

IN THE SUPREME COURT OF MISSISSIPPI

VINCENT P. PONTILLO

APPELLANT

v.

CASE # 2008-CA-00612

WAREHOUSE BAR AND GRILL, ET AL

APPELLEE

APPELLANT'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or refusal.

1. Hon. David C. Dunbar
Hon. W. Joseph Wiggins
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2. Wayne Gilpatrick
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3. Honorable W. Swan Yerger
Hinds County Circuit Court Judge
Post Office Box 327
Jackson, Mississippi 39205

Respectfully submitted,

VINCENT PONTILLO

BY:

OF COUNSEL

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STATEMENT OF FACTS

On or about March 19, 2005, Plaintiff was involved in a head-on collision with another vehicle driven by Defendant Wayne Gilpatrick. Plaintiff filed his complaint against the above-named Defendants on or about November 9, 2006, alleging negligence, negligence *per se*, and gross negligence. Tr. 6. Plaintiff subsequently filed a First Amended Complaint on or about May 17, 2007, further alleging *respondeat superior*, negligent supervision and negligent hiring against the Defendants. Tr. 112.

Mr. Gilpatrick went to The Warehouse Bar & Grill, LLC (hereinafter “The Warehouse”) on the evening of March 18, 2005 in order to run karaoke for the establishment that evening. He used The Warehouse’s equipment and he was paid some amount of money. An hour after leaving the bar on that evening Mr. Gilpatrick was involved in the subject collision. Due to the severity of the injuries sustained by both Mr. Gilpatrick and the Plaintiff, all parties to the collision were transported to various medical facilities. Upon Gilpatrick’s arrival at the hospital, authorities requested a sample of his blood in order to determine his blood alcohol concentration. Mr. Gilpatrick refused. It took another four hours before the authorities could obtain a search warrant and extract blood from Mr. Gilpatrick. At that time, his BAC registered at 0.07%. In October 2006, Mr. Gilpatrick was tried and convicted of three (3) counts of D.U.I. mayhem in the Rankin County Circuit Court, *State v. Wayne Gilpatrick*, Cause No. 17526. During trial Gilpatrick admitted to being negligent.

On March 29, 2007, Defendants Wayne Mays and The Warehouse filed both a *Motion for Summary Judgment* and a *Memorandum Brief in Support of Motion for*

Summary Judgment. Appellant responded to that Motion and the The Warehouse noticed the same for hearing.

The hearing on the The Warehouse's Motion was conducted on May 14, 2007, in front of the Circuit Court of the First Judicial District of Hinds County. Contemporaneous with the Defendants' dispositive motion and hearing, Plaintiff sought leave to amend his Complaint. Indeed, Plaintiff properly noticed his hearing on this *Motion for Leave* for the same day and time as the Defendants' above-mentioned motions.

On May 14, 2007, the Circuit Court of the First Judicial District of Hinds County ruled that Defendants' Motion was premature and ordered more discovery be conducted, in order to further flesh out the issues in dispute. Further, the Court granted Leave to Amend to the Plaintiff. Tr. 122-124.

Plaintiff filed his *Amended Complaint* on or about May 18, 2007. Defendant Warehouse Bar & Grill, LLC served their *Answer* to the same on or about May 30, 2007. On or about September 17, 2007, Defendants served a *Re-Notice of Hearing*, seeking to bring their *Motion for Summary Judgment*, filed in March, back on for hearing before this Court. Hearing was conducted on December 10, 2007.

Defendant filed their *Second Motion for Summary Judgment and Motion to Strike* on or about December 19, 2007 asserting, *inter alia*, that Plaintiff has not uncovered enough evidence for there to remain any genuine issues of material fact regarding the liability of The Warehouse Bar & Grill, LLC. Tr. 211. There was no further hearing on The Warehouse's *Second Motion for Summary Judgment and Motion to Strike*.

