshua Dillmon.

Cynthia D. Burney

DONALD J. RAFFERTY, MSB # [redacted]
CYNTHIA D. BURNEY, MSB # [redacted]
*Attorneys for Appellant Fire Dog, Inc., d/b/a Adventure Bar & Grill*

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   B. DILLMON'S UNSWORN STATEMENT TO THE OCEAN SPRINGS POLICE DEPARTMENT IS UNRELIABLE AND THEREFORE CANNOT FORM THE BASIS FOR THE EXPERT OPINION OF DR. STEVEN T. HAYNE

   C. RICARD PRESENTED NO EVIDENCE THAT FIRE DOG, INC. d/b/a ADENTURES BAR & GRILL ("ADVENTURES") PROXIMATELY CAUSED ROBINSON'S DEATH

## II. STATEMENT OF THE CASE

### A. Nature of the Case, Proceedings, and Disposition.

Appellee Sheila Ricard ("Ricard") brought this suit on December 30, 2002, for the wrongful death of Phillip Robinson ("Robinson") on October 23, 2002. (Rec. at 10-14)(Rec. Ex. at 10-14). The Complaint alleges that Robinson was walking across Highway 90 in Ocean Springs, Jackson County, Mississippi when he was struck by a vehicle driven by Joshua Dillmon ("Dillmon"). (Rec. at 11); (Rec. Ex. at 11). Robinson died later that morning. (Rec. at 11); (Rec. Ex. at 11). Ricard alleged that Appellants Treasure Bay Corp. d/b/a Treasure Bay Casino ("Treasure Bay") and Fire Dog, Inc. d/b/a Adventures Bar & Grill ("Adventures") were liable for Robinson's death based upon Mississippi's Dram Shop Act, codified at Miss. Code Ann. §63-3-73. Treasure Bay brought its first Motion for Summary Judgment and its Motion to Strike Affidavit of Ricard's expert, Dr. Steven T. Hayne ("Dr. Hayne"), on for hearing on December 10, 2004. Adventures subsequently filed similar Motions. After hearing argument, the lower court ruled that it did not have enough

information before it to strike Dr. Hayne's affidavit, and therefore, it denied Treasure Bay's Motion for Summary Judgment, as well as the Motion for Summary Judgment of Adventures. The lower court's denial of Treasure Bay's and Adventures' first Motions for Summary Judgment is not before this Court.

On March 26, 2005, Treasure Bay and Adventures took Dr. Hayne's deposition. On August 15, 2005, Treasure Bay filed its Second Motion for Summary Judgment. (Rec. at 29-157); (Rec. Ex. at 15-30). Adventures then filed its Second Motion for Summary Judgment on December 20, 2005. (Rec. at 158-280); (Rec. Ex. at 107-125). The hearing on these Summary Judgment Motions was duly noticed for February 24, 2006. (Rec. at 284-285); (Rec. Ex. at 138). After Plaintiff filed her Response to Treasure Bay's Motion for Summary Judgment, Treasure Bay filed its Rebuttal on February 23, 2006. (Rec. at 295-307); (Rec. Ex. at 127-137). Plaintiff did not file a Response to Adventures' Second Motion for Summary Judgment. (Rec. Ex. at 160, 166 – 168). The Motions were heard before Honorable Dale Harkey, Judge of the Jackson County Circuit Court, on February 24, 2006, and on May 10, 2006, Judge Harkey denied the Motions of Treasure Bay and Adventures without opinion in a short, one paragraph Order. (Rec. at 308); (Rec. Ex. at 196).

Treasure Bay and Adventures filed a Joint Petition for Interlocutory Appeal with this Honorable Court on May 18, 2006. Plaintiff submitted her Answer of Respondent to Joint Petition for Interlocutory Appeal on or about June 16, 2006. The Supreme Court of Mississippi granted the Joint Petition for Interlocutory Appeal.

Now before this Court is the question of whether the lower court erred in denying the Second Motions for Summary Judgment submitted by Treasure Bay and Adventures,

which were based upon Mississippi's "Dram Shop Act," codified at §67-3-73 of the Mississippi Code of 1972, as Amended.[1]

**B. Statement of the Facts.**

Ricard's Complaint alleges that during the early morning hours of October 23, 2002, Joshua Dillmon, who was driving on Highway 90 in Ocean Springs, Jackson County, Mississippi, struck and killed Robinson. (Rec. at 11); (Rec. Ex. at 11). Dillmon left the scene of the accident before the Ocean Springs Police Department ("OSPD") arrived. (Rec. at p. 11); (Rec. Ex. at 11). Dillmon returned to the scene less than an hour later, and at approximately 6:41a.m.[2] he was administered an intoxilyzer test, which revealed a blood alcohol content ("BAC") of 0.088. (Rec. at 54); (Rec. Ex. at 31). Later that morning, between 6:41 a.m. and 9:00 a.m., Dillmon provided a blood sample which indicated a BAC of 0.07. (Rec. at pp. 30, 55); (Rec. Ex. at 16, 32). Dillmon also gave an unsworn statement to OSPD later that morning. (Rec. at 56-90); (Rec. Ex. at 33-68).

Ricard's theory of negligence against Treasure Bay and Adventures is that before the accident, Dillmon consumed alcoholic beverages at Treasure Bay and Adventures while he was visibly intoxicated. Despite his alleged visual intoxication, Ricard claims that employees of both establishments continued to serve alcoholic beverages to Dillmon.

