IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE NO. 2006-CA-01945

ROSIE THOMAS, INDIVIDUALLY AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF WILSON THOMAS, JR., DECEASED — **APPELLANT**

VS.

THE COLUMBIA GROUP, LLC; THE COLUMBIA GROUP, LLC D/B/A SHADY LANE APARTMENTS; AND JOHN DOES 1 -10 — **APPELLEES**

APPEAL FROM THE CIRCUIT COURT OF YAZOO COUNTY, MISSISSIPPI

BRIEF OF APPELLEES THE COLUMBIA GROUP, LLC, THE COLUMBIA GROUP, LLC D/B/A SHADY LANE APARTMENTS

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Defendants/Appellees, The Columbia Group, LLC, The Columbia Group, LLC d/b/a Shady Lane Apartments, certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal:

PARTIES:

1. Rosie Thomas, Individually and on behalf of the wrongful death beneficiaries of Wilson Thomas, Jr., Deceased, Plaintiff/Appellant;
2. The Columbia Group, LLC, The Columbia Group, LLC d/b/a Shady Lane Apartments, Defendants/Appellees;

ATTORNEYS:

3. Michael W. Baxter and Walker R. Gibson, attorneys of record for Defendants/Appellees, The Columbia Group, LLC, The Columbia Group, LLC d/b/a Shady Lane Apartments; and

4. J. Ashley Ogden, attorney of record for Plaintiff/Appellant, Rosie Thomas, Individually and on behalf of the wrongful death beneficiaries of Wilson Thomas, Jr., Deceased.

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TABLE OF CONTENTS

PAGE

CERTIFICATE OF INTERESTED PERSONS i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW 2

B. STATEMENT OF THE FACTS 3

SUMMARY OF THE ARGUMENT 5

STANDARD OF REVIEW 7

ARGUMENT 8

I. REBUTTAL TO THOMAS' STATEMENT OF FACTS 8

A. Thomas' claim that Shady Lane had knowledge that Wilson Thomas, Jr. was an apartment resident 8

B. The allegation that security guards were discontinued to "save money". 8

C. The allegation that shooter, Cornelius Young, was a "non-resident" of the apartment complex 8

D. The claim that manager, Catherine Washington, promised to "get security" 9

E. The claim that Washington admitted fault for Thomas' death 9

II. THOMAS' BURDEN OF PROOF UNDER MISSISSIPPI LAW 10

III. THE ABSENCE OF A SECURITY GUARD WAS NOT THE PROXIMATE CAUSE OF THOMAS' DEATH 11

IV. SHADY LANE CREATED NO DUTY TO PROTECT THOMAS FROM AN OBVIOUS DANGER 15

V. CORNELIUS YOUNG'S INTENTIONAL, CRIMINAL ACT WAS THE INDEPENDENT, SUPERSEDING AND INTERVENING CAUSE OF WILSON THOMAS, JR.'S DEATH 18

VI. PASSIVE ACTS OF ALLEGED NEGLIGENCE DO NOT GIVE RISE TO LIABILITY 21

VII. PROXIMATE CAUSE IS NOT ALWAYS A JURY QUESTION 22

VIII. THE LATEST MISSISSIPPI APPELLATE CASE INVOLVING A PREMISES SHOOTING OFFERS GUIDANCE 23

IX. SHADY LANE BREACHED NO DUTY OWED TO THOMAS 25

X. THE INTENTIONAL AND CRIMINAL ACTS OF CORNELIUS YOUNG WERE UNFORESEEABLE TO SHADY LANE 26

XI. ALLEGED CRIME STATISTICS DO NOT CREATE FORESEEABILITY .. 30

XII. THE LOWER COURT PROPERLY DISREGARDED THE SPECULATIVE, INADMISSIBLE OPINIONS OF JOHN TISDALE 32

XIII. THE TRIAL COURT CORRECTLY REJECTED THE UNTIMELY AFFIDAVIT OF THOMAS' WITNESS, SHEAERICA PARKER. 34

CONCLUSION 38

CERTIFICATE OF SERVICE 39

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Alexander v. State, 610 So. 2d 320 (Miss. 1992) 33

Baptiste v. Jitney Jungle Stores of America, Inc., 651 So.2d 1063 (Miss.1995) 7

Benson v. National Union Fire, 762 So. 2d 795 (Miss. App. 2000) 7, 9

Crain v. Cleveland Lodge 1532, Order of Moose, Inc., 641 So. 2d 1186 (Miss. 1994) 7, 10, 24-5, 31

Davis v. Christian Brotherhood Homes of Jackson, MS, Inc., __ So. 2d __, 2007 WL 1334380 (Miss. App. May 8, 2007) 23, 24, 32

E. I. Dupont DeNumours & Co. v. Ladner, 73 So. 2d 249 (Miss. 1954) 23

Grisham v. John Q. Long V.F.W. Post No. 457, 519 So. 2d 413 (Miss. 1991) 10, 23, 25

Hoffman v. Planters Gin Co., 358 So. 2d 1008 (Miss. 1978) 6

Hoke v. Holcomb & Associates, 186 So. 2d 474 (Miss. 1966) 18, 23

Holliday v. Pizza Inn, Inc., 659 So. 2d 860 (Miss. 1995) 10, 18, 20, 23, 25

Hughes v. Star Homes, Inc., 379 So. 2d 301 (Miss. 1980) 21

Johnson v. Alcorn State Univ., 929 So. 2d 398 (Miss. App. 2006) 22-3

Martin, et al. v. Rankin Circle Apartments, et al., 941 So. 2d 854 (Miss. App. 2006) 3, 6, 11, 15, 18, 23

Milam v. Gulf, Mobile and Ohio Railroad, 284 So. 2d 309 (Miss. 1973) 18, 23

Mississippi City Lines, Inc. v. Bullock, 194 Miss. 630, 13 So. 2d 34 (1943) 23

Nowell v. Southern Jitney Jungle, 830 So. 2d 621 (Miss. 2002) 7

Page v. Siemens Energy and Automation, Inc., 728 So. 2d 1075 (Miss. 1998) 35

Pargas of Taylorsville, Inc. v. Craft, 249 So. 2d 403 (Miss. 1971) 23

Price v. Park Management, Inc., 831 So. 2d 550 (Miss. App. 2002) 10, 25

Seymour v. Brunswick Corp., 655 So.2d 892 (Miss.1995) 7

Shelby v. State, 403 So. 2d 338 (Miss. 1981) 35

Southland Management Co. v. Paul Brown, 730 So. 2d 43 (Miss. 1998) 18-9

Stewart v. State, 33 So. 2d 787 (Miss. 1948) 35

Stringfellow v. Stringfellow, 451 So. 2d 219 (Miss. 1984) 35

Robinson v. Howard Brothers of Jackson, Inc., 372 So. 2d 1074 (Miss 1979) 23

Robinson v. McDowell, 247 So. 2d 686 (Miss. 1971) 23

Titus v. Williams, 844 So. 2d 459 (Miss. 2003) 6, 10, 15, 21, 23, 25

OTHER

Mississippi Rule of Evidence 701 34

Mississippi Rule of Evidence 702 34

Mississippi Rule of Evidence 703 34

Mississippi Rule of Evidence 704 34

STATEMENT OF THE ISSUE ON APPEAL

The only issue properly before this Court is whether the Circuit Court of Yazoo County, Mississippi, correctly granted Defendants/Appellees' motion for summary judgment.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

This appeal arises out of a Complaint filed by Plaintiff/Appellant, Rosie Thomas, Individually and on behalf of the wrongful death beneficiaries of Wilson Thomas, Jr., deceased (hereinafter collectively referred to as "Thomas") on or about July 27, 2004, in the Circuit Court of Yazoo County, Mississippi. (R 6)[1] In her Complaint, Thomas asserts claims against Defendants/Appellees, The Columbia Group, LLC, The Columbia Group, LLC d/b/a Shady Lane Apartments (hereinafter collectively referred to as "Shady Lane"), for alleged negligent security, failure to warn, and failure to maintain the apartment complex in a reasonably safe condition. (R 6) Thomas claims that Shady Lane's alleged negligence caused the August 1, 2003 shooting death of her son, Wilson Thomas, Jr., by his close friend, Cornelius Young, during an ongoing feud between them over girlfriends. (R 6) Thomas specifically claims that if Shady Lane had a security guard on the date in question, Wilson Thomas, Jr. *probably* would not have been shot by Cornelius Young. (RE 6:53)

Shady Lane filed its motion for summary judgment on or about February 16, 2006. (R 28) In its motion, Shady Lane argued that the intentional and criminal actions of the shooter, Cornelius Young, were unknown and unforeseeable to the owners of the Shady Lane apartments. (R 31) Shady Lane also asserted that nothing it did or failed to do proximately caused the shooting in question. (R 31) The Yazoo County Circuit Court initially denied Shady Lane's motion on April 28, 2006. (R 521)

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[1] References are to the Record ("R") and Record Excerpts ("RE"). The number preceding the colon of the Record Excerpt represents the tab of the Record Excerpt where the pertinent information may be located. The numbers following the colon represent the page number in the record.