The Circuit Court of the First Judicial District of Hinds County granted Defendant's *Motion to Strike* the expert affidavit of Plaintiff's expert, Kimberly Kraft Moulds on or about March 7, 2008. Tr. 274. The Circuit Court of the First Judicial District of Hinds County granted Defendant's *Second Motion for Summary Judgment* on or about March 7, 2008. Tr. 276 The Circuit Court of the First Judicial District of Hinds County ordered and adjudged the *Final Judgment of Dismissal with Prejudice as to the Warehouse Bar & Grill, LLC*. Tr. 279.

II. STANDARD OF REVIEW

This Court is to employ a de novo standard of review of a lower court's grant of summary judgment. *Moss v. Batesville Casket Co.*, 935 So.2d 393, 398 (Miss.2006). The evidence must be viewed in the light most favorable to the party against whom the motion was made, and the moving party bears the burden of demonstrating that no genuine issue of fact exists. *Id.* "[T]his Court looks at all evidentiary matters in the record, including admissions in pleadings, answers to interrogatories, depositions, affidavits, etc." *Harrison v. Chandler-Sampson Ins., Inc.*, 891 So.2d 224, 228 (Miss.2005) (citing *Aetna Cas. & Sur. Co. v. Berry*, 669 So.2d 56, 70 (Miss.1996)). For a summary judgment motion to be granted there must exist no genuine issues of material fact and the moving party will then be entitled to a judgment as a matter of law. M.R.C.P. 56(c), *Heigle*, 771 So.2d at 345. On the other hand, "[i]f there is doubt as to whether or not a fact issue exists, it should be resolved in favor of the non-moving party." *Aetna*, 669 So.2d at 70 (Miss.1996)(citing *Ratliff v. Ratliff*, 500 So.2d 981, 981 (Miss.1986)). "The moving party has the burden of demonstrating that no genuine issue of material fact exists, and the non-moving party must be given the benefit of the doubt concerning the

existence of a material fact.” *Howard v. City of Biloxi*, 943 So.2d 751, 754 (Miss.Ct.App.2006).

ISSUE ONE: THE TRIAL COURT COMMITTED ERROR IN GRANTING THE WAREHOUSE BAR AND GRILL SUMMARY JUDGMENT

The Warehouse Bar & Grill filed their Motion for Summary Judgment on or about March 29, 2007. Hearing was held on the same on or about May 14, 2007. It was determined by the lower court, at that time, that due to the short period of time since the filing of the Complaint, more discovery would be allowed in order to further flesh out pertinent testimony and facts. The parties indeed conducted several depositions throughout the summer of 2007 and Plaintiff even amended his Complaint. On or about September 17, 2007, The Warehouse Bar & Grill noticed another hearing on the same dispositive motion, seemingly failing to consider that the Complaint on which their effort was based had been amended since the April 2007 hearing. Indeed, not only was the Complaint amended since the filing of the original dispositive effort, but further discovery was conducted and certain parties had been dismissed from the action. In short, Appellee Re-Noticed a Hearing for their Motion for Summary Judgment which was drafted and originally argued before the Plaintiff amended his Complaint.

Due to the fact there existed several claims in Amended Complaint that were not address in Appellees’ first Motion for Summary Judgment, it seemed clear to Appellants that dismissal of unaddressed claims would be violative of the burdens and safeguards relating to summary judgment. However, due to the severity of dispositive motions, Appellants filed a Supplemental Response to Defendants Motion for Summary Judgment, seeking to re-address the assertions of Defendant’s Motion with the use of facts and testimony discovered since the May 14, 2007 hearing. Appellant also included an

opinion and affidavit from Kimberly Kraft Moulds, Ph.D, stating that Mr. Gilpatrick was likely intoxicated at the time of this subject incident. Hearing was indeed conducted on or about December 10, 2007, in chambers, and without record, at the preference of the trial judge.