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[1] All section references are to the Mississippi Code of 1972, as Amended, herein "Miss. Code. Ann.," unless otherwise specified.

[2] The air blank was tested at 6:41 a.m., with Dillmon's test at 6:42 a.m. However, as Dr. Hayne refers to the intoxilyzer test of 6:41 a.m., that time shall be used throughout.

Ricard alleged that the continued service of alcoholic beverages to a visibly intoxicated Dillmon was contrary to Mississippi's Dram Shop Act and therefore Treasure Bay's and Adventures' actions constituted gross negligence, due to a willful, wanton and reckless disregard for the safety of society, and negligence *per se*. Ricard further concluded that Treasure Bay's and/or Adventures' actions in continuing to serve alcoholic beverages to a visibly intoxicated Dillmon were the proximate cause of the accident which, in turn, caused the death of Robinson. (Rec. at 11-13); (Rec. Ex. at 11-13).

According to Dillmon's unsworn statement, he claimed to have been a patron at Treasure Bay's lounge, The Pirate's Den, from approximately 10:00 p.m. to 11:30 p.m. on October 22, 2002. (Rec. at 56-57); (Rec. Ex. at 33-34). He left the Pirate's Den approximately six hours before he allegedly struck and killed Robinson. Dillmon claimed to have consumed either 4 or 5 beers while he was at The Pirate's Den. (Rec. at 57); (Rec. Ex. at 34). Dillmon then claimed he went to Adventures where he consumed approximately three beers before leaving an hour later, but possibly between 2:30 a.m. and 3:00 a.m., October 23, 2002. (Rec. at 57-58); (Rec. Ex. at 34-35). From there, Dillmon claimed he went to Casino Magic where he talked with co-workers and ate a hamburger, but consumed no more alcohol. (Rec. at 59, 64); (Rec. Ex. at 36, 41). Dillmon also told OSPD that he remembered striking something which he believed to be a construction barrel. (Rec. at 61); (Rec. Ex. at 38). After the collision, he pulled over in a parking lot approximately one-half mile away and stayed there for around one hour before returning to the scene. (Rec. at 66, 136, p.43); (Rec. Ex. at 43, 91).

Ricard took the depositions of the two Pirate's Den employees working the night of October 22, 2002, and the three Adventures' employees working the early morning hours of October 23, 2002. At these depositions, Treasure Bay's and Adventures' policies for handling intoxicated patrons were delved into in considerable detail. Ricard was unable to establish Dillmon's presence at either location on the night and early morning hours in question, as none of the employees: 1) knew who Dillmon was; 2) knew what Dillmon looked like; 3) knew whether or not Dillmon had, in fact, been a patron at their respective establishments during the times in question; or 4) remembered seeing Dillmon at Treasure Bay or Adventures.[3] These depositions further confirmed Ricard's earlier admission to a

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During deposition testimony, employees of Treasure Bay and Adventures testified, in part, as follows:

Peter Smith, Beverage Supervisor, Treasure Bay:

Q: Have you talked about any part of this case or the accident that brings us here today with Charles [bartender]?

A: Just whether or not we - - if he knew the name or if we remembered, you know, if he knew who he was, what he looked like. No one knows who this guy is, so -

Q: Okay. And Charles has said the same thing, he doesn't know him?

A: Right. (Deposition Transcript of Peter Smith, Page 57, lines 9-18; Record p. 109; Rec. Ex. at 74).

Charles Buck, Bartender, Treasure Bay:

Q: Now, on that particular night of October the 22nd of '02, obviously, since you don't know Josh Dillmon and didn't know Josh Dillmon, you really don't have any idea whether he was in the Pirate's Den or not that evening as we sit here today?

A: No. (Deposition Transcript of Charles Buck, Page 30, lines 17-23; Record p. 118; Rec. Ex. at 76).

Sean Godley, Bartender, Adventures:

Q: Do you know who Joshua Dillmon is or Josh Dillmon?

A: No, ma'am, I do not. (Deposition Transcript of Sean Godly, Page 26, lines 7-9; Record p. 236; Rec. Ex. at 140).

Kenneth Huff, Bartender/Manager on Duty, Adventures:

Q: So do you know now who Joshua Dillmon is?

A: No idea. (Deposition Transcript of Kenneth Huff, Page 15, lines 19-21; Record p. 242; Rec. Ex. at 142).

Request for Admission from Treasure Bay and Request for Admission from Adventures that she had no eyewitnesses who had either seen Dillmon at The Pirate's Den or Adventures or who saw him "visibly intoxicated" at the time he claimed to have been a patron of either establishment. (Rec. at 92, 225); (Rec. Ex. at 70).

In Dr. Hayne's Affidavit dated November 3, 2004, he first established his credentials as a pathologist and then discussed the materials he reviewed in formulating his expert opinions regarding whether or not Dillmon would have appeared "visibly intoxicated" on the night and early morning hours in question. (Rec. at pp. 122-123); (Rec. Ex. at 77-78). Specifically, based on Dillmon's intoxilyzer results indicating a BAC of 0.088, his blood sample results indicating a BAC of 0.07, and Dillmon's unsworn statement to OSPD, Dr. Hayne averred as follows:

1. Dillmon would have had an elevated BAC on the night of October 22, 2002, and the early morning hours of October 23, 2002, when he was present at The Pirate's Den and Adventures.

