IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

HOUSTON HARTLEY — APPELLANT

VS. — CAUSE NO.: 2009-CA-01772

OLD VENICE PIZZA COMPANY, INC. — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
HINDS COUNTY, MISSISSIPPI, FIRST
JUDICIAL DISTRICT

BRIEF OF APPELLANT

Oral argument is not requested

OF COUNSEL:

J. ASHLEY OGDEN, ESQ. (MSB [redacted]
JAMES W. SMITH, JR., ESQ. (MSB [redacted]
OGDEN & ASSOCIATES, PLLC
500 East Capitol Street, Suite 3
Jackson, Mississippi 39201
Telephone: (601) 969-0999
Facsimile: (601) 969-0089

ATTORNEYS FOR APPELLANT

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

HOUSTON HARTLEY **APPELLANT**

VS. **CAUSE NO.: 2009-CA-01772**

OLD VENICE PIZZA COMPANY, INC. **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 the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

I. Houston Hartley, Appellant

II. Old Venice Pizza Company, Inc., Appellee

III. Honorable William F. Coleman, Jr., Circuit Judge

IV. Honorable Matthew A Taylor, Esq. Jamie L. Heard, Esq. and Barbara Johnson Meeks, Esq. of Scott, Sullivan, Streetman & Fox, P.C., Attorneys for Appellees

V. Honorable J. Ashley Ogden and James W. Smith, Jr. of Ogden & Associates, PLLC, Attorney for Appellant

RESPECTFULLY SUBMITTED, this the 6th day of April, 2010.

BY: J. Ashley Ogden
J. Ashley Ogden

OF COUNSEL:

J. ASHLEY OGDEN, ESQ. (MSB [redacted]
JAMES W. SMITH, JR., ESQ. (MSB [redacted]
OGDEN & ASSOCIATES, PLLC
500 East Capitol Street, Suite 3
Jackson, Mississippi 39201
Telephone: (601) 969-0999
Facsimile: (601) 969-0089

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE NO.**

RULES

STATEMENT OF THE ISSUES

1. **Whether the trial court erred in denying Plaintiff's Motion for a New Trial after the trial court stated it committed error regarding the jury instructions.**

2. **Whether the trial court erred in allowing the jury to consider an apportionment of fault to the plaintiff.**

3. **Whether the trial court erred in giving the jury two "form of verdict" jury instructions.**

4. **Whether the trial court erred in denying plaintiff's unopposed oral motion for a mistrial.**

5. **Whether the trial court erred by its denial of Plaintiff's Motion in Limine which allowed the jury to hear testimony that the plaintiff had consumed alcoholic beverages prior to his assault, and allowed the jury to hear questioning from counsel for the defendant that implied the plaintiff was intoxicated at the time of the incident**

STATEMENT OF THE CASE

This case is an action for damages by Houston Hartley (hereinafter "Hartley") against defendant Old Venice Pizza Company, Inc. (hereinafter "Old Venice") for negligent security, failure to warn of a dangerous condition, and failure to maintain the premises in a reasonably safe condition, among other things, and for not preventing the assault of Hartley which occurred while he was an invitee on the premises of Old Venice on or about January 6, 2007.

The trial was held before a jury of twelve (12) commencing on June 8, 2009 and ending on June 11, 2009. The case was submitted to the jury on instructions delivered by the lower court. The jury found in favor of plaintiff Houston Hartley and awarded him $128,000.00 in damages but apportioned 30% fault to the plaintiff and 70% fault to the defendant Old Venice, thereby reducing his damages award to $89,600.00. In post trial motions, the trial court held it erred in allowing the jury to consider apportioning fault to the plaintiff and in not submitting a jury instruction defining any negligence of the plaintiff. The trial court reinstated the full jury verdict. The plaintiff requested a new trial but was denied. Appellant perfects this appeal from the lower court's judgments.

FACTS

Houston Hartley was a customer at the Old Venice Pizza Company on January 6, 2007. (Tr. 491:13-19). On this night the Defendant had a security guard, Clayton Fox, working the parking lot. Fox wore a uniform, carried a gun, handcuffs, and badge. The shirt he was wearing was black and said "security" on it. (Tr. 386:14-27). Fox had no police training and was not licensed or trained to carry a gun. (Tr. 385:20 to 386:2). He was also the general maintenance man at the property. (Tr. 390:12 to 391:2). His defined duties as security was to "separate folks when they get into arguments." (Tr. 391:20-29). His first priority was the physical security of the customers. (Tr. 392:18-21). That was the policy of Old Venice on January 6, 2007. (Tr. 392:22-24). He was told "If you see trouble, break it up." (Tr. 398:1-2). He was told by management, "[i]f trouble breaks out, get it separated and get them out of here so it doesn't disturb the normal course of business." (Tr. 399:14-25). He said he was authorized to put his hands on someone to stop a problem or if someone was being stomped about the head while on the ground. (Tr. 405:26 to 406:5). He acknowledged that he was aware of problems in the parking lot. He described it as "occasionally a scuffle in the parking lot, car break-ins...." (Tr. 408:1-4). Old Venice's policy for persons in the parking lot was they had to be inside or off the property. (Tr. 285:27 to 286:7).

