# IN THE SUPREME COURT OF MISSISSIPPI

**2009-TS-00570**

**ROBINSON PROPERTY GROUP, L.P.**
**D/B/A HORSESHOE CASINO AND HOTEL** **APPELLANTS**

**VS** **NO. 2009-TS-00570**

**OLIVIA MCCALMAN, AS PERSONAL REPRESENTATIVE AND AS GUARDIAN OF KEVIN ANDREW MCCALMAN AND KENNETH ANTHONY MCCALMAN, THE WRONGFUL DEATH BENEFICIARIES OF SARAH MCCALMAN, DECEASED, AND GERALDINE HOLMES, INDIVIDUALLY AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF MICHAEL LEROY HOLMES, DECEASED** **APPELLEES**

Appealed from the Circuit Court of Tunica County

## APPELLEE'S BRIEF

**ORAL ARGUMENT REQUESTED**

Ralph E. Chapman
Dana J. Swan
CHAPMAN, LEWIS & SWAN
P.O. Box 428
Clarksdale, Mississippi 38614
Telephone: (662) 627-4105
Facsimile: (662) 627-4171

Kent Haney
Haney Law Office
P.O. Box 206
Clarksdale, Mississippi
Telephone: (662)627-5501
Facsimile: (662)-627-5502

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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 the Supreme Court or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Olivia McCalman, as Personal Representative and as Guardian of Kevin Andrew McCalman and Kenneth Anthony McCalman, The Wrongful Death Beneficiaries of Sarah McCalman, Deceased;

2. Geraldine Holmes, Individually and on Behalf of the Wrongful Death Beneficiaries of Michael Leroy Holmes, Deceased;

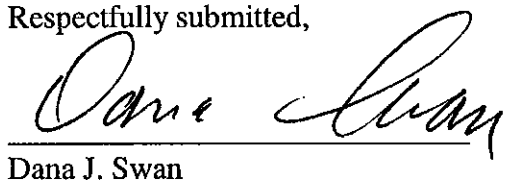
3. Ralph E. Chapman, Dana J. Swan, Chapman, Lewis & Swan, Clarksdale, Mississippi, Counsel for Olivia McCalman, as Personal Representative and as Guardian of Kevin Andrew McCalman and Kenneth Anthony McCalman, The Wrongful Death Beneficiaries of Sarah McCalman, Deceased;

4. C. Kent Haney, Haney Law Office, Clarksdale, Mississippi, as Personal Representative and as Guardian of Kevin Andrew McCalman and Kenneth Anthony McCalman, The Wrongful Death Beneficiaries of Sarah McCalman, Deceased;

5. Robinson Property Group, L.P., D/B/A Horseshoe Casino and Hotel.

6. Robert L. Moore and Dawn D. Carson, Heaton and Moore, P.C., Memphis, Tennessee, Counsel for Robinson Property Group, L.P., D/B/A Horseshoe Casino and Hotel.

Respectfully submitted,



Dana J. Swan

## TABLE OF CONTENTS


Certificate of Interested Persons ..... ii

Table of Contents ..... iv

Table of Authorities, Other Cases ..... v

I. Statement of the Issues ..... 1

II. Statement of the Case ..... 1

III. Relevant Facts ..... 2

IV. Summary of Argument ..... 5

V. Argument ..... 6

A. THE TRIAL COURT DID NOT COMMIT ERROR IN ENTERING THE PLAINTIFFS' ORDER ON JURY VERDICT ..... 7

1. The Plaintiffs' Action in Submitting a Proposed Order on Jury Verdict to the Trial Court was Proper ..... 7
2. The Order Entered Reflected the Jury's Findings on Both Compensatory and Punitive Damages and the Motion to Alter or Amend was Properly Denied ..... 7
3. The Plaintiff's Pled that the Casino was Jointly and Severally Liable for the Actions of Rodney Dean ..... 9

B. THE COURT DID NOT COMMIT ERROR BY FAILING TO GRANT THE DEFENDANT'S MOTION FOR DIRECTED VERDICT ON ALL ISSUES MADE AT THE CLOSE OF THE PLAINTIFFS' CASE IN CHIEF AND AGAIN AT THE CLOSE OF ALL PROOF AS HORSESHOE SHOULD BE LIABLE FOR THE ACTIONS OF RODNEY DEAN PURSUANT TO THE DRAM SHOP ACT ..... 12

C. THE COURT DID NOT COMMIT ERROR BY FAILING TO ALLOW THE JURY TO APPORTION NEGLIGENCE AGAINST SARAH McCALMAN AND MICHAEL HOLMES OF THE JURY VERDICT FORM ..... 18

D. THE TRIAL COURT DID DOT COMMIT ERROR BY EXCLUDING OFFICER SKINNER FROM TESTIFYING THAT RODNEY DEAN WAS NOT CHARGED OR CONVICTED OF A "DUI" ARISING FROM THE AUTOMOBILE ACCIDENT ..... 22

Conclusion ..... 23

Certificate of Service ..... 24

## TABLE OF AUTHORITIES
## CASES


| Description | Page |
|---|---|
| *Narkeeta Timber Co., Inc. v. Jenkins,* 777 So. 39, 41 (Miss. 2000) | 5, 6 |
| *Odier v. Sumrall,* 353 So.2d 1370, 1374 (Miss.1978) | 6, 19 |
| *Treasure Bay Corp. v. Ricard,* 967 So.2d 1235 (Miss 2007) | 6, 9, 18 |
| *Hughes v. Tupelo Oil Company,* Inc. 510 So.2d 502, 504 (Miss. 1987) | 6, 22 |
| *Spalding v. Spalding,* 691 So.2d 435, 439 (Miss.1997) | 7, 22 |
| *B & W Farms v. Mississippi Transp. Com'n.,* 922 So.2d 857, 858-859 (Miss. 2006) | 10 |
| *Mack Truck, Inc., v. Tackett,* 841 So.2d 1107, 1112 (Miss. 2003) | 14 |
| *Bridges Ex Rel Bridges v. Park Place Entertainment,* 860 So.2d 818 (Miss. 2003) | 16 |
| *White v. Rainbow Casino- Vicksburg Partnership, L.P.,* 910 So.2d 713 (Miss. App. 2005) | 16 |
| *Daubert v. Merrill-Dow Pharms. Inc.,* 509 U.S. 579 (1994) | 16 |
| *Odier v. Sumrall,* 353 So.2d 1370, 1374 (Miss.1978) | 19 |
| *Saxton v. Rose,* 201 Miss. 814, 29 So.2d 646 (1947) | 19 |
| *Hill v. Dunaway,* 487 So.2d 807 (Miss. 1986) | 20, 21 |

## STATUTES

Miss. Code Ann § 85-5-7 ..... 6, 8, 9

Miss. Code Ann § 67-3-73 ..... 8

Miss. Code Ann §11-7-15 ..... 11

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## I.