On August 3, 2006, Shady Lane filed its renewed motion for summary judgment, citing a newly published case that was handed down by the Mississippi Court of Appeals after the Yazoo County Circuit Court's April 28, 2006 denial of Shady Lane's original motion for summary judgment - *Martin, et al. v. Rankin Circle Apartments, et al.*, 941 So. 2d 854 (Miss. App. 2006). Based on the *Rankin Circle* case, discussed *infra*, the Yazoo County Circuit Court entered an Order Granting Shady Lane's renewed motion for summary judgment on or about August 23, 2006. (RE 2:557) The court held that the absence of a security guard at Shady Lane did not proximately cause the shooting in question. (RE 3:57) Thomas subsequently filed a notice of appeal to this Court.

B. STATEMENT OF THE FACTS

This is a premises liability case arising out of the August 1, 2003 shooting death of Wilson Thomas, Jr. by his close friend, Cornelius Young, at the Shady Lane apartments in Yazoo City, Mississippi. (R 6)

Shady Lane is an apartment complex that is subsidized by the United States Department of Housing and Urban Development (HUD). (RE 8:54) HUD guidelines require that all persons living with a tenant must be disclosed and added to the tenant's lease in order to calculate the amount of rent for the apartment. (RE 8:54) The Columbia Group was managing the apartments during the relevant time period in question. (RE 8:54) Catherine Washington was the on-site manager during the relevant time period in question. (RE 8:54)

At the time of the August 1, 2003 shooting incident, Thomas was not a tenant at the Shady Lane apartments, but was staying with one of his girlfriends/tenant, Teresa Mitchell. (RE 7:79-80) Mitchell testified that she knowingly violated HUD and Shady Lane guidelines by failing to add Thomas to her lease. (RE 7:79-80, R 85) Thomas was not listed on any tenant's lease at the Shady

Lane apartments. (RE 8:56) Shady Lane apartment manager, Catherine Washington, testified that she had no knowledge that Thomas was living at the Shady Lane apartments. (RE 8:56)

In addition to dating Shady Lane tenant, Teresa Mitchell, at or around the time of this incident, Thomas was also dating another Shady Lane tenant, Toni Richardson. (RE 6:73-4, RE 7:77-8) The shooter, Cornelius Young, was dating Toni Richardson's daughter, Michelle Richardson. (RE 6:73-4) Unlike Thomas, Young was a tenant at Shady Lane and was listed on the lease of his mother, Patricia Young, at the time of the shooting incident. (RE 8:56, R 88)

Thomas and Young knew one another, spent time together and were close friends. (RE 4:60-1, RE 5:67, RE 6:73, RE 7:77-8) Thomas affectionately referred to Young as his "son." (RE 4:60-1, RE 5:67, RE 6:73-4, RE 7:77-8)

On July 25, 2003, Thomas and Young had a personal argument at the Shady Lane apartments over a domestic matter involving the Richardsons. (RE 6:73-4, RE 7:79) The argument escalated into Young shooting at and grazing Thomas. (RE 6:73-4, RE 7:79) Following the July 25, 2003 shooting, Thomas filed criminal charges against Young. (R 410) Unexplainably, the Yazoo County Sheriff's Department did not pick up nor arrest Young. (R 410)

A few days later on August 1, 2003, Young ran into Thomas again and shot and killed Thomas at the Shady Lane apartments. (R 6, R 70) After shooting Thomas, Young was overheard to state "I told you I was going to get you." (RE 6:74) Thomas' family and friends admitted that the August 1, 2003 shooting incident between Thomas and Young was not a random act of violence, but rather a domestic dispute between two friends. (RE 4:60-2, RE 5:67-8, RE 6:74, RE 7:78)

Wilson Thomas, Jr.'s own family and all of his friends were "shocked" to hear that Young had shot Thomas because Young "was not a violent person." (RE 4:60-1, RE 5:67, RE 6:74, RE 7:78) Thomas' family and friends also admitted that they "couldn't believe" that the shooting took

place because Thomas and Young were such close friends. (RE 4:60-1, RE 5:67, RE 6:72, 74, RE 7:78)

At the time of Thomas' death on August 1, 2003, he was under the influence of cocaine and alcohol. (RE 9:81)

SUMMARY OF THE ARGUMENT

This is a case where two close friends feuded over girlfriends and one friend (Cornelius Young) shot and killed the other friend (Wilson Thomas, Jr.) as a result. (RE 6:73-4, RE 7:79) At the time of this incident, Shady Lane tenant, Cornelius Young, was dating Michelle Richardson. (RE 6:73-4) Michelle Richardson was the daughter of one of Wilson Thomas, Jr.'s girlfriends/Shady Lane tenant, Toni Richardson. (RE 6:73-4, RE 7:77-8)

One week before Thomas' death, Young and Thomas got into an argument over the Richardsons at the Shady Lane apartments. (RE 6:73-4, RE 7:79) During their argument, Young shot at and grazed Thomas. (RE 6:73-4, RE 7:79) Although Thomas obviously knew that Young had shot at him (and in fact grazed him) on July 25, 2003 and that Young still lived at the Shady Lane apartments, Thomas again entered the apartments on August 1, 2003 - **while Thomas was under the influence of alcohol and high on cocaine.** (RE 9:81, R 70, RE 6:73-4, RE 7:79) After entering the complex, Young suddenly and unexpectedly shot and killed Thomas. (RE 6:74)

The heirs of Thomas are suing the management of the Shady Lane apartments (The Columbia Group) alleging only that the failure to have a security guard caused the death of Thomas. (RE 4:63) However, this is not a case where an unknown assailant attacked the decedent. (RE 4:62) To the contrary, both the victim and the assailant knew each other and were close friends. They were so close prior to this feud that Thomas affectionately called Young his "son." (RE 6:73, RE 7:78) This shooting was so surprising that even Thomas' own family and friends said they were "shocked" and

"couldn't believe" that Young shot Thomas. (RE 4:60-1, RE 5:67, RE 6:74, RE 7:78) They all admitted that Young was "not a violent person." (RE 4:60-1, RE 5:67, RE 6:74, RE 7:78) **Thus, Thomas' argument that a security guard would have prevented one friend from suddenly and without warning pulling a gun and shooting his friend over a purely personal and domestic matter is preposterous, and stretches the bounds of foreseeability beyond its breaking point.**

Furthermore, Thomas' argument that alleged hearsay reports of crimes involving different individuals, on different dates and under totally different circumstances has absolutely no relevance to an ongoing domestic feud between two friends over girlfriends. Thomas' attempt to prove up evidence of alleged crime statistics involving alleged criminal conduct by unknown assailants is nothing more than a smoke screen and is not relevant to the issue in this case.

Most importantly, Shady Lane is guilty of no affirmative or active act of negligence which proximately caused the death of Thomas. The trial court correctly held that no action on the part of Shady Lane proximately caused tenant, Cornelius Young, to shoot and kill his close friend, Wilson Thomas, Jr., over a domestic quarrel. (RE 3:57)

The case at bar is precisely in line with and is controlled by this Court's decision in *Titus v. Williams*, 844 So. 2d 459 (Miss. 2003), and a recent decision handed down by the Mississippi Court of Appeals in *Martin, et al. v. Rankin Circle Apartments, et al.*, 941 So. 2d 854 (Miss. App. 2006), which were both shooting cases.

