IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DANIEL EDMONDS	**Appellant,**
vs.	**NO. 2008-CA-00759**
ROBINSON PROPERTY GROUP, LIMITED PARTNERSHIIP, d/b/a HORSESHOE CASINO & HOTEL TUNICA; JOHN DOE 1; JOHN DOE 2; and JOHN DOE 3,	**Appellees.**

BRIEF OF APPELLEE

APPEALED FROM THE CIRCUIT COURT OF TUNICA COUNTY, MISSISSIPPI CIVIL ACTION 2005-0286

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certify the following list of persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate potential disqualifications or refusal/recusal.

1. Trial Judge — Honorable Albert B. Smith
2. Appellant — Daniel Edmonds
3. Attorney for Appellant — Kevin J. Rudlett
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4. Appellee — Robinson Property Group, Limited Partnership
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6. Sharon Grandberry-Reynolds, Circuit Court Clerk, Tunica County
7. Horseshoe Casino and Hotel
8. Vickie Clark

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STATEMENT ON ORAL ARGUMENT

The Appellee respectfully requests oral argument. This appeal presents complicated facts and legal issues, and an oral argument would be beneficial to this Court and to the parties. The Appellee, therefore, respectfully submits that oral argument would be appropriate in this case.

I.

STATEMENT OF THE ISSUES

1. Whether the trial court correctly granted the Motion for Directed Verdict at the close of Plaintiff's proof.
2. Whether the court abused its discretion in denying the plaintiff's Motions for Contempt and for Sanctions.

II.

STATEMENT OF THE CASE RELEVANT TO THE MOTION FOR DIRECTED VERDICT

This case arises out on an incident at the Horseshoe Casino in Robinsonville, Mississippi on February 11, 2005 when Appellant claims he was injured when another patron of the casino struck him in the face and hit him several times. (Appellee R.E. 4, 5, 6, and 7). Mr. Edmonds filed an Amended Complaint for damages on February 21, 2006 against Robinson Property Group, Limited Partnership. (Appellee R.E. 5). The Second and Third Amended Complaints were filed June 4, 2007 and June 11, 2008 respectively. (Appellee R.E. 6 and 7). The plaintiff requested unspecified damages in his original and Amended Complaints. (Appellee R.E. 4, 5, 6, and 7).

Robinson Property Group, L.P. filed its Answer to the Third Amended Complaint on August 9, 2007 denying that it was guilty of any act or omission that proximately caused the injuries alleged in the plaintiff's complaint. (Appellee R.E. 8). Defendant further alleged comparative fault against the aggressor known as John Doe 3. *Id.*

The matter was set for trial on March 13, 2008 before a jury and the Honorable Albert B. Smith. (Appellee R.E. 9). The plaintiff's case was supported by the testimony of the plaintiff; his friend, Lisa Barciszewski; Brenda Tyler; and Vickie Clark as an adverse witness. (R. Tran. p. 3, ll. 14-29). At the close of Mr. Edmonds proof, counsel for the Appellee made a Motion for Directed Verdict on the basis that the plaintiff had not met his burden of proof on the allegations contained in his complaint. (R. Tran. pp. 184-194). The motion was granted. (R. Tran. p. 200, l. 15). On April 11, 2008 the Court entered an Order on the Directed Verdict. (Appellee R.E. 2). The plaintiff, Daniel Edmonds, filed his Notice of Appeal on April 28, 2008. (Appellee R.E. 3).

This Honorable Court docketed and assigned a case number, as well as, provided a briefing schedule on October 1, 2008.

III.