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Cindy Habel, Cocktail Waitress, Adventures:

Q: Do you know who Joshua Dillmon is?

A: If I seen a picture, I may, but there's too many people that come through my establishment to know. I know a lot of people by what they drink and not what their name is, you're Jack and Coke, you're Bud Light, you're this. I have no idea.

Q: So as we sit here today, you don't know whether he [Joshua Dillmon] was in the bar on the evening of October 22nd, 2002?

A: I have absolutely no idea. (Deposition Transcript of Cindy Habel, Page 18, lines 2-12; Record p. 250; Rec. Ex. at 144).

2. During this time frame (10:00 p.m., October 22, 2002, to 3:00 a.m., October 23, 2002) Dillmon would have exhibited significant signs of visible intoxication including, but not limited to, marked alteration as to: a) orientation of time, person, and place; b) emotional stability; c) light reflex and motor coordination; d) self-control; e) judgment; f) ability to ambulate and maintain his balance; and, g) the ability to perform fine motor skill tasks.

3. Any individual skilled or trained in the observation and monitoring of such signs of "visible intoxication," with minimal skill, should have recognized the significance of impairment exhibited by Dillmon due to his "elevated BAC" on the night and early morning hours in question.

(Rec. at 122-123); (Rec. Ex. at 77-78).

In response to Dr. Hayne's Affidavit, Treasure Bay and Adventures took Dr. Hayne's deposition on March 25, 2005 (Rec. at 125-149); (Rec. Ex. at 80-104). During his deposition, Dr. Hayne testified that Dillmon would have achieved a BAC of approximately 0.14 to 0.15 percent or higher between the hours of 10:00 p.m. on October 22, 2002 and 6:41 a.m. on October 23, 2002, when he was administered the intoxilyzer test. (Rec. at 130, p. 20); (Rec. Ex. at 85). Dr. Hayne testified he arrived at that figure by extrapolating backwards from the time of Dillmon's intoxilyzer test, given at 6:41 a.m., October 23, 2002, to the time he claimed to have entered The Pirate's Den at 10:00 p.m., October 22, 2002. (Rec. at 130, p. 20-21); (Rec. Ex. at 85). Dr. Hayne testified that, had Dillmon only consumed 7 or 8 beers from 10:00 p.m., October 22, 2002, until 6:41 a.m., October 23, 2002, as he claimed in his unsworn statement, his BAC at the time of the intoxilyzer test would have been 0.00. (Rec. at 131, p. 23); (Rec. Ex. at 86). Dr. Hayne testified that for

Dillmon to have registered a BAC of 0.088 at 6:41 a.m., October 23, 2002, he would have had to have consumed another 8 beers, or double the amount he claimed to have consumed in his unsworn statement to OSPD. (Rec. at 134, p. 36); (Rec. Ex. at 89). Therefore, Dr. Hayne expressly rejected Dillmon's claims to have only consumed 7 or 8 beers, while at the same time, accepted his time line of 10:00 p.m., October 22, 2002, to 6:41 a.m., October 23, 2002 and accepted Dillmon's statements pertaining to where he went that evening and his statement that he had no alcohol at Casino Magic. (Rec. at 130, p. 21 through 131, p. 23, 146 p. 85 through 147 p. 86); (Rec. Ex. at 85-86, 101-102, ). Dr. Hayne had no idea when or where those extra 8 beers were consumed. (Rec. at 135, p. 39 and 136, p. 45); (Rec. Ex. at 90-91).

Dr. Hayne further testified that Dillmon would **not** have been intoxicated at the time he claimed he was a patron of The Pirate's Den. The following exchange took place:

Q: Your expert affidavit that I have says Dillmon would have an elevated ethyl alcohol level [from 10:00 p.m., October 22, 2002, to 3:30 a.m., October 23, 2002]. Is it your opinion that he would have had an elevated ethyl alcohol level from [10:00 p.m. to 11:30 p.m., October 22, 2002], the time he was at Pirate's Den?

A: I wouldn't say intoxication. Intoxication to me is a legal issue for the operation of a motor vehicle and other restricted activity. I would say "impaired." He would be impaired certainly after consuming ethyl alcohol and we have to rely in part upon his history of consumption of ethyl alcohol. As I remember, he indicated he consumed four to five beers during his first visit at a bar.

Q: So you have no expert opinion that Dillmon was legally intoxicated when he left The Pirate's Den at [11:30 p.m., October 22, 2002]?

A: Legally intoxicated, a [BAC] level equivalent of 0.08?

Q: Yes, Sir.

A: I don't know that, Sir.

(Rec. at 131, pp. 24-25 through 132, p. 26); (Rec. Ex. at 86-87). Dr. Hayne further clarified

his opinions about his Affidavit when asked the following in his deposition:

Q: So, it's not your opinion that there would have been signs of visible impairment? It's your opinion that there would be signs of visible intoxication?

A: Impairment. Intoxication to me is a legal term.

Q: Okay, is it not the term you used in your opinion? I don't believe you said visible impairment.

A: I would expect to see impairment as to ability. Impairment as to judgment.

Q: Okay, and in paragraph six you say—

A: Visible intoxication.

Q: Signs of visible intoxication?

A: But I'm really talking about impairment.

Q: Okay, so this paragraph six shouldn't read "signs of visible intoxication." It should read "signs of visible impairment," should it not?