Rankin Circle and *Titus* both held that negligence that merely created the conditions leading to injury, but that did not initiate the injury-causing actions themselves, could not be the basis for applying the *Hoffman* affirmative negligence doctrine. *Titus*, 844 So. 2d at 466; *Rankin Circle*, 941 So. 2d at 863, quoting *Hoffman v. Planters Gin Co.*, 358 So. 2d 1008 (Miss. 1978). Like the shootings in *Rankin Circle* and *Titus*, there is an absence of proximate causation in the case at bar,

which is defined as that "cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred." *Id.* Like the courts held in the *Rankin Circle* and *Titus* cases, what we have, at most, in the present case is that Shady Lane furnished the "condition" upon which the shooting of Thomas occurred, but did not "put in motion" the shooting itself. *See Rankin Circle*, 941 So. 2d at 864; *Titus*, 844 So. 2d at 466, quoting *Nowell v. Southern Jitney Jungle*, 830 So. 2d 621, 623 (Miss. 2002).

The trial court correctly refused to hold Shady Lane to a strict liability standard and correctly held that any alleged negligence on the part of Shady Lane in this case did not "put in motion" or proximately cause the shooting death of Thomas. (RE 3:57) Because Thomas' claim fails on the issue of proximate causation, summary judgment in favor of Shady Lane was proper and should be affirmed on appeal.

STANDARD OF REVIEW

In reviewing a lower court's grant of summary judgment, the reviewing court must employ a *de novo* standard of review. *Baptiste v. Jitney Jungle Stores of America, Inc.*, 651 So.2d 1063, 1065 (Miss.1995). The court must review "all evidentiary matters before us in the record: affidavits, depositions, admissions, interrogatories, etc." *Seymour v. Brunswick Corp.*, 655 So.2d 892, 895 (Miss.1995). Where the moving party on a summary judgment motion can show a complete failure of proof by the non-moving party on an essential element of the claim, the moving party is entitled to summary judgment as a matter of law. *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So. 2d 1186, 1188 (Miss. 1994). Summary judgment is appropriate if the non-moving party fails to prove a material fact essential to his claim. *Benson v. National Union Fire*, 762 So. 2d 795, 800 (Miss. App. 2000). The existence of numerous facts in dispute will not prevent the entry of summary judgment where the disputed facts are not material to the issue to be decided. *Id.* at 800.

ARGUMENT

I. REBUTTAL TO THOMAS' STATEMENT OF FACTS

Thomas' statement of facts is both inaccurate and misleading in many places. Shady Lane will clarify the major inaccuracies:

A. Thomas' claim that Shady Lane had knowledge that Wilson Thomas, Jr. was an apartment resident.

Thomas states on page 2 of her brief that Shady Lane manager, Catherine Washington, knew Thomas was residing at the complex with one of his girlfriends/tenant, Teresa Mitchell, and never objected to him living with Mitchell. This statement is not true. To the contrary, Washington, testified that she had no knowledge that Thomas was living at the Shady Lane apartments. (RE 8:56)

B. The allegation that security guards were discontinued to "save money."

Thomas states on page 3 of her brief that Shady Lane discontinued security guards at the complex to save money and that crime worsened after security guards were discontinued. This statement is not true. In fact, Shady Lane replaced physical security guards with a state-of-the-art camera monitoring system that was monitored both on-site by the manager and off-site by a paid monitoring service. (RE 8:54) Thomas' allegation that crime increased after the installation of the camera system is based on pure opinion testimony and not supported by any evidence. The one lay witness Thomas relies on for this statement, Sheaerica Parker, who was not even a tenant, admitted that her statement was purely her opinion and not supported by any evidence. (R 149)

C. The allegation that shooter, Cornelius Young, was a "non-resident" of the apartment complex.

Thomas on page 3 of her brief states that Cornelius Young was a "non-resident." However, Thomas cannot dispute that Young was listed as a tenant on the lease of his mother, Patricia Young, at the time of this incident. (RE 8:56) To the contrary, it was Wilson Thomas, Jr. who was not a

tenant of the complex and who was violating federal law under the Department of Housing and Urban Development's regulations by not reporting himself as living with one of his girlfriends/tenant, Teresa Mitchell. (RE 7:79-80, R 85)

D. The claim that manager, Catherine Washington, promised to "get security."

Thomas next claims on pages 3 and 4 that manager, Catherine Washington, "began calling meetings with tenants" and told the tenants she was "going to get security", she was "banning Young from entering Shady Lane" and "evicting Young's mother and family." This is false and misleading. Washington adamantly denies that she made any of these statements and denies any knowledge of the July 25, 2003 shooting. (RE 8:58) Moreover, Shady Lane already had security in the form of the state-of-the-art camera monitoring system.

E. The claim that Washington admitted fault for Thomas' death.

Thomas claims on page 5 that Washington admitted after Thomas' August 1, 2003 shooting that Thomas' death was her fault. This is totally untrue. This is a self-serving statement by Thomas and Washington adamantly denied this allegation. (RE 8:58)

In the final analysis, Thomas' misstated facts in her effort to attempt to create questions of fact are not material facts that change the outcome or require the reversal of the trial court's grant of summary judgment. **Indeed, this Court is well aware that the existence of numerous facts in dispute will not prevent the entry of summary judgment where the disputed facts are not material.** *Benson v. National Union Fire*, 762 So. 2d 795, 800 (Miss. App. 2000). None of the facts asserted by Thomas and rebutted above are material as they relate to proximate causation and the trial court correctly granted summary judgment in favor of Shady Lane as a matter of law.

II. THOMAS' BURDEN OF PROOF UNDER MISSISSIPPI LAW.

In order for Thomas to establish negligence on the part of Shady Lane under Mississippi law, she must prove by a preponderance of the evidence that: (1) Shady Lane owed Wilson Thomas, Jr. a duty; (2) Shady Lane breached that duty; (3) Thomas incurred damages; and (4) Shady Lane's breach proximately caused Thomas' injuries. *See Crain v. Cleveland Lodge 1553*, 641 So. 2d 1186, 1188 (Miss. 1994).

In order to establish a duty on the part of Shady Lane, Thomas must prove that the intentional and criminal conduct of Young was reasonably foreseeable to Shady Lane. Foreseeability in a premises case is found by determining whether the owner had "cause to anticipate" the criminal assault by: (1) actual or constructive knowledge of the assailant's violent nature; or (2) actual or constructive knowledge that an atmosphere of violence existed on the premises. *See Crain*, 641 So. 2d at 1188; *Price v. Park Management, Inc.*, 831 So. 2d 550, 551 (Miss. App. 2002); and *Grisham v. John Q. Long V.F.W. Post No. 457*, 519 So. 2d 413, 416 (Miss. 1991).

Even if Thomas can show that Shady Lane owed Wilson Thomas, Jr. a duty and that it breached that duty, which are both denied, Thomas still must ultimately show that Shady Lane's actions or inactions proximately caused Thomas' death or she cannot recover. Indeed, Mississippi courts have held that absent a showing that the acts or omissions of a premises owner or manager proximately caused a plaintiff's injuries, summary judgment is appropriate. *See Rankin Circle*, 941 So. 2d at 864; *Holliday v. Pizza Inn, Inc.*, 659 So. 2d 860, 865 (Miss. 1995); *Titus*, 844 So. 2d at 466; *Price*, 831 So. 2d at 551; *Crain*, 641 So. 2d at 1188; and *Grisham*, 519 So. 2d at 416.

Thomas' arguments fail on all fronts. As outlined below, the trial court correctly held that Thomas could not meet her burden under Mississippi law and summary judgment was appropriate.

No absence of a security guard at Shady Lane proximately caused Young to shoot and kill his

close friend, Thomas, in revenge over a purely domestic matter. For the same reasons found by the trial court, this Court should affirm the dismissal of this action in favor of Shady Lane.