## STATEMENT OF ISSUES

The Appellant has listed eight statements of issues to which the Appellees will address. However, it does not appear that issue Number 3, "whether the Trial Court erred in denying Defendant's Motion for a New Trial" was specifically addressed in their brief. Out of an abundance of caution, the Appellees would state that the Trial Court did not err in denying the Motion for a New Trial.

## II.

## STATEMENT OF THE CASE

This cause of action arises out of the Complaint filed by the Plaintiffs, Appellees, on or about December 27, 2002, and an Amended Complaint filed on or about May 8, 2003. The cause of action was a wrongful death and survivor action involving Sarah McCalman, Deceased, and Michael Holmes, Deceased. The suit was filed by Olivia McCalman on behalf of the Estate and Wrongful Death Beneficiaries of Sarah McCalman, Deceased and Geraldine Holmes, on behalf of the Estate

and Wrongful Death Beneficiaries of Michael Holmes, Deceased. (Hereafter collectively referred to as "Appellees" or "Plaintiffs"). Suit was brought against the Robinson Property Group, L.P., d/b/a Horseshoe Casino and Hotel (Hereinafter referred to "Casino") as well as Defendant Rodney Dean. The suit against the Casino was brought under the Mississippi Dram Shop Act for serving Defendant Rodney Dean alcoholic beverages while he was visibly intoxicated.

The cause of action went to trial on February 9, 2009, the Honorable Albert B. Smith, III, as Trial Judge. On February 12, 2009, the Jury returned a verdict in favor of the McCalman beneficiaries in the amount of $700,000.00 and in favor of the Holmes beneficiaries in the amount of $400,000.00. Fault was assessed as follows: Defendant Rodney Dean, 50%, Defendant Casino 45%, and Synithia Harris (the driver of the Appellee's vehicle) at 5%.

Judgment was entered on February 23, 2009 whereas on February 27, 2009, the Casino filed a Motion to Alter or Amend the Judgment and a Motion for a New Trial. On March 23, 2009, the trial court denied both motions. On April 7, 2009, the Casino took this appeal.

## III.

## RELEVANT FACTS

This cause of action arises out of a fatal motor vehicle accident which occurred on or about August 2, 2002. Sarah McCalman, Deceased and Michael Holmes, Deceased were guest passengers in a vehicle driven by Synithia Harris, Deceased. The accident occurred in Tunica County, Mississippi on Highway 61 in which the vehicle driven by Synithia Harris was hit by a vehicle driven by Defendant Rodney Dean. McCalman and Holmes were husband and wife and had been married for approximately six months.

At trial, the proof showed that Defendant Rodney Dean had been at the Casino for approximately sixteen hours straight while drinking approximately three Corona beers per hour.

During this time period he had no food to eat. He had gotten to the Casino at approximately 4 a.m. that morning and left at approximately 8:30 p.m. that evening. Several witnesses testified that when he left the Casino he was driving at approximately 100 miles per hour. At trial, the Appellees utilized as an expert Dr. Steven Hayne who testified that Rodney Dean would have been visibly intoxicated while being served the alcoholic beverages.

Defendant Rodney Dean was called as an adverse witness. He testified that in 2002 when this accident happened he was living in Byhalia, Mississippi with his mother. (T. 122). At that time, he was working for Federal Express in Memphis. *Id.* He had worked there since 1999 and was an auditor. (T. 123). He testified that on August 1, 2002 he had worked at Federal Express near the Memphis Airport, had gone in at 9 o'clock that evening and had gotten off at 2 o'clock the next morning, which would have been August 2, 2002. (T. 122-124). After leaving work at 2 o'clock in the morning, he went home and arrived at about 3:30 a.m. (T. 126). That morning he left his home to go to Horseshoe Casino. Although he thought he got there between 11 and 2 o'clock that afternoon, the record reflected that he actually got to the Horseshoe Casino at 4 a.m. that morning. (T. 141). Therefore, he would have had little, if any sleep before arriving at the Casino.

On that day he was driving a 1995 Red Nissan 240. (T. 126-127). While at the Casino, he usually played blackjack. While he was there, he was served and drank Corona beer which was free. (T. 127). According to Dean, the waitress was steadily bringing them. *Id.* He testified that he drank two or three per hour. (T. 128). He then admitted that at the time of the accident he was intoxicated. (T. 143). Although he had been there nearly sixteen hours, he admitted that he had not had anything to eat during that time. (T. 145). He admitted that, that was a long time to be gambling and drinking Corona beer. *Id.* He had no other alcohol except the alcohol served to him at the Casino. (T. 146). He did not know how much alcohol it would take to impair his ability to operate a motor vehicle.

(T. 150). He testified that he only gambled at one black jack table and that the waitress steadily brought him beer and that the waitress would come by to give him another beer before he finished the one that he was drinking. (T. 130). He left the Casino at approximately 8:30 p.m. and it took him about ten minutes to get to the accident scene. (T. 133). Assuming that Dean was there for a total of sixteen hours and started drinking one to two hours after he arrived and stopped drinking one to two hours before he left, Dean would have been steadily drinking three Corona beers per hour for twelve to fourteen hours without ingesting any food.