A: **Yes**, that is a common term and you have to address the Court so they understand it. It's— they deal with intoxication. **I deal basically with impairment in this type of issue. But the Court, I don't think, understands the difference between impairment and intoxication**. So, I use it synonymously. But when we're defining very carefully these terms, then I'm using impairment and intoxication. He was intoxicated certainly when the pedestrian was struck. Now that's a legal issue.

(Rec. at 135, pp. 40-41); (Rec. Ex. at 90). (**Emphasis added**). Dr. Hayne testified that he had no personal knowledge that Dillmon would have exhibited any of the signs of visible intoxication he identified in paragraph five of his affidavit. (Rec. at 139, p. 56-57); (Rec. Ex. at 94). Dr. Hayne then offered the following testimony:

Q: Do you believe, is it your opinion Dillmon, at 5 feet, 11 inches tall and 220 pounds could have become intoxicated on 5 beers, assuming a twelve ounce beer, assuming 4% alcohol?

A: For the purpose of driving an automobile, **no, Sir**.

Q: **He could not have?**

A. **No, Sir.**

Q: And we've defined that as 0.08, correct?

A: 0.08, if he weighed 220 pounds and he was drinking one ounce of ethyl alcohol with an elevation of .015 times five multiplied by .55, consuming all the ethyl alcohol at once, reaching a maximum ethyl alcohol concentration at twenty-five to forty minutes of consumption, **no, Sir.**

(Rec. at 144, p. 74); (Rec. Ex. at 99). (**Emphasis added**). Lastly, the following exchange took place during Adventure's examination of Dr. Hayne:

DR. HAYNE: My– I asked– the question, you asked was at the first bar, if he had consumed only the amount that he stated that he consumed [4 to 5 beers].

Q: Uh-hum (indicates affirmative).

DR. HAYNE: 4 to 5 beers, would he have shown signs of significant impairment?

Q: Right.

DR. HAYNE: **No, he would not have.**

Q: Okay, and I believe, and correct me if I'm wrong, but I believe you stated that **[Dillmon] would not have been legally intoxicated at the point when he left the first bar [The Pirate's Den]** and drove to the second bar, if he only had what he said in the statement [4 to 5 beers].

DR. HAYNE: **If he only had 4 to 5 beers, he would not, with a body weight of 220 pounds, no**.

(Rec. at 148 p. 93 - 149, p. 94); (Rec. Ex. at 103-104).

Dillmon has not been deposed. Dillmon, who to Adventures' knowledge is still under indictment for Robinson's death, through his attorney, J. Adam Miller, Esquire, informed all parties that Dillmon would exercise his Fifth Amendment right against self-incrimination if subpoenaed to a deposition. (Reporter's Transcript, herein "RT" at pp. 9-10, 28); (Rec. Ex. at 153-154, 172).

## III. SUMMARY OF THE ARGUMENT

For Ricard to recover for the wrongful death of Robinson from Adventures, she must proceed under Mississippi's Dram Shop Act, codified at Miss. Code Ann. §67-3-73. To do so, she must satisfy a number of conditions. Specifically, she must demonstrate that Dillmon was served alcoholic beverages by employees of Adventures Bar & Grill, at a time when he was "visibly intoxicated." The only evidence Ricard presented to the lower court to establish Dillmon's presence at Adventures, let alone that he was served alcoholic beverages there at a time he was "visibly intoxicated," was Dillmon's unsworn statement to OSPD. Ricard admitted in response to a request for admission from Adventures that she had no eyewitnesses who will testify that Dillmon appeared visibly intoxicated at Adventures on the date and between the hours in question. It stands to reason then, that no witnesses saw Dillmon being served alcoholic beverages while he was visibly intoxicated. Ricard's depositions of Adventures' employees working that night further confirmed that no one remembered either seeing Dillmon or seeing Dillmon served alcoholic beverages at a time he was "visibly intoxicated." (See fn. 3, *supra*).

Dr. Hayne's deposition testimony established that he based his conclusion that Dillmon would have evinced signs of "visible *impairment*" during the night of October 22, 2002, to the early morning hours of October 23, 2002, in large part, on Dillmon's unsworn statement to OSPD. However, Dr. Hayne also explicitly testified that he did not believe portions of Dillmon's statement. Specifically, Dr. Hayne accepted Dillmon's time line (10:00 p.m., October 22, 2002, to 6:41 a.m., October 23, 2002) and statements regarding his whereabouts (The Pirate's Den, Adventures, Casino Magic, and a parking lot after striking Robinson with his vehicle), but rejected his statements as to how many beers he had

consumed (7 or 8), and where those beers were consumed. It is generally agreed by the parties that Dillmon's stated intention to exercise his Fifth Amendment right against self-incrimination renders him unavailable for evidentiary purposes. However, Dillmon's unsworn statement to OSPD is inadmissible under Rules 804(b)(3) and (b)(5) of the Mississippi Rules of Evidence since Dr. Hayne expressly rejected portions of it as untrue. Therefore, it is inadmissible and cannot be used to establish either Dillmon's whereabouts or that he consumed alcohol at The Pirate's Den or Adventures. More importantly, due to its unreliability, it cannot serve as a foundation upon which Dr. Hayne may base his opinions.

