IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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

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 **Appellee**

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 potential disqualifications or refusal.

1. Honorable Albert B. Smith, III
2. Ralph Chapman
3. C. Kent Haney
4. Olivia McCalman
5. Geraldine Holmes
6. Sarah McCalman
7. Kevin Andrew McCalman
8. Kenneth Anthony McCalman

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The Appellant 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 Appellant therefore respectfully submits that oral argument would be appropriate in this case.

I.

STATEMENT OF THE ISSUES

1. Whether the trial court erred in entering the Order of Jury Verdict submitted by Plaintiffs' without knowledge or consent of the Defendants?
2. Whether the trial court erred in finding the defendant, Robinson Property Group jointly and several liable for the action of Rodney Dean?
3. Whether the trial court erred in denying defendant's motion for new trial?
4. Whether the trial court erred in denying defendant's motion to alter or amend jury verdict?
5. Whether the trial court committed error by failing to grant the defendant's motion for directed verdict on all issues made both at the close of the plaintiff's case in chief and again at the close of all proof as Horseshoe should be liable for the action of Rodney Dean.
6. The court committed error by failing to allow the jury to apportion negligence against Sara Elizabeth McCalman and Michael Leroy Holmes by refusing to include Sara Elizabeth McCalman and Michael Leory Holmes as potentially negligent parties on the jury verdict form.
7. The court committed error by failing to provide the following instruction:

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

8. The court committed error by excluding from the jury proof of the facts that Rodney Dean was neither charged with nor convicted of any offense arising

out of the automobile accident, despite the fact that the plaintiff first introduced evidence that Rodney Dean was being investigated for the offense of "DUI".

II.

STATEMENT OF THE CASE

The plaintiffs' filed a Complaint on December 27, 2002, and Amended Complaint filed on May 8, 2003, alleging that on August 8, 2002, the defendant, Robinson Property Group, Limited Partnership d/b/a Horseshoe Casinos (Horseshoe Casino) served alcohol to Rodney Dean, a guest of the Horseshoe, when he was visibly intoxicated. R. Vol. I, p. 55. The plaintiffs' further allege that Mr. Dean became intoxicated as a result of drinking alcohol at the Horseshoe, and as a result of his intoxication was involved in an accident involving Sarah McCalman and Michael Holmes. R. Vol. I, p. 55. The plaintiffs named both Rodney Dean and Horseshoe Casino as defendants in the Amended Complaint. R. Vol. I, p. 54.

The defendant, Horseshoe Casino, filed its answer on May 19, 2003, and Amended Answer Complaint was filed on June 27, 2003, alleging the following:

1. Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted against Horseshoe.
2. Sarah McCalman was the sole proximate cause or a proximate contributing cause of the alleged subject accident and any purported injuries and/or damage alleged in the Plaintiffs' Amended Complaint.
3. The negligence of third parties for whom Horseshoe cannot be held responsible was the sole proximate cause or a proximate contributing cause of the alleged subject accident and any purported injuries/damages alleged in Plaintiffs' Amended Complaint.
4. Horseshoe affirmatively pleads the provisions of Miss. Code Ann. §85-5-7, *et seq* and asks the trier of fact to make a determination of the percentage of fault, if any attributable to Horseshoe and the percentage of fault attributable to the Plaintiff's decedent and any third parties for whom Horseshoe cannot be held responsible.
5. Horseshoe pleads assumption of risk on part of Plaintiffs' decedent.
6. Plaintiffs' Amended Complaint fails to join an indispensable party.
7. Horseshoe plead the provisions of Miss. Code Ann. § 67-3-73 (1) and (2).
8. Horseshoe avers that the standards for imposition of punitive damages under Mississippi law are unconstitutionally vague, both with respect

to the standards for imposing liability and with respect to the standards for assessing the amount of punitive assessment, which vagueness is violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and of the Due Process Clause of the Fifth Amendment of the United States Constitution, as well as Article III, Section 14 of the Mississippi Constitution. Additionally, the application of such vague standards is capricious, disproportionate and not rationally related to any legitimate government interest, which is violative of the same constitutional provisions.

9. Horseshoe avers that any claim for punitive damages in this action and the failure to dismiss such claim from this suit forthwith unconstitutionally chills its access to court and counsel and is violative of both substantive and procedural due process provisions of the Fourtheenth and Fifth Amendments of the United States Constitution and the First Amendment to the United States Constitution, as well as Article III, Section 14 of the Mississippi Constitution and Article III, Sections 24 and 25 of the Mississippi Constitution.
10. Horseshoe avers that any threat or assessment of punitive damages based on net worth, retained earnings or wealth violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.
11. Horseshoe avers that the imposition of any punitive damage award is violative of Article III, Section 28 of the Mississippi Constitution as an excessive fine in this proceeding, which at this junction is quasi-criminal in nature.
12. Horseshoe avers that the assessment of punitive damages against it would violate the procedural safeguards afforded it under the Sixth Amendment of the Constitution of the United States, in that punitive damages are quasi-criminal and penal in nature, and it is entitled to the same procedural safeguards accorded those charged with crimes against the state of against the United States, which are not accorded to it in this proceeding.
13. Horseshoe alternatively pleads and invokes Mississippi Code Annotated §11-1-65, as amended, as these provisions relate to determinations and awards of punitive damages in matters in which punitive damages are sought.
14. Horseshoe avers that the claims of Geraldine Holmes should be bifurcated.
15. Horseshoe invokes and pleads the provisions of the Mississippi Tort Reform Act to the extent that these provisions apply to the alleged cause of action filed on behalf of the Plaintiff Geraldine Holmes, individually and as the wrongful death beneficiary of Micheal Leroy Holmes.