STATEMENT OF THE FACTS RELEVANT TO THE MOTION FOR DIRECTED VERDICT

According to the plaintiff, on or about February 11, 2005, the plaintiff, Daniel Edmonds, was a guest at Horseshoe Casino and Hotel, which is owned and operated by Robinson Property Group, LP. (Appellee R.E. 4, 5, 6, and 7). On that date, as Edmonds was sitting at a food bar, another patron approached where Edmonds was sitting and began eating Edmonds' French fries. *Id.* According to the plaintiff, Edmonds informed the patron that he was eating Edmonds' fries; the patron gave Edmonds an "evil look" and walked away. (Appellee R.E. 10). Edmonds did not report these actions to a security guard. Edmonds observed the man speak to someone and then return to the food bar near Edmonds. *Id.* Edmonds then told the man, "Here, I don't want these anymore. You eat the fries." *Id.* The man then struck Edmonds in the face and hit him several times before Edmonds saw a security guard. *Id.* According to Edmonds, he had no fear, indication or apprehension that he was going to be struck by the patron. *Id.* Edmonds did not see a security guard in the area prior to the attack. *Id.* He first saw a security guard in the midst of the altercation which was subsequently broken up by the security guards. (R. Tran. pp. 110-111, ll. 4-29, 1-3.)

IV.

STANDARD OF REVIEW ON THE MOTION FOR DIRECTED VERDICT

The standard of review of a motion for directed verdict is de novo. If this Court finds that evidence favorable to the non-moving party, along with reasonable inferences drawn therefrom presents a jury question, then the motion should not have been granted. *Pace v. Fin Sec. Life of Miss.*, 608 So.2d 1135 (Miss. 1992), *Entergy Miss., Inc. v. Bolden,* 854 So.2d 1051, 1054 (Miss. 2003).

V.

STATEMENT OF THE ARGUMENT RELEVANT TO THE MOTION FOR DIRECTED VERDICT

The trial court correctly granted a directed verdict in favor of the defendant. The plaintiff presented zero proof that there was an "atmosphere of violence" such that the defendant was on notice of the potential danger to the plaintiff. Further, the plaintiff presented zero proof that it was reasonably foreseeable that the patron would attack the plaintiff and, finally, the plaintiff presented zero proof that the defendant had the opportunity to intervene in such as way as to avoid injury to the plaintiff. In order to avoid *per se* liability to premises owners, the Court requires this evidentiary burden be met by the plaintiff. *Simpson v. Boyd*, 880 So.2d 1047, 1051 (Miss. 2004).

VI.

ARGUMENT RELEVANT TO THE MOTION FOR DIRECTED VERDICT

The standard of review of a motion for directed verdict is de novo. If this Court finds that the evidence favorable to the non-moving party, along with reasonable inferences drawn therefrom present a jury question, then the motion should not have been granted. *Pace v. Fin Sec. Life of Miss.*, 608 So.2d 1135 (Miss. 1992), *Entergy Miss., Inc. v. Bolden,* 854 So.2d 1051, 1054 (Miss. 2003). In the case before this court, the trial court correctly found that the plaintiff failed to prove that it was reasonably foreseeable that another patron would attack him and that the defendant had the opportunity to intervene in such a way as to avoid injury to the plaintiff. The plaintiff likewise failed to prove that there was an "atmosphere of violence" at the defendant's casino such that the defendant would be on notice of the danger.

Premises liability is a theory of negligence where a duty for the premises owner arises by virtue of his ownership and control over the premises where others may be injured, and the duty owed depends on the status of the person on the premises. *Corley v. Evans*, 835 So.2d 30 (Miss. 2003). A patron of a casino is a business invitee of that establishment. *Estate of White ex. rel White v. Rainbow Casino-Vicksburg Partnership*, 910 So.2d 713, 719 (Miss. App. 2005). A premises owner is not an insurer of the business invitee's safety but has a duty to exercise reasonable care to protect the business invitee from reasonably foreseeable injury at the hands of other patrons. *Lyle v. Mladinich* 584 So.2d 397, 399 (Miss. 1991).