At that hearing, counsel for Appellant explained the herein-contained regarding the chronology of the case and the facts motivating a *Supplemental Response*. While the lower court heard oral arguments on The Warehouse's Motion for Summary Judgment, the court further advised that he would allow Appellee the ability to respond to Appellant's Supplemental Response and rule accordingly, without further hearing. The Warehouse Bar & Grill instead filed a *Second Motion for Summary Judgment and a Motion to Strike* the opinion of Ms. Moulds. Tr. 211. Plaintiff responded to Appellee's Second Motion for Summary Judgment and Motion to Strike the opinion of Ms. Moulds. Tr. 258. Subsequent to these filings, no further hearing was conducted, although Appellee had filed a Second and separate Motion for Summary Judgment and Motion to Strike. Instead, the trial court granted Appellee's dispositive efforts and dismissed Plaintiff's case.

Existing authority in Mississippi explains clearly that the notice and hearing requirements of *Miss. R. Civ. Pro* 56 regarding summary judgment are to be strictly enforced. *Partin v. North Mississippi Medical Center, Inc.*, 929 So.2d 924, 934 (Miss.App. 2005). Further, Mississippi law, in general, declares that granting a summary judgment motion without a hearing is error. *Id.* at 935. While the lower court conducted two hearings on Appellee's initial *Motion for Summary Judgment*, this was not the motion that ultimately resulted in the dismissal of Mr. Pontillo's case: The effort that

dismissed Appellant's cause of action was The Warehouse's *Second Motion for Summary Judgment and Motion to Strike*. There was never any hearing noticed or conducted on The Warehouse's *Second Motion for Summary Judgment and Motion to Strike*, making dismissal of Appellant's case error.

In *Partin v. North Mississippi Medical Center* 929 So.2d 924(Miss.App. 2005), the Court found reversible procedural error in granting a motion for summary judgment when no hearing had been set as required by Rule 56 of the *Mississippi Rules of Civil Procedure*. The Court, in *Partin*, also highlighted the oft-held lens through which summary judgment motions should be viewed: motions for summary judgment should be viewed with a skeptical eye, and in questionable cases, the trial court should deny the motion. *Id.* at 933; citing *Dailey v. Methodist Medical Center*, 790 So.2d 903 (Miss.App. 2001); *Burkes v. Fred's Stores of Tennessee*, 768 So.2d 325, 328 (Miss.App. 2000). The non-moving party does not have to prove all of the elements of their case to survive a pre-trial summary judgment motion; rather, the non-moving party only has to demonstrate there are genuine issues of material fact. *Id.* Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. *Partin*, 929 So.2d at 928.

The central issue of this matter surrounds whether and under what circumstances Wayne Gilpatrick consumed alcohol while at The Warehouse Bar & Grill. Mr. Gilpatrick's own testimony at his criminal trial illustrated that he indeed was working and had consumed alcohol. Moreover, the affidavit of Kimberly Kraft Moulds, Ph.D further solidified the existence of disputed facts. Tr. 203-205. It is Mr. Pontillo's contention that

Mr. Gilpatrick consumed alcohol while working for The Warehouse Bar & Grill, became intoxicated, departed, and subsequently caused the subject collision. The Warehouse Bar & Grill contends that Mr. Gilpatrick did not consume alcohol on their premises on the evening in question. Dr. Moulds' mathematical blood-alcohol extrapolation was provided to illustrate a material, genuine issue of disputed fact. The collision occurred at or around an hour after Mr. Gilpatrick departed The Warehouse. Four hours later, his blood-alcohol content was .07%. Appellant outlined the flaws in The Warehouse's assertions and illustrated testimony possibly evidencing Mr. Gilpatrick did, in fact, consume alcohol on their premises. Tr. 134-136. Combined with the standard set out above from *Partin*, the lower court erred in granting The Warehouse's *Second Motion for Summary Judgment* as this is a questionable case with many outstanding material issues.