Steven Stewart also testified on behalf of the Plaintiff. On August 2, 2002, he was also at the Horseshoe Casino for dinner and some gambling. (T. 205). He left the Casino about 8 o'clock. *Id.* As he left the Casino, he testified that a red car passed him on his left side doing approximately 100 miles per hour. (T. 206). Although he did not see the accident, when he got to the accident scene he saw the red car there that passed him earlier and he recognized Rodney Dean. *Id.* The reason he recognized Rodney Dean was that he used to work for Federal Express and recognized him. (T. 206-207). He testified that while at the Casino, he also saw Mr. Dean and that he was acting frantic and going from table to table in a panicky fashion. (T. 207).

Another witness, Debra White, actually saw the accident and testified that the Dean vehicle ran a red light at a high rate of speed and collided with the vehicle driven by Synithia Harris and occupied by Michael Holmes and Sarah McCalman. (T. 217). According to White, the Harris vehicle was traveling at a normal rate of speed and had a green light. (T. 218). Another eye witness, Willie Garfield, stated that the vehicle driven by Dean passed him on the right side at a high rate of speed doing between 90 and 100 miles an hour. (T. 231-232). The Dean vehicle was zig zagging in and out of traffic. *Id.* He testified that normally when people drive like that they are either running away from something or they are drunk. *Id.*

After the accident, Dean was taken to the Region Medical Center in Memphis, Tennessee. A Mississippi Highway Patrol Officer, Bennie Skinner, went to Memphis to take a blood sample. He arrived there at 1 a.m. on the morning of August 3, 2002, to take the blood sample that was ultimately delivered to the crime lab in Jackson. The results of that blood test showed a B.A.C. of 0.13. A blood sample drawn by the Regional Medical Center at 10 o'clock p.m. on August 2, 2002 indicated a B.A.C. of 0.16.

At trial, the Plaintiff's expert, Dr. Steven Hayne, testified that based upon the blood alcohol samples which were taken, Dean would have been visibly intoxicated while he was being served the alcohol. Although no one actually testified as an eye witness that they observed Dean being intoxicated, the testimony of Dr. Hayne was heard by the jury and the jury believed him. Although the Defendant presented another expert, Dr. Anthony Verlangieri, the jury heard both experts and found Dr. Hayne to be more credible. Based upon all the evidence at trial, the jury returned a verdict of $700,000.00 for McCalman and $400,000.00 for Holmes. Fault was allocated 50% for Dean, 45% for the Casino and 5% for Harris. From that jury verdict, this appeal was taken.

## IV.

## SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in denying either the Casino's motion for a new trial or a directed verdict. *Narkeeta Timber Co., Inc. v. Jenkins,* 777 So. 39, 41 (Miss. 2000). The Plaintiffs' proposed jury verdict, which was ultimately accepted by the trial court, was supported by both the laws of Mississippi and the testimony at trial. The jury was properly allowed to allocate fault between Synithia Harris, the Casino and Rodney Dean. The trial court properly refused an instruction which would have allocated fault to the Plaintiffs Michael Holmes and Sarah McCalman as there was no proof of any negligence on their part. Absent such proof, the Casino was not entitled

to such an instruction. *Odier v. Sumrall,* 353 So.2d 1370, 1374 (Miss.1978).

There was sufficient testimony from Dr. Steven Hayne and from Rodney Dean himself for the jury to conclude that the Casino served alcohol to Dean while he was visibly intoxicated. The testimony of Dean established that he was intoxicated by his own admission. Such testimony created a factual question for the jury. *Treasure Bay Corp. v. Ricard*, 967 So.2d 1235 (Miss 2007). The jury properly allocated fault for the Plaintiffs' damages in the amount of 5% Harris, 45% Casino and 50% Dean. Mississippi Dram Shop Act as a matter of law creates joint and several liability between the server of alcohol and the intoxicated person for damages inflicted on a plaintiff. Miss Code Ann 85-5-7. Finally, the trial court did not commit error in refusing to allow testimony that Dean was not charged with DUI. *Hughes v. Tupelo Oil Company*, Inc. 510 So.2d 502, 504 (Miss. 1987).

## V.

## ARGUMENT

Although it does not specifically appear that Statement of Issue Number 3, dealing with the trial court's denial of a new trial was addressed by the Casino, out of an abundance of caution, the Plaintiffs would state that the trial court acted properly. A trial court will not be reversed for denying a motion for a new trial unless the trial court abused its discretion. *Narkeeta Timber Co., Inc. v. Jenkins,* 777 So. 39, 41 9Miss. 2000). The central issue in this case was whether or not the Casino served Rodney Dean alcohol on their premises while he was visibly intoxicated. The Plaintiffs presented the testimony of their expert, Dr. Steven Hayne, who testified that the Casino Defendant served Rodney Dean alcohol while he was visibly intoxicated. Dr. Hayne was accepted by the trial court as an expert. Dean also admitted that he was intoxicated. Based upon the applicable standard, the trial court correctly denied the Casino's motion for a new trial. Furthermore, the Casino put on their own expert, Dr. Anthony Verlangieri, who offered testimony that contradicted that of Dr.

Hayne. Again, the trial court did not abuse its discretion in denying the motion for a new trial based upon the applicable standard as a jury issue was presented for the jury's consideration.

### A. THE TRIAL COURT DID NOT COMMIT ERROR IN ENTERING THE PLAINTIFFS' ORDER ON JURY VERDICT

#### 1. The Plaintiffs' Action in Submitting a Proposed Order on Jury Verdict to the Trial Court was Proper.

Initially, the Casino complains that the proposed order forwarded to the trial court on the jury verdict was somehow improper because it was made without notice. The Casino offers no authority for this proposition, therefore, the Court should not address it. *Spalding v. Spalding*, 691 So.2d 435, 439 (Miss.1997)(Court will not address assignment of error to which no authority is cited). However, the record reflects that the Casino received all notice required. The jury returned a verdict on February 12, 2009. On February 19, 2009, the Plaintiffs mailed a copy of their proposed jury verdict to the trial court with a copy to the Casino's attorneys, the Honorable Robert L. Moore and the Honorable Dawn Davis. On that same date of February 19, 2009, the Plaintiffs' also faxed at 13:09 a copy of the proposed order to the same attorneys. On the next day of February 20, 2009, the Casino mailed and faxed their proposed order to the trial court, as well as to the Plaintiffs' attorneys. Three days later on February 23, 2009, the trial court entered the Plaintiffs' order.

