IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NO. 2008-CA-00612

VINCENT P. PONTILLO **APPELLANT**

VS.

WAREHOUSE BAR AND GRILL, LLC **APPELLEE**

BRIEF OF APPELLEE

Appealed from the Circuit Court of Hinds County, Mississippi

ORAL ARGUMENT NOT REQUESTED

David C. Dunbar, Esq. ([redacted]
Benny M. "Mac" May, Esq. [redacted]
DunbarMonroe, P.A.
270 Trace Colony Park, Suite A
Ridgeland, Mississippi 39157
Telephone: (601)898-2073
Facsimile: (601)898-2074

CERTIFICATE OF INTERESTED PERSONS

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

1. Vincent Paul Pontillo
   179 Blackstone Boulevard
   Brandon, Mississippi 39047
   Plaintiff / Appellant

2. Merrida (Buddy) Coxwell, Esq.
   Charles R. Mullins, Esq.
   Kevin J. White, Esq.
   Coxwell & Associates, PLLC
   Post Office Box 1337
   Jackson, Mississippi 39215-1337
   Counsel for Plaintiff / Appellant

3. Wayne Mays, sole member of
   The Warehouse Bar & Grill, LLC
   9347 Highway 18, West
   Raymond, Mississippi 39154
   Defendant / Appellee

4. David C. Dunbar, Esq.
   Benny M. "Mac" May, Esq.
   DunbarMonroe, P.A.
   270 Trace Colony Park, Suite A
   Ridgeland, Mississippi 39157
   Counsel for Defendant / Appellee

5. Wayne Gilpatrick, MDOC#124377
   Central Mississippi Correctional Facility
   Building 3-C
   Post Office Box 88550
   Pearl, Mississippi 39208
   Co-Defendant

6. Honorable W. Swan Yerger
Circuit Court Judge, Hinds County
Post Office Box 327
Jackson, Mississippi 39205-0327
Trial Court Judge

Respectfully submitted,

THE WAREHOUSE BAR & GRILL, LLC

By Its Attorneys,

DunbarMonroe, P.A.

By: 
David C. Dunbar
Benny M. "Mac" May

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I.

STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT COMMITTED ERROR IN GRANTING THE WAREHOUSE BAR AND GRILL SUMMARY JUDGMENT.

II. WHETHER THE TRIAL COURT COMMITTED ERROR IN STRIKING THE AFFIDAVIT OF KIMBERLY KRAFT MOULDS, PH.D.

II.

STATEMENT OF THE CASE

A. Facts / Nature of the Case

In the early morning hours of March 19, 2005, Vincent P. Pontillo, the Appellant herein, was a passenger in a vehicle involved in a head-on collision with another vehicle driven by Wayne Gilpatrick ("Gilpatrick") while traveling on Highway 18 in Rankin County, Mississippi. While the extent of Pontillo's injuries was disputed at the trial court level, it appears that Plaintiff was in fact, injured, at least to some extent, as the result of the subject accident.

On the evening of March 18, 2005, prior to the accident, Gilpatrick had been operating the karaoke machine at The Warehouse Bar & Grill ("The Warehouse"). Gilpatrick testified that he received "gas money" from Wayne Mays, the owner of The Warehouse, for operating the karaoke equipment. He further testified that he did not consume any alcohol whatsoever while operating the karaoke equipment. Gilpatrick was driving home from The Warehouse at the time of the subject accident.

There is no question that Gilpatrick was present on the premises of The Warehouse that night. However, there was absolutely no evidence presented to the trial court to show that either The Warehouse, or any of its agents, employees or principals, was involved in the subject accident,

played any part in the alleged "entrustment" to Gilpatrick of the Chevrolet C-10 automobile that he was driving when the accident occurred, or served alcohol to Gilpatrick at all on March 18-19, 2005 (except for one beer at about 3:00 p.m.) Furthermore, there was certainly no evidence presented to the trial court which would serve to demonstrate that The Warehouse or its agents served alcohol to Gilpatrick at a time when he was "visibly intoxicated." Lastly, there was no evidence presented to the trial court which would support Pontillo's assertion that Gilpatrick was an employee or servant of The Warehouse, or that he was performing any business whatsoever on behalf of The Warehouse at the time of the accident.