R. Vol. I, pp.83-87.

During the next several years discovery was exchanged between the parties and

the necessary orders were entered extending the deadlines. A Motion to Amend Answer was filed on August 25, 2005, by Horseshoe requesting that the Answer be Amended to allow fault to be assessed against Henry Gillespie, the driver of another car involved in the accident and Synithia Harris, the driver of the vehicle Mr. Holmes and Ms. McCalman were riding. The Mississippi Uniform Accident report provided that Mr. Gillespie's blood alcohol was .08 and Ms. Harris' blood alcohol was also .08 and that she was making a left turn crossing oncoming traffic. R. Vol. 1, pp. 277-78. On September 16, 2005, an Order Granting Motion to Amend Answer was entered. R.Vol. II, p. 304. On September 22, 2005, an Amended Answer was filed making allegations of negligence against Ms. Harris and Mr. Gillespie. R. Vol. II, p. 307. Discovery continued, including depositions of parties and expert witnesses. Jury instructions were filed by the plaintiffs on December 3, 2008. R. Vol. II, pp. 526-58. Motions in limine were filed by plaintiffs' counsel on December 3, 2008. R. Vol. II, pp. 522-25. Objections to plaintiffs' jury instructions were filed by defendant on December 24, 2008. R. Vol. II, p. 568. Responses to plaintiffs' Motions in Limine were filed on December 24, 2009. R. Vol. II, p. 573. Defendant's jury instructions were filed on December 29, 2008. R. Vol. II, pp. 579-600. The defendant filed a Notice of Intent to Offer Medical Records pursuant to 902 for the records from:

The Regional Medical Center for Rodney Dean
Crime Lab Results on Rodney Dean
Personnel File Rodney Dean Federal Express

R.Vol. III, p. 604. A Request for Entry of Default was filed by the plaintiffs against Rodney Dean on February 9, 2009. R. Vol. III, p. 801. The Affidavit for Default was entered on February 9, 2009. R. Vol. III, p. 802. The Default Judgment and Motion for Judgment for Default were entered against Rodney Dean with the court on February 9, 2009. R. Vol. III, p. 804-05. The Default Judgment was entered with the court on February 9, 2009. R. Vol. III, p. 810. Additional jury instructions were filed by the plaintiff on February 18, 2009. R. Vol. III, pp. 821-824. The jury instructions as admitted, denied or withdrawn are provided within the record. R. Vol. III, pp. 833-864. The jury found for the plaintiffs and assessed fault as listed below:

Rodney Dean 50%
Horseshoe 50%
Synthia Harris 5%

R. Vol. III, 868. The jury verdict form is provided below:

JURY INSTRUCTION NO. _____

After considering the Court's instructions as a whole, nine or more of us give the following answers to the following questions:

1. Do you find Rodney Dean committed negligence which proximately caused or contributed to the automobile accident?

Yes: x

No: _____

(The plaintiffs have the burden of proof. Please go to Question No. 2.)

2. Do you find Horseshoe committed negligence for serving or furnishing

alcohol to Rodney Dean when he was visibly intoxicated and that such intoxication was a proximate cause of the accident?

Yes: x

No: _____

(The plaintiffs have the burden of proof. Please go to Question No. 3.)

3. Do you find Synthia Harris committed negligence which proximately caused or contributed to the automobile accident?

Yes: x

No: _____

(The defendants have the burden of proof. Please go to Question No. 4.)

4. What percentage of fault do you assess against each of the following:

Rodney Dean	50	%
Horseshoe	45	%
Synthia Harris	5	%
Total	100	%

(Please go to Question No.).

5. What is the total amount of damages which you find, by preponderance of the evidence, have been sustained by: (Do not reduce the amounts below for any percentage of fault. The Court will address this).

Olivia McCalman, as Personal Representative and as Guardian of Kevin Andrew McCalman and Kenneth Anthony McCalman, the Wrongful Death Beneficiaries of Sarah McCalman, Deceased,	**$700,000**
Geraldine Holmes, Individually and on Behalf of the Wrongful Death Beneficiaries of Michael Leroy Holmes, Deceased,	**$400,000**

R. Vol. III, pp. 868-869. Defense counsel had requested to assess fault against both Sarah McCalman and Michael Leroy Holmes, but was denied from doing so by the court. R. Trial Tran. p. 794, 795 and 797, R. Excerpt I. Punitive Damages were not awarded to either plaintiff by the jury. R. Vol. III, p. 865. The Judgment on Jury Verdict was signed by the Judge on a date unknown and entered with the court on February 23, 2009. R. Vol. III, pp. 871-872, R. Excerpt D. This was done without the knowledge or consent of the defendant's counsel. R. Vol. III, pp. 875-877. Defense counsel had not seen or agreed to the order. R. Vol. III, p 875-76. The plaintiff's order provided that the defendants Rodney Dean and Horseshoe were jointly and severally liable for each judgment minus the amount assessed against Ms. Harris. R. Vol. III, pp. 872-73, R. Excerpt D. The issue of joint and several liability was specifically argued during the entry of jury instructions. R. Vol. III, p.876. The plaintiffs made a conscious strategic decision at trial not to submit the issue of joint and several liability to the jury. R. Vol. III, p. 876, R. Excerpt H. The plaintiffs withdrew the proposed jury verdict form. R. Vol. III, p. 876. The Amended Complaint filed by the plaintiffs did not allege joint liability for the damages sustained. R. Vol. III, p. 876. By making the defendants jointly and severally liable Horseshoe (the only collectible party) was

now liable for the full amount assessed against both Dean and Horseshoe, rather than just 45%. R. Vol. III, p. 873.