In *Simpson v. Boyd*, a former employee of a law office sued her former boss after she was assaulted at the office one morning by an intruder. 880 So.2d 1047, 1051 (Miss. 2004). The Mississippi Supreme Court upheld summary judgment for the employer because the plaintiff had offered no evidence that the type of crime committed against her perpetrated by a man who

simply walked into the office off the street, was reasonably foreseeable. *Id.* at 1052. In trying to prove foreseeability, the plaintiff offered evidence that the law office was located in a high-crime area, that there had been a handful of verbal exchanges in the office between clients and the lawyer and that there had even been a couple of minor criminal instances over a three year period. *Id.* However, the Court ruled that in order for the plaintiff to recover she would have to establish an "atmosphere of violence" evidenced by an "overall pattern of criminal activity prior to the event in question that occurred in the general vicinity of the defendant's business premises" or a "frequency of criminal activity on the premises" sufficient to put the defendant on constructive notice of the danger. *Id.* The Court observed that this evidentiary burden was necessary because a lower standard would "open the door to nearly per se liability for premises owners" when an invitee is attacked by someone on the premises. *Id.*

The plaintiff offered zero evidence that Robinson Property Group, L.P. could reasonably foresee that Daniel Edmonds would be attacked by another patron or that this "foresight" would have proximately avoided the injuries and damages of which the plaintiff is now complaining. On this point, the plaintiff's own deposition and trial testimony, is quite clear the he did not warn any security guards about the troublesome patron after the first incident, the plaintiff did not see security guards until after he was attacked and that the fight ended when a security guard appeared on the scene.

Q: **When he did that [eat your fries], did you report that to a security officer?**

A: **No.**

Q: **Did you try to get the attention of a security officer?**

A: **I didn't think I needed any security at that point.**

Q: Did you see a security officer in the area?

A: No, not at that point.

(Appellee R.E. 10).

Q: **At the point you were hit and before that point, had you seen any security officers in the area?**

A: **Not that I can remember.**

Q: So the first time you saw a security officer was after he had hit you several times?

A: No, that's not---It was in the middle of him hitting me.

Q: Had he hit you several times?

A: Yes, he had hit me several times.

Q: **Was that the first time that you had seen a security officer, after he had hit you several times?**

A: **Yes.**

Id.

Q: Go ahead and keep watching [Exhibit 2-videotape]. Tell me when it starts.

A: Right now.

Q: All right, right now. Now, you tell me when it stops.

(videotape playing)

Q: Is it still going on?

A: Yes, it is.

Q: Are you still in the frame?

A: I think we're in the corner here.

Q: Is it still going?

A: Yes, everybody is still watching.

Q: You are still in the frame?

A: No. No, I'm not. I can't see myself.

Q: Tell me when the fight stops.

A: Okay.

(videotape playing)

Q: Is it still going on?

A: Yes, it is.

Q: Tell me when it stops?

A: That pretty much was it.

Q: Now, you are saying it's over with. Now, on your oath, Mr. Kobs [sic], **did the fight end when the security guard entered** the screen from the right to the left? Mr. Kobs, I be you [sic] pardon, Mr. Edmonds.

A: **Yes, it did.** When the security guard entered the screen, that's when the fight stopped.

(R. Tran. pp. 110-111, ll. 4-29, 1-3).

Mississippi law requires the plaintiff to present evidence that an "atmosphere of violence" existed at the Horseshoe Casino which would put the casino on notice that an attack by a patron was reasonably foreseeable and that the defendant would have then had the opportunity to intervene in such a way as to avoid injury to the plaintiff. The plaintiff failed to offer any evidence that the attack was foreseeable, any evidence that an "atmosphere of violence" existed in the casino or any evidence that the defendant had an opportunity to intervene in a manner that would have prevented injury. According to the plaintiff's own testimony he was already under

attack when the first security guards appeared. He further testified that the altercation was sudden, unexpected, unforeseeable and unprovoked.

> Q: Was there anything about the man's manner or demeanor besides being rude that you thought required a security officer?
>
> A: Not up to that point, no.
>
> Q: Was there anything about his manner or demeanor up to the point that he attached you from the rear that made you fearful that he would attack you?
>
> A: Not fearful that he would attack me.
>
> Q: He wasn't being loud?
>
> A: No.
>
> Q: Had it [sic] touched you in any way up until this point?
>
> A: No.