Although the Casino offers no authority that this procedure was improper, there is nothing in Rules 54 or 58 of the Mississippi Rules of Civil Procedure which would require any other action on the part of the Plaintiffs. In addition, there is nothing in Rules 54 or 58, nor of case law which requires that the trial court hold a hearing before entering an order on a judgment.

#### 2. The Order Entered Reflected the Jury's Findings on Both Compensatory and Punitive Damages and the Motion to Alter or Amend was Properly Denied

Initially, it should be noted that the Jury did not find for the Plaintiffs on the issue of punitive

damages, and the Plaintiffs' order on jury verdict so reflects. The judgment reflected the jury's finding that Horseshoe Casino was 45% at fault, Rodney Dean was 50% at fault, and that Synithia Harris was 5% at fault. The Appellees would state that the Dram Shop Act requires that a casino and an intoxicated patron who causes an accident are jointly and severally liable for any injury. When this cause was filed in December of 2002, the then applicable Miss Code Ann 85-5-7 provided that "except as may be otherwise provided in subsection (6) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be joint and several only to the extent necessary for the person suffering injury, death or loss to recover fifty percent (50%) of his recoverable damages." Subsection (6) states in part that "joint and several liability shall be imposed on all who consciously and deliberately pursue a common plan or design to commit a tortious act, or actively take part in it." The Dram Shop Act provides at Miss Code Ann 67-3-73 that "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 and property damage, inflicted by an intoxicated person upon himself or upon another person." Had the statute provided that it was the **sale**, rather than the consumption, of alcoholic beverages that was the proximate cause, then arguably a separate cause of action might exist against the Casino which would render it then only severally liable rather than jointly liable. Further the version of Miss Code Ann 85-5-7, which was effective when this cause of action accrued, provided that joint and several liability "shall be imposed on all who consciously and deliberately pursue a common plan or design to commit a tortious act, or actively take part in it." Both the Casino and Dean actively took part in a common plan to have Dean consume alcoholic beverages while on the premises of the Casino. As a matter of law, these facts make Horseshoe and Dean jointly and severally liable for 95% of the damages.

This interpretation is consistent with *Treasure Bay Corp. v. Ricard*, 967 So.2d 1235 (Miss 2007) which held that Dr. Haynes' opinion that Treasure Bay's patron was visibly intoxicated while being served alcohol was sufficient to defeat summary judgment in favor of Treasure Bay. To reach this holding, this Court must have concluded that the intoxicated patron and the casino are jointly and severally liable as the only proof in the record was that the patron consumed alcohol while being visibly intoxicated on Treasure Bay's premises.

The Casino argues that the jury did not find joint liability between Rodney Dean and the Casino nor was it asked to find that Dean and the Casino acted "consciously and deliberately pursuant to a common plan or design to commit a tortious act." The argument is without merit. Upon the factual finding that the Casino, served Dean alcohol while he was visibly intoxicated and that Dean's intoxication was the proximate cause of the accident, joint liability is imposed by law upon the Casino.

### 3. The Plaintiffs Pled That the Casino was Jointly and Severally Liable for the Actions of Rodney Dean

There is no merit to the arguments that the Plaintiffs did not plead that Rodney Dean and the Casino acted "consciously and deliberately pursuant to a common plan or design to commit a tortuous act." Although other counts in the Plaintiffs' Complaint are sufficient under notice of pleading to present such a charge, Count 4 states as follows:

> Plaintiffs charge that the Defendant Casino embarked upon a plan, course of action, habit, routine and conduct to entice gamblers to their Casino with advertisements of monetary awards, fun, food, excitement and **free liquor**. While there, the Defendant Casino . . . provided free liquor to the gamblers, particularly, those gambling large amounts in an effort to cause gamblers to stay longer, gamble more, and tip the waitresses more, and do so recklessly while under the influence in order to profit the Casino more and as such, this amounts to gross negligence in that the Defendant Casino knew the vast majority of gamblers, Defendant, Rodney Dean included, would

operate their vehicles to return home and endanger themselves and the traveling public.

Count 4 more than satisfies the requirements of pleading requirements under applicable Mississippi law. See Eg. *B & W Farms v. Mississippi Transp. Com'n* ., 922 So.2d 857, 858-859 (Miss. 2006)(all notice pleading requires is that the opposing party be placed on notice of the claim asserted).

On page 23 of their brief, the Casino states: "This issue was argued to the court prior to submission of jury instructions to the jury and the trial court found they should not be joined together." However, what actually happened is that the Plaintiffs' counsels specifically withdrew their proposed jury instructions P-21 that combined the alleged acts of the negligence of Dean and the Casino in favor of a jury verdict form which separated these acts.[1] (T. 794-797). It should be

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Jury Instruction P-21 read as follows:

You are instructed to first read the entire instruction before answering any part of this instruction.