The defendant, Horseshoe filed a Motion to Alter or Amend and Motion for New Trial on February 27, 2008. R. Vol. III, pp. 875-880. The Motion to Alter or Amend set forth the following arguments:

The defendant, Robinson Property Group, L.P., and moves the court for entry of an order altering and amending the Judgment on Jury Verdict signed by the court on February 19, 2009, and entered with the court on February 23, 2009, awarding judgment against the defendants, Rodney Dean and Robinson Property Group, L.P. d/b/a Horseshoe Casino, jointly and severally in the amount of $380,000.00 to the plaintiff, 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 $665,000.00 to the plaintiff, Geraldine Holmes, Individually and on Behalf of the Wrongful Death Beneficiaries of Michael Leroy Holmes, Deceased and would state the following:

1. The order that was presented to the court was presented by the plaintiffs without approval or knowledge of the defendants.

2. The order that was entered with the court fails to reflect the jury's findings on both compensatory and punitive damages. The defendants prepared a separate order which is literally consistent with the jury verdict form. The jury did not find joint liability between Rodney Dean and the Horseshoe. The jury did not find, nor was it asked, to find that Rodney Dean and the Horseshoe acted "consciously and deliberately pursuant to a common plan or design to commit a tortious act." This factual finding by the trier of fact is a *sine qua non* for the type of joint liability being argued by the plaintiffs.

3. The plaintiffs made the conscious strategic decision at trial not to submit the issue of joint liability to the jury. During the charge conference, plaintiffs' counsel specifically withdrew the proposed jury verdict form that combined the alleged acts of negligence of Rodney Dean and the Horseshoe in favor of a jury verdict form which separated those acts.

4. The plaintiffs did not plead that Rodney Dean and the Horseshoe acted "consciously and deliberately pursuant to a common plan or design to commit a tortious act" either in the original Complaint, any amendment to that Complaint or in the pretrial statement itself. The Amended Complaint does not even allege joint liability for the damages sustained. No party is entitled to relief beyond that which is set out in the pleadings.

5. The defendant did plead the comparative negligence of Rodney Dean as an affirmative defense in this case and the jury found that he was guilty of acts of negligence different in type and kind from the acts of negligence alleged against the Horseshoe. Pursuant to Mississippi law, absent a finding by the trier of fact that there has

been a conscious and deliberate pursuit of a common plan or design to commit a tortious act, negligent parties are liable in damages in proportion to their percentage of comparative fault.

> In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

Miss. Code Ann. §11-7-15

6. This is not the first dram shop act case ever tried or reported. There is no case known to defense counsel reported in the State of Mississippi by which the fault of the tavern and the fault of the intoxicated person have been combined as is being urged by plaintiffs' counsel in this case. If the rule were otherwise, then a specific case cite should be available, but it is not.

R. Vol. III, p. 875, R. Excerpt E.

The defendants filed a separate Motion for New Trial that provided:

The defendant, Robinson Property Group, L.P., pursuant to Rule 59 of the Mississippi Rules of Civil Procedure and moves the court for entry of an order awarding a new trial on all issues and as grounds, therefore, would respectfully allege that the court committed reversible error in the following respects:

1. The court committed error by failing to grant the defendant's motion for directed verdict on all issues made both at the close of the plaintiffs' case in chief and again at the close of all proof;

2. The court committed error by failing to allow the jury to apportion negligence against Sarah Elizabeth McCalman and Michael Leroy Holmes by refusing to include Sarah Elizabeth McCalman and Michael Leroy Holmes as potentially negligent parties on the jury verdict form;

3. The court committed error by failing to instruct the jury as follows:

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

4. The court committed error by excluding from the jury proof of the facts that Rodney Dean was neither charged with nor convicted of any offense arising out of the automobile accident, despite the fact that the plaintiff first introduced evidence that Rodney Dean was being investigated for the offense of "DUI".

R. Vol. III, p. 879, R. Excerpt F.

The plaintiffs filed their Response to Defendant's Motion to Alter or Amend on March 5, 2009, along with their Response to Defendant's Motion for New Trial. R. Vol. III, p. 890 and 894. The court denied on March 23, 2009, both Defendants' Motion to Alter and Amend and Motion for New Trial without any finding or hearing. R. Vol. III, pp. 898-899, R. Excerpt B and C. The Notice of Appeal was filed with the court on April 7, 2009. R. Vol. III, p. 901. The Designation of Record and Certificate of Compliance with Rule 11(b)1 were filed on April 16, 2009. R. Vol. III, p. 905-908.

III.

RELEVANT FACTS

Robinson Property Group, L.P. is the company which owns and does business as the Horseshoe Casino and Hotel located in Robinsonville, Mississippi. R. Vol. I, 83. The Horseshoe owns and operates its business in such a way as to make the premises reasonably safe for those guests who are exercising reasonable and ordinary care for their own safety. R.Vol. I, 83. The Horseshoe has policies and procedures for concerning the service of alcoholic beverages on its premises, and employees had special training to recognize if someone had too much to drink. R. Tran. 673-674.

On August 8, 2002, it is alleged that Mr. Dean was a guest at the Horseshoe Casino in Robinsonville, Mississippi, and served alcohol when he was visibly intoxicated. Horseshoe denies that Mr. Dean was served alcohol while being visibly intoxicated and further denies that there is any evidence of such. R. Trans. 658, ll. 23-25.