One theory upon which Plaintiff sought recovery from The Warehouse in the trial court was that "[u]pon information and belief the Plaintiff believes that employees at The Warehouse, sold, furnished, and/or served alcohol to the Defendant Wayne Gilpatrick at a time when Defendant, Wayne Gilpatrick was visibly intoxicated," and that said sale was "negligent." R. at V. 1, p. 116. However, Plaintiff also attempted to recover under negligence *per se*, claiming that The Warehouse "violated Miss. Code Ann. § 67-1-83 by serving, furnishing or selling alcohol to the Defendant Wayne Gilpatrick." R. at V. 1, pp. 116-117. The *respondeat superior* theory offered by Mr. Pontillo was that, "[u]pon information and belief, the employees and/or owner of The Warehouse supplied, furnished and served Mr. Gilpatrick with alcohol and allowed him to consume it while he was working, during his work hours and within the course of his employment," and that while driving home in an intoxicated state or while under the influence he collided with Plaintiff and caused injury. R. at V. 1, p. 117. Negligent supervision was also tossed in the mix by Plaintiff, as he claimed that "as a result of [Gilpatrick's] drinking at work he became intoxicated." Lastly, "negligent hiring" of Mr. Gilpatrick by The Warehouse was offered as a basis for recovery, although no factual basis or

causal link was given for this final theory asserted against The Warehouse. R. at V. 1, p. 118. Frankly, no evidence was ever presented by Plaintiff to support any of his theories of recovery.

B. Course of Proceedings and Disposition in the Court Below

Vincent P. Pontillo filed suit against Wayne Gilpatrick, The Warehouse Bar & Grill, Wayne Mays and Brandon Vinson on or about November 9, 2006, alleging negligence, negligence *per se* and gross negligence. R. at V. 1, p. 6. The Warehouse and Mays filed a Motion for Summary Judgment as to the allegations of the Complaint on R. at V. 1, p. 26. Plaintiff opposed The Warehouse's Motion for Summary Judgment, filed on or about March 29, 2007, primarily on the basis of its timing, contending that he should be afforded an opportunity to conduct discovery in hopes of generating a factual basis for his claims against The Warehouse. R. at V. 1, p. 63. The Court initially withheld ruling on The Warehouse's motion for summary judgment, allowing Plaintiff additional time to conduct discovery and, ultimately, to amend his Complaint. R. at V. 1, pp. 122, 124. Plaintiff filed his First Amended Complaint on or about May 17, 2007, alleging *respondeat superior*, negligent supervision, and negligent hiring as additional counts against The Warehouse. R. at V. 1, p. 112. The Warehouse filed its second motion for summary judgment, and motion to strike Plaintiff's expert, on December 18, 2007. R. at V. 2, p. 211. Plaintiff filed his response on December 27, 2007. On March 7, 2008, the trial court entered two separate orders. One order granted The Warehouse's motion to strike the affidavit of Kimberly Kraft Moulds, Ph.D., which was submitted by Plaintiff as part of its response to The Warehouse's dispositive motion. R. at V. 2, p. 274. The other order granted The Warehouse's second motion for summary judgment. R. at V. 2, p. 276. The trial court also entered on that same day a final judgment of dismissal with prejudice

as to The Warehouse. R. at V. 2, p. 279. Plaintiff filed his notice of appeal herein on April 7, 2008. R. at V. 2, p. 280.

III.

SUMMARY OF THE ARGUMENT

The trial court's grant of summary judgment to The Warehouse was sound, and should be affirmed. While no hearing was held on the second motion for summary judgment filed by The Warehouse, any error arising from that omission was harmless, as the parties were given ample time for discovery, all issues were fully briefed by both parties well in advance of the entry of the trial court's order granting summary judgment in favor of The Warehouse and the court conducted a hearing on the motion after it was originally filed. The record in this case firmly establishes that there were no disputed issues of material fact, and that summary judgment in favor of the Warehouse was appropriate.

Likewise, the trial court's order striking Pontillo's expert was proper. The purported expert was completely lacking in qualification to provide opinions regarding " the interpretation of the effects of ethyl alcohol in human beings" as she was designated. Furthermore, her offered opinions were completely irrelevant to Pontillo's claims against The Warehouse.

IV.

STANDARD OF REVIEW

"Summary judgment is granted 'if the pleadings, depositions and answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" *Treasure Bay Corp. v. Ricard*, 967 So. 2d 1235, 1238 (¶10) (Miss. 2007) (quoting Miss. R. Civ. P. 56(c). "The evidence

must be viewed in the light most favorable to the nonmoving party." *Ricard*, 967 So.2d at 1239 (¶10) (citing *Flores v. Elmer*, 938 So. 2d 824, 826 (Miss. 2006)). "A party opposing summary judgment must come forward with significant probative evidence to support each essential element of his claim." *Mallery v. Taylor*, 805 So. 2d 613, 620 (¶11) (Miss. Ct. App. 2002) (citing *Wilbourn v. Stennett, Wilkinson, and Ward*, 687 So. 2d 1205, 1214 (Miss. 1996)). "Conclusory allegations, bare assertions, and speculations do not suffice." *Id.* (citing *Brewton v. Reichbold Chem., Inc.*, 707 So. 2d 618, 620 (Miss. 1998).