On January 6, 2007, Plaintiff Hartley had a few appetizers and drinks with his wife and some friends. (Tr. 491:17-19; 491:28-29). About 20 minutes before Houston left the restaurant management escorted a drunk man and his group of friends out of the bar. (Tr. 175:1-4; 492:6-10). The security guard told the group their friend was visibly drunk. (Tr. 395:25-28). When patrons went to leave, the drunk man was sitting on the curb right at the front door, puking with his shirt off. His five buddies were standing around him. You literally had to step over him to get

out the front door. (Tr. 175:16-24; 231:13-19). The drunk and his group of friends were an impediment or hazard to persons trying to get out the door. (Tr. 175:25-29). They were blocking the front door exit and hanging out in the parking lot. (Tr. 200:10-23). The security guard was standing there and watching. (Tr. 177:8-10; 200:24-29). One of the women who was leaving, Parish Malouf, took a picture of the drunk man with her cell phone and that made his buddies mad. (Tr. 176:22-26). They started arguing with her and trying to take her cell phone. (Tr. 176:27 to 177:9). The men began swearing and demanding the phone. The security guard was about 5 feet away and did nothing while the matter escalated. (Tr. 442:4-18). The men surrounded the woman and her husband, who had gone to get the car, returned her aid. (Tr. 201:1-15). The men were trying to wrestle the phone away from Ms. Malouf. (Tr. 465:18). The drunk men had his wife surrounded. When Mr. Malouf came to her aid the group began accosting him. (Tr. 201:2-15). The security guard was there doing nothing, but was close enough that he could do something if he wanted to. (Tr. 201:16-23). While Mr. Malouf is trying to get his wife away from this group blocking the front door, Plaintiff is trying to leave through the front door. (Tr. 201:27 to 202:4). The group was drunk and belligerent. (Tr. 179:1-4). Then a black truck came onto the property, several men unloaded out of the truck and came to join the argument. (Tr. 179:10-18). The size of the group grows to 12 to 15 men. (Tr. 182:2-10). The security guard stood and watched. (Tr. 181:10-13). Witness Louis Wilkinson said to the security guard, "there's fixing to be a fight." And the guard replied, "I'm not getting involved." (Tr. 179:12-29).

About this time Hartley comes out the front door and had to "work my way through that crowd trying to get to my truck." (Tr. 492:24-29; 538: 24-27). The only way Hartley could get to his truck was through the crowd at the front door. (Tr. 520:2-7; 538:11-27). He did not suspect

there was going to be a problem. (Tr. 539:6-10). As Hartley was working his way through the rowdy crowd, the security guard was there observing the incident. (Tr. 495:14-25). The guard was not trying to do anything to break up the problem. (Tr. 495:20 to 496:5). As Hartley is going by, he tries to calm everything down and tells his friends "let's go, we don't want any problems." (Tr. 493:2-11;180:12-15; 520:24-25). At this point one of the men in the group "sucker punches" him (Tr.181:19-29: 466:6). The group begins beating and kicking him and stomping on his head. (Tr. 182:12-15; 493:2-21). The security guard made no attempt to break up the attack, separate the crowd, or stop the attack. (Tr. 182:16-25). He stood and watched. (Tr. 467:1).

The security guard took no action to disburse the crowd or break up the argument before it got out of hand. He did not prevent problem from escalating. (Tr. 495:26-496:10). He did not stop the men from harassing the woman. (Tr.177:16-26). The security guard provided no aid to Hartley. (Tr. 206:13). He took no efforts to separate the men from Ms. Malouf. (Tr. 206:16). He made no effort to separate the group when they turned on Mr. Malouf. (Tr. 206:19). He just stood and watched and made not attempt to stop anything. (Tr. 206:27 to 207:2). The security guard had several opportunities to stop the attack from starting and several chances to break it up, but chose not to get involved even though the policy of the Defendant was to clear the parking lot of all trouble and to prevent fights from occurring and to secure the safety of the customers.

As a result of the assault, Hartley suffered sever damage to his teeth having to get twelve teeth repaired due to cracks, breaks or chips. (Tr. 496:28-498:1). He incurred $8,241.50 in medical bills. (Tr. 499:19-25). He has headaches and depression. (Tr. 501:6-15). He expects to see doctors for the remainder of his life due to his injuries. (Tr. 502:7-15).

SUMMARY OF THE ARGUMENT

It was error for the trial court to find that it allowed faulty jury instructions on apportionment of fault to be submitted to the jury but after admitting such error did not order a new trial. During trial no evidence was submitted to show any negligence on the part of the plaintiff but the trial court still allowed the jury to consider a percentage of fault against the plaintiff. The trial court in post trial motions agreed it had erred in the jury instruction but did not order a new trial. Instead it removed the percentage of fault against the plaintiff and reinstated the amount of the verdict. This is procedurally incorrect. The trial court also erred in not submitting a jury instruction describing what negligence, if any, the plaintiff committed. The trial court also committed error by giving the jury contradictory form of the verdict instructions. The trial court committed error in not declaring a mistrial when plaintiff requested a mistrial and the defendant joined the request. The trial court committed error by allowing the defendant to provide testimony placing fault on the third party criminal when the criminal assailant was not a party and the law does not allow this type of prejudicial argument. The only proper and fair remedy as provided under law in regards to the trial courts errors is to award a new trial.

Standard of Review

The standard of review for evidentiary rulings by the trial court is abuse of discretion. "A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *In re Volkswagen of Am., Inc.* 545 F.3d 304, 310 (5th Cir. 2008) (quoting *McClure v. Ashcroft*, 335 F.3d 404, 408 (5th Cir. 2003) (citation omitted). Abuse of discretion is defined as creating a prejudice to the party's case. *Edwards v. State*, 737 So.2d 275 (Miss. 1999).

