

**IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

**YVETTE MASON-SHERMAN, INDIVIDUALLY,
AND ON BEHALF OF THE HEIRS AND
WRONGFUL DEATH BENECIARIES OF
CHARLES MCDONALD, JR., DECEASED, and
THE ESTATE OF CHARLES MCDONALD, JR.**

PLAINTIFFS

VS.

CIVIL ACTION NO.: 2017-156

PERFORMANCE OIL EQUIPMENT, INC., ET AL.

DEFENDANTS

**ANSWER & AFFIRMATIVE DEFENSES OF
PERFORMANCE OIL EQUIPMENT, INC.**

Defendant, Performance Oil Equipment, Inc. ("Performance") files this, its Answer & Affirmative Defenses to Plaintiffs' First Amended Complaint and would state unto the Court as follows:

FIRST DEFENSE & MOTION TO DISMISS

The First Amended Complaint fails to state a claim against Performance upon which relief can be granted and should therefore be dismissed.

**SECOND DEFENSE
ANSWER**

Performance answers the allegations contained in the First Amended Complaint, paragraph by paragraph, as follows:

PARTIES

1.

Performance is without sufficient information to admit or deny the allegations contained

within paragraph 1 of the First Amended Complaint and therefore denies same.

2.

Paragraph 2 of the First Amended Complaint contains no allegations directed towards this Defendant. To the extent that this Court requires a response however, same is hereby denied.

3.

Performance admits the allegations contained within paragraph 3 of the First Amended Complaint.

4.

Performance admits the allegations contained within paragraph 4 of the First Amended Complaint.

JURISDICTION AND VENUE

5.

Performance denies the allegations contained within paragraph 5 of the First Amended Complaint.

6.

Performance denies the allegations contained in paragraph 6 of the First Amended Complaint.

STATEMENT OF FACTS

7.

Performance admits the allegations contained in paragraph 7 of the First Amended Complaint.

8.

Performance admits the allegations contained in paragraph 8 of the First Amended Complaint.

9.

Performance admits that the Henley-Young Juvenile Justice Center is next door to Performance. Performance is without sufficient information to admit or deny the remaining allegations contained within paragraph 9 of the First Amended Complaint and therefore denies same.

10.

Paragraph 10 of the First Amended Complaint contains no allegations directed towards Performance. To the extent that this Court requires a response however, same is hereby denied.

11.

Paragraph 11 of the First Amended Complaint contains no allegations directed towards Performance. To the extent that this Court requires a response however, same is hereby denied.

12.

Performance admits that Decedent was a trespasser. Performance denies the remaining allegations contained within paragraph 12 of the First Amended Complaint.

13.

Performance denies the allegations contained in paragraph 13 of the First Amended Complaint.

14.

Performance denies the allegations contained in paragraph 14 of the First Amended Complaint.

15.

Performance denies the allegations contained in paragraph 15 of the First Amended Complaint.

16.

Performance denies the allegations contained in paragraph 16 of the First Amended Complaint.

17.

Performance denies the allegations contained in paragraph 17 of the First Amended Complaint.

18.

Performance denies the allegations contained in paragraph 18 of the First Amended Complaint.

19.

Performance denies the allegations contained in paragraph 19 of the First Amended Complaint.

CAUSES OF ACTION

20.

Performance denies the allegations contained in paragraph 20 of the First Amended Complaint, including each subpart thereto.

21.

Performance denies the allegations contained in paragraph 21 of the First Amended Complaint, including each subpart thereto.

DAMAGES

22.

Performance denies the allegations contained in paragraph 22 of the First Amended Complaint, including each subpart thereto.

23.

Performance denies the allegations contained in paragraph 23 of the First Amended Complaint, including each subpart thereto.

24.

Performance denies the allegations contained in paragraph 24 of the First Amended Complaint, including each subpart thereto.

25.

Performance denies the allegations contained in the unnumbered paragraph beginning “WHEREFORE PREMISES CONSIDERED,” and denies that Plaintiffs are entitled to any recovery from it whatsoever. Performance prays for such further relief as it may be entitled in the premises.

THIRD DEFENSE

Performance did not actively participate in the wrong alleged, nor the harm suffered, by any party.

FOURTH DEFENSE

Performance, by way of affirmative defense, pleads the doctrines of laches, equitable estoppel, release, payment, acquiescence, waiver, accord and satisfaction, unclean hands and all other matters constituting an avoidance or affirmative defenses as may be shown by the facts in

this matter.

FIFTH DEFENSE

Performance, by way of affirmative defense, denies that Plaintiffs are entitled to any damages whatsoever, but would state that any damages which may hereafter be awarded to Plaintiffs should be apportioned pursuant to and in accordance with Section 85-5-7 of the Mississippi Code Annotated (1972).