Mr. Dean allegedly left the Horseshoe Casino and traveled northbound on U.S. Highway 61. R. Trans. 157. When he entered the intersection of U.S. Highway 61 and Grand Parkway South, a vehicle driven by Synithia L. Harris and occupied by Sarah McCalman and Michael Holmes, was attempting to make a left-hand turn off of southbound U.S. Highway 61 onto a side street. R. Trans. 159, ll. 13-24. The intersection is controlled by a traffic control signal and the light for both drivers was green at the time. R. Tran. 159. Mr. Dean would have had the right of way to proceed through the intersection. R. Tran. 159. Ms. Harris was negligent in the operation of her vehicle in failing to yield to Mr. Dean as evidenced on the jury verdict form. R. Vol. III, pp. 868-869.

As a result of the accident Ms. Harris and Mr. Holmes were both pronounced dead at the scene. Ms. McCalman was transported to Memphis to the Regional Medical Center where she was pronounced dead upon arrival. Ms. Harris and Mr. Holmes were recently married at the time of the collision.

Ms. Harris was the driver of the vehicle in which Mr. Holmes and Ms. Harris were passengers. Ms. Harris had a blood alcohol level of .08. R. Trans. 452. Blood was drawn from all drivers involved in the collision. Mr. Dean's blood alcohol content was .13. R. Trans. 19-24. Ms. Harris' blood alcohol content was .08. R. Tran. 452. A third driver (Henry Gillespie) entered the intersection sometime after the initial collision, striking the crashed cars a second time, and causing additional injuries and damages, and Mr. Gillespie's blood alcohol content was.10.

Fault has been asserted against Ms. Harris for the negligent operation of her vehicle.

Fault was asserted against Ms. McCalman and Mr. Holmes for comparative fault as they voluntarily rode as passengers in a vehicle operated by a person under the influence of alcohol, Ms. Harris.

Horseshoe denies that Mr. Dean was visibly intoxicated while at the Horseshoe Casino. Part of the job of the floor supervisor was to determine if the customer needed anything or had too much to drink. R. Tran. p. 654, ll. 3-8. Training was provided about how to take care of a guest while the guest was drinking. R. Tran. p. 654, ll. 22-26. Training was provided three or four times a year, explaining what to watch for if a person was getting too much to drink or of they were getting belligerent. R. Tran. p. 655, ll. 1-7. If it was thought a person was getting too much to drink then you were advised to tell

your pit boss, and the pit boss would watch the person and if the pit boss felt that the person had too much to drink then the shift manager was contacted. R. Tran. p. 655, ll. 14-17. Then it was the shift manager that would decide to remove the guest or not. R. Tran. p. 655, ll. 17-20. The shift manager if thought the player had too much to drink they would stop serving them alcohol, feed them and offer a hotel room. R. Tran. p. 655, ll. 21-26. Pat Cuneo Thomas, who in August 2002 was a Floor Supervisor working as table games supervisor for Horseshoe Casino. R. Tran. pp. 652-653. Pat Cuneo Thomas was the floor supervisor, as noted by Exhibit 16, and she did not remember Mr. Dean, and she also did not note that anyone was intoxicated on the date of the incident. R. Tran. p. 658, ll. 23-25. She did not recollect anyone who was loud, belligerent, stumbling, staggering, fumbling with cards or anything like that on the date of the incident. R. Tran. p. 658, ll. 26-29.

Mr. Dean left his home and went to the Horseshoe Casino and played table games. R. Tran. p. 126-128. Mr. Dean drank Corona beer on the day of the incident. R. Tran. p. 127, ll. 19-26. Mr. Dean testified he drank two or three beers an hour while at the Horseshoe. R. Tran. p. 128, ll.9-15. Mr. Dean stated that he did not begin drinking alcohol immediately, but it was only after he was asked several times if he wanted a beverage. R. Tran. p. 129, ll. 1-6. Mr. Dean was at the same table the entire time. R. Tran. p. 130, ll. 25-28. Mr. Dean was going to work at Fed Ex the night of the accident. R. Tran. p. 131, ll. 21-23. Mr. Dean had been reprimanded before for being late or missing work at Fedex. R. Tran. p. 131. Mr. Dean was paid by Fedex on Thursday and it is not good to miss Friday after being paid. R. Tran. p. 132. The accident occurred approximately 4 ½ miles from the Horseshoe. R. Tran. p. 134, ll. 1-2. Mr. Dean did not

feel he was too intoxicated. R. Tran. p. 134, ll. 7-8. The State Crime lab provided that his blood alcohol level was .13. R. Tran. p. 19-24. The Regional Medical Center provided a blood alcohol level of .16, by use of serum. R. Tran. p. 134, ll. 9-14. Mr. Dean stopped drinking alcohol one hour before he left, because he had to go to work. R. Tran. p. 153, ll. 22-23. Mr. Dean testified as he proceeded northbound on highway 61 the light in his direction was green at the intersection he entered where the wreck occurred. R. Tran. p. 157, l. 2-3. Mr. Dean did see the vehicle being driven by Ms. Harris, and carrying Ms. McCalman and Ms. Harris was when it was in the middle of the divided highway. R. Tran. p. 159, ll. 6-11. The vehicle that the deceased plaintiffs were traveling made a left turn, failing to yield, into the line of traffic of Mr. Dean. R. Tran. p. 159, ll. 13-24. Instead of the vehicle stopping, the vehicle did not stop and pulled in front of Mr. Dean. R. Tran. p. 164, ll. 6-10. Mr. Dean was traveling with the flow of traffic at the time of the impact, somewhere around 60 to 65 mph. R. Tran. 166, ll. 5-11.