III. THE ABSENCE OF A SECURITY GUARD WAS NOT THE PROXIMATE CAUSE OF THOMAS' DEATH.

The heart of this case is that the *proximate cause* of Wilson Thomas, Jr.'s death was not the absence of a security guard, as Thomas alleges. (RE 4:63) Rather, the proximate cause of Thomas' death was the intentional and criminal actions of Cornelius Young, who shot Thomas in revenge during a feud over their girlfriends. The trial court recognized this and correctly ruled that Thomas **"can't put together a set of facts to prove that the defendants did anything to cause Young to kill Thomas. That's the bottom line."** (RE 3:57)

The trial court based its ruling on another strikingly similar shooting case that was handed down after the filing of this lawsuit - *Martin, et al. v. Rankin Circle Apartments, et al.*, 941 So. 2d 854 (Miss. App. 2006). The *Rankin Circle* case offers clear guidance for the case at bar. In *Rankin Circle*, the family of a shooting victim ("Martin") brought suit against the Rankin Circle apartments alleging that the apartment owner and manager failed to provide adequate security and breached the implied warranty of habitability. *Id.* at 854. Martin, like Thomas in the case at bar, alleged that the owner and manager's failure to provide security caused the shooting death. *Id.*

In *Rankin Circle*, the shooter shot the deceased after they argued over the course of the day about a woman. *Id.* at 856-7. Similarly, Cornelius Young shot and killed Wilson Thomas, Jr. during an ongoing feud between them over girlfriends. (RE 6:73-4, RE 7:79) In *Rankin Circle*, the deceased's family argued that the owner and manager failed to have security guards, a "crime management plan" and other heightened security measures that *might* have prevented the shooting. *Id.* at 862. Here, Thomas likewise argues that Shady Lane should have had a security guard that, in

her opinion, *might* have prevented the shooting. (RE 4:63) Wilson Thomas, Jr.'s family specifically alleges that "[i]f they [Shady Lane] had had a security guard, he'd [Wilson Thomas, Jr.] be probably still here." (RE 4:63)

However, the Mississippi Court of Appeals in *Rankin Circle* rejected the same argument of the deceased's family and affirmed the lower court's grant of summary judgment, holding that nothing the owner or manager did or did not do "put in motion" the shooting. *Id.* at 864. The *Rankin Circle* court held that although the Rankin Circle apartments may have been in a high crime area and the manager knew of the shooter's violent past, the deceased was fully aware of any negative atmosphere at the complex and in fact had been participating in that atmosphere before the shooting. *Id.* Specifically, the *Rankin Circle* court held:

> **[T]he deceased had been participating in that atmosphere for a substantial period of time before the actual shot was fired. He had been in a position to 'observe and fully appreciate the peril' that was imminent, given the day's events of which he had clearly been a part. Moreover, the deceased was not a stranger to these apartments and whatever atmosphere existed there.**

Id. (emphasis added).

Precisely the same points can be made about Wilson Thomas, Jr. in the present case. Thomas, like Martin in *Rankin Circle*, was no stranger to the Shady Lane apartments having allegedly lived there with one of his girlfriends/tenant, Teresa Mitchell, for several years before his death. (RE 7:79-80) Although the *Rankin Circle* court stated that all parties admitted Rankin Circle was in a high crime area, that fact has not been established here and has been denied by Shady Lane. However, even if the Court were to assume Shady Lane was a high crime area, which is denied, it cannot be argued that Thomas was unaware of it having lived there for several years before his death. (RE 7:79-80)

It can also be said that Thomas, like Martin in *Rankin Circle*, had participated in the alleged atmosphere before his death. Indeed, Thomas had an altercation with the shooter, Young, the week before he was killed. (RE 6:73-4, RE 7:79) Moreover, it is undisputed that the deceased, Wilson Thomas, Jr., was close friends with and knew that the shooter lived at the Shady Lane apartment complex. (R 71)

Despite being armed with the knowledge that a tenant at the apartment complex (Young) had the week before tried to shoot him, Wilson Thomas, Jr., continued to frequent the apartments where he knew the shooter lived. Furthermore, the deceased, Wilson Thomas, was not a stranger to the Shady Lane apartments and whatever atmosphere existed there. (RE 7:79-80) In fact, Wilson Thomas, Jr. had himself participated in that atmosphere before he was killed, just as the decedent in *Rankin Circle* had. (RE 6:73-4, RE 7:79) Wilson Thomas, Jr.'s friend, Chakila Kyles, who witnessed his death, confirmed the ongoing feud between Thomas and Young by testifying as follows:

Q. So you don't know why Chuck [Wilson Thomas, Jr.] and Neil [Cornelius Young] were fighting, do you?

A. Yeah.

Q. Why was that?

A. Because when they were fighting, Chuck [Thomas] was trying to break it up.

Q. So that was a personal matter? That was a domestic dispute, right?

A. Um-hum. (Affirmative)

Q. That was something going on between Chuck [Thomas] and Neil [Young] and Michelle [Richardson]?

A. They were fighting. He [Thomas] was just trying to break it up, and he [Young] went ballistic.

...

Q. And when Neil [Young] shot Chuck [Thomas], I believe you testified at the trial that he said "I told you I was going to get you."

A. Yeah.

Q. So this was a feud going on between those two guys?

A. Yeah.

(RE 6:74)

It is undeniable that the deceased, Wilson Thomas, Jr., had been in a position to "observe and fully appreciate the peril" that was imminent, given the prior fight between him and the shooter, Young. (RE 6:74) Thomas was no stranger to Young and Thomas, like Martin in *Rankin Circle*, interjected himself into a conflict with Young by returning to the very location (Shady Lane) where Young had shot at him only a few days earlier. (R 70)

The *Rankin Circle* court also analyzed the actions of the management to combat the crime in the area of the complex. The manager testified that Rankin Circle kept regular business hours, she patrolled the complex, attended security workshops, posted signs and took other measures. *Id.* at 857-8. Although Shady Lane denies that a "high crime area" existed at the complex, the management also put in place many of the same things the management in *Rankin Circle* had. Specifically, Shady Lane had regular on-site office hours, area lighting, an iron fence surrounding the apartment complex and one entrance/exit. (RE 8:54) The management and owners of Shady Lane went one step further than the management in *Rankin Circle* by installing a state-of-the-art monitored security camera system that cost nearly $100,000.00 and was monitored on-site by the manager and off-site by a paid monitoring company. (RE 8:54) **However, like the *Rankin Circle***

court held, these features had nothing to do with a shooting between two close friends who were feuding over a personal matter. The *Rankin Circle* court held that "[t]he dangers of crime at Rankin Circle were well-known by all and steps were taken to address the problems." *Id.* at 862.

In the case at bar, Thomas' entire argument is based on pure speculation by asking this Court to guess as to what a security guard *might* have done to prevent Wilson Thomas, Jr.'s death. (RE 4:63) **However, the court in *Rankin Circle* rejected the same request of the decedent's family, holding that the owner and manager had no duty to warn or protect the deceased from a known peril, especially a peril that he had been voluntarily participating in.** *Rankin Circle*, 941 So. 2d at 864.

Just as the court in *Rankin Circle* held that steps taken or not taken by management did not cause the shooting death where the management admitted crime was a problem, this Court should likewise hold that not having a security guard did not proximately cause Young to shoot Thomas after the two feuded over girlfriends. Moreover, just as the court in *Rankin Circle* refused to hold the owner and manager liable where the deceased observed and fully appreciated a known peril, yet continued to participate in that peril, this Court should likewise absolve Shady Lane of liability and affirm the trial court's grant of summary judgment.

IV. SHADY LANE CREATED NO DUTY TO PROTECT THOMAS FROM AN OBVIOUS DANGER.

On page 30 of her brief, Thomas tries to distinguish the holdings in *Rankin Circle* and *Titus* by arguing that Thomas was an invitee at Shady Lane at the time of his death, unlike the decedents in *Rankin Circle* and *Titus*, and was owed a higher duty. However, Thomas' argument lacks merit

and has already been rejected by the court in *Rankin Circle*. As discussed above, the court in *Rankin Circle* held as follows:

> **The broadest duty owed anyone who enters on a landowner's property was to provide reasonably safe premises and to warn of hidden dangers. The key holding in *Titus* is "that the duty to warn disappears entirely when it is shown that the injured person did, in fact, observe and fully appreciate the peril."**

Rankin Circle, 941 So. 2d at 863, quoting *Titus*, 844 So. 2d at 467. The *Rankin Circle* court specifically held that where the decedent had the chance to **"observe and fully appreciate the peril"**, his status is **"irrelevant."** *Id.* at 863.

