

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

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

PLAINTIFFS

V.

CIVIL ACTION NO. 2017-156

**WAYNE PARISH, JIMMY RATLIFF, AND PERFORMANCE
OIL EQUIPMENT, INC.**

DEFENDANTS

**DEFENDANT, WAYNE PARISH'S,
ANSWER AND AFFIRMATIVE DEFENSES TO
PLAINTIFF'S FIRST AMENDED COMPLAINT**

COMES NOW, Defendant Wayne Parish by and through its undersigned counsel, and responds to Plaintiffs' First Amended Complaint as follows:

FIRST DEFENSE

The Complaint fails to state a claim or cause of action upon which relief can be granted against this Defendant.

SECOND DEFENSE

This Defendant incorporates each and every defense available to it as set forth in Rule 12(b)(1)(7) of the Mississippi Rules of Civil Procedure (M.R.C.P.) pursuant to which this Defendant demands that the action filed herein against it be dismissed with prejudice.

THIRD DEFENSE

This Defendant generally denies all of the averments contained in the Complaint, and each paragraph and subparagraph thereof, except such designated averments, paragraphs or subparagraphs, as are expressly set forth to the contrary more fully herein below pursuant to Rule 8(b) of the Mississippi Rules of Civil Procedure.

FOURTH DEFENSE

Should this Defendant be held liable to the Plaintiff, this Defendant is entitled to contribution and apportionment of liability pursuant to Miss. Code Ann. '85-5-7. It would be unconstitutional to hold this Defendant responsible for the criminal acts in question.

FIFTH DEFENSE

Defendant affirmatively pleads that some or all of the losses allegedly suffered by the Plaintiff, and which are the subject of Plaintiff's Complaint, were cause entirely by the actions of the Decedent, and therefore, the Plaintiff is not legally entitled to recover damages from this Defendant

SIXTH DEFENSE

Defendant affirmatively pleads self-defense.

SEVENTH DEFENSE

Defendant affirmatively pleads Miss. Code. Ann. 97-3-15(3), also known as the "Castle Doctrine."

EIGHT DEFENSE

Defendant asserts that the Decedent was a trespasser and he did nothing willfully or wantonly to injure the Decedent.

NINTH DEFENSE

Defendant asserts that the subject premises was reasonably safe at the time of the subject incident

TENTH DEFENSE

Defendant asserts that the sole proximate cause of the Decedent's injuries and damages was the criminal conduct of the Decedent.

ELEVENTH DEFENSE

The imposition of exemplary or punitive damages in this case would deprive this Defendant of property without due process of law and would deny to this Defendant the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution and in violation of Article 3, Section 14 and Article 3, Section 24 of the Constitution of the State of Mississippi. Therefore, these claims should be dismissed.

TWELFTH DEFENSE

The imposition of exemplary or punitive damages in this matter would constitute imposition of an excessive fine in violation of Amendment VIII of the United States Constitution, prohibiting excessive fines, cruel and unusual punishments and Article 3, Section 28 of the Constitution of the State of Mississippi, prohibiting excessive fines. Therefore, these claims should be dismissed.

THIRTEENTH DEFENSE

The imposition of exemplary or punitive damages in this matter violate the provisions of the Contract Clause of Article I, Section X, Clause 1 of the United States Constitution, prohibiting any law which impairs the obligation of contracts and of Article 3, Section 16 of the Constitution of the State of Mississippi, prohibiting laws which impair the obligation of contracts. Therefore, these claims should be dismissed.

FOURTEENTH DEFENSE

This Defendant affirmatively pleads that he is not responsible for any injuries and damages alleged by the Plaintiff which are pre-existing conditions which preceded this incident.

FIFTEENTH DEFENSE

This Defendant reserves the right to affirmatively plead any and all other defenses and affirmative defenses available to it which may become applicable through discovery and during the trial of this cause.

SIXTEENTH DEFENSE

The facts not having been fully developed, this Defendant adopts the following affirmative defenses: Accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense as may be shown by the facts in this cause, including, but not limited to, the right to claim indemnity from any or all of the other defendants and to file a cross-claim or other pleading to assert said claim.

SEVENTEENTH DEFENSE

This Defendant avers that any award of punitive damages to the Plaintiff in this case would be a violation of the constitutional rights and safeguards provided to Defendant under the Constitution of the State of Mississippi and the Constitution of the United States of America including, without limitations, that there are no constraining limitations placed on a jury's discretion in considering the imposition or amount of punitive damages. There are no meaningful trial court and appellate review mechanisms to constitutionally confirm any punitive damages award, and imposition would allow a verdict obtained by passion and prejudice.

EIGHTEENTH DEFENSE

Imposition of punitive damages in this case would constitute a violation of this Defendant's constitutional rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America.