SIXTH DEFENSE

Performance, by way of affirmative defense, would show that the Plaintiffs may have failed to mitigate their damages, if any, and as such Performance is not legally responsible for the avoidable consequences of any alleged actions or injuries.

SEVENTH DEFENSE

Performance, by way of affirmative defense, would state that the sole proximate cause of the alleged damages and injuries alleged by the Plaintiffs were due to the actions or inactions of Plaintiffs and/or others for which this Defendant cannot be held responsible.

EIGHTH DEFENSE

Performance, by way of affirmative defense, would show that Plaintiffs may have failed to join an indispensable party needed for a just adjudication of this action.

NINTH DEFENSE

Performance, by way of affirmative defense, would state that an intervening or supervening event or events may have proximately caused and/or contributed to the damages and injuries alleged in Plaintiffs' First Amended Complaint for which Performance is not responsible.

TENTH DEFENSE

If the Plaintiffs have heretofore settled or should hereafter settle for any alleged injuries and damages with any parties, Performance is entitled to a credit in the amount of said settlement.

ELEVENTH DEFENSE

Performance, by way of affirmative defense, would show that the relief being sought by Plaintiffs is not recognized as recoverable damages and should therefore be denied.

TWELFTH DEFENSE

Performance gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend this Answer to assert such defenses.

THIRTEENTH DEFENSE

To the extent proven applicable by investigation and discovery, Performance asserts as a defense the doctrine of spoliation of evidence in the event that Plaintiffs or any other party or any party not joined in this matter has failed to properly preserve relevant evidence in post-incident condition.

FOURTEENTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, because at all relevant times Performance acted reasonably and in good faith with due care for the rights and safety of others.

FIFTEENTH DEFENSE

Performance did not violate or breach any duty which it may have owed to the Plaintiffs, including but not limited to, any duty alleged under common law or any applicable state statutes or regulations. Strict proof of the alleged acts of negligence or breach of duty is demanded.

SIXTEENTH DEFENSE

To the extent Plaintiffs seek punitive or exemplary damages against Performance, Plaintiffs have failed to plead an adequate basis for such damages. An award of punitive or exemplary damages could violate this Defendant's state and federal constitutional rights and would constitute an undue burden on interstate commerce. Thus, any claims for punitive or exemplary damages are governed by and limited in accordance with *State Farm Auto Insurance Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1573 (2003) and its progeny, as well as by Section 11-1-65 of the Mississippi Code Annotated.

SEVENTEENTH DEFENSE

There should be no recovery of punitive damages against Performance because such a recovery would violate the Fifth, Eighth and Fourteenth Amendment to the Constitution of the United States, and the Mississippi Constitution.

EIGHTEENTH DEFENSE

Plaintiffs' claims are barred and/or limited by the doctrines of comparative and/or contributory negligence.

NINETEENTH DEFENSE

Performance pleads all applicable provisions of Section 11-1-69 of the Mississippi Code Annotated, which bars the recovery of hedonic damages.

TWENTIETH DEFENSE

Performance intends to rely on all other affirmative defenses that may become available or apparent during the course of discovery, and therefore reserves the right to amend its Answer to assert all such defenses.

TWENTY-FIRST DEFENSE

Plaintiff lacks standing to bring the First Amended Complaint.

TWENTY-SECOND DEFENSE

The acts complained of were beyond the scope of authority of any employee, agent or partner of Performance and occurred beyond what is usually done in the management of its trade or business.

WHEREFORE, Performance Oil Equipment, Inc. prays that the First Amended Complaint be dismissed with prejudice and all costs of court be taxed to the Plaintiffs.

THIS, the 10th day of May, 2017.

PERFORMANCE OIL EQUIPMENT, INC.

By: /s/ Edderek L. Cole
Edderek L. "Beau" Cole, MSB# 100444
John C. McCants, MSB#104811
Darryl Wilson, MSB#104902

OF COUNSEL:

MARON MARVEL BRADLEY ANDERSON & TARDY, LLC
200 South Lamar Street
City Centre
Post Office Box 2803
Jackson, Mississippi 39225
Telephone: (601) 974-8732
Facsimile: (601) 206-0119
bcole@maronmarvel.com
jmcants@maronmarvel.com
dwilson@maronmarvel.com

CERTIFICATE OF SERVICE

I hereby certify that I have served all counsel of record via electronic correspondence and have mailed via U.S. mail, postage prepaid, a true and correct copy of the foregoing pleading to:

Carlos Moore
Tucker Moore Law Group, LLP
P.O. Box 1487
Grenada, MS 39802
carlos@carlosmoorelaw.com

Michael S. Carr
Carr & Calderon
P.O. Box 1818
Cleveland, MS 38732
mcarr@carrcalderon.com
Attorneys for Plaintiffs

THIS, the 10th day of May, 2017.

/s/ Edderek L. Cole