"The standard of review by which an appellate court reviews the grant or denial of a motion for summary judgment under Rule 56(c) of the Mississippi Rules of Civil Procedure is *de novo*." *Grammar v. Dollar*, 911 So. 2d 619, 621-22 (¶ 4) (Miss. Ct. App. 2005) (citing *McMillan v. Rodriguez*, 823 So. 2d 1173, 1176-77 (¶ 9) (Miss. 2002)). In determining whether a motion for summary judgment was properly granted, the reviewing court must view the evidence "in the light most favorable to the party against whom the motion has been made." *Weatherly v. Union Planters Bank, N.A.*, 914 So. 2d 1222, 1224 (¶ 9) (Miss. Ct. App. 2005) (citation omitted). The appellate court "will only reverse a trial court's decision to grant summary judgment if triable issues of fact exist." *Johnston v. Palmer*, 963 So. 2d 586, 592(¶ 11) (Miss. Ct. App. 2007) (citing *Bowie v. Montfort Jones Mem'l Hosp.*, 861 So. 2d 1037, 1041 (¶ 8) (Miss. 2003)).

V.

ARGUMENT

A. WHETHER THE TRIAL COURT COMMITTED ERROR IN GRANTING THE WAREHOUSE BAR AND GRILL SUMMARY JUDGMENT.

Pontillo first attacks the trial court's decision as being procedurally inappropriate, arguing that the judgment must be reversed because the trial court granted The Warehouse's second motion for summary judgment without first holding a hearing on same. In advancing this argument, Pontillo relies mainly upon a 2005 decision by the Mississippi Court of Appeals. *Partin v. North Mississippi Medical Center, Inc.*, 929 So. 2d 924 (Miss. Ct. App. 2005). In *Partin*, several defendants filed their motions for summary judgment and timely noticed them for a March 28, 2003, hearing. *Id.* at 928 (¶11). Another defendant, Dr. Oakes, filed his motion for summary judgment just four days before the scheduled hearing. *Id.* Following the hearing, the trial court took the motions under advisement. *Id.* Several months later, the trial court sent a letter to all counsel stating that the summary judgment motions all defendants were granted. *Id.*

The Court of Appeals reversed as to Dr. Oakes, finding that "there was nothing substantive put on [at the hearing] by Dr. Oakes or by [plaintiff] respecting Dr. Oakes's particular role in the case." *Partin*, 929 So. 2d at 935 (¶39). The Court also noted that Dr. Oakes's counsel had openly declared at the hearing that "his motion for summary judgment was not yet ripe, being filed only four days before the hearing on the other parties' motions." *Id.* The Court further recognized that the Plaintiff, "not expecting to be dealing with Dr. Oakes's motion until a later date, did not prepare or deliver any specific response to Dr. Oakes at the March 28, 2003 hearing." *Id.*

The facts of the *Partin* matter are easily distinguishable from those of the case at bar. Unlike in *Partin*, the facts of the instant matter were fully fleshed out during discovery and were fully presented to the trial court by way of the hearing on the original motion for summary judgment and the parties respective filings on The Warehouse's motion for summary judgment.[1] There were no outstanding issues of material fact at the time that the trial court rendered its decision, and Pontillo had been given abundant opportunity to address all issues. As the *Partin* Court noted, "the cases of *Croke v. Southgate Sewer Dist.*, 857 So. 2d 774, 778 (¶ 10) (Miss. 2003), and *Adams v. Cinemark USA, Inc.*, 831 So. 2d 1156, 1163 (¶ 26) (Miss. 2002), declare that the error in granting a summary judgment motion without a hearing may be harmless error if there are, indeed, no triable issues of fact." *Id.* at 934 (¶38). The *Adams* Court declared that a summary judgment motion may be decided upon written briefs, if it appears that there are no genuine issues of material fact. *Adams*, 831 So. 2d at 778 (¶ 12). Importantly, the *Adams* Court noted that "where ruling is withheld pending completion of discovery [as happened in the instant matter], violation of the time requirement of Rule 56 (c) will often. . .be harmless." *Id.* at 645 (¶26). As in *Adams*, Pontillo had ample time for discovery prior to the entry of summary judgment, so any error on the part of the trial court in not holding a hearing on The Warehouses' second motion for summary judgment was harmless. Additionally, in Pontillo's case, the Court did conduct a hearing on the issues relevant to the motion. Pontillo's claim that the trial court's decision must be reversed for procedural error in granting summary judgment is without merit.

