

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

PLAINTIFF

TONY BROWN

VS.

CAUSE NO. 15-91

WAFFLE HOUSE, INC., KIRBY
KENDRICK, INDIVIDUALLY, EDWARD
MOSBY, INDIVIDUALLY, AND JOHN
DOES #1-5

FILED
SEP 07 2016
ZACK WALLACE, CIRCUIT CLERK
BY _____ D.C.

DEFENDANTS

PRE-TRIAL ORDER

1. *Counsel.*

Appearing for the Plaintiff
Tony Brown:

J. Ashley Ogden (ashleyogden@aol.com)
James W. Smith, Jr. (j.smith@ogdenandassoc.com)
Tyler A. Royals (tyler@ogdenandassoc.com)
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Appearing for the Defendants
Waffle House, Inc,
Kirby Kendrick, and
Edward Mosby¹:

A. La'Verne Edney (ledney@bakerdonelson.com)
Bradley W. Smith (bsmith@bakerdonelson.com)
D. Sterling Kidd (skidd@bakerdonelson.com)
Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.
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¹ Mr. Mosby is referred to as "Edward Moses" in the Complaint. That is not his name.

2. *Nature of the case.* This is a negligence case where Plaintiff alleges Defendants are obliged to pay damages because he was shot in the parking lot of the Waffle House restaurant located at 4800 Highway 18 West, Jackson, Mississippi. The Defendants respond they are not liable for a number of reasons, including Plaintiff was not permitted on the premises, and they satisfied their legal duties with respect to the security of the premises.

3. *Pending Motions.*

1. *Defendant's Motion for Summary Judgment* (MEC No. 136).
2. *Defendant's Motion for Summary Judgment on Plaintiff's Punitive Damage Claim* (MEC No. 137); and
3. *Defendants' Consolidated Motion in Limine* (MEC No. 146).
4. *Plaintiff's Omnibus Motion in Limine* (MEC No. 152).
5. *Plaintiff's Second Motion in Limine* (MEC No. 155).

4. *Position of the parties.*

By the Plaintiff:

This is a negligence and premises liability case. Plaintiff Tony Brown was shot in the knee while sitting in his vehicle in the Highway 18 Waffle House parking lot. Plaintiff came to the property to purchase and eat food. He was instructed by Waffle House employees to leave the property and purchase cigarettes for the employees. When he returned he ordered a beverage and was in his car in the parking lot. After eating his food and drinking his beverage, Plaintiff was not feeling well so he laid down in the back seat of his car. His passenger remained in the front passenger seat. A stranger who had entered the property approached the car and tried to sell bootleg c.d.'s to the passenger. Plaintiff exited the back seat and was attempting to get into the driver side of the car to get his shoes so he could go back inside the Waffle House. As he reached for the latch, he noticed the man standing outside the vehicle on the passenger side was holding a gun. The unknown assailant started shooting at the passenger so Plaintiff jumped into the front driver's seat and ducked to avoid being shot. While trying to shield himself on the car floor Plaintiff was hit by one of the bullets in the leg.

There was an atmosphere of violence on Defendants' property based on the high amount of crime that occurred on the property and in the general vicinity of Defendants' property. Defendants had been robbed at gunpoint and began using armed security to protect the property. At some point Defendants discontinued or cut back the armed security. Defendants were aware of the atmosphere of violence on and around the property and failed to keep the premises in a reasonably safe condition. Plaintiff claims Defendants failed to provide adequate security to address or remedy the atmosphere of violence on the property and failed to protect its customers and invitees from foreseeable harm, such as the gunshot wound that caused injury to Tony Brown's knee.

By the Defendant:

The shooting at issue occurred early in the morning of September 17, 2014. Plaintiff was not supposed to be at the Waffle House that morning, or at any other time, as he had been previously and permanently banned from the premises for inappropriate behavior.