It is fundamental Mississippi law that in order to prevail on a negligence action, a plaintiff must prove the four elements of duty, breach, proximate causation and injury, by a preponderance of the evidence. Here, even if Dillmon's unsworn statement is admissible to establish his presence at Adventures, and Ricard can prove Dillmon was served alcohol there at a time he was "visibly intoxicated," once he left Adventures and arrived, without incident, at Casino Magic, Adventures' exposure to liability ended. According to Dillmon, he left The Pirate's Den at 11:30, October 22, 2002, arrived at Adventures, and stayed there an hour or until 2:30 a.m. or 3:00 a.m., October 23, 2002. That represents a time span of up to 3 to 3 ½ hours. Ricard has no evidence that Dillmon's alleged consumption of alcohol at Adventures during this time frame proximately caused Robinson's death at approximately 5:15 a.m., October 23, 2002, roughly two to five hours later.

## IV. AUTHORITY, ANALYSIS AND ARGUMENT

### A. Standard of Review

A lower court's grant or denial of a motion for summary judgment is reviewed *de*

*novo*. ***Commercial Bank v. Hearn***, 923 So.2d 202, 204 (Miss. 2006) (***citing Brooks v. Roberts***, 882 So.2d 229, 231 (Miss. 2004)). The ***Hearn*** Court wrote:

> The party seeking summary judgment bears the initial burden of demonstrating there are no genuine issues of material fact to be decided by the trier of fact. Miss. R. Civ. P. 56. Furthermore, all such evidentiary matters, including admissions in pleadings, answers to interrogatories, depositions and affidavits, must be examined in the light most favorable to the non-moving party. ***Davis v. Hoss***, 869 So.2d 397, 401 (Miss. 2004). The burden, however, is not entirely with the moving party. As this Court has clearly held, 'the non-moving party may not defeat the motion merely by making general allegations or unsupported denials of fact.... 'The party opposing the motion must by affidavit or otherwise set forth specific facts showing there are indeed issues for trial." ***Id. citing Drummond v. Buckley***, 627 So.2d 264, 267 (Miss. 1993). (citations omitted).

***Hearn***, 923 So.2d at 204.

The Court may grant summary judgment only where, viewing the evidence in the light most favorable to the non-movant, the movant establishes that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. **Miss. R. Civ. P. 56(c)**; ***Nationwide Mutual Ins. Co. v. Garriga***, 636 So.2d 658, 661 (Miss. 1994).

### B. The Lower Court Erroneously Denied the Second Motion for Summary Judgment of Treasure Bay, Corp. d/b/a Treasure Bay Casino

Mississippi's Dram Shop Act, codified at Miss. Code Ann. §67-3-73, entitled "Immunity from liability of persons who lawfully furnished or sold intoxicating beverages to one causing damage," reads, in pertinent part:

> (1) The Mississippi Legislature finds and declares that the consumption of intoxicating beverages, rather than the sale or serving or furnishing of such beverages, is the proximate cause of any injury, including death... inflicted by an intoxicated person upon... another person.
>
> (2) [N]o holder of an alcoholic beverage... permit... who lawfully sells or serves intoxicating beverages to a person who may lawfully purchase [them], shall be liable... to any other person or to the estate, or

> survivors of either, for any injury suffered off the licensed premises, including wrongful death... because of the intoxication of the person to whom the intoxicating beverages were sold or served.
>
> (4) The limitation of liability provided by this section shall not apply to... any holder of an alcoholic beverage... permit... ***when it is shown that the person making the purchase of an alcoholic beverage was at the time of such purchase visibly intoxicated.***

(***Emphasis* added**). There is no distinction, as far as the immunity of §67-3-73 is concerned, between the direct selling of alcoholic beverages by the holder of an alcoholic beverage permit and the mere furnishing of intoxicating beverages by the same holder of the permit. ***Bridges v. Park Place Entertainment***, 860 So.2d 811, 815-16 (Miss. 2003).

Furthermore, §67-3-73(4) ***does not*** employ the reasonable man test, but ***requires proof*** that Dillmon ***himself*** was visibly intoxicated at the time ***he*** was served alcohol at Adventures. Therefore, Ricard must come forward with evidence proving that Adventures' employees provided alcoholic beverages to Dillmon while he was visibly intoxicated.

Mississippi's common law imposes no responsibility on the holder of an alcoholic beverage permit for the selling or furnishing of alcoholic beverages to an individual who has become intoxicated, and whose intoxication proximately causes injuries to another. ***Munford, Inc. v. Peterson***, 368 So.2d 213, 215 (Miss. 1979). The only method of recovery available to one, like Ricard, who seeks to hold the holder of an alcoholic beverage permit liable for such injuries, is to make a negligence *per se* claim. ***Moore v. K&J Enterprises***, 856 So.2d 621, 624 (Miss. Ct. App. 2003). Negligence *per se* is a violation of a statutory, usually penal, law. ***Id***. To prevail on a negligence *per se* claim, Ricard must prove that: (1) Robinson was a member of the class sought to be protected

under §67-3-73; (2) Robinson's injuries and resulting death was what the statute intended to avoid; and (3) Adventures' violation of the statute proximately caused or contributed to Robinson's death. ***Id.*** (***citing Brennan v. Webb***, 729 So.2d 244, 249 (Miss. Ct. App. 1998)).

The Mississippi Legislature chose not to define the term "visibly intoxicated" in §67-3-73(4). Furthermore, Mississippi common law has not defined the term "intoxication." The only definition of intoxication in Mississippi law is found in Mississippi's Implied Consent Law, codified at Miss. Code Ann. §63-11-30, which states that, for purposes of operating a motor vehicle, one is under the influence of an intoxicating liquor if they have a BAC of 0.08 or higher.