Mr. Dean denies he ever received a DUI, public drunkenness or being a habitual drunkard. R. Tran. p. 176. Mr. Dean does not remember the number of beers that he drank, what time he arrived or exactly what time he stopped. R. Tran. 183. Mr. Dean denies having problems with his cards, cashing in his chips, trouble with anyone sitting next to him or trouble going to the restroom and back. R. Tran. 184. Mr. Dean did not have any problems finding his car or getting into his vehicle. R. Tran. 185. The vehicle behind Mr. Dean hit him in the rear, after he impacted the Harris' vehicle. R. Tran. 189.

Officer Bennie Skinner of the Mississippi Highway Patrol testified that in the chain of custody documentation, upon being questioned by Mr. Chapman that "Offense, DUI" as listed on the evidence bag with Mr. Dean's blood. R. Trans. 243. When Officer

Skinner was questioned by Mr. Moore whether Mr. Dean received a DUI, the plaintiffs objected. R. Trans. 280.

Plaintiff's expert, Dr. Hayne confirmed that Mr. Dean on arriving at the emergency room at the Regional Medical Center on the date of the accident underwent the Glascow Coma exam and the scale provided:

Eye opening and spontaneous:		4	- As high as it can go
Verbal response:	Oriented	5	- As high as it can go
Motor response:	Obeys Commands	6	

All tests were normal. R. Tran. p. 444. There is no record of any alcohol use or slurring of speech in the medical records. R. Tran. p. 445.

The plaintiffs' provided several witnesses that allege to have seen Mr. Dean prior to his vehicle impacting the vehicle driven by Ms. Harris the impact.

Steven Stewart

Observed a vehicle described as Mr. Dean's driving in excess of 100 miles per hour. R. Tran. pp. 204-205. Mr. Stewart stated that he had seen Mr. Dean prior to leaving the casino, going from table to table acting frantic. R. Tran. p. 207. Looked like he was trying to get winning hand, but remembers nothing else. R. Tran. p. 211. He did not recollect seeing Rodney Dean being served alcohol. R. Tran. p. 212. He did **not** testify that Rodney appeared to be drunk. R. Tran. p. 212.

Debra White

She saw the accident and states that the "red" car ran the red light and hit the car turning. R. Tran. p. 217.

Willie Garfield

He observed a red car pass him driving a high rate of speed. R. Tran. p. 231. No idea of his condition or how he was acting at the Horseshoe. R. Tran. p. 238.

Only one person saw Mr. Dean inside the casino, and he did not provide testimony that Mr. Dean was "visibly intoxicated". R. Tran. p. 212.

The plaintiff's presented Dr. Steven Hayne as their expert for the proposition that Mr. Dean would have been visibly intoxicated at the time he left the casino. Dr. Steven Hayne testified that Ms. Harris blood alcohol was .08 and Mr. Holmes was .04. R. Trans. p. 452, l. 20-23, 26-29. Dr. Hayne testified that orientation of time is important in making a decision whether someone is visibly intoxicated. R. Trans. p. 436. He stated it was one of the issues that you can see impairment as to time, person and place depending on the ethyl alcohol level. R. Trans. p. 436. He agreed Mr. Dean had some responsibility because he knew to stop drinking one hour before going to work, that he had to go to work and what day of the week it was. R. Tran. p. 437. Mr. Dean went to the restroom and came back to the same blackjack table. There was no testimony from anyone sitting around Mr. Dean that he was intoxicated. R. Tran. p. 441.

There is a difference between medical BAC and medical/legal BAC. R. Tran. p. 445. There is a difference between whole blood and serum. R. Tran. 445. Serum is after the red blood cells and the coagulation factors have been removed. R. Tran. 445. The test at the Regional Medical Center for Mr. Dean of .16 was serum and it would be higher than the whole blood test that was done at the crime lab of .13. R. Tran. 446.

The defendant offered Dr. Anthony Verlangieri as an expert in the field of Toxicology and Pharmacology. R. Trans. 712. Dr. Verlangieri testified that

based on the Glascow Coma Scale, along with his other findings that Mr. Dean would not have been exhibiting signs of intoxication over the legal limit at the time he was in and left the Horseshoe Casino. R. Trans. 724. Dr. Verlangieri testified that Mr. Dean's blood level did not peak until 10:00 p.m.. R. Trans. 731. Prior to 10:00 p.m. he was still in the absorption phase, and after that he was in the elimination phase. R. Trans. 731-732. Dr. Verlangieri testified to a reasonable degree of scientific certainty that Mr. Dean did **not** exhibit by his actions any visible sign of intoxication at the time periods of 6, 7, 7:30 or 8:00 p.m. while he was at the Horseshoe Casino. R. Trans. 738.

IV.

SUMMARY OF THE ARGUMENT

The court should have granted the defendant, Horseshoe's Motion for Directed Verdict on all issues made both at the close of the plaintiff's case in chief and again at the close of all proof. For the defendant, Horseshoe to be liable the plaintiffs must prove that the Horseshoe was negligent under the Dram Shop Act, Miss. Code Ann. §67-3-73. To be successful the plaintiffs must prove that the defendant, Rodney Dean was visibly intoxicated and that the defendant, Horseshoe served him alcoholic beverages while he was visibly intoxicated.

The defendant, Horseshoe alleged comparative fault against Rodney Dean, Synthia Harris for negligence in turning in front of Rodney Dean and further alleged fault against Sarah Elizabeth McCalman and Michael Leroy Holmes for riding in the vehicle with Ms. Harris when she was under the influence of alcohol. The court erred by not allowing the names of McCalman and Holmes on the jury verdict form so fault could be assessed against them. The defendant, Horseshoe requested that a comparative fault instruction be provided to the jury, but this was denied by the court in error.