Plaintiff arrived at the Waffle House on September 16, 2014, supposedly to drop his fiancée Renee Smith off for work. However, he lingered on the premises for the next five hours, and even slept in the back seat of Ms. Smith's car. Just after 2:15 a.m., an individual approached the passenger window of the vehicle, and Plaintiff walked to the front driver's side of the vehicle, where a gun was stowed. As soon as he arrived there, a shootout occurred, during which Plaintiff discharged his firearm numerous times.

The shootout was an unusual – even unprecedented – event. There were no violent incidents at the restaurant in the five years prior to the shootout, and only six incidents at the restaurant, period. Further, there were only three incidents on the premises in the three years before Plaintiff's shootout, and no incidents in the year before his shootout.

Faced with this proof, Plaintiff's case focuses on the other businesses around the Waffle House and on unverified Calls for Service to the restaurant. Plaintiff attempts to use this data to argue that the Waffle House was in atmosphere of violence, and should have had an armed security guard working the premises every night. Plaintiff also contends that Defendants should have warned him that the premises was dangerous and he might be shot there.

Defendants took numerous steps to make its customers safe. Among other things, they (1) used closed-circuit television on the premises; (2) posted signs instructing people on the premises not to loiter, and that they were being recorded by the CCTV; (3) maintain a corporate security department that monitors each restaurant's security needs; (4) hired a company to provide an armed guard on the busiest nights of the week (Friday and Saturday), and to also provide roaming security from time-to-time; (5) actively encouraged law enforcement to come to Waffle House, and offered discounts when they did; (6) designed the restaurant and property with a small parking lot that is easy to monitor; (7) designed the building with massive glass windows that allow by-passers (e.g., customers and, more importantly, the police) to see activity inside and also allow exiting customers to see activity and conditions outside in the parking lot before going to their cars; and (8) designed the restaurant with a small parking lot that is easy to monitor, and (9) designed the parking lot with good lighting to deter crime.

Further, Defendants were under no duty to warn Plaintiff of supposed dangers on the premises, because (1) there were no such dangers to warn the Plaintiff of, and (2) the Plaintiff himself believed the premises were not safe, so he did not need a warning.

5. *Witnesses.*

a. Offered by the Plaintiffs

The following is a list of witnesses that the Plaintiff anticipates calling at the trial (excluding witnesses to be used solely for rebuttal or impeachment). The listing of a WILL CALL

witness herein constitutes a representation, upon which opposing counsel may rely, that the witness will be present at trial in the absence of reasonable written notice to opposing counsel to the contrary. The listing of a MAY CALL witness constitutes a representation that counsel reasonably expects to call the witness at trial, but is not bound to do so.

<i>NAME</i>	<i>WILL CALL</i>	<i>MAY CALL</i>	<i>FACT LIABILITY EXPERT DAMAGES</i>
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Tony Brown		may	F/L/D
Rene Smith		may	F/L/D
Basil Bostwick, II		may	F/L
Melvin Wilson		may	F/L
LaTonya Dixon, JPD		may	F/L
George Moore , JPD		may	F/L
Fredrick Gowan, JPD		may	F/L
Julian Lonie, JPD		may	F/L
Jermaine McGee, JPD		may	F/L
Zyquilla Kency		may	F
Jonathon Nickson		may	F
Edward Rodgers		may	F/L
Michael Byrd		may	F/L
William Gaines		may	F/L
Brittany Edmund		may	F/L
Brandy McMillan		may	F/L
Edward Mosby		may	F/L
Kirby Kendrick		may	F/L
Ken Goodrum		may	F/L/E
Dr. Jason Craft		may	E/D
Jeff Wright		may	E/D
Jermaine McGee, JPD		may	F/L
Gabriel Regan or Records Custodian from MS Forensics Laboratory		may call	F

In addition to the witnesses listed above, Plaintiff reserves the right to call one or more of the witnesses identified by the Defendants in section 8(b) below.