(Appellee R.E. 10).

If the plaintiff sustained any injury, it was sustained in the initial assault and there is no testimony for the proposition that he sustained any additional injury as a proximate result of the fight lasting longer that it "should have." In fact, the plaintiff's testimony, as set out above, plainly states that when the security officer appeared on the scene the fight ended.

In addition, the defendant cannot be held to reasonably foresee injuries by a plaintiff who may have invited the attack. By his own words, the plaintiff engaged his attacker after an initial verbal altercation and after John Doe 3 had already walked away. In deposition testimony, Edmonds stated:

> "The fries were by me and he started eating them and I said, "Hey, sir, do you know you're eating my French fries," and he came back with---I don't remember the exact comment but basically, you know, mind your own business or leave me alone or something to that extent. And the **he** sort of, you know, **pushed the fries back at me after he had ate a few of them**. So I didn't think much about it. **I**

seen him walk away because you could tell that he was intoxicated and he was stumbling a little bit."

(Appellee R.E. 10).

Q: Mr. Edmonds, tell me about what happened. And I know you kind of described it a bit earlier. But tell me again what happened, from the moment you arrived at the Horseshoe Casino?

A: ....John Doe did come and eat my French fries. We had said a few words. I don't even remember what they were. I couldn't understand what he was saying back to me anyway. When he did come back, he---**like they were saying, he would step back** from whatever reason. Then he would come back to the bar right next to me. **I did slide the fries down to him. And I said, "There you go, sir. You eat the fries. I don't want them." In a little bit of a rude more that....**

(R. Tran. p. 93).

By further confronting, John Doe 3, the plaintiff invited the attack, a fact which Robinson Property Group could never foresee that an invitee would do. The Mississippi Supreme Court has set a reasonable bar for patrons attacked by other patrons to recover from the premises owner: the owner must be on notice of a dangerous "atmosphere of violence." The plaintiff failed to prove, and by his own testimony affirmatively disproves, that there was an atmosphere of violence at the Horseshoe Casino. The plaintiff testified that there was nothing about the attacker that put him in fear or caused him to feel the need to approach a security officer to report the incident up until the point he was attacked. The plaintiff further testified that in a "rude" manner he returned the French fries to John Doe 3 *after* John Doe 3 walked away from the altercation. Without an "atmosphere of violence," and in the face of unforeseeable provocation, there is no reasonably foreseeable injury. Without a reasonably foreseeable injury, the plaintiff has not met his burden of proof and directed verdict in favor of the defendant is correct.

VII.

STATEMENT OF THE CASE RELEVANT TO THE MOTIONS FOR CONTEMPT AND FOR SANCTIONS

On or about, February 28, 2007 counsel for the Plaintiff filed his first Motion for Citation for Contempt and for Sanctions. (Appellee R.E. 11). Defendant responded to this Motion on April 5, 2007. (Appellee R.E. 12). The trial court entered an Amended Order on May 4, 2007 in which the Court determined that it would take the matter under advisement until such time as the Plaintiff had the opportunity to conduct additional discovery into the matter. (Appellee R.E. 13). On or about, October 12, 2007 the Plaintiff filed his Amended Motion for Citation for Contempt and Sanctions which the Defendant responded to on December 11, 2007. (Appellee R.E. 14, Appellee R.E. 16). The plaintiff Noticed hearing of his motion for December 18, 2007, the day before the trial was to begin. (Appellee R.E. 15). On December 17, 2007 the court issued an Order resetting the trial for March 13, 2008. (Appellee R.E. 17). In the Pre-Trial statement filed on February 1, 2008, Plaintiff's counsel listed the Amended Motion for Contempt and Sanctions. (Appellee R.E. 18). On February 15, 2008, the Plaintiff Re-Noticed the hearing on his motion for March 13, 2008, the day on which the trial was set to begin. (Appellee R.E. 19). The trial judge denied the Motion on the basis of his review of the pleadings. (R. Trans. pp. 62-63, ll. 22-29, 1-3.)