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[1]The second motion for summary judgment and all associated filings, both in support and in opposition, were submitted after the trial court conducted its hearing on May 14, 2007, on the original motion. The filings were allowed to permit the parties to address comprehensively all issues deemed relevant.

Equally baseless is Pontillo's claim of substantive error regarding the trial court's grant of summary judgment. Pontillo states in his brief that "[t]he central issue of this matter surrounds whether and under what circumstances Wayne Gilpatrick consumed alcohol while at The Warehouse Bar & Grill" on the night in question. This is partially accurate. In order for any liability to fall upon The Warehouse for the accident based upon Gilpatrick's consumption of alcohol on the premises, Pontillo would need to set forth facts which show 1) that Gilpatrick was served that alcohol by The Warehouse 2) at a time when he was visibly intoxicated.

The Warehouse would show that the trial court was correct in finding no evidence that Gilpatrick was an employee of The Warehouse. However, this issue is wholly irrelevant to Pontillo's claims, because there is no evidence that Gilpatrick was engaged in any business whatsoever on behalf of The Warehouse at the time of the accident. Rather, all evidence points to the fact that Gilpatrick was drivng home when the accident occurred. Even assuming *arguendo* that Gilpatrick was an employee or agent of The Warehouse, "[i]t is a general rule that an employer is not liable for the acts of his employees going to and returning from work." *Colvin v. Ellis Const. Co., Inc.*, 840 F. Supp. 59, 62 (N. D. Miss. 1993) (citing *Smith v. Anderson-Tulley Co.*, 608 F. Supp. 1143, 1146 (S. D. Miss. 1985); *Luther McGill, Inc. v. Cook*, 306 So. 2d 304, 306 (Miss. 1975)).

Pontillo also argues that the trial court erred in granting summary judgment in favor of The Warehouse because, in his response to The Warehouse's second motion for summary judgment, Pontillo "disagreed" with portions of The Warehouse's itemization of undisputed facts. However, Pontillo makes no specific arguments regarding any of those "disagreements," nor does he cite any authority regarding such "disagreements." "It is well-settled that failure to provide authority is a procedural bar and places no obligation on [the appellate] Court to consider the issue on appeal."

Taylor v. Kennedy, 926 So. 2d 957, 959 (¶4) (Miss. Ct. App. 2006) (citing *Grey v. Grey*, 638 So. 2d 488, 491 (Miss. 1994)).

Notwithstanding the procedural bar of Pontillo's stated issue regarding his disagreement with The Warehouse's itemization of undisputed facts, a closer look at the "disputed" issues of fact which Pontillo generally references in his brief reveals that, as to each such issue, there is either no genuine dispute, or such dispute is wholly irrelevant to Pontillo's claims against The Warehouse. Those issues of fact, as set forth by The Warehouse, and as responded to by Pontillo, are as follows:

iii. There is no evidence that Wayne Gilpatrick consumed alcohol while operating karaoke at The Warehouse Bar & Grill, LLC on March 18-19, 2005.

Response: Plaintiff disagrees. While this fact is material, it is certainly disputed by Plaintiff. There exists circumstantial evidence that Mr. Gilpatrick consumed alcohol while operating karaoke at The Warehouse on March 18-19, 2005.

The "circumstantial evidence" to which Pontillo refers is the "expert" opinion of Kimberly Kraft Moulds, which is discussed in detail *infra*. Notwithstanding the lack of any relevant qualification whatsoever, Moulds opinion provides no basis upon which a jury could reasonably discern that Gilpatrick consumed alcohol at The Warehouse while operating karaoke on the night in question.

iv. Wayne Gilpatrick was not in the course or scope of employment with The Warehouse Bar & Grill , LLC at the time of the collision involving Plaintiff.

Response: Plaintiff disagrees. While this fact is material, it is certainly disputed by Plaintiff. Mr. Gilpatrick was operating the property of The Warehouse at the direction of The Warehouse and was paid for his work.