One can find a discussion of what is, and is not, intoxication in ***Yazoo & M.V.R. Co. v. Davidson***, 106 Miss. 108, 63 So. 340 (Miss. 1913); however, none of the definitions found therein were adopted in the two paragraph decision of the Court. Treasure Bay offered another definition for intoxication to the lower court from American Jurisprudence 2d, which reads:

> §17 Intoxication; drunkenness
>
> It has been said that the terms "intoxication" and "drunkenness" are scarcely susceptible of accurate definition for practical purposes, and are so familiar that they define themselves. [note omitted] "Intoxication" is a word merely synonymous with "inebriety," "inebriation," or "drunkenness," and is expressive of that state or condition which inevitably follows from taking excessive quantities of an intoxicant. To some people, it means being under the influence of an intoxicant to such an extent as to render one helpless, while others speak of a person as intoxicated when he or she is only slightly under the influence. ***However, the latter condition is not, in either the strict or general sense, one of intoxication***, which implies undue or abnormal excitation of the passions or feelings, or the impairment of the capacity to think and act correctly and efficiently, and suggests a loss of the normal control of

one's faculties. [note omitted]

> As far as the infliction of physical injuries upon a third party is concerned it has been said that a person may be deemed intoxicated within the meaning of a civil damage act when his excessive use of intoxicants has produced such a material change in his normal mental status that his behavior becomes unpredictable and uncontrolled, and when, as a result, slight irritations, real or imaginary, cause outbursts of anger which find expression in acts of physical violence against another. [note omitted]

45 Am. Jur. 2d INTOXICATING LIQUORS §17 (***Emphasis*** added).

Other states have been presented with the opportunity to define "visible intoxication." By way of example, in ***Beaulieu v. The Aube Corporation***, 796 A.2d 683 (Maine 2002) the Court turned to Maine's Liquor Liability Act, 28 A.M.R.S.A. §2501, *et seq.* for its definition. The Court wrote that "intoxication" was defined as a substantial impairment of an individual's mental or physical faculties as a result of drug or liquor use. ***Id.*** at 691. The Court wrote that "visibly intoxicated" was defined as a state of intoxication accompanied by a perceptible act, a series of acts, or the appearance of an individual which clearly demonstrates a state of intoxication. ***Id.*** at 691. The ***Beaulieu*** Court concluded, "[w]e agree with the Massachusetts Supreme Judicial Court that 'evidence of apparent intoxication,' or of elevated blood [alcohol] levels, at some later point in time, does not, by itself, suffice to show that the person's intoxication was evident at the time the last drink was served." ***Id.*** at 691 (***citing Douilard v. LMR, Inc.***, 433 Mass. 162, 170 N.E. 2d 618, 621 (2001)). Without any evidence of "visible intoxication" at the time the last drink was served, the ***Beaulieu*** Court wrote, "would require the jury to speculate," and such speculation could not be permitted. ***Id.*** at 691.

The Appellate Court of Connecticut was also faced with the question of the definition of "visible intoxication" in ***Hayes v. Caspers, Ltd.***, 90 Conn. App. 781, 881 A.2d 428

(2005). It wrote that proof of the sale of intoxicating liquors to an intoxicated person required:

> [Proof of] something more than to be merely under the influence of, or affected to some extent by, liquor. Intoxication means an abnormal mental or physical condition due to the influence of intoxicating liquors, a visible excitation of the passions and impairment of the judgment, or a derangement or impairment of physical functions and energies. When it is apparent that a person is under the influence of liquor, when his manner is unusual or abnormal and is reflected in his walk or conversation, when his ordinary judgment or common sense are disturbed or his usual will power temporarily suspended, when these or similar symptoms result from the use of liquor and are manifest, a person may be found to be intoxicated. He need not be 'dead-drunk.' It is enough if by the use of intoxicating liquor he is so affected in his acts or conduct that the public or parties coming in contact with him can readily see and know this is so.

***Id.*** at 441 (***quoting Sanders v. Officers Club of Connecticut, Inc.***, 196 Conn. 341, 349-50, 493 A.2d 184 (1985)). The ***Hayes*** Court then affirmed the lower court's judgment in favor of the tavern. ***Hayes***, 881 A.2d at 441.

Assuming, arguendo, that Ricard could prove Dillmon consumed alcohol at Adventures, under any of the aforementioned definitions of "visibly intoxicated," Ricard remains unable to prove that Dillmon was visibly intoxicated when served his last beer at Adventures. Even using Mississippi's Implied Consent Law and its designation of a BAC of 0.08 or more as being under the influence of alcohol, which would be a "best case" scenario for Ricard, her claims fail as a result of her own expert's testimony that Dillmon ***would not have even been legally intoxicated at the time he left The Pirate's Den or at the time he arrived at Adventures***. Since Ricard cannot establish Dillmon was "intoxicated," it is impossible for her to prove "visible" intoxication. Therefore, the lower court erred in not granting Adventures' motion for summary judgment as a matter of law. Adventures moves this Court to reverse the decision of the lower court and render judgment in favor of Adventures as a matter of law.