VIII.

STATEMENT OF THE FACTS RELEVANT TO THE MOTION FOR CONTEMPT AND FOR SACTIONS

The defendant's first notice of this claim, that later became this Complaint, came by way of certified letter dated April 7, 2005, from Attorney J. Kevin Rundlett. (Appellee R.E. 16). Mr. Rundlett's letter alleges that on **February 14, 2004** [sic] the plaintiff was injured as a result of an unspecified "incident" that had occurred at the Horseshoe Casino. *Id.* Upon receipt of that notice, an investigation was begun resulting in a finding that "we have checked our records and we do not have a report this incident." *Id.* The reports of that investigation were reported to Mr. Rundlett by fax dated April 13, 2005. *Id.* A follow-up investigation performed by a separate legal coordinator for the defendant confirmed that "there was no incident report filed by Daniel Edmonds on this date for either the Horseshoe Tunica or Harrah's Tunica property. *Id.* Vickie Clark, Risk Manager at the Horseshoe property, contacted the attorney and requested that Daniel Edmonds come in and file an incident report. To this date, he has not." *Id.*

On September 28, 2005, the plaintiff filed suit against **Harrah's Tunica Corporation** [sic] alleging that on **February 14, 2004** [sic], he was injured during an altercation with another guest. *Id.* Discovery which was filed along with the Complaint asked the defendant to produce information concerning security guards who were working and restaurants which were open on **February 15, 2004.** [sic] The case was assigned to defense counsel and a claims file (Exhibit 1 attached to original Response, under seal for *in camera* review only) consisting of all of the information known to the defendant was forwarded to defense counsel for his use in defending the case. Harrah's Tunica Corporation (which at one time did business as the Harrah's Casino & Hotel but which has never done business as the Horseshoe Casino & Hotel) filed its Answer,

denying any knowledge whatsoever concerning the event described in the Complaint, and propounded discovery all in an effort to determine the truth of the allegations which were being made against it.

In addition to propounding formal discovery to the plaintiff, on October 25, 2005, defense counsel contacted the risk manager for the old Harrah's (now Resorts), in an effort to determine whether the incident had occurred at the old Harrah's rather than at the Horseshoe. *Id.* In addition, defense counsel spoke or met directly with the Risk Manager for Horseshoe on November 9, 2005, January 13, 2006, January 24, 2006, January 27, 2006, March 11, 2006, April 28, 2006, June 15, 2006 and on July 11, 2006, always concerning any additional avenues that might be explored in an effort to locate any record, anywhere concerning this incident. *Id.* (Exhibit 2 attached to original Response, under seal for *in camera* review only). Each time, the answer was that there was no record of the incident. *Id.* This fact was reported to the client by correspondence dated October 19, 2005, October 31, 2005, November 4, 2005, January 12, 2006, January 17, 2006, February 7, 2006, May 16, 2006, August 22, 2006, and December 9, 2006. *Id.* (Exhibit 3 attached to original Response, under seal for *in camera* review only).

On January 9, 2006, the plaintiff gave his sworn deposition, this time testifying that the incident occurred on **February 11, 2005** [sic] at **2:30 a.m.** [sic], after he had checked in at 1:30 a.m. that same morning and before he had checked out that same day.

While defense counsel was conducting discovery in compliance with the Mississippi Rules of Civil Procedure, plaintiff's counsel was issuing *ex parte* subpoenas in violation of Mississippi Rules of Civil Procedure. An *ex parte* subpoena issued by plaintiff's counsel, without notice to defense counsel, on February 10, 2006, seeking all files, all incident reports and all surveillance videos was served upon Robinson Property Group, whose officers had naively

prepared a response to that subpoena and was preparing to send it directly to plaintiff's counsel before contacting defense counsel. *Id.* A true and correct copy of the response that was prepared is marked as Exhibit 4 (attached to original Response), under seal for *in camera* review only.