As discussed *supra*, it is undisputed that Gilpatrick was on his way home from The Warehouse at the time of the collision. Therefore, regardless of what he was doing while he was at

The Warehouse that evening, he was most assuredly not in the scope and course of his employment at the time of the collision. *Colvin v. Ellis Const. Co., Inc.*, 840 F. Supp. 59, 62 (N. D. Miss. 1993) (citing *Smith v. Anderson-Tulley Co.*, 608 F. Supp. 1143, 1146 (S. D. Miss. 1985); *Luther McGill, Inc. v. Cook*, 306 So. 2d 304, 306 (Miss. 1975)).

v. Neither The Warehouse, nor any of its agents, principals, owners or employees, sold or served alcohol to defendant Wayne Gilpatrick at a time when he was visibly intoxicated on March 18 or March 19, 2005.

Response: Plaintiff disagrees. While this fact is material, it is certainly disputed by Plaintiff. There exists circumstantial evidence that Mr. Gilpatrick was served or provided alcohol while he was visibly intoxicated.

Again, the "circumstantial evidence" to which Pontillo refers is the "expert" opinion of Kimberly Kraft Moulds, which was properly stricken by the trial court.

vi. Wayne Mays, the sole member of The Warehouse, served only one (1) alcoholic beverage to Wayne Gilpatrick on March 18, 2005, a beer, at approximately 3:00 p.m.

Response: Plaintiff disagrees. While this fact is material, it is certainly disputed by Plaintiff. There exists circumstantial evidence that Mr. Gilpatrick was served or provided more than one alcoholic beverage on March 18, 2005.

Plaintiff again refers to the "expert" opinion of Kimberly Kraft Moulds, which was properly stricken by the trial court, as "circumstantial evidence" that should have precluded summary judgment in favor of The Warehouse.

vii. The Warehouse served no alcohol to Wayne Gilpatrick on March 19, 2005.

Response: Plaintiff disagrees. While this fact is material, it is certainly disputed by Plaintiff. There exists circumstantial evidence that Mr. Gilpatrick was served or provided alcohol on March 19, 2005.

One more time, Plaintiff attempts to couch Moulds stricken affidavit as appropriate circumstantial evidence which should have acted to preclude summary judgment.

viii. No act or omission by The Warehouse has been shown or may be shown by Plaintiff to be the proximate or contributing cause of Mr. Pontillo's injuries and/or damages.

Response: Plaintiff disagrees. While this fact is material, it is certainly disputed by Plaintiff. There is indeed a genuine issue as to this material fact.

Here, Pontillo does not even elude to what evidence upon which he bases his disagreement with The Warehouse's offering of an undisputed fact. Given that Pontillo has failed to even attempt to make an argument in this regard, The Warehouse is under no obligation to respond.

Pontillo has failed, both at the trial court level and in his briefing to this Court, to enumerate a single disputed issue of material fact which should have acted to preclude summary judgment against him. As such, the trial court's decision must be affirmed.

B. THE TRIAL COURT DID NOT COMMIT ERROR IN STRIKING THE AFFIDAVIT OF KIMBERLY KRAFT MOULDS, PH.D.

After a year of litigation and discovery, and nine (9) months after The Warehouse filed its first motion for summary judgment, Pontillo sought for the first time to introduce purported expert opinion testimony interpreting the results of a blood-alcohol test performed on Gilpatrick following the subject accident. R. at V. 1, p. 126. In a last-ditch effort to create the illusion of a jury issue, Pontillo offered the affidavit of Kimberly Kraft Moulds, Ph.D., a purported "expert in the interpretation of the effects of ethyl alcohol in human beings." R. at V. 1, p. 136. The Warehouse took issue with Pontillo's designation of a *clinical counselor* to offer opinions requiring calculations and analysis of lab results. A review of Dr. Moulds resume reveals that her research concentration has been focused in the area of eating disorders and psychology. R. at V. 2, pp. 206-210. The Warehouse therefore moved to strike Dr. Moulds' affidavit on the grounds that she was unqualified to render opinions in the field in question and that the opinions contained in her affidavit were

unreliable. The trial court struck Dr. Moulds' affidavit, finding that she was not qualified by knowledge, skill, experience, training and/or education to render the opinions set forth in her affidavit, and that her opinions were based upon speculation, guess work and/or conjecture rather than facts in evidence. R. at V. 2, pp. 274-275.