Continuing, The Warehouse Bar & Grill asserted in their Motions that Mr. Gilpatrick was not working for them on the night in question. Appellant in his *Supplemental Response to Wayne Mays' and The Warehouse's Motion for Summary Judgment* outlined testimony, elicited during discovery, putting the merits of this fact very much in issue. Tr. 128-132. Mr. Gilpatrick was working at The Warehouse's discretion, using their equipment, at their direction, on their premises and was paid for being there. Those facts are not in dispute, yet the lower court found no genuine issue and disposed of Appellant's case.

In The Warehouse Bar & Grill's *Second Motion for Summary Judgment*, Appellee itemizes several facts which they list as undisputed. Tr. 212-213. Not only are a large portion of those itemized facts still quite disputed, Appellant addressed these facts in his *Response to Defendant The Warehouse Bar & Grill's Second Motion for Summary*

Judgment, highlighting which assertions by The Warehouse were undisputed and which were very much in dispute. Tr. 260-261. Somewhat shockingly, the lower court granted Appellee's dispositive motion notwithstanding the myriad of genuine issues of material fact evidenced by the various motions and responses filed with the trial court. "If there is doubt as to whether or not a fact issue exists, it should be resolved in favor of the non-moving party." *Aetna*, 669 So.2d at 70. It seems clear that the dismissal of Appellant's case was hearing, in light of the existing issues of fact and in light of the failure of the lower court to conduct a hearing on The Warehouse's Motion.

**ISSUE TWO: THE TRIAL COURT COMMITTED ERROR IN STRIKING THE
AFFIDAVIT OF KIMBERLY KRAFT MOULDS, PH.D.**

When reviewing the trial court's decision to allow or exclude evidence, including expert testimony, this Court applies an "abuse of discretion" standard. *Canadian National/Illinois Central Railroad v. Hall*, 953 So.2d 1084, 1094 (Miss.2007). Unless the Court concludes that a trial court's decision to admit or exclude evidence was arbitrary and clearly erroneous, that decision will stand. *Irby v. Travis*, 935 So.2d 884, 912 (Miss.2006). Under Mississippi Rules of Evidence Rule 702, trial courts are charged with being gatekeepers in evaluating the admissibility of expert testimony. *Id.* "We are confident that our learned trial judges can and will properly assume the role as gatekeeper on questions of admissibility of expert testimony." *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31, 40 (Miss.2003). Mississippi Rules of Evidence 702 provides: "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) their 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.

A trial court ruling on the admissibility of expert testimony determines whether the testimony rests on a reliable foundation and is relevant in a particular case. *Id.* at 36. There must be a valid scientific connection to the pertinent inquiry as a precondition to admissibility, and the party offering the expert's testimony must show that the expert has based his testimony on the methods and procedures of science, not merely subjective beliefs or unsupported speculation. *Id.*

Mr. Pontillo offered retrograde blood-alcohol content extrapolation in order to satisfy his burden on summary judgment. Tr. 203-204. Without hearing on The Warehouse's Motion, the trial court ruled to strike testimony and affidavit of the Appellant's witness and grant Appellees' Motion. Kimberly Kraft Moulds, Ph.D provided an opinion regarding Mr. Gilpatrick's level of intoxication on the night in question. Dr. Moulds based her opinions on Mr. Gilpatrick's blood-alcohol content of 0.07%, taken on the morning of March 19, 2005, and Mr. Gilpatrick's statements given at his criminal trial. Tr. 203-204. The lower court struck Dr. Moulds' affidavit without hearing, although this affidavit was provided pursuant existing authority illustrating the admissibility of blood-alcohol extrapolation.