NINTEENTH DEFENSE

Any award of punitive damages in this case would violate the constitutional rights and safeguards provided to this Defendant under the due process clause of the Fourteenth Amendment and/or Fifth Amendment to the Constitution of the United States of America and/or under the due process clause of Article III, Section 14 of the Constitution of the State of Mississippi and that punitive damages and any method by which they might be assessed are unconstitutionally vague and not rationally related to legitimate government interest. If consideration of punitive damages is to be allowed, then the standard for proving the same, as provided in Miss. Code Ann. Sections 11-1-63 and 11-1-65 (Supp. 1993), must be by clear and convincing evidence.

TWENTIETH DEFENSE

The procedure and/or standards governing imposition of punitive damages are impermissibly vague, arbitrary, improper and/or violates the due process clause of the Fourteenth Amendment and/or the Fifth Amendment of the Constitution of the United States of America and/or Article III, Section 14 of the Constitution of the State of Mississippi.

TWENTY-FIRST DEFENSE

Any award of punitive damages in this Case would violate the procedural and/or substantive safeguards provided to this Defendant under the Fifth, Sixth, Eighth and/or Fourteenth Amendments to the Constitution of the United States and/or under Article III, Section

14 and 26 of the Constitution of the State of Mississippi, and that punitive damages are penal in nature and, consequently, this Defendant is entitled to the same procedural and substantive safeguards afforded to criminal defendants.

TWENTY-SECOND DEFENSE

It violates the rights and safeguards guaranteed by the Constitution of the United States of America and/or the Constitution of the State of Mississippi to impose punitive damages against this Defendant. To do so would be penal in nature and require a burden of proof which is less than the beyond a reasonable doubt burden of proof required in criminal cases in this State, and less than a unanimous jury verdict.

TWENTY-THIRD DEFENSE

This Defendant avers that any award of punitive damages to the Plaintiff in this case would violate the Eighth Amendment to the Constitution of the United States and/or Article III, Section 28 of the Constitution of the State of Mississippi in that said punitive damages would be an imposition of an excessive fine.

TWENTY-FOURTH DEFENSE

It will be unconstitutional to award any punitive damages as such would violate the Fifth and Fourteenth Amendments to the United State Constitution and Article III, Section 14 of the Mississippi State Constitution in that:

1. Said damages are intended to punish and deter this Defendant and thus this proceeding is essentially criminal in nature;
2. This Defendant is being compelled to be a witness against himself in a proceeding essentially and effectively criminal in nature, in violation of its right to due process;

3. The Plaintiff's burden of proof to establish punitive damages in this proceeding, effectively criminal in nature, is less than the burden of proof required in other criminal proceedings, and thus violates this Defendant's right to due process;
4. That inasmuch as this proceeding is essentially and effectively criminal in nature, this Defendant is being denied the requirements of notice of the elements of the offense, and the law and authorities authorizing punitive damages are so vague and ambiguous they are in violation of the due process clause of the Fifth Amendment and/or the Fourteenth Amendment of the Constitution of the United States and also in violation of Article III, Section 14 of the Constitution of the State of Mississippi.

TWENTY-FIFTH DEFENSE

This Defendant avers that any award of punitive damages to the Plaintiff in this case would be in violation of the constitutional rights and safeguards provided to this Defendant, under the Constitution of the State of Mississippi and the Constitution of the United States of America including, without limitation, that there are no constraining limitations placed on a jury's discretion in considering the imposition or amount of punitive damages, there are no meaningful trial court and appellate review mechanisms to constitutionally confirm any punitive damage award, imposition would allow a verdict tainted by passion and prejudice, and Plaintiff impermissibly seeks a punitive damage award that bears an unconstitutional relationship to the alleged actual amount in question.

TWENTY-SIXTH DEFENSE

With respect to each and every cause of action, Plaintiff is not entitled to recover because of any superseding and/or intervening acts and/or omissions of persons or entities other than Defendants.

TWENTY-SEVENTH DEFENSE

If Plaintiff has made or does make settlement with any person or party whatsoever for all or any part of the damages claimed herein, then this Defendant is entitled to full or other credit for the amount of such settlement for the damages otherwise recoverable against this Defendant herein, with said settlement credit to be given in accord with the procedures and statutes so provided.

TWENTY-EIGHT DEFENSE

The Complaint must be dismissed pursuant to Miss. R. Civ. P. 12(b)(6) and or 12(e), or, in the alternative, Plaintiff must replead the Complaint in order to satisfy the requirements of Miss. R. Civ. P. 8, 9 and 11. The recent Mississippi Supreme Court decision in *Harold's Auto Parts, Inc. et al v. Flower Mangialardi, et al* No. 2004-IA-01308-SCT (Miss., August 26, 2004) establishes that, to satisfy Rules 8, 9 and 11, Plaintiffs must plead specific facts and legal conclusions that provide Defendants fair notice of each claim made against them and the grounds thereof. The Complaint fails to meet this standard and must be dismissed, or Plaintiff must be required to replead it.