### C. Dr. Hayne's Opinions are Based upon Inadmissible Hearsay and Should Therefore be Excluded

Dr. Hayne's deposition testimony established that he based his conclusion that Dillmon would have evinced signs of "visible *impairment*" during the night of October 22, 2002, to the early morning hours of October 23, 2002, in large part, on Dillmon's unsworn statement to OSPD. However, Dr. Hayne also explicitly testified that he did not believe portions of Dillmon's unsworn statement to OSPD. Specifically, Dr. Hayne accepted Dillmon's time line (10:00 p.m., October 22, 2002, to 6:41 a.m., October 23, 2002) and statements regarding his whereabouts (The Pirate's Den, Adventure's, Casino Magic, and a parking lot after allegedly striking Robinson with his vehicle), but rejected his statements as to how many beers he had consumed (7 or 8), and where those beers were consumed.

It is generally agreed by the parties that Dillmon's stated intention to exercise his Fifth Amendment right against self-incrimination renders him unavailable for evidentiary purposes. However, Dillmon's unsworn statement to OSPD is inadmissible under Rule 804(b)(3) and (b)(5) of the Mississippi Rules of Evidence since Dr. Hayne has expressly rejected portions of it as untrue. Therefore, it is patently inadmissible to establish either Dillmon's whereabouts or that he consumed alcohol at Adventures or anywhere else. As Dr. Hayne cannot render an opinion without resorting to Dillmon's inadmissible statement, he ultimately provides no information which would assist the trier of fact.

Dillmon's unsworn statement is ultimately inadmissible under Miss. R. Evid. Rule 804(b)(5), which permits the admission of other statements not specifically covered by Rule 804 if those statements have "equivalent circumstantial guarantees of trustworthiness." In this case, Dr. Hayne relies ***entirely*** on Dillmon's unsworn statement to OSPD to establish both his whereabouts from 10:00 p.m., October 22, 2002, to 6:41 a.m., October 23, 2002,

and that he consumed alcohol at The Pirate's Den and Adventures. However, Dr. Hayne also expressly rejected as untrue those portions of Dillmon's unsworn statement which do not support his conclusions. Miss. R. Evid. 804(b)(3) does not permit the statement of an unavailable witness to be carved up by an advocate who proclaims only those portions which support his opinion are "true," and therefore admissible, while ignoring those portions which render his opinion invalid. Dr. Hayne clearly established that the statement lacked such "equivalent circumstantial guarantees of trustworthiness." The lower court picked up on this dilemma at oral argument:

THE COURT: Let me assume – Assume that I'm going to disallow the statement, strike it, you know, rule it inadmissible under the rules of evidence. Where are you then? You don't know when he was drinking, where he was drinking. You don't have proof of anything.

MR. CALHOUN: That's right, your Honor. But I think that's a credibility issue that would be for the trier of fact, the jury.

THE COURT: Well, if it gets admitted, then it's up to the jury.

MR. CALHOUN: Yes, Sir.

THE COURT: But up to that point... I mean, I've got unavailability issues here, I've got issues of trustworthiness, reliability on that statement. And just assume that I disallow it. You're out, aren't you?

MR. CALHOUN: Well, unless – unless your Honor allows us to finally take the deposition of Mr. Dillmon. And that's the only–

THE COURT: Well, you've got a [Miss. R. Civ. P.] 56(f) request here. What's the deal? I mean, this case is what, three years old? Four years old? How come he hasn't been deposed by now?

MR. CALHOUN: Well, we've attempted on several occasions to get his deposition.

THE COURT: And? You've been informed the same thing represented by Mr. Cassady?

MR. CALHOUN: Yes, Sir.

THE COURT: That he ain't talking?

MR. CALHOUN: Well, he says that.

THE COURT: He lawyered up, as they say.

MR. CALHOUN: Right.

(RT, p. 27, L. 16-28; p. 28, L. 1-19); (Rec. Ex. at 171-172).

Dillmon's unsworn statement to OSPD is clearly inadmissible under either Rule 804(b)(3) or (b)(5) in that there is no guarantee as to its trustworthiness as a whole. Portions of it may be true and portions of it may be untrue. Portions of it may have been given by Dillmon with thoughts of deflecting or limiting the trouble he found himself in after submitting to an intoxilyzer, giving a blood sample, and sitting across the table from Officer Flowers of the OSPD under suspicion of killing a man with his car. Rule 804 does not deal with portions of statements but with "the statement" as a whole. The lower court itself recognized this dilemma at oral argument before denying Adventures' motion without comment. Dillmon's unsworn statement to OSPD was, and remains, inadmissible. As such, Ricard cannot establish either Dillmon's whereabouts or how much he drank before allegedly striking and killing Robinson. Without relying on this statement, Dr. Hayne cannot render his expert opinion, absent which Ricard has no evidence that a genuine issue of material fact exists. Therefore, the lower court erred in not finding Dillmon's unsworn statement inadmissible and not granting Adventures' Second Motion for Summary Judgment as a matter of law. Adventures moves this Court to reverse the decision of the lower court and render judgment in favor of Adventures as a matter of law.

**D. Proximate Causation**

It is fundamental Mississippi law that in order to prevail on a negligence action, a

plaintiff must prove the four elements of duty, breach, proximate causation and injury, by a preponderance of the evidence. ***Leflore County v. Givens***, 754 So.2d 1223, 1230 (Miss. 2000) (***citing Lovett v. Bradford***, 676 So.2d 893, 896 (Miss. 1996)). Ricard's negligence *per se* allegation only applies to the first two elements of a negligence claim: duty and breach of duty. ***Moore***, 856 So.2d at 630. Ricard must also prove that Robinson's death resulted from a natural and continuous sequence, absent any intervening or superseding causes, without which his death would not have occurred. "Foreseeability is an essential element of both duty and causation." ***Delahoussaye v. Mary Mahoney's, Inc.***, 783 So.2d 666, 671 (Miss. 2001).