In addition, Plaintiff reserves the right to read in the deposition of Melvin Wilson and any other witness who can be proved to be unavailable.

b. Offered by the Defendants:

The following is a list of witnesses whom Defendants anticipate calling at the trial (excluding witnesses to be used solely for rebuttal or impeachment). The listing of a WILL CALL witness herein constitutes a representation, upon which opposing counsel may rely, that the witness will be present at trial in the absence of reasonable written notice to opposing counsel to the

contrary. The listing of a MAY CALL witness constitutes a representation that counsel reasonably expects to call the witness at trial, but is not bound to do so.

<i>NAME</i>	<i>WILL CALL</i>	<i>MAY CALL</i>	<i>FACT LIABILITY EXPERT DAMAGES</i>
Kirby Kendrick		√	F
Edward Mosby		√	F
Jeff Wright		√	F/L/E
William Gaines		√	F
Britney Edmond		√	F
Simeon Rainbow		√	F
Melvin Wilson		√	F
Michael Byrd		√	F
Deshun Williams		√	F
ZlyQuilla Kency ²		√	F
Brandy McMillan		√	F
Robert Johnson		√	L/E
Michael Reddix, M.D.		√	E/D
Greg Wood, M.D.		√	E/D
Detective Jermaine McGee		√	F
Randy Jones		√	F
30(b)(6) representative of Waffle House		√	F

In addition to the witnesses listed above, Defendants reserve the right to call one or more of the witnesses identified by the Plaintiffs in section 8(a) above.

6. *Exhibits.*

The parties are providing this preliminary exhibit list without waiver of their objections to any exhibits. The parties are working in good faith to resolve all objections, but if they are unable

² Ms. Kency may be called via deposition.

to do so, will submit an updated pretrial order with their list of objections no later than August 26, 2016.

a. To be offered by the Plaintiffs:

EXHIBIT NO.	IDENTIFIER	DESCRIPTION	OBJECTION
P-1		JPD Incident Report from Tony Brown shooting dated 9/17/14	
P-2		JPD Incident Report dated 4/9/12	Miss. R. Evid. 401, 403
P-3		JPD Offense List for Waffle House property dated 9/17/05-9/17/14 with Summary of Offenses Reported	Miss. R. Evid. 106, 401, 402, 403, 404, 802, 1003, 1006
P-4		JPD Calls for Service for Waffle House property dated 9/17/05-9/17/14 with Summary of Calls for Service	Miss. R. Evid. 106, 401, 402, 403, 404, 802, 1003, 1006
P-5		JPD Offense List for Grid 5110 dated 9/17/05-9/17/14 with Summary of Offenses Reported	Miss. R. Evid. 106, 401, 402, 403, 404, 802, 1003, 1006
P-6		JPD Offense List for Grid 5111 dated 9/17/09-9/17/14 with Summary of Offenses Reported	Miss. R. Evid. 106, 401, 402, 403, 404, 802, 1003, 1006
P-7		Composite Exhibit of JPD Incident Reports with Summary of Incident Reports	Miss. R. Evid. 103, 401, 402, 403, 404, 802, 1003, 1006
P-8	WH-0023-0360	Composite Exhibit of pictures taken by JPD	
P-9	WH-0371-0437	Emails from Waffle House Director of Corporate Security	Miss. R. Evid. 401, 402, 403, 404, 802
P-10	WH-0540-0541	List of Waffle House stores	Miss. R. Evid. 401, 402, 403,

EXHIBIT NO.	IDENTIFIER	DESCRIPTION	OBJECTION
		with security guards	404
P-11	WH-004-013	Armstrong Security Contract	Miss. R. Evid. 401, 402, 403, 404
P-12	DVD	Surveillance Video produced by Waffle House with timeline of events	Miss. R. Evid. 106, 401, 402, 403, 404, 802, 1003, 1006 (objections are to timeline only).
P-13		Medical Summary Sheet of Bills	Miss. R. Evid. 106, 802, 1003, 1006
P-14		Medical Records – AMR	
P-15		Medical Bills – 9/17/14 UMMC	Miss. R. Evid. 802
P-16		Medical Records – Merit Health River Oaks Hosp.	Miss. R. Evid. 401, 402, 403, 802
P-17		Expert Report from Dr. Craft	Miss. R. 401, 402, 403, 802
P-18		Expert Report from Ken Goodrum	Miss. R. 401, 402, 403, 802
P-19		Melvin Wilson Deposition	Miss. R. Evid. 401, 403, 802
P-20		Fingerprint Analysis	Miss. R. Evid. 401, 403, 802