Robinson Property Group has no Security Department record, however described, for any incident occurring on the date and at the time as alleged by the plaintiff in his original Complaint, in his first Amended Complaint, in his second Amended Complaint, in his initial discovery requests or in his deposition. A great deal of time, effort and expense was incurred responding to this Complaint filed against a wrong party and then diligently searching for records that do not exist. However, due largely to efforts outside of the pleadings, a videotape of an incident involving an unknown black male and an unknown white male was located and produced to adverse counsel just as soon as it was located. *Id.* The videotape documents an incident that occurred at approximately 6:00 a.m. on **February 12, 2005**, which is both a date and a time different from the allegations of the original, first and second amended Complaints. *Id.* It was not until a third Amended Complaint was filed in July 2007, that the plaintiff finally correctly stated a cause of action against Robinson Property Group for the incident that occurred on that date. The only corroborating proof that this incident occurred is the videotape involving "two unknown males." There is no Security Department Incident Report of the incident whatsoever.

In addition to providing what is believed to be the videotape of the incident to adverse counsel, Robinson Property Group responded without claim of privilege to interrogatories, requests for production of documents and requests for admissions. It provided the names and contact information for all persons known to it to have knowledge of discoverable facts and made all of those individuals available for deposition at the convenience of counsel. Robinson

Property Group even produced internal work product, providing a written script of the events shown on the videotape. Far from withholding information from adverse counsel, Robinson Property Group and defense counsel went the extra mile, and incurred unnecessary expense, in order to locate and to turn over evidence to a plaintiff who was unable to describe when, where, and under what circumstances his alleged cause of action arose.

IX.

STANDARD OF REVIEW ON THE DENIAL OF THE PLAINTIFF'S MOTION FOR CONTEMPT AND FOR SANCTIONS

The correct standard of review of a trial court's decision about whether to impose sanctions for discovery abuses under an abuse-of-discretion standard. *Jones v. Jones*, 995 So.2d 706, 711 (Miss. 2008), citing *Tinnon v. Martin,* 716 So.2d 604, 611 (Miss.1998) (citation omitted). The provisions for imposing sanctions are designed to give [trial] court[s] great latitude. *Id.* citing *Amiker v. Drugs for Less, Inc.,* 796 So.2d 942, 948 (Miss.2000). We will affirm a trial court's decision unless we have a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors. *Id.* citing *Cooper v. State Farm Fire & Cas. Co.,* 568 So.2d 687, 692 (Miss.1990).

X.

ARGUMENT RELEVANT TO DENIAL OF THE PLAINTIFF'S MOTION FOR CONTEMPT AND FOR SANCTIONS

As set out above, in order to over turn the trial court's ruling regarding the imposition of sanctions on a party, this Court must find, with definite and firm conviction, that the trial judge, after weighing relevant factors, made a clear error of judgment in its conclusion. In short that it abused the great latitude granted in the provisions for imposing sanctions, a great latitude and discretion that was "designed" into those provisions.

In the instant case, on the first hearing regarding the Plaintiff's motion, the Court determined to take the matter under advisement and permit additional discovery into the matter. The depositions of the Defendant's 30(b)(6) representatives and Defendant's employees were taken August 10, 2007 with a substantial portion of examination concentrating on issues relevant to the Plaintiff's Motion. Thereafter, an Amended Motion for Contempt and Sanctions was filed on October 12, 2007 incorporating information gleaned during discovery. Prior to the trial beginning on March 13, 2008, the trial judge entertained all pending motions. In regards to the Motion for Contempt and Sanctions, the trial court held:

Mr. Rundlett:	We have a pending motion regarding sanctions that I want to be heard. Also we have a motion *ore tenus*.
The Court:	I've already reviewed and—that motion. It's self-explanatory. That Motion is denied.

(R. Tran. p. 62, ll. 22-27).