ARGUMENT

I. Trial Court Erred in Not Ordering New Trial After the Trial Court Admitted It Committed Error in Allowing Faulty Jury Instructions.

The court may grant a new trial only when justice so requires in circumstances when the verdict is against the overwhelming weight of the evidence, **the jury is confused by faulty jury instructions,** or the verdict is based on bias, passion, and prejudice. *Hamilton v. Hammons*, 792 So.2d 956 (Miss. 2001); Miss. R. Civ. P. 59. Errors occurring at the trial cannot be reviewed without a motion for new trial. *Hayes v. Slidell Liquor Co.*, 55 So. 356, 357 (Miss.1911). Specifically, plaintiff requests this Court order a new trial so that a new jury may consider the full weight of plaintiff's evidence.

The trial court admitted on the record that it had allowed a faulty jury instruction. The trial court also admitted that it failed to provide a proper jury instruction on negligence. (Tr. 697:13-16; 701:21-27). Nevertheless, instead of granting a new trial the trial court simply reinstated the original verdict without the 30% deducted due to supposed fault by the plaintiff. The remedy provided by the trial court was not consistent with the law. The correct remedy is a new trial. The trial court's order did not remedy the error in the jury instructions. A new trial should be granted when justice requires. Circumstances which justice so requires are "when the

verdict is against the overwhelming weight of the evidence, the jury has been confused by **faulty jury instructions**, or the verdict is based on bias, passion, and prejudice." *Hamilton*, 792 So. 2d 956, 965 (emphasis added). **"If the instructions 'do not fairly or adequately instruct the jury, [the appellate court] can and will reverse.'"** *Moore v. State*, 755 So. 2d 1276, 1280 (Miss. Ct. App. 2000) (quoting *Boone v. Wal-Mart Stores, Inc.*, 680 So. 2d 844, 845 (Miss. 1996) (emphasis added)).

The trial court stated in post trial motions hearing Defendant's jury instruction was given to the jury allowing the jury to "reduce the award by any negligence on the part of the Plaintiff, but [Defendant] didn't give any or set out any facts that [the jury] could find negligence." (Tr. 694:26 to 695:3). The trial court stated, "you cannot rely on an instruction allowing the jury to find or to award if there is negligence in the case without setting out the particular facts of that case." (Tr. 696:9-15). The trial court stated, "it was error on my part not to give one, but it was also error on [Defendant's] part not to submit one...." (Tr. 697:12-16).

The trial court concluded,

> I have reviewed my notes and my recollection of the testimony in this case on this particular point as to whether or not there was sufficient evidence to give an instruction on comparative negligence. It's a very close issue, but in my **opinion in hindsight I was wrong in allowing testimony on this particular point. For further reasons on the jury instructions it was error not to define what acts could be considered negligence on the part of the Plaintiff.**

(Tr. 701:16-26). After the trial court ruled that there was error in the instructions (Tr. 701:21-27), the plaintiff requested a new trial which the court denied. (Tr. 702:19 to 703:1). The trial court stated the erroneous admission of testimony concerning the acts of the plaintiff would not affect the jury's determination on total amount of damages. (Tr. 703:9-14). The plaintiff then again asked the court for a new trial and the court stood on its ruling. (Tr. 703:19-23).

The trial court's remedy to remove the comparative negligence instruction after the fact and to reinstate the verdict is procedurally incorrect. The damage to the plaintiff cannot be cured by simply adding the amount of damages that were initially reduced because of erroneous defective jury instructions. This remedy does not allow for the consideration of any pain and suffering award. Since the complete verdict itself only equals the total amount of medical bills that were submitted, the verdict as corrected does not allow for any addition of pain and suffering, which was an element of plaintiff's damages submitted to the jury. The jury was obviously bias and prejudiced in this verdict. The only proper and fair remedy as provided under law is to award plaintiff a new trial as requested.

II. The Trial Court Erred in Allowing the Jury to Consider an Apportionment of Fault to the Plaintiff.

A. No Facts Show Any Negligence by Plaintiff

The trial court erred in allowing the jury to apportion fault to the plaintiff. Based on the trial court's defective instruction, the jury was required to find a percentage of fault to the plaintiff. (R. 815- Court instruction number 28, D-20). The verdict placing 70% fault on defendant and 30% fault on plaintiff was against the greater weight of the evidence presented, since there was no testimony that the plaintiff caused or contributed to his injuries. .

Apportionment of fault is only appropriate where a defendant has plead and proven negligence on the part of a party or non-party. *Eckman v. Moore*, 876 So. 2d 975, 988 (Miss. 2004). Apportionment of fault is an affirmative defense and defendants have the burden to prove any apportionment of fault. The burden of proof rests on the shoulders of the one asserting an affirmative defense. *Id* at 988. Defendant is required to prove the negligence of the individual they assert is at fault and prove that the negligence contributed to the cause of plaintiff's injury for there to be fault allocated to someone other than the named

Defendants. *Breaux v. Grand Casinos of Miss.*, 854 So. 2d 1093, 1097 (Miss. App. 2003) (citing *King v. Dudley*, 286 So. 2d 814, 817 (Miss. 1973)). There was no testimony by any witnesses that Hartley acted negligently. In post trial motion hearings, the trial court agreed with the plaintiff's argument that:

1. the instruction on comparative negligence against laintiff was wrong. (Tr. 701:16-23)
2. the court erred for not instructing the jury on what negligence, if any, the plaintiff committed.(Tr. 701:24-27).