Plaintiff reserves the right to use any document produced by any of the parties during discovery. Plaintiff reserves the right to use any exhibit produced by the Defendants. Plaintiff reserves the right to use demonstrative exhibits, including enlargements of any document or exhibit.

Plaintiff reserves the right to offer into evidence at trial any document attached as an exhibit to any deposition taken in this cause.

Plaintiff reserves the right to introduce the written discovery responses/supplemental responses of either party and/or any document produced by either party during discovery.

Plaintiff reserves the right to introduce the deposition transcript of any witness that was deposed in this cause.

Plaintiff reserves the right to introduce any document relied upon by any expert witness.

Plaintiff reserves the right to use rebuttal exhibits.

Defendants reserve the right to make objections regarding admissibility of the exhibits submitted by Plaintiff before, or during, trial.

b. To be offered by the Defendant:

EXHIBIT NO.	IDENTIFIER	DESCRIPTION
D-1	Waffle House-Brown 000004-00009	Armstrong Security Contract
D-2	Waffle House-Brown 000010-000011	JPD Investigative Report dated 09/17/2014, Report # 2014174255
D-3	Waffle House-Brown 000012-000013	JPD Investigative Report dated 09/17/2014, Report # 2014174237
D-4	Waffle House-Brown 000014-000018	JPD Calls of Service for Case No. 2014-174237
D-5	Waffle House-Brown 000019-000020	JPD Calls for Service for Case No. 2014-174260
D-6	Waffle House-Brown 000021-000022	JPD Calls for Service for Case No. 2014-174255
D-7	Waffle House-Brown 000023-000360 D-7.1-D-7.338	JPD Photograph
D-8	Waffle House-Brown 000361	(5)911 Calls
D-9	Waffle House-Brown 000362	Security Incident Log showing entries from 2009 through the date of the accident.
D-10	Waffle House-Brown 000363-000368	Armstrong Security Agreement
D-11	Waffle House-Brown 000449-000461	Sales Data from 9/19/13-9/17/14
D-12	Waffle House-Brown 000462	Full House Policy
D-13	Waffle House-Brown 000463	House Rules
D-14	Waffle House-Brown 000464	JPD evidence log from subject incident.
D-15	Waffle House-Brown	JPD Calls for Service for Event

EXHIBIT NO.	IDENTIFIER	DESCRIPTION
	000465-000469	Number 2014-174237
D-16	Waffle House-Brown 000470-000471	JPD Calls for Service for Event Number 2014-174260
D-17	Waffle House-Brown 000472-000473	JPD Calls for Service for Event Number 2014-174255
D-18	Waffle House-Brown 000476-000479	JPD Incident Report for Case Number 2014-069806
D-19	Waffle House-Brown 000480	JPD Calls for Service for Event Number 2014-107876
D-20	Waffle House-Brown 000481-000482	JPD Calls for Service for Event Number 2014-107845
D-21	Waffle House-Brown 000483	JPD Calls for Service for Event Number 2014-102811
D-22	Waffle House-Brown 000484	JPD Calls for Service for Event Number 2014-084225
D-23	Waffle House-Brown 000485-000486	JPD Calls for Service for Event Number 2014-069806
D-24	Waffle House-Brown 000487	JPD Calls for Service for Event Number 2014-061296
D-25	Waffle House-Brown 000488-000489	JPD Calls for Service for Event Number 2014-049531
D-26	Waffle House-Brown 000490-000491	JPD Calls for Service for Event Number 2014-043735
D-27	Waffle House-Brown 000493-000494	JPD Incident Report for Case 2014- 044579
D-28	Waffle House-Brown 000495-000496	JPD Calls for Service for Event Number 2014-044579
D-29	Waffle House-Brown 000497-000502	JPD Uniform Crash Report Case Number 2014-00055302
D-30	Waffle House-Brown 000503	JPD Calls for Service for Event Number 2014-055302
D-31	Waffle House-Brown 000504-000509	JPD Uniform Crash Report Case Number 2014-00063577
D-32	Waffle House-Brown 000510-000511	JPD Calls for Service for Event Number 2014-063577
D-33	Waffle House-Brown 000512-000517	JPD Uniform Crash Report Case Number 2014-00109208
D-34	Waffle House-Brown 000518-000519	JPD Calls for Service for Event Number 2014-109208
D-35	Waffle House-Brown 000520-000525	JPD Uniform Crash Report Case Number 2014-00120012
D-36	Waffle House-Brown 000526-	JPD Calls for Service for Event Number 2014-120012
D-37	Waffle House-Brown	JPD Uniform Crash Report Case