The *Rankin Circle* holding torpedoes Thomas' argument. The undisputed facts prove that Wilson Thomas, Jr. observed and fully appreciated the peril of coming in contact with Cornelius Young, considering Young had shot at and grazed Thomas only a few days earlier. (RE 6:73-4, RE 7:79) The fact that Thomas knew Young had shot at him a few days before he was killed is undeniable because Thomas had actually filed criminal charges against Young on account of the first shooting, but Young was inexplicably never picked up nor arrested. (R 410) Even though Thomas knew Young had tried to kill him the week before, Thomas nevertheless returned to Shady Lane where he knew Young lived. **Based on the holdings in *Rankin Circle* and *Titus*, Shady Lane was under no duty to warn Thomas or protect Thomas from a peril that Thomas obviously knew about and was fully aware of.** *Rankin Circle*, 941 So. 2d at 863; *Titus*, 844 So. 2d at 467.

It also cannot be overlooked that Thomas participated in the peril that caused his death. (RE 6:73-4, RE 7:79-80) As the *Rankin Circle* court held, the decedent had been in a position to "observe and fully appreciate the peril" given that he participated in the alleged criminal atmosphere by fighting with the shooter. *Id.* at 864. Based on this holding in *Rankin Circle*, Thomas here cannot

escape the admitted fact that Wilson Thomas, Jr. was feuding with Cornelius Young over their girlfriends and Thomas certainly observed and fully appreciated the danger of interacting with Young. (RE 6:73-4, RE 7:79-80) When Thomas returned to the complex after knowing that Young lived there and had shot at him a few days earlier, Thomas **"needed no further warnings than he received"** as the court in *Rankin Circle* held. *Id.*

Thomas argues that Shady Lane's manager undertook or created a duty by allegedly promising to ban Young from the property and hire a security guard. However, Thomas' argument fails based on the ruling in *Rankin Circle*. Even if this Court assumes manager, Catherine Washington, promised to evict Young and hire a security guard after the July 25, 2003 shooting, which Washington adamantly denies, there is no information in the record that Washington ever made these alleged promises to Wilson Thomas, Jr. Thomas relies only on the statement of one of Thomas' girlfriends, Teresa Mitchell. Mitchell testified that *she*, not Thomas, was allegedly told by Washington that Young would be banned and a security guard hired. (R 118) **No evidence in the record exists that Washington ever promised Wilson Thomas, Jr. that she would protect him from Cornelius Young or that Thomas relied upon such a promise.**

Thomas also argues that because manager, Catherine Washington, allegedly knew of the first shooting on July 25, 2003, she then had notice of Young's violent past and a duty to provide security to protect Wilson Thomas, Jr. However, the court in *Rankin Circle* rejected this same argument. The manager in *Rankin Circle* testified that she knew the shooter and was aware of his criminal record before the incident. *Id.* at 858. Furthermore, the manager in *Rankin Circle* also testified that she knew the shooter had shot two other people, including his own brother, before the incident. *Id.* **Even considering the admitted knowledge of the Rankin Circle manager of the shooter's**

violent past, the *Rankin Circle* court refused to hold the owner or manager liable where the decedent knowingly interjected himself into a peril that he not only observed, but helped create. *Id.* at 864. Based on the holding in *Rankin Circle*, this Court should likewise reject Thomas' argument that Shady Lane's alleged knowledge of the July 25, 2003 shooting created a duty to protect Thomas. Shady Lane neither created nor breached any alleged duty owed to Thomas and was not the proximate cause of his death. Therefore, summary judgment was appropriate.

V. CORNELIUS YOUNG'S INTENTIONAL, CRIMINAL ACT WAS THE INDEPENDENT, SUPERSEDING AND INTERVENING CAUSE OF WILSON THOMAS, JR.'S DEATH.

Mississippi has long recognized the doctrine of remote causation, which does not give rise to liability. The doctrine of remote causation says that an alleged negligent act which merely furnishes the condition or occasion upon which injuries are received but does not put in motion the act that caused the harm is relegated to a remote, non-actionable act and is not the proximate cause of the injuries. *See Holliday v. Pizza Inn, Inc.*, 659 So. 2d 860, 865-66 (Miss. 1995); *Southland Management Co. v. Paul Brown*, 730 So. 2d 43, 48 (Miss. 1998); *see also, Milam v. Gulf, Mobile and Ohio Railroad*, 284 So. 2d 309, 314 (Miss. 1973); *Hoke v. Holcomb & Associates*, 186 So. 2d 474 (Miss. 1966). In each of these cases, this Court expressly held that any negligent act by the premises owner, at most, amounted only to remote, non-actionable negligence where it did not put in motion the intervening, proximate cause of the injury.

The *Rankin Circle* court applied the theory of intervening/superseding causes in its ruling, by holding: "In our case, the shooter Campbell's appearance at the complex is an **intervening cause** as is recognized both in premises liability decisions such as *Titus* and in the warranty of habitability

cases such as *Sweatt*." *Id.* at 864. In the case at bar, the unforeseeable, criminal and intentional act of Young shooting Thomas during their ongoing feud over a domestic matter was also an intervening cause that broke the chain of causation. The trial court correctly held that nothing Shady Lane's management did or did not do caused or put in motion this shooting. (RE 3:57) The court in *Rankin Circle* reached the same result by stating as follows:

> **What we have at most in the present case is that the defendants 'furnished the condition' in which the shooting occurred but did not 'put in motion' the shooting itself.... The defendants did not 'put in motion' the events leading up to the shooting. The deceased needed no further warning than he received.**

Id. This Court should apply the same analysis used by the *Rankin Circle* court. Nothing Shady Lane's manager did or did not do caused or "put in motion" the shooting death of Wilson Thomas, Jr. Shady Lane not having a security guard did not proximately cause Young to shoot his close friend, Thomas. Thomas, like Martin in *Rankin Circle*, was "fully cognizant of the developing dangers around him." *Id.* at 864.

Thomas, like Martin, "had been participating in that atmosphere", was in a position to "observe and fully appreciate the peril" and "needed no further warnings than he received." *Id.* No liability should exist for Shady Lane based on Young's intentional, criminal acts that amounted to the intervening and proximate cause of Wilson Thomas, Jr.'s death. Therefore, the trial court correctly granted summary judgment in favor of Shady Lane as a matter of law.

Other Mississippi Supreme Court cases have applied the theory of intervening/superseding causes. For example, in *Southland Management Co. v. Paul Brown*, 730 So. 2d 43, 48 (Miss. 1998), the Court held that merely dumping pieces of floor tile in the woods behind the premises where

children were known to play did not proximately cause an injury to one of several boys who threw the pieces at one another while playing a game. The *Southland* Court held that:

> It was the act of the child throwing the tile piece that proximately caused Brown's injury and **not the remote act** of disposing of construction residue. There is no principled basis to find actionable negligence on the part of Southland in this case.

Id. at 865-66.

Another example is *Holliday v. Pizza Inn, Inc.*, 659 So. 2d 860, 865-66 (Miss. 1995), the Court held that Pizza Inn was not liable for a fight that suddenly and unexpectedly broke out on the premises. The *Holliday* Court held that:

> **Although one may be negligent, yet if another, acting independently and voluntarily, puts in motion another and intervening cause which efficiently thence leads in unbroken sequence to the injury, the latter is the proximate cause and the original negligence is relegated to the position of a remote and, therefore, a non-actionable cause. Negligence which merely furnishes the condition or occasion upon which injuries are received, but does not put in motion the agency by or through which their injuries are inflicted, is not the proximate cause thereof. The question is, did the facts constitute a succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the alleged wrong and the injury?**

Id.

In both *Southland* and *Holliday*, the Mississippi Supreme Court held that an independent intervening cause, which leads in unbroken sequence to the injury, can sever the chain of causation as it relates to the original actor and thus result in a finding of no liability. **The absence of a security guard, which is not by itself negligent or in violation of any Mississippi law, did not lead in unbroken sequence to the shooting death. Put another way, the absence of a security guard did not proximately cause Young to shoot his close friend, Thomas, over a domestic dispute.** It was

Young's intervening, intentional and criminal act of shooting Thomas that proximately caused his death. The trial court's grant of summary judgment should therefore be affirmed on appeal.

Young's criminal actions were independent, intervening acts that clearly led in natural and unbroken sequence to Thomas' death. Young's acts alone were the proximate cause of Thomas' death. **Absent Young's intentional and criminal acts, Thomas would never have been injured.** The independent, intervening act of Young feuding with Thomas over girlfriends led in unbroken sequence to the shooting death of Thomas and thus relegated Shady Lane's alleged omission or failure to hire a security guard to the position of a remote and, therefore, non-actionable cause. *See Holliday*, 659 So. 2d at 865-66.