The trial court concluded, "I have reviewed my notes and my recollection of the testimony in this case on this particular point as to whether or not there was sufficient evidence to give an instruction on comparative negligence. It's a very close issue, but in my opinion in hindsight I was wrong in allowing testimony on this particular point. For further reasons on the jury instructions it was error not to define what acts could be considered negligence on the part of the Plaintiff." (Tr. 701:16-27).

The trial court failed to apply the law and the facts in the case and committed error by allowing defendant's proposed jury instruction labeled "D-20" (Court instruction 28) (R. 815) to be given to the jury. This instruction improperly allowed the jury to apportion fault to the plaintiff when there was no evidence presented at trial that the plaintiff's actions were a direct or proximate cause of his assault and resultant injuries.

In order for the plaintiff to be negligent, there had to be evidence that the plaintiff was aware of the danger and appreciated the danger. See, *Thomas v. Columbia Group, LLC,* 969 So. 2d 849 (Miss. 2007) where victim did not appreciate the danger and did not willfully place himself in peril. The *Thomas* case is practically on all fours with the case at bar. Thomas was a victim who "did nothing to instigate the shooting" and did not willfully place himself in peril. *Id.* at 854. However, the duty to warn or protect disappears entirely when it is shown that the

injured person did, in fact, observe and fully appreciate the peril. *Titus v. Williams,* 844 So. 2d 459 (Miss. 2003). In *Titus*, the victim approached the shooter and first attacked him. *Id.* at 464. The shooter then retrieved his gun and killed the victim. *Id.* There was no evidence that Hartley instigated the fight or appreciated the problem beforehand.

The plaintiff testified **he did not instigate** the attack:

> Q: What did you do to instigate any of this attack?
> A: Nothing. Nothing. I had no idea what was going on. I was just walking by and saw my friends there.

(Tr. 494:29 to 495:3)

The plaintiff testified **he was not aware and did not appreciate the danger** presented:

> Q: Tell us if you were able to appreciate what was going on at any point that would alert you that there was going to be a problem.
> A: I suspected nothing was about to happen
> Q: You did not know there was a problem until you got into the middle of it, right?
> A: Right.

(Tr. 538:28 to 539:10)

The group of men who were starting the fight were between the plaintiff and his truck and he had to go through them to get to his car. "They were in route to my truck. They were between where I came out of the door and on my way to the truck. So it was no—that was the only way I could go." (Tr. 520:1-40). See also plaintiff's testimony:

> Q: Houston, what did you have to get through to get your car?
> A: A crowd of guys, a crowd of rowdy men.

(Tr. 537:16-18)

> Q: Did you come over to this incident or did you go through this incident?
> A: I went through the incident because I was on my way to my vehicle when I came across it.
> Q: Well, if the Defendant kept saying that you walked into the situation, what's your response to that?
> A: No, I did not. I was going to my truck, so I had to walk through them to get to my vehicle. And I happened to walk across them while I was going to my vehicle.

(Tr. 538:11-27)

Testimony from other witnesses verified plaintiff did not start or contribute to the attack.

Testimony of Louis Wilkinson:

> Q: Did he [plaintiff] instigate or get into this incident at all?
> A: No.
> Q: Did he make any effort to interject himself in between all these people who are arguing back and forth about the phone?
> A: No.

(Tr. 180:12-22)

Testimony of Justin Malouf:

> Q: At any point in time, did the two—did you see Houston throw any punches?
> A: No.
> Q: At any point in time, did you see Houston interject himself and try to start any trouble?
> A: No.
> Q: All right. Did you or do you have any testimony that would indicate that Houston agitated or started this thing?
> A: None whatsoever.

(Tr. 202:23 to 203:3)

Testimony of Amy Hartley:

> Q: [W]hat if anything did you see your husband do that started the attack?
> A: He didn't do anything...he did nothing wrong.

(Tr. 470:23 to 471:9)

Testimony of Plaintiff premises security expert Ken Goodrum:

> Q: What fault did you find, or do you have an opinion about anything that Houston did wrong?
> A: None.
> Q: Okay, wait, you have no opinion or—
> A: No. Mr. Hartley didn't do anything wrong.

(Tr. 328:13-17)

Based on the evidence, plaintiff did not appreciate the peril and he did not start, instigate or contribute to the fight. Plaintiff was a mere victim as in *Thomas*. There was no evidence to

support a jury instruction for apportioning fault or for contributory negligence against the plaintiff.

B. Evidence Submitted Does Not Support a Jury Instruction Apportioning Fault to Plaintiff

All the evidence at trial established plaintiff as an invitee, leaving the restaurant and trying to get to his car through a crowd that was growing hostile. But, there is no evidence that plaintiff caused or contributed to his injuries or the fight that broke out.

1. Plaintiff was an Invitee

Based on the evidence presented at trial, the jury was given a peremptory instruction "You are instructed that as a matter of law, Houston Hartley was at all times an invitee of Old Venice Pizza Company during the time of the alleged incident." (R.963, instruction P-22). Given by the court. (Tr. 606:13 to 607:2). See also, testimony that plaintiff was a customer (Tr. 322:5-8).