1. Do you find from the preponderance of the evidence that Robinson Property Group, L.P., d/b/a Horseshoe Casinos, through its employees served Rodney Dean an alcoholic beverage while he was visibly intoxicated?
_____ Yes _____ No.
If you answered "No" to the question above, stop and proceed no further, and advise the Bailiff that you have reached your verdict. If you answered "Yes" proceed to the next question.
2. Do you find from the preponderance of the evidence that the negligence of Rodney Dean proximately caused or contributed to Plaintiffs' Decedents damages?
_____ Yes _____ No.
3. If you answered "No" to the previous questions, proceed no further and notify the Bailiff that you have reached your verdict. If you answer "Yes", proceed to the next question.
4. Assign to each person or entity listed below the percentage of fault you attribute in proximately causing or contributing to the death of SARAH MCCALMAN AND MICHAEL LEROY HOLMES
_____% Robinson Property Group, L.P., d/b/a Horseshoe Casinos
_____% Synithia Harris
Your percentage must total 100%.
5. Set forth the total amount of damages incurred by the plaintiffs as a result of the death of SARAH MCCALMAN, (Do not reduce this amount for any percentage of fault as the Court will address this)
$_____
6. Set forth the total amount of damages incurred by the plaintiffs as a result of the death of MICHAEL LEROY HOLMES, (Do not reduce this amount for any percentage of fault as the Court will address this)
$_____

( R. 836-837).

noted that the Plaintiffs' counsel repeatedly stated that "we feel that under the law that Dean and Horseshoe are one and the same for apportionment purposes." (T. 796). This withdrawal of the jury instruction is of no consequence. Indeed, it was absolutely necessary for the jury to separate the fault of the Casino with that of Dean. In order for the jury to find for the Plaintiff against the Casino, the jury would have to find that the Casino first served alcoholic beverages to Dean while he was visibly intoxicated. The jury found in favor of the Plaintiffs on this issue. Next, the jury would have to find that the intoxication of Dean caused the accident. The jury also found in favor of the Plaintiff on this issue. It was, therefore, necessary for the jury to consider both acts of negligence. The jury could have found that the Casino had no negligence and that Dean was 100% responsible for the accident. Under that scenario, of course, the Casino would not be liable. It would have been improper for the jury not to apportion fault against both Defendants, as opposed to assigning fault to both Defendants together. There is no merit to the Casino's position. Further, there is no merit to the argument of the Casino that there must be a finding of fact that there has been a conscious and deliberate pursuit of a common plan or design to commit a tortuous act.

It should noted that Miss. Code Ann § 11-7-15, cited by the Casino in support of their position, is not even applicable to the argument that the Casino appears to be putting forth. This statute addresses the comparative fault of a Plaintiff with respect to a defendant, not the fault of co-defendants. As previously stated, the Dram Shop Act itself when coupled with the appropriate joint liability statute, creates joint and several liability upon a Casino and an intoxicated patron who causes an accident. Therefore, Horseshoe Casino is liable for both the 45% fault for which the jury assigned to the Casino as well as the 50% fault which the jury assigned to Defendant Dean.

For the reasons so stated, the Casino's motion to alter or amend the judgment was properly denied.

**B. THE COURT DID NOT COMMIT ERROR BY FAILING TO GRANT THE DEFENDANT'S MOTION FOR DIRECTED VERDICT ON ALL ISSUES MADE AT THE CLOSE OF THE PLAINTIFFS' CASE IN CHIEF AND AGAIN AT THE CLOSE OF ALL PROOF AS HORSESHOE SHOULD BE LIABLE FOR THE ACTIONS OF RODNEY DEAN PURSUANT TO THE DRAM SHOP ACT**

The Casino completely ignores the testimony of Dr. Steven Hayne who testified that Rodney Dean would have been visibly intoxicated when being served alcoholic beverages. The Court recognized Dr. Hayne as an expert in the field of pathology, toxicology, cause of death, blood alcohol and the effects of blood alcohol to be specific. (T. 404). For the past twenty or so years, Dr. Hayne has limited his practice to anatomic, clinical and forensic pathology. (T. 399). For the past ten years, Dr. Hayne has performed around 1800 autopsies. (T. 401). He performed an autopsy on both Michael Holmes and Synithia Harris. (T. 402). He reviewed the Mississippi Crime Lab report on blood alcohol taken from Rodney Dean. (T. 404). A sample was taken in the usual customary fashion of the Mississippi Crime Lab. (T. 405). The sample was drawn at 1 o'clock in the morning, the day after the crash. (T. 404). Dr. Hayne was given a hypothetical, with no objection from the Casino's counsel, to assume that Dean had not eaten anything during the sixteen hours he was at the Casino. Further that Dean went to the Horseshoe Casino at around 4 or 5 a.m. and stayed there until some point immediately proceeding that accident which occurred about 8:35 p.m. on the same day. Dr. Hayne was asked to further assume that he quit drinking alcohol at least an hour before he departed the Horseshoe Casino and consumed no alcohol after the crash. In utilizing generally accepted alcohol absorption and elimination equations, with the value of 0.13% alcohol taken at 1 o'clock in the morning following the date of the accident, Dr. Hayne testified that at the time he left the Casino his blood alcohol content would have been 0.18.

Dr. Hayne also had available a blood alcohol test from the Regional Medical Center which

was taken at approximately 10:00 p.m. the day of the accident. That blood alcohol test gave a B.A.C. of 0.16. This would have been approximately an hour and a half after the accident. Based upon those records Dean would have had a blood alcohol content of 0.175 when he left the Casino. (T. 412). Dr. Hayne testified that, that was not a significant difference between those two samples and that they are supportive of each other. *Id.* He testified that at these levels there would be an impairment of operation of a motor vehicle and that he was approaching two times the level to presume a legal impairment. (T. 413). He testified that he would be emotionally unstable and have problems with reasoning and thought processes as well as critical judgment. *Id.* He testified that there would also be problems with perception, with movement and with comprehension of the environment. (T. 414). He testified that there would further be decreased reaction time and that one would respond more slowly to a critical event or any other event. *Id.* There would be problems with vision, as well as problems with glare from the light which would be more severe. *Id.* There would actually be drowsiness in a person with alcohol at this level. *Id.*

Then when asked if Dean was furnished alcohol at the Casino and was at a level of 0.18 or 0.175 when he left the Casino, would he have exhibited a visual appearance of impairment due to alcohol while there at the Casino and while being furnished alcohol. Dr. Hayne answered that to a person who is knowledgeable with alcohol, he would expect that there would be visual observations indicative of impairment. (T. 415). When explaining what observations would be made, Dr. Hayne testified that a person should be able to see impairment in walking or even standing, as well as slurring of speech. (T. 416). He further testified that skilled tasks would be difficult to perform, and then when asked any detailed questions it would be difficult for that person to respond appropriately. (T. 416). He opined that if Dean had this level of impairment, he would expect that an experienced person whose job it is and duty that it is to observe levels of intoxication or impairment, would in

the exercise of reasonable care had observed this. (T. 418).