Thus, the trial court indicated that it had reviewed the pleadings relevant to the Plaintiff's Motion, considered the arguments of the parties, determined that the arguments were "self-

explanatory" and found that sanctions were not warranted. The court later expounded at length on its method of reaching the conclusion to deny the motion for contempt and sanctions:

The Court:	And for the plaintiff's lawyers—
The Reporter:	Are we on the record?
The Court:	We are on the record. **I did not cavalierly drop that denial of your motion for contempt on you.** You did a very detailed or explicit—well, we had a brief hearing before in chambers, so I understood the facts. And then you detailed it after that, so I didn't need a full hearing. We would have had to have had a very lengthy—a hearing. I based the ruling—basically, there was no prejudice that over a year ago that it happened. **I don't see that through the correspondence that Moore provided that he did anything intentional or neglectful for that matter.** I think that the casino—and I questioned, well, maybe I could fine the casino. But I think that the dates would be something he's going to be overturn on appeal. **I didn't just cavalierly deny that motion. I have considered it extensively. It was very well written and I understand it.** You need to get those beforehand, but I don't—It wouldn't have made a difference.
Mr. Rundlett:	I apologize, your Honor. We were informed by the Court that this was an option for hearing., if we chose to do that. I'll be candid.
The Court:	**When you get a motion like that where it's a pretty big deal,** and obviously looking at it and seeing the detailed work you did on it and appreciating the work that you did on it, I'd have—in this case, it wouldn't have made difference. But you could have gotten more of a time for a hearing. But we went over the fact in chambers in my office. I think at this point we'll probably provide in more detail--I think since he provided the correspondence and all of that of his side of the deal. And I don't mean to be short with you Counsel, but I want to get the jury moving and out of here. But

> now that we've had time—I just wanted to address during this period we had a break. I feel better when the jury is gone, and all that.

(R. Tran. pp. 78-80. ll. 24-29, 1-29, 1-14).

The court thus set out its reasons for reaching the conclusion that the motion was not well taken and explained the due consideration it afforded this motion which it considered a "pretty big deal." Accordingly, the trial court having made explicit its clear and considered reasoning behind ruling that contempt and sanctions were not appropriate in this instance, and having found that Defendant's counsel was neither "intentional or neglectful for that matter" in pursuing the issues relating to obtaining a copy of the video, it would be improper for the Court to overturn the denial of contempt and sanctions.

XI.

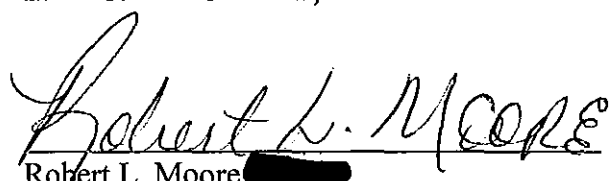
CONCLUSION

When one business invitee is attacked by another business invitee, in order to prevent *per se* liability, Mississippi law requires the plaintiff to meet an initial burden of proving that the premises owner is on notice of a dangerous "atmosphere of violence" before the alleged attack occurred. Without such evidence, the premises owner owes no duty to prevent such an attack. Robinson Property Group had no notice of an "atmosphere of violence" because none existed. Nor was it foreseeable the plaintiff would provoke John Doe 3 and invite the attack. The plaintiff has not met his burden under Mississippi law and, therefore, the trial court's directed verdict for the defendant is correct and should stand.

The plaintiff has not offered proof that the trial court made a clear error in judgment or abused its discretion in its ruling against contempt or sanctions. Rather the plaintiff has set forth in his brief again the very detailed explanation of its positions that the trial judge stated he considered carefully in light of the acknowledged seriousness of the question and ruled against. The trial court did not abuse its discretion in holding that contempt and sanctions were not warranted in this instance and its ruling should stand.

Respectfully submitted,

HEATON AND MOORE, P.C.

By: 

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and exact copy of the Brief of the Appellee has been mailed, by United States mail, postage prepaid, to the following:

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This the 9th day of February, 2009.