2. An Atmosphere of Violence Existed at the Property

During trial, plaintiff presented evidence showing that the defendant Old Venice had a history of crime on the property, including fights and assaults occurring on the property and in the parking lot. (Tr. Transcr. 320:21-321:28). Plaintiff's premises security expert, Ken Goodrum, testified the property had a pattern of crime (Tr. 321:4-21) and that an atmosphere of violence existed on the property in January 2007. (Tr. 321:15-21).

3. Defendant had Actual Knowledge of Problem with Crime on the Property

Plaintiff presented evidence that the defendant and its managers and security guard knew they were having problems with crime on the property. (Tr. 323:1-12).

4. Defendant Knew the Attack was Foreseeable

The testimony presented by plaintiff's expert, Ken Goodrum, was that the attack of

plaintiff was foreseeable. (Tr. 323:1-12). That foreseeability of plaintiff being attacked came by the Defendant's knowledge of pre-occurring crimes on the property via an ongoing problem with fights and armed robbery. (Tr. 323:26 to 324:6). It also came from the security guard's failure to stop an escalating situation when he had about seven different opportunities to do so. (Tr. 324:7 to 325:19).

5. Defendant Did Not Warn Plaintiff of the Danger in Its Parking Lot

The defendant removed an intoxicated group of men from the bar and then sat them right at the front door exit so that any patron leaving the restaurant had to literally step over the drunk person. (Tr. 175:19-24). The group of men kicked out of the bar were trespassers. (Tr. 322:9-13). The group of men created an impediment or hazard to customers leaving the premises. (Tr. 175:25-29). But, the defendant did not warn the plaintiff or others of the problem defendant had created.

6. Defendant Failed to Remove the Problem from the Property and Refused to Break Up the Incident Before it Escalated

The testimony showed that the security guard's job was to clear the parking lot and protect the customers. (Tr. 325:20-24). The defendant failed to remove a known danger from its property despite having actual notice of the danger's presence. (Tr. 324:9-325:19). Old Venice allowed the intoxicated man and his five friends to remain outside the restaurant, positioned on the front stoop so close to the entrance of Old Venice that the intoxicated man and his friends created an obstacle to people entering and leaving Old Venice. (Tr. 175:16-29). The security guard was close enough to see what was occurring and did nothing but watch. (Tr. 177:1-26). After a girl took a photograph of the drunk person, his group grew hostile and started arguing and fighting with the girl to get her cell phone while the security guard just stood and watched. (Tr. 176:14 to 177:1). The group of men argued with other patrons for three to four minutes while the security

guard watched and did nothing. (Tr. 178:11-26). It was obvious the group was drunk and belligerent. (Tr. 179:1-4). The security guard was standing in the group watching the problem escalate and did nothing to break up the argument or remove anyone from the property. (Tr. 495:20 to 496:10). Witness Louis Wilkinson told the guard, "there is a fight fixing to break out." And, the guard stated, "I'm not getting involved." (Tr. 179:23-29). Defendant's policy on January 6, 2007, was first priority security of customers. (Tr. 392:18-21). The policy for security regarding trouble was "If you see trouble, break it up." (Tr. 397:26 to398:2) and "if trouble breaks out, get it separated and get them out of here so it doesn't disturb the normal course of business." (Tr. 399:14-24). And security patrolled the parking lot. (Tr. 400:13-18). Defendant failed in its duty.

7. Plaintiff was an Innocent Bystander

The testimony at trial was that the plaintiff did not instigate the incident (Tr. 180:16-18) and he did not interject himself into the arguing group. (Tr. 180:19-22). He simply walked by the group and said to Justin Malouf, "Hey, let's go." (Tr. 180:26-29). He was trying to calm everyone down. (Tr. 181:1). He was trying to get to his car to leave.

> Q: Did you come over to this incident or did you go through this incident?
> A: I went through the incident because I was on my way to my vehicle when I came across it.

(Tr. 538:11-20)

There was no evidence presented that the plaintiff at any time caused or contributed to his assault. The jury's verdict was contrary to the evidence in that no reasonable person could have reached the conclusion that the plaintiff was 30% liable for this assault, without the jury resorting to the use of passion or prejudice, or confusion of the issues, or the use of defective jury instructions that required the jury to consider placing fault on the plaintiff.

At the time of Hartley's assault, the defendant owed him, as an invitee, a duty of reasonable care to protect him from attacks by third parties while on the premises. *Gatewood v. Sampson*, 812 So. 2d 212, 219 (Miss. 2002). The testimony showed that the defendant and its security guard breached this duty by failing to remove a known danger from their property, and by failing to intervene or otherwise come to the plaintiff's aid, despite witnessing the events leading up to and including his assault. The general rule is that all instructions must be supported by the evidence. Where an instruction is not supported by evidence it should not be given. *Dennis v. State,* 555 So. 2d 679, 683 (Miss. 1989). Granting instructions not supported by evidence is reversible error. *Lancaster v. State*, 472 So. 2d 363, 365 (Miss. 1985).

There was no evidence presented by either party that the plaintiff did anything to cause or contribute to his assault, and therefore the jury should **not** have been required to apportion a percentage of fault to the plaintiff. Apportionment of fault is an affirmative defense that the defendant has the burden of proving. *Eckman,* 876 So. 2d at 989. In *Eckman* the court stated, "it is fundamental that the burden of affirmative defenses rests squarely on the shoulders of the one who expects to avoid liability by the defense." *Id.* (citing *Marshall Durbin Co. v. Warren*, 633 So. 2d 1006, 1009 (Miss. 1994)). There was no testimony or evidence presented by the defendant that the plaintiff did anything to start the fight. The defendant presented no evidence that the plaintiff was acting negligent in any way. The defendant presented no evidence that the plaintiff was anything but an invitee on the way to his car when he was assaulted. The defendant presented no evidence that the plaintiff's actions of going to his car contributed to him being attacked by a third party. And, there was no testimony by anyone that the plaintiff's acts caused his injuries.