With respect to Synithia Harris, Dr. Hayne performed an autopsy and drew vitreous fluid to determine her blood alcohol level. It was his opinion that Synithia Harris was not impaired by reason of alcohol. (T. 427). The jury having heard the testimony of Dr. Hayne, found his testimony to be credible and found that the Casino served Rodney Dean while he was visibly intoxicated.

Although the Defendants offered their own expert, Dr. Anthony Verlangieri, who testified that Rodney Dean was not intoxicated when served his last drink, his opinion was thoroughly discredited upon cross-examination. This presented a classic case of the battle of the experts. The battle of the experts goes to the jury. *Mack Truck, Inc., v. Tackett,* 841 So.2d 1107, 1112 (Miss. 2003).

For example Dr. Verlangieri was completely incorrect as to how long Dean had been at the Casino. He assumed that Dean arrived at 3 p.m. that afternoon and left at 8p.m. that night, a period of only five hours. (T. 749). However, the testimony of Dean indicated that he actually arrived at 4 a.m. rather than 3 p.m. and was at the Casino for sixteen hours. *Id.* He assumed that he left the Casino at 8:00 p.m. and the accident occurred forty minutes later. When faced with his opinion that when he left the Casino at 8 o'clock he was not drunk but forty minutes later he was drunk at the time of the accident, he could not answer the discrepancy. (T. 751). In fact he refused to answer the question that if Dean did not leave the Casino forty minutes before the accident, but rather five to ten minutes before the accident, would he had been drunk when he left the Casino. (T. 755-56). Since Verlangieri assumed that it was forty minutes from the time he left the Casino until the accident, he couldn't explain why it took Dean forty minutes to travel those three miles. (T. 752) Further he didn't know that witnesses saw Dean traveling at speeds of up to 100 miles per hour after he left the Casino. (T. 752). He further thought that the Highway Patrol blood alcohol sample was

drawn at 11 o'clock p.m. the day of the accident rather than 1 o'clock a.m. the day after the accident. (T. 762). Dr. Verlangieri did not take into consideration that Rodney Dean had nothing at all to eat on the day of August 2, 2002. He was not aware that Dean drank two or three beers an hour for at least fourteen hours. (T. 767).

It was clear that Dr. Verlangieri's opinions were based upon incorrect information. The jury having heard both Dr. Hayne and Dr. Verlangieri, found Dr. Hayne's testimony to be more credible. Again, this was a classic case of battle of the experts and the jury chose to believe Dr. Hayne. The other witnesses from the Casino offered little in the way of support for the Casino's position that Dean was not served alcoholic beverages while he was visibly intoxicated. One such witness was Pat Cuneo Thomas, who was a Casino floor supervisor on August of 2002. (T. 653). She testified that it would be just about impossible to keep up with the number of alcoholic beverages served to a person because they didn't pay any attention to how many drinks were being served unless they thought they were getting too much. (T. 664). She also testified that it was the Casino's rule that they could not get another drink until the one that they had was finished. (T. 665). However, Rodney Dean testified that he was served beer while he still had not finished his previous beer. Thomas agreed that if somebody were served beer in this manner, they would become intoxicated more quickly. (T. 665).

Another witness was Marcia Soverign, while employed at the Casino as a pit manager. (T. 676). However, she had no memory of having contact with Rodney Dean. (T. 678). She also testified that if someone were there for sixteen hours and drinking that it was not her job to keep up with how much they drink. (T. 684). She further testified that cocktail waitresses do not keep up with how much a person drinks either. (T. 685). Neither of these witnesses offered any support whatsoever that Rodney Dean was not intoxicated when served alcohol at the Casino. Nor do the

decisions cited by the Casino offer any support for their position either. The two cases cited have nothing to do with the allegations in the present cause of action. Both of the cases of *Bridges Ex Rel Bridges v. Park Place Entertainment*, 860 So.2d 818 (Miss. 2003) and *White v. Rainbow Casino-Vicksburg Partnership, L.P.*, 910 So.2d 713 (Miss. App. 2005) deal with the standing of a self induced intoxicant, as opposed to a third party being injured by an intoxicated person. Therefore, they have no relevance to this particular case. Further, in *White*, there was no expert who testified that the plaintiff *White* was intoxicated, as is in the case *sub judice*. The holding in *White* and *Bridges* was that as a self induced intoxicant, the plaintiff was not in a class protected by the Dram Shop Act.

The only mention in their brief of Dr. Hayne's testimony is the statement that Hayne's opinion that Dean was visibly intoxicated "is disputed and flawed." However, no evidence is offered as to why it is flawed or disputed since the jury found otherwise. The Casino further states on Page 27 that "the mathematical equation used by the plaintiff's expert was flawed by assumptions." It should be noted that no objection was made by the Casino's counsel when Plaintiffs' counsel asked him detailed hypothetical questions, nor was any *Daubert* motion ever filed. Further, no explanation is given as to the allegation of flawed assumptions except for the fact that, according to the Casino, "Hayne stated that the best determination was vitreous fluid from the party's eye." This statement is somewhat baffling because what Dr. Hayne actually said was he favored vitreous fluids while he was doing an **autopsy**. (T. 424).[2] The reasoning for this is that during trauma, blood may become contaminated when bodily organs rupture due to trauma, however the vitreous fluid is not subject to the same cross-contamination. *Id.* Of course, Dr. Hayne testified that it is impossible to obtain

[2] According to the vitreous fluid taken from Harris and Holmes, the B.A.C. was 0.01 for Harris and none for Holmes. Both Harris and Holmes died from trauma.

vitreous fluid from a person who is not dead, such as Mr. Dean. (T. 423). The Casino's position that only vitreous fluid can give an accurate blood alcohol content and such was not performed on Mr. Dean, reminds the Plaintiffs of the old story of a defense lawyer who asked an autopsy performing pathologist one too many questions:

**Q. Now doctor, all of your patients are dead aren't they?**
**A. Well, I hope so!**

Dr. Hayne's assumptions were not flawed. All of his assumptions are contained in the record. Indeed, it was the assumptions of the Casino's expert, Dr. Verlangieri that were flawed. None of his assumptions are contained in the record. A table which compares the assumptions of the two experts is found hereto as Table 1.