Finally, the court erred in finding the defendants, Horseshoe and Rodney Dean jointly and severally liable. There was no finding by the trier of fact that the defendants, Horseshoe and Rodney Dean "consciously and deliberately pursuant to a common plan or design to commit a tortious act". Pursuant to Mississippi law this is the only way the Horseshoe would be liable for the actions of Rodney Dean. Further, the plaintiffs failed to plead joint and several liability in their complaint.

V.

ARGUMENT

Questions of law are reviewed de novo. *Narkeeta Timber Co., Inc. v. Jenkins*, 777 So.2d 39, 41, ¶5 (Miss. 2000). A motion for new trial challenges the weight of the evidence. *Hartel v. Pruett*, 998 So.2d 979, 991, ¶32 (Miss. 2008). A reversal is warranted only if the trial court abused its discretion in denying a motion for new trial. *Id.*

A. THE COURT ERRED AS A MATTER OF LAW IN ENTERING PLAINTIFFS' ORDER ON JURY VERDICT FINDING THE DEFENDANT, HORSESHOE CASINO JOINTLY AND SEVERALLY LIABLE FOR THE NEGLIGENCE OF RODNEY DEAN, AND FAILING TO GRANT DEFENDANT'S MOTION TO ALTER OR AMEND

1. The Plaintiffs' Actions of Submitting the Order on Jury Verdict to the Court without Notice or Approval of the Defendant was Improper

The court erroneously entered an Order on Jury Verdict awarding judgment against the defendants, Rodney Dean and Robinson Property Group, L.P. d/b/a Horseshoe Casino jointly and severally in the amount of $380,000 to the plaintiff, 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 $665,000.00 to the plaintiff, Geraldine Holmes, Individually and on Behalf of the Wrongful Death Beneficiaries of Michael Leroy Holmes, Deceased.

The order that was presented to the court was presented by the plaintiffs without approval or knowledge of the defendants. Prior to submission of the Order on Jury Verdict to the court, the plaintiffs did not contact the defendant or provide the defendant

with a copy of the Order on Jury Verdict for Approval. The plaintiffs sent the Order on Jury Verdict to the court without knowledge or consent of the defendants.

The defendants upon receiving notice of the plaintiffs' actions provided to the court their version of the Order on Jury Verdict, which provided the verdict as provided by the jury without a finding of joint and several liability. R. Excerpt J and K. The actions of the plaintiffs of submitting the Order to the court without notice or approval of the defendants was improper. R. Excerpt L and M.

The Order on Jury Verdict entered by the court was wrong. The jury did not find that Horseshoe was jointly and severally liable. The actions of submission of the order prior to providing to adverse counsel or without notice to the court that adverse counsel had not approved the order were improper.

2. The Order that was Entered Fails to Reflect the Jury's Findings on Both Compensatory and Punitive Damages

The defendants prepared a separate order which is literally consistent with the jury verdict form. The jury did not find joint liability between Rodney Dean and the Horseshoe. The jury did not find, nor was it asked, to find that Rodney Dean and the Horseshoe acted "consciously and deliberately pursuant to a common plan or design to commit a tortious act." This factual finding by the trier of fact is a *sine qua non* for the type of joint liability being argued by the plaintiffs. Mississippi Code Ann. § 85-5-7 states:

(2) [I]n any civil action based on fault, the liability for damages caused by two (2) or more person shall be joint and several only to the extent necessary for the person suffering the injury ear or loss to recover fifty percent (50%) of his recoverable damages.

(3) as otherwise provided in subsections (2) and (6) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be several only, and not joint and several and a joint tort-feasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault. In assessing percentages of fault an employer and the employer's employee or a principal and the principal's agent shall be considered as one (1) negligent act or omission of the employee or agent.

(4) Any defendant held jointly liable under this action shall have a right of contribution against fellow joint tort-feasors. A defendant shall be held responsible for contribution to other joint tort-feasors only for the percentage of fault assessed to such defendant.

Narkeeta Timber Co., Inc. v. Jenkins, 777 So.2d 39, 42, ¶8 (Miss. 2000). §85-5-7 abolishes joint and several liability over 50% of the judgment and leave untouched joint and several liability up to 50% of the judgment. *Id.* at ¶6.

Miss. Code Ann. §85-5-7 as rewrote in 2004 provides the following:

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. Any person held jointly and severally liable under this section shall have a right of contribution from his fellow defendants acting in concert.

Within either writing of the statute there is no loop hole for the finding of joint and several liability against Horseshoe for the actions of Rodney Dean. The parties are separate and their actions are separate. The plaintiffs' arguments that they should be

joined together are wrong. 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.

3. The Plaintiff's Failed to Plead that Horseshoe was Jointly and Severally Liable for the Actions of Rodney Dean

The plaintiffs made the conscious strategic decision at trial not to submit the issue of joint liability to the jury. During the charge conference, plaintiffs' counsel specifically withdrew the proposed jury verdict form that combined the alleged acts of negligence of Rodney Dean and the Horseshoe in favor of a jury verdict form which separated those acts.

The plaintiffs did not plead that Rodney Dean and the Horseshoe acted "consciously and deliberately pursuant to a common plan or design to commit a tortious act" either in the original Complaint, any amendment to that Complaint or in the pretrial statement itself. The Amended Complaint does not even allege joint liability for the damages sustained. No party is entitled to relief beyond that which is set out in the pleadings.