In order for the jury to be able to consider apportioning fault to the plaintiff or any other party, the defendant must prove (1) negligence by a preponderance of the evidence and (2) also show that such negligence contributed to the cause of the plaintiff's injury. *Breaux*, 854 So. 2d at 1097. Since the Defendant failed to present any evidence that the plaintiff acted negligently or caused or contributed to his assault, the jury should not have been required to apportion any percentage of fault to him under the law. The only testimony submitted was that the plaintiff was trying to get to his car and had to pass by or through the hostile crowd. No one testified that plaintiff's interaction with the crowd caused his injuries. As a peace maker, Hartley was merely trying to get Malouf to go home. The trial court erred in giving such an instruction to the jury when the case law does not allow this.

III. Trial Court Erred in Not Giving Negligence Instruction Defining What Negligence, if Any, the Plaintiff Committed

In post-trial motions, the trial court questioned that if it had allowed the jury to consider a percentage of fault, then why was there no contributory negligence instruction directing the jury on what negligence the plaintiff committed. (Tr. 694:26 to 697:16). The court ruled it committed error, because the defendant and court did not provide an instruction to direct the jury on what was the definition of plaintiff's negligence. (Tr. 697:11-16). "[A]n instruction charging negligence or contributory negligence must define those acts which would constitute such." *Trainer v. Gibson*, 360 So. 2d 1226,1228 (Miss. 1978). No such instruction was presented to the jury. Based on the trial court's ruling regarding the lack of this instruction, a new trial must be granted.

IV. The Trial Court Erred in Giving the Jury Two Contradictory "Form of Verdict" Jury Instructions

The trial court erred by giving the jury two contrary jury instructions regarding the form of the verdict, defendant's jury instruction labeled "D-20" (court instruction 28. R. at 815) and plaintiff's jury instruction labeled "P-2"(court instruction 29). (R. at 782). Defendant's jury instruction "D-20" (court instruction 28) erroneously required the jury to apportion a percentage of fault from 0 – 100 % to both the plaintiff and the defendant. The verdict that was ultimately returned by the jury apportioned 30% fault to the plaintiff and 70% fault to the defendant. As the plaintiff has noted, under Mississippi case law, the jury should not have been required to apportion fault to the plaintiff, because there was no evidence or testimony presented to the jury that the plaintiff acted negligently or contributed to his injury in any way. See *Eckman*, 876 So. 2d at 989; *Breaux*, 854 So. 2d at 1097. Also, defendant's jury instruction "D-20" (court instruction 28), was given to the jury before plaintiff's jury instruction "P-2" (court instruction 29). The trial court erred in giving the flawed instruction "D-20" (court instruction 28) to the jury before "P-2"(court instruction 29), as it confused the jury and required them to apportion fault to the plaintiff when they should not have done so under the case law and before they had determined if the defendant was liable. Defendant's jury instruction "D-20" should have been denied by the trial court for its failure to adhere to precedence and its potential to confuse and incorrectly instruct the jury regarding their findings of liability in this matter.

V. The Trial Court Erred in Denying Plaintiff's Unopposed Oral Motion for a Mistrial

The trial court failed to apply the law and the facts in the case and committed reversible error by its refusal to grant plaintiff's motion for mistrial made during trial. (Tr. 545:20 to 546:21). During trial the plaintiff requested a mistrial. (Tr. 545:20 to 546:21). Defendant agreed

to the grounds for plaintiff's motion for mistrial. (Tr. 546:15-17). It was error and unduly prejudicial to the plaintiff for the trial court to deny plaintiff's motion for mistrial when defendant confessed and agreed to the mistrial.

Plaintiff's basis for a mistrial was the defendant's continued attempt to allocate fault to the criminals who attacked the plaintiff. Plaintiff moved for a mistrial when defendant elicited testimony from witnesses to have them testify that the criminal third party was the cause of the attack. (Tr. 545:20-546:4). Plaintiff did not sue the criminals who assaulted him because he did not have the information to press criminal charges and did not know the identity of the third party criminals. (Tr. 540:3-15). Plaintiff objected every time the defendant went into this line of questioning and the trial court sustained the objection but then allowed the defendant to continue with this line of improper questioning. (Tr. 529:15-29)

In, *Whitehead v. Food Max of Mississippi*, 163 F.3d 265, 281 (5th Cir. 1998), the court held under Mississippi law intentional criminal acts of third parties do not relieve the premises owner of liability because allocation of fault did not included intentional tortfeasors. *Whitehead* 163 F. 3d at 271. See, *O'Cain v. Harvey Freeman and Sons, Inc.*, 603 So. 2d 824, 830 (Miss. 1991); See also *Lyle v. Mladinich,* 584 So. 2d 397, 399 (Miss. 1991). Admission Fault cannot be apportioned for intentional torts so assailants should not be apportioned fault in a civil matter unless they are a party. But, the trial court allowed the defendant, over plaintiff's objections, to continuously ask the witnesses why did they not blame the assailants instead of the defendant. (Tr. 528:23-530:10; 456:29 to 457:457:28; 528:23-529:29).