TABLE 1

| Assumption | Dr. Hayne | Dr. Verlangieri |
|---|---|---|
| Number of Hours that Dean was at the Casino | Sixteen Hours | Five Hours |
| Time that Blood Sample was Taken by Mississippi Highway Patrol at the Med in Memphis | 1:00 am the Morning of August 3, 2002 | 11:00 p.m., the Evening of August 2, 2002 |
| Time between Dean Leaving Casino and the Accident | Five to Ten Minutes | Forty Minutes |
| Amount of Alcohol Dean Consumed at Casino | Two to Three Corona Beers per Hour | Was not Aware of Amount |
| Amount of Food Dean Ingested While at Casino for Sixteen Hours | No Food Ingested | Was not Aware that Dean Ingested no Food During the Entire Time he was at Casino |
| Speed of Dean upon Leaving Casino as Observed by Witnesses | 90 to 100 miles per hour | Did not Know |
| Actions by Dean at Accident Intersection | Ran Red Light | Did not Know |

The Casino is completely incorrect that the only true way to determine if Mr. Dean was served alcohol when he was visibly intoxicated would be eye witness testimony. This Court has already determined that expert testimony alone may establish that an individual was visibly intoxicated while being served alcoholic beverages. *Treasure Bay Corp. v. Ricard*, 967 So.2d 1235 (Miss 2007). This assignment is without merit.

C.

**THE COURT DID NOT COMMIT ERROR BY FAILING TO ALLOW THE JURY TO APPORTION NEGLIGENCE AGAINST SARAH McCALMAN AND MICHAEL HOLMES ON THE JURY VERDICT FORM**

The Court did not commit error by refusing to allow the jury to apportion negligence against Sarah Elizabeth McCalman and Michael Leroy Holmes or refusing to include Sarah Elizabeth McCalman and Michael Leroy Holmes as potentially negligent parties on the jury verdict form. The Appellant alleges that the Plaintiffs, McCalman and Holmes, were negligent by allowing Synithia Harris to operate a vehicle, when Harris was allegedly intoxicated and offered the following instruction.

> If you find from a preponderance of the evidence of this case that Sarah McCalman and Michael Leroy Holmes were negligent in allowing themselves to become passengers in the vehicle driven by Synithia Harris then fault should be assessed against them.

The trial court properly refused this instruction in that there was no proof to support the proposed instruction because there was no proof that Harris was visibly intoxicated nor any proof that any alleged intoxication contributed to the accident. According to Dr. Hayne, it was his opinion that Synithia Harris was not impaired by reason of alcohol, based upon the vitreous fluid B.A.C. of 0.01, which he favored over the blood B.A.C. of 0.08. (T. 427). In order for a party to be entitled to an instruction, the instruction must be a correct statement of the law and there must be evidence

to support the instruction. *Odier v. Sumrall,* 353 So.2d 1370, 1374 (Miss.1978).

The trial court properly refused the instruction as there was absolutely no evidence to support giving the instruction. In refusing the instruction, the court explained its reasoning as follows:

> **THE COURT**: This is what -- it's confusing when you get to --past the hurdle of the point that you're talking about and you got to apportion it five ways. The basis, I think for your jury instruction, your motion that they, under the case that you cite – and I don't have it in my hand - - saying if you're getting in the car with somebody drunk is flawed for a couple of reasons. But I -- you need to think about it. It's flawed because, a) we don't have evidence, I think, that the two passengers knew or should have known that the people were drunk inside the vehicle. B) they were like .04?
>
> **MR. MOORE**: The passenger was .04. The driver was .08.
>
> **THE COURT**: Okay . . . 08. Pursuant to your expert, there was a-- we don't have odds on that they should have known. I think that there is no other testimony on that issue.
> **MR. MOORE**: Yes, there is.
>
> **THE COURT**: Well, not enough . . .

(T. 783-784).

The two cases cited by the Casino to the trial court, and the one case cited to this Court, simply do not support giving such an instruction. In *Saxton v. Rose*, 201 Miss. 814, 29 So.2d 646 (1947), the plaintiff Saxton was fatally injured while riding with a driver Eldridge, who ran off the road. Witness after witness testified that Eldridge was intoxicated by both his appearance and actions. In deciding that the plaintiff was barred by the doctrine of assumption of the risk[3] from recovering from Eldridge, the Court announced that "if it is manifest that the host, from drunkenness, or other cause, is unfit to drive the car, and that his driving will endanger the life and limbs of others, and the guest is aware of the condition of affairs, and voluntarily rides in the car with such a host,

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[3] Of course, assumption of the risk is no longer viable in Mississippi. *Churchill v. Pearl River Basin Dev. Dist.,* 757 So.2d 940 (Miss.1999).

the negligence of the latter becomes the negligence of the host." *Id* at 650.

Similarly, the case of *Hill v. Dunaway*, 487 So.2d 807 (Miss. 1986) offers no support for the Casino's argument. In *Hill*, the Court found that the evidence supported a finding that a passenger's contributory negligence in riding with an intoxicated driver was justified in reducing her recovery. However, the evidence was that the passenger and driver both consumed at least a six-pack of beer between Jackson and Hattiesburg, that they purchased at least another six-pack of beer in Hattiesburg and continued to drink as they drove south, that immediately before the accident the driver by his own admission was under the influence of alcohol, that and prior to the accident the driver became sleepy while continuing to drive. *Id* at 809. These facts are certainly not present here. There was no evidence of any sort offered as to the behavior of the driver Harris or her passengers McCalman and Holmes.