TWENTY-NINTH DEFENSE

Plaintiff cannot recover against Defendant pursuant to any theory with regard to bystander liability.

THIRTIETH

Plaintiff cannot recover against Defendant pursuant to any theory with regard to premises liability.

THIRTY-FIRST

Defendant committed no act of negligence, gross negligence or any other wrongdoing that caused or contributed to Plaintiff's alleged damages.

ANSWER

Defendants responds to Plaintiffs' Complaint paragraph by paragraph as follows:

PARTIES

1. Defendant lacks knowledge or information sufficient to form a belief as to the truth or veracity of the allegations contained in Paragraph 1 of the Complaint. Therefore, the allegations are denied.
2. Defendant admits the allegations contained in paragraph 2 of the Complaint.
3. Defendant admits the allegations contained in paragraph 3 of the Complaint.
4. Defendant admits the allegations contained in paragraph 4 of the Complaint.

JURISDICTION AND VENUE

5. Defendant admits that this court has jurisdiction over the parties and the subject matter of this action. However, Defendant denies the remaining allegations contained in paragraph 5.
6. Defendant admits the allegation contained in paragraph 2 of the Complaint.

STATEMENT OF FACTS

7. Defendant lacks knowledge or information sufficient to form a belief as to the truth or veracity of the allegations contained in Paragraph 7 of the Complaint. Therefore, the allegations are denied.

8. Defendant admits the allegations contained in paragraph 8 of the Complaint.

9. Defendant lacks knowledge or information sufficient to form a belief as to the truth or veracity of the allegations contained in Paragraph 9 of the Complaint. Therefore, the allegations are denied.

10. Defendant lacks knowledge or information sufficient to form a belief as to the truth or veracity of the allegations contained in first sentence of Paragraph 10 of the Complaint. Therefore, the allegations are denied. The remaining allegations of Paragraph 10 are denied

11. Defendant lacks knowledge or information sufficient to form a belief as to the truth or veracity of the allegations contained in Paragraph 11 of the Complaint. Therefore, the allegations are denied.

12. Defendant admits the allegations contained in Paragraph 12 of the Complaint.

13. Defendant denies the allegations contained in Paragraph 13 of the Complaint.

14. Defendant denies the allegations contained in Paragraph 14 of the Complaint.

15. Defendant denies the allegations contained in Paragraph 15 of the Complaint.

16. Defendant denies the allegations contained in Paragraph 16 of the Complaint.

17. Defendant denies the allegations contained in Paragraph 17 of the Complaint.

18. As the allegations described in Paragraph 18 of the Complaint are directed towards another Defendant, Defendant reserves response to this allegations. To the extent a response is required, the allegations are denied.

19. Defendant denies the allegations contained in Paragraph 19 of the Complaint.

CAUSES OF ACTION

20. Defendant denies the allegations contained in Paragraph 20 of the Complaint (including but not limited to subparagraphs: a., b., c., d., and e) of the Complaint.

21. Defendant denies the allegations contained in Paragraph 21 of the Complaint.

DAMAGES

22. Defendant denies the allegations contained in Paragraph 22 of the Complaint.

23. Defendant denies the allegations contained in Paragraph 23 of the Complaint.

24. Defendant denies the allegations contained in Paragraph 24 of the Complaint.

Defendant denies the allegations of the next unnumbered paragraph of the Plaintiffs' Complaint which begins with "WHEREFORE, PREMISES CONSIDERED, ..." and deny that Plaintiffs are entitled to the relief requested.

AND NOW having fully answered the allegations of Plaintiffs' Complaint, Defendant, Wayne Parish, requests that this Court grant the following relief:

- a) A judgment in favor of Defendant dismissing all of Plaintiffs' claims hereunder with prejudice;
- b) An award of all court costs and legal expenses including, but not limited to, attorney's fees incurred in this matter; and,
- c) That judgment be rendered for Defendant for such other relief as may be deemed by the Court to be just and proper in the premises or other such relief that this Court may provide.

RESPECTFULLY SUBMITTED this the 10th day of May, 2017.

WAYNE PARISH

BY: /s/Robert L. Gibbs
ROBERT L. GIBBS

OF COUNSEL:

Robert L. Gibbs, MSB No. 99692
Tujuana S. McGee, MSB No. 104263
Gibbs Travis PLLC
1400 Meadowbrook Road, Suite 100
Jackson, Mississippi 39211
Telephone: (601) 487-2640
Facsimile: (601)366-4295
Email: rgibbs@gibbstravis.com
Email: tmcgee@gibbstravis.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was duly served upon all known counsel of record, this the 10th day of May, 2017, and upon all parties registered with the Court's electronic filing system by operation of the Court's MEC system.

/s/ Robert L. Gibbs
ROBERT L. GIBBS