VI. PASSIVE ACTS OF ALLEGED NEGLIGENCE DO NOT GIVE RISE TO LIABILITY.

Mississippi courts have held that where a party's alleged negligence was merely passive and the party committed no intentional or willful action, no liability will result for the passive party. *See Titus v. Williams*, 844 So. 2d 459 (Miss. 2003); *Hughes v. Star Homes, Inc.*, 379 So. 2d 301 (Miss. 1980). Thomas alleges that Shady Lane's manager failed to have a security guard, failed to enforce a banned list, failed to evict Young, and that the manager failed to take other precautions that might possibly have prevented the shooting in question. Put another way, Thomas' allegations against Shady Lane all involve alleged "inactions" or "failures", as opposed to affirmative acts. **These inactions, even assuming they were supported by the evidence and amounted to negligence, which is adamantly denied, would amount to nothing more than passive negligence.** Pursuant to the doctrine of remote causation and the Court's holding in *Titus*, these alleged passive inactions are relegated to a remote and

therefore non-actionable cause. The trial court's grant of summary judgment should therefore be affirmed on appeal.

The Mississippi Court of Appeals in *Johnson v. Alcorn State University*, 929 So. 2d 398 (Miss. App. 2006), also applied the doctrine of an intervening, superseding cause in favor of the premises owner by holding that:

> **[The] shooting of JeKeley and Roddel is certainly not the harm that would have otherwise resulted from failing to log-in [the shooter] when he entered the campus, and there is no evidence that it was anything other than an extraordinary event on the campus of Alcorn State. What is more, the police department's failure to log-in someone would not normally result in a shooting. Not only that, operation of the intervening force, [the shooter's] decision to draw a pistol and shoot JeKeley and Roddel, was entirely [the shooter's] decision. The record contains no evidence that Alcorn State somehow coerced [the shooter] into shooting JeKeley and Roddel.**

Id. at 413 (emphasis added).

Like the plaintiff in *Johnson*, Thomas' assumption in the case at bar that a security guard "probably" would have stopped two close friends, Young and Thomas, from feuding over girlfriends does not create a fact question. An alleged lack of a security guard did not proximately cause the shooting of Thomas. Young's intervening, intentional and criminal act caused this shooting. Summary judgment was therefore correctly granted by the lower court in favor of Shady Lane and should be affirmed on appeal.

VII. PROXIMATE CAUSATION IS NOT ALWAYS A JURY QUESTION

Thomas argues on page 27 of her brief that in Mississippi, proximate causation is a jury question. However, that is certainly not always the case. Indeed, this Court and the Mississippi Court of Appeals have not hesitated to affirm the grant of summary judgment and directed verdicts in favor of premises owners and managers on appeal on the issue of proximate causation and the

doctrine of independent, intervening causes. *See Martin, et al. v. Rankin Circle Apartments, et al.*, 941 So. 2d 854 (Miss. App. 2006)**(summ. jud. aff'd)**; *Davis v. Christian Brotherhood Homes of Jackson, MS, Inc.*, __ So. 2d __, 2007 WL 1334380 (Miss. App. May 8, 2007)**(summ. jud. aff'd)**; *Johnson v. Alcorn State University*, 929 So. 2d 398 (Miss. App. 2006); *Holliday v. Pizza Inn, Inc.*, 659 So. 2d 860 (Miss. 1995)**(summ. jud. aff'd.)**; *Mississippi City Lines, Inc. v. Bullock*, 194 Miss. 630, 13 So. 2d 34 (1943)**(reversed and rendered)**; *Hoke v. Holcomb & Associates, Inc.*, 186 So. 2d 474 (Miss. 1966)**(directed ver. aff'd.)**; *Milam v. Gulf, Mobile and Ohio Railroad Co.*, 284 So. 2d 309 (Miss. 1973)**(directed ver. aff'd.)**; *Robinson v. McDowell*, 247 So. 2d 686 (Miss. 1971)**(reversed and rendered)**; *Pargas of Taylorsville, Inc. v. Craft*, 249 So. 2d 403 (Miss. 1971)**(reversed and rendered)**; *Robinson v. Howard Brothers of Jackson, Inc.*, 372 So. 2d 1074 (Miss 1979)**(directed verdict aff'd.)**; *E. I. Dupont DeNumours & Co. v. Ladner*, 73 So. 2d 249 (Miss. 1954)**(reversed and rendered)**; *Grisham v. John Q. Long V.F.W. Post*, 519 So. 2d 413 (Miss. 1988)**(summ. jud. aff'd.)**, *Titus v. Williams*, 844 So. 2d 459 (Miss. 2003)**(summ. jud. aff'd)**.

The trial court here correctly concluded that Thomas failed to prove that any alleged lack of security on the part of Shady Lane or any other action or inaction on the part of Shady Lane proximately caused the shooting incident in question. (RE 3:57) This Court should affirm the lower court's grant of summary judgment as a matter of law.

VIII. THE LATEST MISSISSIPPI APPELLATE CASE INVOLVING A PREMISES SHOOTING OFFERS GUIDANCE.

Since the trial court granted Shady Lane's motion for summary judgment, the Mississippi Court of Appeals handed down another premises shooting case that offers guidance in this case -

Davis v. Christian Brotherhood Homes of Jackson, MS, Inc., __ So. 2d __, 2007 WL 1334380 (Miss. App. May 8, 2007). In *Davis*, the family of Lucius Davis filed suit against the owner and manager of the Christian Brotherhood apartments, alleging that the failure to have a security guard caused the death of Davis. *Id.* at ¶ 4. However, the trial court granted summary judgment in favor of the Christian Brotherhood apartments, holding that nothing the defendants did or did not do proximately caused one acquaintance to shoot another during an argument over the commission of a crime. *Id.* at ¶ 41-2. On appeal, the Mississippi Court of Appeals affirmed the lower court's grant of summary judgment, holding that Christian Brotherhood did not proximately cause an unexpected shooting that occurred between two acquaintances "in the heat of the moment." *Id.*

Like the court held in *Christian Brotherhood*, this Court should also hold that Shady Lane's alleged lack of a security guard would not have stopped a tenant (Young) from suddenly and unexpectedly shooting and killing his friend (Thomas) over a domestic quarrel. Like the shooter in *Christian Brotherhood*, Young here was a tenant that had a right to be on the property. (RE 6:56, R 88) No amount of security could have stopped these two friends from feuding over girlfriends and, moreover, holding Shady Lane liable for every domestic dispute over personal matters would place a strict liability standard on Shady Lane, which has been rejected by the Mississippi Supreme Court. *See Crain v. Cleveland Lodge 1532*, 641 So. 2d 1186, 1191 (Miss. 1984). Based on the holdings in *Rankin Circle, Christian Brotherhood* and the other numerous Mississippi appellate cases discussed herein, this Court should hold that the absence of a security guard was not the proximate cause of Wilson Thomas, Jr.'s death.

IX. SHADY LANE BREACHED NO DUTY OWED TO THOMAS.

Instead of proving what Shady Lane did that proximately caused Wilson Thomas, Jr.'s death, Thomas wastes page after page of her brief arguing that Wilson Thomas, Jr. was an invitee at the time of his death and Shady Lane failed to protect him from Young. However, it is undisputed that Thomas was not a tenant and Shady Lane has repeatedly denied that Thomas was an invitee at the time of the shooting in question. Furthermore, even the admissions of Thomas' own family and friends disprove that Thomas was an invitee.

Thomas' own girlfriend, Teresa Mitchell, admitted that she broke federal law by intentionally refusing to report Thomas as a resident to Shady Lane management out of fear that it would increase her rent. (RE 7:79-80, R 85) Shady Lane manager, Catherine Washington, confirmed that Thomas was not a tenant and she had no knowledge he was living at the complex. (RE 8:56) **Based on Mississippi law and these admissions, Thomas was *at most* the invited guest of tenant, Teresa Mitchell.** As a guest who was only there for his own benefit, Thomas was considered a licensee under Mississippi law and the only duty owed to him by Shady Lane was to refrain from willfully or wantonly trying to injure him. *See Holliday v. Pizza Inn, Inc.*, 659 So. 2d 860, 865 (Miss. 1995); *Titus v. Williams*, 844 So. 2d 459, 466 (Miss. 2003); *Price v. Park Management, Inc.*, 831 So. 2d 550, 551 (Miss. App. 2002); *Crain v. Cleveland Lodge 1532*, 641 So. 2d 1186, 1188 (Miss. 1994); and *Grisham v. John Q. Long V.F.W. Post No. 4057, Inc.*, 519 So. 2d 413, 416 (Miss. 1988).