On page 29 of the brief of the Casino, this statement is made. "Testimony was the three had been out to dinner before the accident occurred. It is clear that the driver of the vehicle in which they were riding was under the influence of alcohol at the time of the accident and both Ms. McCalman and Mr. Holmes were voluntarily riding with her." Aside from the irony of the Casino's position that Harris, with only a .08 B.A.C. was visibly intoxicated, and Dean at 0.13 was not, there is absolutely no evidence to support these statements. First, there was no evidence that Harris, Holmes and McCalman were even together at the Casino until they left. There was no surveillance tape or any witness offered by the Casino that showed the three drinking together, or evidence that either Holmes or McCalman believed that Harris was intoxicated. Second, there was no evidence that any actions of Holmes and McCalman, as passengers, contributed to their injuries. The trial court was correct in concluding that there was no evidence to support the giving of the instruction or of apportioning negligence to the Appellees.

This instruction, which was instruction D-5( c), was properly refused by the trial court. In addition to the fact that there was no evidence of intoxication of Harris to justify giving the instruction, the instruction is an incorrect statement of the law. By stating that "fault should be assessed against them," the instruction implies that their negligence caused the accident rather than contributing to their injuries, thereby increasing their damages. This is contrary to *Hill v. Dunaway*, *supra* at 810, when this Court held that acts or omissions of plaintiff go to contributing to his injury and resulting damages, and not in his causing the accident. There was no medical proof of any sort that either McCalman or Holmes contributed to their injury by riding with Harris.

That the Casino's position was contrary to *Hill v. Dunaway,* was made evident by this exchange between the Casino's counsel and the trial court as to why fault should be allocated to Holmes and McCalman:

> **THE COURT:** . . . All right, on the issue we discussed earlier – all right. Now, all right, I thought you had said that the issue would go to damages as opposed to fault?
>
> **MR MOORE:** No, sir.
>
> **THE COURT:** It goes to fault.
>
> **MR. MOORE:** Fault.
>
> **MS. CARSON:** Fault.
>
> **MR. MOORE:** It goes to fault.
>
> **THE COURT:** Good.

This exchange illustrates that the Casino incorrectly argued that the jury should find that Holmes and McCalman were negligent in causing the accident. The argument is contrary to Mississippi law. The trial court properly refused the instruction.

Finally, the proposed form of the verdict suggested by the Casino is hopelessly conflicting.

The Casino proposed that fault be assessed five ways among Harris, McCalman, Holmes, Dean and the Casino. Despite the fact that there was no evidence to support allocating fault five ways, to do so would have been improper. By way of explanation, if the jury were to have allocated fault to the two passengers, then mathematically, the percent of fault allocated to either Holmes, Dean or the Casino would have to be reduced. This would have the effect of Holmes' negligence reducing the injury recovery of his fellow passenger McCalman and McCalman's negligence reducing the injury recovery of Holmes, a nonsensical result. The proposed form of the verdict was properly refused.

**D.**

**THE TRIAL COURT DID DOT COMMIT ERROR BY EXCLUDING OFFICER SKINNER FROM TESTIFYING THAT RODNEY DEAN WAS NOT CHARGED OR CONVICTED OF A "DUI" ARISING FROM THE AUTOMOBILE ACCIDENT.**

The Court did not commit error by excluding from the jury proof of the facts that Rodney Dean was neither charged with nor convicted of any offense from the automobile accident. Despite raising this as an issue on appeal, the Casino cites no authority for this assignment of error. This Court has repeatedly held that it will not consider any issue on appeal for which no authority is cited. *Spalding v. Spalding*, 691 So.2d 435, 439 (Miss.1997). However, the Appellees would point out that this Court has held that it is reversible error to admit evidence of the lack of a defendant receiving a citation. *Hughes v. Tupelo Oil Company*, Inc., 510 So.2d 502, 504 (Miss. 1987)(reversible error to allow investigating officer to testify that he did not issue traffic citation to defendant tractor-trailer driver).

However, the Appellees would respectfully point out that it was the Casino who **first** brought up the issue of DUI. During the examination of Rodney Dean, who was the first witness called at trial, Dean's attorney elicited this exchange with Dean.

Q. Okay. Now, before – well, let me say it this way. Have you ever had a DUI?

A. No.

Q. Have you ever had a public drunk?

A. No.

Q. Have you ever had an alcohol-related offense.

A. No.

Q. Ever?

A. No.

(T. 175-176).

This assignment of error is also without merit in that the Casino was able to improperly inject into evidence that Rodney Dean was not charged with DUI. Since this was already in evidence, what need was there for the Casino to further elicit this improper testimony, such testimony being contrary to well-established Mississippi law.

## CONCLUSION

There was no error committed by the trial court. The testimony at trial presented the classic battle of the experts. The jury found the Plaintiffs' expert to more credible than the Casino's expert. The jury was properly instructed according to applicable Mississippi law and properly determined fault between Harris, the Casino, and Dean. Finally, no error was committed by the trial court in considering the negligence of the Casino and Dean to be joint and severable.

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs would respectfully request that the trial court be affirmed.

This the 12th day of May, 2010.

Respectfully submitted,
Ralph E. Chapman
Dana J. Swan
CHAPMAN, LEWIS & SWAN
Attorneys for Plaintiffs
Post Office Box 428
Clarksdale, MS 38614
(662) 627-4105

By: _____
Dana J. Swan

Of Counsel
C. Kent Haney, Esq.
P. O. Box 206
Clarksdale, MS 38614

**CERTIFICATE OF SERVICE**

I, Dana J. Swan, do hereby certify that I have this day mailed, postage prepaid, or via electronic mail, a true and correct copy of the above and foregoing Brief of Appellants to:

The Honorable Albert B. Smith, III
Circuit Judge
P.O. Drawer 478
Cleveland, MS 38732

Robert L. Moore
Dawn D. Carson
Heaton and Moore, P.C.
100 North Main, Suite 3400
Memphis, TN 38103

THIS, the 12th day of May, 2010.

_____
Dana J. Swan