Pursuant to Mississippi Rules of Civil Procedure 8(a) pleadings must contain:

(1) A short and plain statement of the claim showing that the pleader is entitled to relief

(2) A demand for judgment for the relief to which he deems himself entitled.

All pleadings shall be construed to insure substantial justice is done. Mississippi Rules of Civil Procedure 8 (f). The state courts in analyzing the pleading requirements looked toward the federal cases on this subject that have found "A plaintiff must set forth factual

allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." *Penn National Gaming, Inc. v. Ratliff*, 954 So2d 427, 432, ¶11 (Miss. 2007).

The court in *Penn* held that the Ratliff's failed to adequately plead all the elements necessary to justify disregarding the corporate form therefore that their claim was not viable. *Id.* at ¶ 13. Penn was dismissed without prejudice under Rule 12(b).

The defendant did plead the comparative negligence of Rodney Dean as an affirmative defense in this case and the jury found that Rodney Dean was guilty of acts of negligence different in type and kind from the acts of negligence alleged against the Horseshoe. Pursuant to Mississippi law, absent a finding by the trier of fact that there has been a conscious and deliberate pursuit of a common plan or design to commit a tortious act, negligent parties are liable in damages in proportion to their percentage of comparative fault. *Brown v. North Jackson Nissan, Inc.*, 856 So.2d 692, 699, ¶22 (Miss. Ct. App. 2003).

> In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property; the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

Miss. Code Ann. §11-7-15.

For this action to even be alleged, it first must be plead. The plaintiffs did not plead this in their complaints, pre-trial order and did not even argue to the jury. It was

not until they supplied their order to the judge without knowledge of the defendant that this became an issue.

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

This is not the first dram shop act case ever tried or reported. There is no case known to defense counsel reported in the State of Mississippi by which the fault of the tavern and the fault of the intoxicated person have been combined as is being urged by plaintiffs' counsel in this case. If the rule were otherwise, then a specific case cite should be available, but it is not. Horseshoe should not be liable for the negligent action of Rodney Dean.

Liability is only created when the tavern owner serves the patron when he or she is visibly intoxicated. The Mississippi "Dram Shop" act makes clear that the consumption of alcoholic beverages, and not the sale, service, or furnishing of such beverages, is the proximate cause of any injury inflicted by an intoxicated person upon himself or another person. *Thomas v. The Great Atlantic and Pacific Tea Co.*, 233 F.3d 326, 329 (5th Cir. 2000).

Mississippi Dram Shop Act, Miss. Code Ann. §67-3-73 provides:

(1) The Mississippi Legislature finds and declares that the consumption of intoxicating beverages, rather than the sale or serving or furnishing of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or another person.
(2) Nothwithstanding any other law to the contrary, no holder or an alcoholic beverage, beer or light wine permit, or any agent or employee of such holder, who lawfully sells or serves intoxicating beverages to a person who may lawfully purchase such intoxicating beverages, shall be liable to such person or the estate

or survivors of either, for any injury suffered off the licensed premises, including wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served.

Treasure Bay Corp. v. Ricard, 967 So.2d 1235, 1239, ¶11 (Miss. 2007).

Along with limitations the act also creates a cause of action for those who have been

served intoxicating beverages while visibly intoxicated:

the limitation of liability provided by this section shall not apply to any person who causes or contributes to the consumption of alcoholic beverages by force or by falsely representing that a beverage contains no alcohol, or to any holder of an alcoholic beverage, beer or light wine permit or any agent or employee of such holder when it is shown that the person making a purchase of an alcoholic beverage was at the time of such purchase visibly intoxicated.

Miss. Code Ann. §67-3-73 (4) (Rev. 2004). *Id.* at ¶12.

For liability to attach it is not enough for the plaintiff to show that a patron was served alcohol, but it must be shown that the patron was served alcohol when he or she was visibly intoxicated. *Bridges ex rel. Bridges v. Park Place Entertainment*, 860 So.2d 811, 817, ¶16, 17 and 18. (Miss. 2003). In *Bridges* the plaintiff alleged that fault could be found for self-induced intoxication as a first party action, but the Court held that the statue protected the casino from liability. *Id.* at 818, ¶21.

The court in *White,* another self-induced case, performed an analysis of what characteristics could be used to determine if someone was "visibly intoxicated." *White v. Rainbow Casino-Vicksburg Partnership, L.P.*, 910 So.2d 713, 718 ¶11, 12 and 13. The court in its analysis found that there was no indication that the party was visibly intoxicated, but that she drank, gambled was ambulatory and conversational; that she visited the restroom a number of times, alternated her gambling amount for several slot machines and conversed with her husband throughout the day. *Id.* at ¶13.

The fact situation concerning Ms. White's appearances and actions are very similar to the analysis that must occur in determining if Mr. Dean was visibly intoxicated so that a casino employee would observe his condition. We have a laundry list of things Mr. Dean did including finding his car in parking lot. The law does not hold a licensee or its agent responsible on any basis, such as blood alcohol level of a patron, which would not be externally apparent; instead, the law requires that the tavern owner shall not provide more alcohol when the signs of intoxication are visible. There was no evidence presented by the plaintiffs of anyone seeing Mr. Dean in the Horseshoe Casino acting visibly intoxicated. Further, there is no evidence of anyone that saw Mr. Dean even being served alcohol at Horseshoe Casino. Mr. Dean's own testimony is that he did not think that was intoxicated. Finally, we have the witness, Mr. Stewart, that did see him in the casino, and he stated Mr. Dean was moving from table to table in a frantic nature, but nothing about intoxication. Mr. Stewart stated he was in the army and knew what a drunken man looked like. Not one person that sat at the black jack table testified that Mr. Dean was visibly intoxicated. Therefore, there is no proof Mr. Dean was visibly intoxicated while in the Horseshoe Casino.