Mississippi Rules of Evidence 702 permits expert testimony under the following standard: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. The affidavit and opinion offered by Dr. Moulds in this case did not meet the criteria of admissibility in Mississippi Courts and/or under Miss R. Evid. 702. Dr. Moulds cites in her affidavit the rate of metabolism of a 12-ounce bottle of beer for an adult as one (1) hour, then provides a range of .015 to .02 per hour for the rate of metabolism, which she adds to the .07 test result taken at approximately 5:00 a.m. on March 19, 2005, to back-out the supposed blood alcohol content of Mr. Gilpatrick each hour to 9:00 p.m. the previous day. R. at V. 2, pp. 203-204. Based on such crude calculations, Dr. Moulds renders the "professional opinion that Mr. Gilpatrick had more to drink than he stated." *Id.* at 204. She then goes on to extend her opinion to claim "that Mr. Gilpatrick was either drinking while at work, or he was significantly impaired at the time he arrived for work." *Id.*

The opinions offered by Dr. Moulds are not based upon sufficient facts or data, as she utilized a single test result taken at a point in time to extrapolate supposed alcohol levels at time

intervals up to approximately eight (8) hours before, without more than Gilpatrick's estimate at his criminal trial of the number of beers he consumed after midnight on March 19, 2005. While Dr. Moulds might possibly opine that "Mr. Gilpatrick had more to drink than he stated" based upon her calculations, there is absolutely no way, based upon the information utilized, that she can state to a reasonable degree of scientific/medical certainty that Mr. Gilpatrick consumed any alcohol at The Warehouse between 9:00 p.m. and 12:00 a.m. There is quite simply no evidence or other basis for such a theory.

It is just as possible, using Dr. Moulds' calculations, that Gilpatrick could have consumed five (5) or more beers between the time he left The Warehouse, about 12:00 a.m.[2], and the time of the accident, approximately 1:00 a.m., and metabolized the alcohol at such a rate that he would have registered a blood-alcohol level of .07 at 5:00 a.m. Nothing contained in Dr. Moulds' affidavit establishes the purchase, service, or consumption of alcohol by Wayne Gilpatrick at The Warehouse on March 18-19, 2005, that he was served alcohol while visibly intoxicated, or that he was under the influence while at The Warehouse that evening, but rather it consists of rank speculation and unreliable opinions based upon assumptions not established in evidence.

Setting aside for a moment the impropriety of Dr. Moulds' opinions, it cannot be overlooked that those opinions were completely irrelevant to Pontillo's claims against The Warehouse. While Dr. Moulds' affidavit might arguably be relevant to establish the Pontillo's case against Gilpatrick, it simply has no application whatsoever to his claims against The Warehouse. It is apparent that Pontillo hoped to create a jury issue by offering an expert. However, it is vital to note that, in doing

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[2]R. at V. 2, p. 242.

so, Pontillo merely created a disputed issue of opinion, not one of fact, and an irrelevant one at that. The trial court appropriately struck the affidavit of Dr. Moulds.

V.

CONCLUSION

For the reasons set forth above, Warehouse Bar and Grill, LLC respectfully submits that the Order Granting the Warehouse Bar & Grill, LLC's Motion to Strike, the Order Granting the Warehouse Bar & Grill, LLC's Second Motion for Summary Judgment and the Final Judgment of Dismissal with Prejudice as to The Warehouse Bar & Grill, LLC were proper and should be affirmed.

Respectfully submitted,

THE WAREHOUSE BAR & GRILL, LLC

By Its Attorneys,

DunbarMonroe, P.A.

By: _____
David C. Dunbar
Benny M. "Mac" May

OF COUNSEL:

David C. Dunbar, Esq. ([redacted]
Benny M. "Mac" May ([redacted]
DunbarMonroe, P.A.
270 Trace Colony Park, Suite A
Ridgeland, Mississippi 39157
Telephone: (601)898-2073
Facsimile: (601)898-2074

CERTIFICATE OF SERVICE

The undersigned certifies that he has this day served a copy of this *Brief of Appellee* via United States mail, postage prepaid on the following persons at these addresses:

Honorable W. Swan Yerger
Circuit Court Judge, Hinds County
Post Office Box 327
Jackson, Mississippi 39205-0327

Merrida Coxwell, Esq.
Charles R. Mullins, Esq.
Kevin J. White, Esq.
Coxwell & Associates, PLLC
Post Office Box 1337
Jackson, Mississippi 39215-1337

Wayne Gilpatrick, MDOC#124377
Central Mississippi Correctional Facility
Building 3-C
Post Office Box 88550
Pearl, Mississippi 39208

This the 6 day of January, 2009.

David C. Dunbar
Benny M. "Mac" May