Thomas herself admitted that Shady Lane did not intentionally try to harm Wilson Thomas, Jr. Rosie Thomas testified as follows:

> Q. So the only thing that you're alleging the apartment complex should have done or failed to do, in your opinion, was have a security guard that possibly could have prevented this?

A. **That's correct.**

Q. You're not claiming that the apartment complex, the owners, or the management intentionally tried to harm your son. Correct?

A. **Not intentionally.**

Q. Do you have any knowledge or facts or information that either the management or the owners intentionally tried to hurt Wilson Thomas, Jr.?

A. **No, I don't think so.**

(RE 4:63) Rosie Thomas' testimony clearly establishes that Shady Lane did not knowingly or intentionally cause Wilson Thomas, Jr.'s death. Thomas' death was caused solely by the criminal and intentional acts of his close friend, Cornelius Young, over a purely domestic matter. Nothing Shady Lane did or did not do caused Young to pull the trigger and shoot his close friend, Wilson Thomas, Jr.

Although Thomas was *at most* a licensee under Mississippi law, Shady Lane asked the trial court to assume for the purposes of its summary judgment motion that Thomas was an invitee at the time of the shooting, which it did. (RE 3:55) Even assuming Thomas was an invitee, this assumption does not affect the outcome and the trial court correctly held that Shady Lane did not proximately cause this shooting. (RE 3:57)

X. THE INTENTIONAL AND CRIMINAL ACTS OF CORNELIUS YOUNG WERE UNFORESEEABLE TO SHADY LANE.

Even if the Court were to hold Shady Lane to the highest standard and consider Thomas an invitee, Shady Lane still only had "a duty to exercise reasonable care to protect [patrons] from reasonably foreseeable injury at the hands of another" and to "keep the

premises reasonably safe and warn only of hidden danger." *Crain*, 641 So. 2d at 1189; *Rankin Circle*, 941 So. 2d at 863.

In order to establish a duty on the part of Shady Lane, Thomas must prove that the intentional and criminal conduct of Young was reasonably foreseeable to Shady Lane. Foreseeability in a premises case is found by determining whether the owner had "cause to anticipate" the criminal assault by: (1) actual or constructive knowledge of the assailant's violent nature; or (2) actual or constructive knowledge that an atmosphere of violence existed on the premises. *See Price*, 831 So. 2d at 551; *Crain*, 641 So. 2d at 1188; and *Grisham*, 519 So. 2d at 416.

In the case at bar, Thomas has failed to meet her burden of proving that the intentional and criminal actions of tenant, Young, were foreseeable to Shady Lane. Thomas has not come forward with one single shred of evidence that Shady Lane had actual or constructive knowledge of an alleged "violent nature" on the part of the Young. To the contrary, Thomas herself and the witnesses testified that they were "shocked" to hear that Young shot Wilson Thomas, Jr., because Young was "not a violent person." Rosie Thomas testified as follows:

> Q. Okay. How would a security guard have stopped two guys that knew one another, that were in a feud over something, from fighting?
>
> A. **Neither one of those guys were bad guys, and I'm talking about my son and also Neil [Cornelius Young]. They wasn't no monster. They was human being. They got along.**

(RE 4:63) Witness, Chakila Kyles, testified as follows:

A. **It shocked me that he [Cornelius Young] did it. It shocked me 'cause he don't - he ain't no violent person or be in no mess or nothing like that. It shocked me.**

(RE 6:72) Thomas' own girlfriend/tenant, Teresa Mitchell, confirmed that she, Thomas and Young were friends and they got along without incident prior to the August 1, 2003 shooting. She testified as follows:

Q. They were friends, weren't they?

A. They was. Yes, they was friends.

Q. They knew each other?

A. Yes, they knew each other. Me, Neil [Cornelius Young], and Chuck [Wilson Thomas, Jr.] have hung out on the premises together.

Q. And there were no problems?

A. No.

Q. No fighting?

A. No.

Q. ...Wilson called Cornelius - or treated him like a son, kind of?

A. Yes, he did.

(RE 7:78) Shady Lane apartment manager, Catherine Washington, also testified that Young was not a violent person. She testified as follows:

Q. Also, several witnesses testified that Cornelius Young was not a violent person and that they were shocked that he had shot Wilson Thomas, Jr. Would you agree with that?

A. I never had a problem with either one of them.

Q. You never considered Cornelius Young a violent person?

A. No.

Q. He never threatened you or did anything to your knowledge that would have presented a problem?

A. No.

(RE 8:57-8)

None of the parties or witnesses involved in this case considered Young to be a dangerous or violent person. There is no evidence Young had a criminal record of any kind. Shady Lane's lack of notice of any alleged "violent nature" on Young's part is undeniable and undisputed. It is clear that Thomas has failed to prove that Shady Lane knew of any "violent nature" on the part of Young and, therefore, they had no "cause to anticipate" the shooting incident. *See Crain*, 641 So. 2d at 1189. Under the foreseeability test set forth in *Crain* as to whether a defendant had "cause to anticipate" a criminal act, Thomas cannot prove that Shady Lane knew of Young's alleged "violent nature."

Even if this Court were to assume Shady Lane had knowledge of Young's so-called "violent nature", as Thomas alleges, her claim still fails. The manager in *Rankin Circle*, discussed *supra*, admitted that she knew the shooter had a violent past before he shot the decedent. *Rankin Circle*, 941 So. 2d at 858. The manager even testified that she knew the shooter had shot two other people before this incident, including his own brother. *Id.* **Despite the Rankin Circle manager's clear knowledge of the shooter's "violent nature", that court still held that the decedent interjected himself into a quarrel that he knew about and participated in.** *Id.* Furthermore, the *Rankin Circle* court refused to hold the owner and manager liable because their duty to warn "disappears" when the decedent

observed and fully appreciated the peril he was entering. *Id.* at 863. For these reasons, Shady Lane breached no duty to Thomas and summary judgment was appropriate.

XI. ALLEGED CRIME STATISTICS DO NOT CREATE FORESEEABILITY

Thomas likewise cannot prove that defendants had actual or constructive notice that Shady Lane was an "atmosphere of violence." Instead of presenting factually supported proof that Shady Lane proximately caused this incident, Thomas alleges that a list of 911 telephone calls somehow put Shady Lane on notice that two close friends would suddenly feud over a domestic matter. However, the 911 calls are just that - ***telephone calls*** **where we have no proof as to whether these calls resulted in arrests or convictions**. Calls to 911 are not crimes, nor are they evidence of crimes. **The 911 calls are inadmissible hearsay.** On page 23 of her brief, Thomas states that numerous calls were made to 911 within a ten year period from Shady Lane and argues that this list of calls amounted to an atmosphere of violence. This is a gross misrepresentation of the content and number of these alleged calls. The large majority of these telephone calls were for non-violent occurrences, such as "information," "loud music," "incorrigible child," "deliver message," and "improperly parked vehicle." (R 240-390) **It cannot be argued that telephone calls to 911 asking for information and reporting loud music for example constituted notice that a shooting would occur between two close friends over girlfriends.** These are calls made by unknown private citizens to the police, not to Shady Lane.

Thomas also lumps alleged 911 telephone calls for all of Yazoo County into her allegation that these 911 "calls" of crime created foreseeability. (R 240-390) Thomas is

attempting to hold Shady Lane responsible for unsupported 911 calls that happened miles from the Shady Lane apartments. The county-wide 911 telephone calls amount to nothing more than hearsay allegations. No one knows the motive behind these calls, or if an arrest was made, or if a conviction resulted. Therefore, these telephone calls should not be considered as evidence of anything.