The plaintiffs rely on the testimony of their expert using the "relation back" method to prove that Mr. Dean should have been visibly intoxicated, but this argument is disputed and flawed. After much discussion it was finally determined that there is a difference in whole blood alcohol readings and serum readings, not to mention that Dr. Hayne stated that the best determination was vitreous fluid from the party's eye. The mathematical equation used by the plaintiffs' expert was flawed by assumptions. The

only true way to determine if Mr. Dean was served alcohol when he was visibly intoxicated would be eyewitness testimony, which there was none.

Without evidence that Mr. Dean was visibly intoxicated at time he was served alcohol at Horseshoe no liability should attach and the directed verdict at the close of plaintiffs' proof should have been granted.

C. THE COURT COMMITED ERROR BY FAILING TO ALLOW THE JURY TO APPORTION NEGLIGENCE AGAINST SARAH ELIZABETH MCCALMAN AND MICHAEL LEROY HOLMES BY REFUSING TO INCLUDE SARAH ELIZABETH MCCALMAN AND MICHAEL LEROY HOLMES AS POTENTIALLY NEGLIGENT PARTIES ON THE JURY VERDICT FORM AND PROVIDING THE FOLLOWING INSTRUCTION:

> **IF YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE IN THIS CASE THAT SARAH MCCALMAN AND MICHAEL LEROY HOLMES WERE NEGLIGENT IN ALLOWING THEMSELVES TO BECOME PASSENGERS IN THE VEHICLE DRIVEN BY SYNTHIA HARRIS THEN FAULT SHOULD BE ASSESSED AGAINST THEM.**

On review, jury instructions are read as a whole to determine if the jury was properly instructed. *Causey v. Sanders*, 998 So.2d 393, 409, ¶55 (Miss. 2009). "In determining whether error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found." *Id.* (*quoting Collins v. State*, 691 So.2d 918 (Miss. 1997)). If all the instructions taken as a whole are fair, but not perfectly announce the applicable rules of law, there is no error. *Causey*, 998 So.2d at 409.

It is appropriate to provide a jury instruction to the trier of fact that fault may be apportioned to a passenger in an automobile when they voluntarily ride with a driver that

is under the influence of alcohol. *Hill v. Dunaway*, 487 So.2d 807, 809-810 (Miss. 1986). Further, the passenger may be assigned fault on the jury verdict form to reduce their amount of recovery. *Id.* The Supreme Court in *Hill* found that the trial court's instruction to the jury correctly allowed for comparative fault to be alleged and found against the plaintiff, when it was discovered that the driver was under the influence of alcohol and the plaintiff knew this and continued to ride with the driver. *Id.* at 811.

It was error for the court not to give the instruction concerning the fault of Mr. Holmes and Ms. McCalman, and further an error to not allow Ms. Holmes and Ms. McCalman to be placed on the jury verdict form. There is no cure within the instructions that were read to the jury, to cure the fact that the jury was not instructed that they could assess fault against Mr. Holmes and Ms. McCalman. Further, there is absolutely no cure for the failure to list necessary parties on the jury verdict form other than a new trial.

The defendants within their Answer to the Amended Complaint made clear that fault was alleged against both Mr. Holmes and Ms. McCalman for their action of riding in a vehicle with someone that was under the influence of alcohol and had a blood alcohol level of .08. The evidence was clear that Ms. Harris had been consuming an intoxicant, although there was some dispute of which method should be used in determining the correct level, her eye or her blood alcohol.

Plaintiff's expert, Dr. Hayne, testified that Ms. Harris' blood alcohol was .08 and Mr. Holmes .04. Ms. Harris was the driver of the vehicle where both Mr. Holmes and Ms. McCalman were riding. 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. Therefore, a jury instruction concerning their fault, along with their names on the jury verdict form was appropriate. Ms. Harris was found to be 5% at fault for the accident.

D. THE COURT COMMITTED ERROR BY EXCLUDING FROM THE JURY PROOF OF THE FACTS THAT RODNEY DEAN WAS NEITHER CHARGED WITN NOR CONVICTED OF ANY OFFENSE ARISING OUT OF THE AUTOMOBILE ACCIDENT, DESPITE THE FACT THE THAT THE PLAINTIFF FIRST INTRODUCED EVIDENCE THAT RODNEY DEAN WAS BEING INVESTIGATED FOR THE OFFENSE OF "DUI".

The plaintiffs opened the door to questions of whether or not Mr. Dean had a DUI, as they questioned the officer concerning the notations on the evidence bag. The plaintiffs led the jury to believe Mr. Dean was being investigated for a DUI, but did not allow the defense to explain that Mr. Dean was never charged with DUI. This unexplained inference prejudices the defendant, as an officer was allowed to testify about an investigation of the DUI, without any resolve to the DUI investigation.

The only cure at the time of the occurrence was to allow defendant's counsel to question to officer whether or not Mr. Dean was charged with DUI, which he was not.

VI.

CONCLUSION

This matter should be reversed and a new trial granted to the Defendant based on the arguments above or in the alternative the matter should be remanded directing the trial court to enter an Order on Jury Verdict apportioning fault amongst the tort-feasors, without a finding that Horseshoe was jointly and several liable for the actions of Rodney Dean.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document has been properly served; by U.S. mail, postage pre-paid and properly addressed, upon the following:

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This 29th day of March, 2010.

_____
DAWN DAVIS CARSON