Defendant attempted to submit jury instructions which apportioned fault to the third party criminals and plaintiff objected. (Tr. 623:18-624:14). The trial court finally heeded the plaintiff and ultimately held the defendant could not place the criminal assailant and other random parties

on the jury instruction under apportionment of fault. (Tr. 623:13 to 625:15). However, the jury was already prejudiced by the repeated pattern of improper questioning. "Whether to grant a motion for mistrial is within the sound discretion of the trial court. The standard of review for denial of a motion for mistrial is abuse of discretion." *Irby v. Travis*, 935 So. 2d 884, 908 (Miss. 2006) (citing *Pulphus v. State,* 782 So. 2d 1220, 1222 (Miss.2001)). A "court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *In re Volkswagen of America, Inc.* 545 F.3d at 310. (quoting *McClure,* 335 F.3d at 408. (citation omitted). It was error for the trial court to deny plaintiff's oral motion for mistrial when the defendant had, continuously through plaintiff's case-in-chief, argued that the assailants were responsible to plaintiff for his injuries. (Tr. 456:29-458:26; 528:23-529:29). Furthermore, the defendant confessed to a mistrial on these grounds. (Tr. 546:15-17).

The plaintiff is entitled to a new trial on the grounds that the jury was allowed to hear testimony, over plaintiff's objections, that the plaintiff could have and did not sue the criminal assailants. The jury is not allowed to be presented testimony regarding apportioning fault of the intentional tortfeasors. *Whitehead*, 163 F.3d at 281.; See, *O'Cain*, 603 So. 2d at 830.; See also *Lyle,* 584 So. 2d at 399. Admission of this testimony was prejudicial and error.

VI. The Trial Court Erred in Denying Plaintiff's Motion in Limine Regarding the Plaintiff's Consumption of Alcoholic Beverages Prior to His Assault

Appellant submits that the trial court failed to apply the law and the facts in the case and committed error by its denial of Plaintiff's Motion *in Limine* to exclude the fact that prior to the attack plaintiff had consumed alcoholic beverages. Plaintiff filed a motion to exclude this information. (R. 56-57). The court denied the motion. (Tr. 52:22 to 53:15). The defendant proceeded at trial to question the plaintiff about his prior drinking that day (Tr. 523:1-25)

attempting to prejudice the jury. Even after admitting that he had consumed a small amount of alcohol earlier in the day the defendants presented no testimony that the plaintiff's alcohol consumption was a proximate cause or contributing cause of his injuries. Therefore, the trial court's decision to allow testimony regarding plaintiff's use of alcohol prior to the subject incident, and the trial court's allowance of questioning by counsel for the defendant that implied the plaintiff was intoxicated, was unduly prejudicial to the plaintiff and contrary to Mississippi Rules of Evidence and Mississippi case law.

The trial court erred by denying Plaintiff's Motion *in Limine* to exclude testimony and evidence being presented to the jury implying that the plaintiff was intoxicated at the time of his assault. There was no testimony or evidence presented at trial that Houston Hartley was intoxicated at the time of the assault. The plaintiff testified that he had consumed a few beers but he was not drunk. (Tr. 491:20-22). There was no testimony at trial that indicated plaintiff's alcohol consumption caused or contributed to his assault. This Court has rendered opinions in other cases showing that allowing testimony of alcohol when it is not related to the issue at hand is prejudicial. See, *Pope v. McGee*, where the court held in an action arising from an automobile accident, that evidence of two six packs of beer and an unidentified white powered found in the Defendant's car must be excluded because such evidence offered no proof on proximate causation of the collision, and its prejudicial valued greatly outweighed its probative value. *Pope v. McGee*, 403 So. 2d 1269, 1271 (Miss. 1981). See, *Accu-Fab* where court held that without evidence that the plaintiff's work was affected by the influence of drugs a positive drug screen was irrelevant. *Accu-Fab & Construction, Inc. v. Ladner*, 970 So. 2d 1276, 1284 (Miss. Ct. App. 2000). See, *Holladay v. Tutor* where court held that a box of marijuana and Quaaludes found in a

defendant's car was not relevant and the presentation of such evidence was solely intended to prejudice the jury. *Holladay v. Tutor*, 465 So. 2d 337, 338 (Miss. 1985).

All of the testimony which was presented at trial indicated that Houston Hartley did nothing to cause or contribute to his assault and was merely attempting to make his way to his truck when he was assaulted without provocation. (Tr. 492:29-493:1; 493:12-15; 494:29-495:13). The trial court's admission of testimony that plaintiff had consumed alcohol that day without any evidence to relate the alcohol consumption to his injuries was highly prejudicial to the plaintiff under Miss. R. Evid. 401, 402, and 403 and constitutes reversible error.

VII. Trial Court Erred in Admitting Testimony of Defendant's Expert Warren Woodfork

The trial court erred in allowing Warren G. Woodfork to give testimony outside the scope of his designation. During discovery, plaintiff inquired about the subject matter of Mr. Woodforks' expected testimony. Under Miss. R. Civ. P. 26(b)(4)(A)(i), a party must "identify each person whom they expect to call as an expert witness at trial, and to state the subject matter and substance of their testimony, as well as a summary of the basis for each opinion." *Warren v. Sandoz Pharms. Corp.*, 783 So. 2d 735, 742 (Miss. Ct. App. 2000). On May 7, 2009, defendants submitted their Designation of Warren Woodfork, Sr. as an Expert to the lower court. This document contained the following limited opinions to which Mr. Woodfork was expected to testify:

1. Management, owners and employees of Old Venice provided adequate security and met their responsibilities to provide reasonable car and protections to its patrons.