EXHIBIT NO.	IDENTIFIER	DESCRIPTION
	000527-000535	Number 2014-00127593
D-38	Waffle House-Brown 000536-000538	JPD Calls for Service for Event Number 2014-127593
D-39		Surveillance Videos beginning 8:17 pm on 9/16/14 and running through 9/17/14
D-40	Waffle House-Brown 000542	JPD Dispatch Recording Case Number 2014-043735
D-41	Waffle House-Brown 000543	JPD Dispatch Recording Case Number 2014-049531
D-42	Waffle House-Brown 000544	JPD Dispatch Recording Case Number 2014-061294 & 1296
D-43	Waffle House-Brown 000545	JPD Dispatch Recording Case Number 2014-069806
D-44	Waffle House-Brown 000546	JPD Dispatch Recording Case Number 2014-107845
D-45	Waffle House-Brown 000547	JPD Dispatch Recording Case Number 2014-107876
D-46	Waffle House-Brown 000548	JPD Dispatch Recording Case Number 2014-102811
D-47	Waffle House-Brown 000549	JPD Dispatch Recording Case Number 2014-084225
D-48	Waffle House-Brown 000553-000554	JPD Calls for Service for Event Number 2014-107845
D-49	Waffle House-Brown 000555-000556	JPD Calls for Service for Event Number 2014-061294
D-50	Waffle House-Brown 000557	JPD Calls for Service for Event Number 2014-107876
D-51	Waffle House -Brown 000558	JPD Calls for Service for Event Number 2014-102811
D-52	Waffle House-Brown 000559	JPD Calls for Service for Event Number 2014-084225
D-53	Waffle House-Brown 000560-000561	JPD Calls for Service for Event Number 2014-069806
D-54	Waffle House-Brown 000562	JPD Calls for Service for Event Number 2014-061296
D-55	Waffle House-Brown 000563-000564	JPD Calls for Service for Event Number 2014-049531
D-56	Waffle House-Brown 000565-000566	JPD Calls for Service for Event Number 2014-043735
D-57	Brown_AMR 000001- 000012	AMR
D-58	Brown_Merit 000001- 000057	River Oaks Merit

EXHIBIT NO.	IDENTIFIER	DESCRIPTION
D-59	Brown_UMC 000001-000856	UMC
D-60	Radiology Associates000001-000003	Radiology Associates
D-61	MS Sports Medicine 000001-000009	MS Sport Medicine
D-62	Baptist 000001-000043	Baptist
D-63	Eastover Security 000001-001103	Eastover Security Documents
D-64		Offense Listing produced by plaintiff
D-65	Brown P 000084-000103	JPD Incident Reports from Tony Brown shooting 9/17/14
D-66	Gun found in Renee Smith's car.	
D-67	Spent shell casings found in Renee Smith's car.	
D-68		Deposition Transcript of Zylquillia Kency
D-69		Deposition Transcript of Jermaine McGee
D-70		Deposition Transcript of Melvin Wilson
D-71		Deposition Transcript of Michael Byrd
D-72		Deposition Transcript of Williams Gaines
D-73		Deposition Transcript of Brandy McMillan
D-74		Deposition Transcript of Brittney Edmond