If Dillmon's unsworn statement is determined to be admissible, this remains a bar-hopping case where Dillmon started drinking at The Pirate's Den, continued on to Adventures, then patronized Casino Magic (where he claimed to not have consumed any more alcohol), followed by finding himself in a parking lot after striking and killing Robinson. To hold that Treasure Bay or Adventures was the proximate cause of Robinson's death, hours after he departed these establishments, would make Adventures responsible for the actions of Casino Magic's employees (assuming that is where Dillmon drank the "missing" 8 beers Dr. Hayne claimed he had to have consumed to indicate a BAC of 0.088), and any other establishment Dillmon did not happen to mention to OSPD where he may have stopped for more beer.

Adventures submits that when Dillmon left their establishment and arrived at Casino Magic, or any other destination, without incident, its responsibility and liability for Dillmon's actions terminated. Dillmon's bar-hopping to the next bar / casino was an intervening, superseding event which cut off its responsibility for Dillmon. The lower court erred when it

failed to grant Adventures' Second Motion for Summary Judgment as a matter of law, therefore, Adventures moves this Court to reverse the decision of the lower court and render judgment in its favor as a matter of law.

## V. CONCLUSION

Mississippi's Dram Shop Act is clear as to what Ricard must prove to strip Adventures of its statutory immunity. She must demonstrate that Dillmon was served with alcoholic beverages while visibly intoxicated, and that such service was the proximate cause of Robinson's death. The evidence simply fails to establish the facts required to hold Adventures accountable. Even if Ricard could substantiate that Dillmon was served beer while visibly intoxicated, she still cannot prove that Adventures' alleged negligence was the proximate cause of Robinson's death at approximately 5:15 a.m., October 23, 2002. Ricard cannot establish through her expert, Dr. Hayne, that Dillmon would have been legally or visibly intoxicated while a patron at Adventures. As Ricard cannot even establish by circumstantial evidence that Dillmon was legally intoxicated, it is impossible for Dillmon to have been visibly intoxicated.

Dillmon visited at least one other establishment after leaving Adventures and this acted as an intervening, superseding event, thus cutting off Adventures' liability, if any, for Dillmon's actions.

Finally, the only evidence Ricard has that even puts Dillmon in Adventures is his unsworn statement to OSPD. This statement is inadmissible under Mississippi's Rules of Evidence as Ricard's own expert, Dr. Hayne, expressly testified that portions of it are untrue. Therefore, there are no guarantees of trustworthiness and both the statement and any opinions based thereon should have been excluded.

For all the foregoing reasons, and because the Plaintiff failed to even file a Response to Adventures' Second Motion for Summary Judgment, this Court is urged to find that the lower court erred when it denied Adventures' Second Motion for Summary Judgment; therefore, Adventures moves this Court to REVERSE the decision of the lower court and RENDER judgment for Adventures as a matter of law.

RESPECTFULLY SUBMITTED this, the 5th day of December, 2006.

FIRE DOG, INC. d/b/a
ADVENTURES BAR & GRILL, Appellant

BY: LAW OFFICES OF DONALD J. RAFFERTY, PA

BY: Cynthia D. Burney
DONALD J. RAFFERTY, MSB No. [redacted]
CYNTHIA D. BURNEY, MSB No. [redacted]

## CERTIFICATE

Pursuant to M.R.A.P. Rule 25(a), I hereby certify that I forwarded, for filing, the original and three (3) true and correct copies of the above and foregoing Brief of Appellant, via overnight delivery (United States Postal Service), to:

Hon. Betty W. Sephton
Clerk, Supreme Court of Mississippi
P.O. Box 249
Jackson, Mississippi 39205-0249

I further certify that I have mailed a true and correct copy of the above and foregoing Brief of Appellant *via* First Class U.S. Mail, to:

Tom P.Calhoun, III, Esquire
Lewis, Calhoun & Backhaus
P. O. Drawer 8047
Greenwood, Mississippi 38935-8047

Jackye C. Bertucci, Esquire
Attorney at law
P.O. Box 8212
Biloxi, Mississippi 39535-8212

Walter W. Dukes, Esquire
Je'Nell B. Gustafson, Esquire
Dukes, Dukes, Keating & Faneca, P.A.
Post Office Drawer W
Gulfport, Mississippi 39502

Honorable Dale Harkey
Jackson County Circuit Court Judge
Post Office Box 998
Pascagoula, Mississippi 39568-0998

I further certify that, pursuant to M.R.A.P. Rule 28(m), that I have also mailed an electronic copy of the above and foregoing on an electronic disk and state that this brief was written in Microsoft Word format.

THIS, the 5th day of December 2006.

Cynthia D. Burney
CYNTHIA D. BURNEY

DONALD J. RAFFERTY (MSB #[redacted]
CYNTHIA D. BURNEY (MSB #[redacted]
Law Offices of Donald J. Rafferty, PA
2118 18th Street
Post Office Box 4252
Gulfport, Mississippi 39502
Telephone: (228) 868-5421
Facsimile: (228) 868-5422