In *Treasure Bay Corp., et al v. Ricard*, 2007 WL 3293256 (Miss.), the Supreme Court affirmed the admissibility of an expert's opinion when that opinion was based, in part, on the statements of a defendant, regarding how much alcohol he drank. The court allowed a blood-alcohol extrapolation to be admitted in order to show the possible range of a Defendant's intoxication level at certain intervals through a pertinent time period. In

Treasure Bay, the Court affirmed the admission by a lower court to admit a mathematical blood-alcohol extrapolation. Instantly, the Appellant offered a very similar affidavit; it was based in part on the prior statements of Mr. Gilpatrick, and also contained a range of Mr. Gilpatrick's level of intoxication throughout the evening in question. Appellant's submission of Dr. Moulds' affidavit is analogous to *Treasure Bay* and the lower court erred in striking the same.

Further, and of importance, this cause stems from an incident which led to criminal charges and conviction. In obtaining the conviction, the State provided blood-alcohol extrapolation in order to establish the defendant was intoxicated at the time of the subject collision. An appeal followed and this Court in *Gilpatrick v. State*, 2008 WL 3099526 (Miss.) affirmed the lower court conviction of DUI maiming and the admissibility of blood-alcohol content extrapolation. In *Gilpatrick*, the witness who provided the testimony regarding the extrapolation testified that "we are making, as I stated, some assumptions and some probabilities here . . .". *Id.* Notwithstanding this, the State's expert opined that Mr. Gilpatrick was intoxicated at the time of the collision. The trial court allowed the witness' testimony recognizing that his findings and opinion were not mere speculation. *Id.* It bears mention that the facts present in *Gilpatrick*, a criminal matter, are the same present instantly. The Supreme Court affirmed the admissibility of the blood-alcohol extrapolation in the criminal form of this factual scenario, however the lower court has ruled the same to be inadmissible in this civil action.

In *Smith v. State*, 942 So.2d 308 (Miss.App. 2006), the trial court allowed mathematical calculation of retrograde BAC extrapolation, estimating that defendant's blood alcohol content would have been higher during different pertinent time frames.

After conducting a hearing on the admissibility of retrograde extrapolation, the lower court determined that such extrapolation and calculation was based on scientific method recognized by many scientists and admissible evidence. *Id.* The Court in affirming the decision explained that the lower court's holding of an extensive hearing on the issue of the proffered testimony was an exercise of its proper role as "gatekeeper". *Id.*

In each of these cases, a similar if not identical type of opinion and testimony, as offered by Appellant in opposition to summary judgment, was deemed by this Court to be proper and admissible. The opinion and affidavit of Kimberly Kraft Moulds offered by Appellant clearly outlined upon which facts the data was based. Tr. 203-204. Further, her affidavit makes clear her opinion was based upon mathematical calculations and reliable scientific principles, not mere subjective speculation. *Id.* Finally, her opinion clearly explains what method was utilized to apply the calculations to the data available. When a trial judge's decision to exclude expert testimony is arbitrary and erroneous, it amounts to abuse of discretion. *McLemore*, 863 So.2d at 34. The Appellant prays this Court will remedy this abuse and reverse the errors of the lower court.

CONCLUSION

The instant case is one rife with disputed facts and material issues. As an examination of the record should illustrate, summary judgment was questionable, at best, and should have been denied by the lower court. The failure of the court to hold a hearing on the *Second Motion for Summary Judgment*, the failure to acknowledge the myriad of disputed facts illustrated by the record and the striking of Appellant's expert affidavit, especially when having been done without hearing on the merits, all ring of

error. Appellant prays this Court will remedy these errors and reverse the dismissal of his case.

CERTIFICATE OF SERVICE

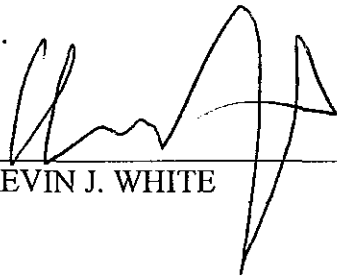
This is to certify that I, Kevin J. White, have this day via United States mail postage prepaid, caused a true and correct copy of the above and foregoing *Appellant's* *Brief* to be served on the following:

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

This the 4th day of November, 2008.



KEVIN J. WHITE