Plaintiff's Objections to Defendants' Exhibits:

- D-11 Relevance, Hearsay, Not Original Document MRE 401, 402, 403, 801, 805, 1002
- D-12 Relevance, Hearsay, Not Original Document MRE 401, 402, 403, 801, 805, 1002
- D-13 Relevance, Hearsay, Not Original Document MRE 401, 402, 403, 801, 805, 1002
- D-39 Relevance, Hearsay, Not Original Document, Not produced during discovery MRE 401, 402, 403, 801, 1002
- D-63 Relevance, Hearsay, Not Original Document MRE 401, 402, 403, 801, 805, 1002

Defendants reserve the right to introduce any exhibit identified by the Plaintiffs.

Defendants reserve the right to use any document produced by any of the parties during discovery.

Defendants reserve the right to use demonstrative exhibits, including enlargements of any document or exhibit.

Defendants reserve the right to offer into evidence at trial any document attached as an exhibit to any deposition taken in this cause.

Defendants reserve the right to introduce the written discovery responses/supplemental responses of either party and/or any document produced by either party during discovery.

Defendants reserve the right to introduce the deposition transcript of any witness that was deposed in this cause.

Defendants reserve the right to introduce any document relied upon by any expert witness.

Defendants reserve the right to use rebuttal exhibits.

Plaintiff reserves the right to make objections regarding admissibility of the exhibits submitted by Defendants before trial.

7. The following is a list and brief description of charts, graphs, models, schematic diagrams, and similar objects which will be used in opening statements or closing statements, but which will not be offered in evidence:

The parties have not yet determined what demonstrative exhibits they may will use, but will exchange those no later than August 31, 2016, and supplement this pre-trial order accordingly.

a. To be used by the Plaintiffs:

The Plaintiff anticipates that he may use enlargements of exhibits; enlargements of certain deposition pages; demonstratives to illustrate the timing of this incident; photographs of the premises; and summaries and/or charts of any exhibit or any portion thereof. Plaintiff will also use a demonstrative check list for an exhibit and photographs. Plaintiff will use demonstrative overhead photos depicting crime in the area.

Defendants object to each of these documents because they are neither original documents nor satisfy Miss. R. Evid. 1003 or 1006. Further, some of the documents violate Miss. R. Evid. 106, 401, 403, and 802.

b. To be used by Defendant:

The Defendants anticipates that they may use enlargements of exhibits; enlargements of certain deposition pages; demonstratives to illustrate the timing of this incident; photographs of the premises; and summaries and/or charts of any exhibit or any portion thereof. As indicated on Defendants' exhibit list, they also intend to use certain items of physical evidence that were taken from the scene of this incident. Finally, Defendants may use a PowerPoint presentation during voir dire, or during opening and closing statements.

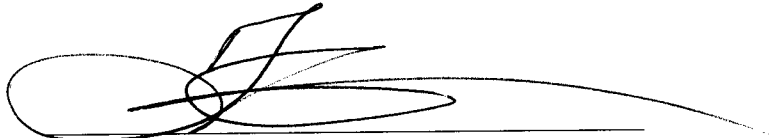
If any other objects are to be used by any party, such objects will be submitted to opposing counsel prior to the trial. If there is any objection to use of the objects, the dispute will be submitted to the Court.

8. *This is a jury case.*

9. *Additional Orders.*

Ordered that the above allowances and agreements are binding on all parties in the above-styled cause unless this order is modified by the Court for good cause and to prevent manifest injustice.

This 6th day of ~~August~~ ^{Sept.}, 2016.



HONORABLE TOMIE T. GREEN
HINDS COUNTY CIRCUIT COURT JUDGE

Agreed:


ATTORNEY FOR PLAINTIFF

*by permission
Sterling Kell*


ATTORNEY FOR DEFENDANTS