2. Old Venice, its management, owners and employees provided security officers for the protection of its patrons.

3. Old Venice, its management, owners, employees nor security were negligent in providing protection and security to Houston Hartley and preventing any assaults to him.

4. Security officers provided by Old Venice were properly trained and supervised and performed their duties adequately and as required.

5. Mr. Hartley's injuries were not proximately caused by any negligence or failure on the part of Old Venice, its management, owners, employees or security officers. (R. 641)

Plaintiff filed a motion to strike Woodfork's opinions because they were unsupported speculation and had not supplied any methodology. (R. 624-627). The trial court denied the motion. (Tr. 52:23 to 52:13). During trial, Mr. Woodfork repeatedly gave opinions outside the scope of his expert designation. The trial court committed reversible error by allowing that testimony.

A. Woodfork was Incorrectly Allowed to Testify About the Legal Status of the People Involved in the Incident

Woodfork's opinion did not include any opinion on the status of the Plaintiff or any other persons yet the trial court allowed him to render this opinion.

> Q: Now, getting in, Mr. Woodfork, to what you think in your - - your actual opinions as an expert in this case on - - on these particular facts, based on what you reviewed that you just told us about, are there circumstances surrounding Mr. Hartley's injuries and the circumstances of what happened that evening that are typical in cases that you've seen in which a business like Old Venice was sued for inadequate security?
> A: From what I have gathered in looking at the depositions and all of the facts in this case, everybody involved seems to have been invitees of this particular establishment.
>
> By Mr. Ogden: Objection. May we approach? I'll just put it on the record. This expert has provided no testimony until just now about the st - - status of anybody, so he's not allowed to, at this point, testify about the status is of anyone on the property.
>
> By the Court: Overruled.

(Tr. 561:12-28)

It was improper to allow Woodfork to testify as to the legal status of the people involved in the incident. The trial court committed reversible error.

B. Woodfork was Allowed to Testify that Liability Rested on the Criminal Assailants

As stated above, in *Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265 (5th Cir. 1998) the court held allocation of fault among defendants does not include the intentional tortfeasor. *Id.* See also, *O'Cain v. Harvey Freeman and Sons, Inc.*, 603 So. 2d 824, 830 (Miss. 1991); *Lyle v. Mladinich,* 584 So. 2d 397, 399 (Miss. 1991).

Woodfork was allowed to testify:

> Q. Now, do you have an opinion based on your review of the case, inspection of the property and hearing all of the testimony, as to whether Old Venice security, in this case Clayton Fox, properly performed his duties that night?
> A. I think he properly performed his duties based on - - not only on his deposition, but I've had interviews with him - - and **I placed the fault or the blame for this strictly on the third - - unidentified third parties** that I think if a police investigation had been conducted after this incident occurred, we would better be able to identify - -
>
> Mr. Ogden: Plaintiff objects to the testimony about third party liabilities. We move that testimony be stricken from the record and the jury be so instructed to disregard that testimony as improper.
>
> Court: Sustained. Members of the jury, you disregard the testimony as to the liability of third parties. Thank you. Move along.

(Tr. 570:15-571:9)

> Q. And he indicated to this jury that he placed no blame on those drunken individuals. Were you here during that testimony?
> A. Yes.
> Q. Do you place any blame on these individuals?
>
> Mr. Ogden: Objection, move to strike based on prior objection.

Mr. Taylor: Your Honor, I think their basis for that was talking about third party crimes. We've identified them as - - as individuals. In Goodrum's testimony, we asked this exact same question.

By the Court: It will be overruled. It will be overruled as to the spec - - specific question. Go ahead.

Q. You can answer, Mr. Woodfork.
A. Well - - well, certainly there's no evidence that the security guard caused the injuries to Mr. Hartley.

(Tr. 371:28-372:21)

Woodfork's attempt to place blame on the third party intentional tortfeasors was unfairly prejudicial to plaintiff. And it was never provided as an opinion that he would give. The trial court committed reversible error by allowing him to render this opinion.

CONCLUSION

Plaintiff respectfully requests that this case be remanded back to the trial court for a new trial on the merits.

Respectfully submitted this the 6th day of April, 2010.

BY: J. Ashley Ogden
J. Ashley Ogden

OF COUNSEL:

J. ASHLEY OGDEN, ESQ. (MSB [redacted]
JAMES W. SMITH, JR., ESQ. (MSB [redacted]
OGDEN & ASSOCIATES, PLLC
500 East Capitol Street, Suite 3
Jackson, Mississippi 39201
Telephone: (601) 969-0999
Facsimile: (601) 969-0089

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I, the undersigned counsel of record, hereby certify that I have this day forwarded, by U.S. Mail, postage prepaid, a true and correct copy of the foregoing Appellant's Brief to:

Matthew A. Taylor, Esq.
Jamie L. Heard, Esq.
Scott, Sullivan, Streetman & Fox, P.C.
P.O. Box 13847
Jackson, MS 39236-3847
Attorney for Defendant

Honorable William F. Coleman, Circuit Court Judge
P.O. Box 27
Raymond, MS 39154

So certified, this the 6th day of April, 2010.

J. Ashley Ogden