The Mississippi Supreme Court in *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So. 2d 1186 (Miss. 1994), has already addressed the treatment of 911 "reports" of crime. In *Crain*, the plaintiff argued that a total of 278 "reports" of crimes from around a premises amounted to foreseeability on the part of the owner that an assault on a guest would occur. *Id.* at 1189. However, the *Crain* court pointed out that there were only 11 reports of violent crimes within a five year period and stated **"[t]hese incidents, in and of themselves, hardly seem adequate to put [the owner] on notice that a serious assault upon an invitee was foreseeable."** *Id.* at 1192. The *Crain* court looked past the plaintiff's allegations of foreseeability based on mere reports of crimes and held as follows:

> Assuming, without deciding that Crain made a showing sufficient to establish the foreseeability of the assault, therefore placing on [premises owner] a duty to protect against it, he must still make a showing of proximate cause.... **Crain made no showing that any omission on the part of [the owner] was the proximate cause of the attack or injury. This failure on the part of Crain to make any showing as to proximate cause, an essential element of his claim, makes summary judgment in favor of [the owner] appropriate in this instance.**

Id. at 1192.

Applying the logic in *Crain*, assuming Thomas made a showing sufficient to establish the foreseeability of Thomas' shooting (which Shady Lane denies), therefore placing a duty

on the part of Shady Lane to protect against it, Thomas must still make a showing of proximate cause. This Thomas failed to do. Thomas made no showing that any omission on the part of Shady Lane was the proximate cause of the shooting. Like the court held in *Crain*, this failure on the part of Thomas to make any showing as to proximate cause, an essential element of her claim, makes summary judgment in favor of Shady Lane appropriate in this instance.

Based on Thomas' argument, she would hold Shady Lane to a standard of strict liability for *any* crime committed on their property. To hold Shady Lane liable for a fight between two close friends based solely on hearsay 911 calls would amount to strict liability, which has been expressly rejected by the Mississippi Supreme Court. The *Crain* court held that **"[w]e refuse to place upon a business a burden approaching strict liability for all injuries occurring on its premises as a result of criminal acts by third parties."** *Id.* at 1191. This Court should hold likewise and affirm the grant of summary judgment on appeal.

XII. THE LOWER COURT PROPERLY DISREGARDED THE SPECULATIVE, INADMISSIBLE OPINIONS OF JOHN TISDALE.

Thomas relies on the opinion of her premises security expert, John Tisdale, in support of her argument that Shady Lane's lack of security guards proximately caused Wilson Thomas, Jr.'s death. (R 233) Tisdale concludes in his report that Shady Lane's "failure to have a security guard at the front gate" or "to patrol property" was the proximate cause of Wilson Thomas, Jr.'s death. (R 233) However, the Mississippi Court of Appeals in *Davis v. Christian Brotherhood*, 2007 WL 1334380, discussed *supra*, analyzed the nearly identical statements made by the plaintiff's so-called security expert, Tyrone Lewis. In *Christian*

Brotherhood, Jackson Police Department officer, Tyrone Lewis, submitted a report and affidavit making the conclusory statements:

> The cause of the death of Lucius Davis was the Defendants' failure to have any security guards or other security measures. These security guards would have stopped Troy Younger [shooter] from loitering and starting a fight with Lucius Davis in the parking lot, which preceded Lucius Davis's death.

Id. at ¶ 43. The *Christian Brotherhood* court rejected Lewis' statements by finding that his affidavit violated M.R.E. 702(1) that requires expert opinion testimony to be "based upon sufficient facts or data." *Id.* at ¶ 44. The *Christian Brotherhood* court held as follows:

> We find no evidence in the record to support Commander Lewis's conclusion that security guards would have expelled Troy Younger from the premises of CBA, thereby preventing Younger from shooting and killing Lucius Davis.

Id. at ¶ 47.

Like the court in *Christian Brotherhood* held, this Court should also hold that Tisdale's opinion is not based on any facts in this case and does not create a jury question as to the cause of this shooting. **There is only one proximate cause of this shooting - the intentional and criminal acts of Cornelius Young**. Tisdale's report should not be considered by this Court because expert testimony only offered to put forth a legal conclusion is a waste of time and should be excluded. *See Alexander v. State*, 610 So. 2d 320 (Miss. 1992). **Even a cursory reading of Tisdale's report shows that it was only offered to allege a legal conclusion as to why Thomas was killed. It has no other purpose but to tell the trier of fact how to hold.** The Mississippi Rules of Evidence and Mississippi caselaw clearly exclude the opinion testimony of experts that is presented solely

to put forth a legal conclusion as to an ultimate issue that is not helpful to the trier of fact. (M.R.E. 701, 702, 703 and 704; *see also, Alexander*, 610 So. 2d 320.)

Tisdale is not in a position to determine the cause of Wilson Thomas, Jr.'s death or to assume that a security guard would have stopped an otherwise peaceful tenant (Young) from carrying out a sudden and unexpected shooting against his friend (Thomas). (R 233) Tisdale has no personal, first-hand knowledge of this shooting incident and cannot testify as to what a security guard would have done. Tisdale's opinion does not create a question of fact and is nothing more than an unsupported legal conclusion that is not allowed under Mississippi law. It cannot be argued that Tisdale's report was helpful to the trier of fact when the only reason it was submitted was to set forth a legal conclusion that Thomas asked the trial court to adopt. Tisdale's conclusory report was, therefore, correctly rejected by the trial court.

XIII. THE TRIAL COURT CORRECTLY REJECTED THE UNTIMELY AFFIDAVIT OF THOMAS' WITNESS, SHEAERICA PARKER.

On page 35 of Thomas' brief, she argues that the trial court failed to consider the affidavit of her witness, Sheaerica Parker, in support of her Motion for New Trial, Amendment of Judgment, J.N.O.V. and Motion for Relief from Judgment following the trial court's August 23, 2006 grant of summary judgment. However, what Thomas conveniently fails to mention is that Parker's affidavit was submitted *after* the trial court granted Shady Lane's motion for summary judgment.

Thomas submitted Parker's affidavit in an attempt to re-litigate this case by asking the trial court to consider so-called "new" information from one of her own

witnesses that, more importantly, should have been discovered and could have been discovered before the hearing on Shady Lane's summary judgment motion, especially when one considers the fact that this was one of Thomas' own witnesses. Indeed, Thomas identified Parker as a witness she would call at trial. The Mississippi Supreme Court has made it very clear that attempts by a party to re-litigate a case by claiming the discovery of "new evidence" should rarely be granted and only in exceptional circumstances. *See Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984). The trial court correctly disregarded Parker's affidavit finding that no such exceptional circumstances exist here.

Thomas' attorney submitted an affidavit arguing that Parker was allegedly hostile and that Parker evaded his attempts to serve her with a trial subpoena. (R 586) Most notably, neither Thomas nor her attorney stated that they attempted to meet with Parker in preparation for the trial. This is quite telling when the Court considers that they knew of Parker's address and did in fact ultimately serve her with a trial subpoena.

Thomas and her attorney failed to show how they made diligent efforts to meet with Parker before the trial court's grant of summary judgment. Rule 60(b) of the Mississippi Rules of Civil Procedure requires that a party show that the "newly discovered evidence" could not have been discovered before the dismissal by exercising due diligence. *See Page v. Siemens Energy and Automation, Inc.*, 728 So. 2d 1075, 1079 (Miss. 1998)(movant must show reasonable diligence when submitting new evidence); *Stewart v. State*, 33 So. 2d 787, 789 (Miss. 1948)(movant must show evidence could not have been discovered before dismissal and the evidence would probably produce a different outcome); *Shelby v. State*,

403 So. 2d 338, 340 (Miss. 1981)(movant must show evidence could not have been discovered sooner by diligence).

Thomas and her counsel had nearly seven months to talk to Parker and discover the "new" information alleged in her affidavit. However, they admittedly did not attempt to meet with her. (R 588) Had they been diligent in their efforts to contact Parker, or even try to contact Parker at all, this alleged information would have been discovered prior to the hearing on Shady Lane's summary judgment motion. Thomas and her attorney's failure to talk to their own trial witness, Parker, is **not** a basis for relief. *Stringfellow*, 451 So. 2d at 221 (neither ignorance nor carelessness on the part of an attorney will provide grounds for relief).

The bottom line is that neither Thomas nor her counsel made the required showing of due diligence as to why they did not meet with Parker, a witness Thomas intended to call at trial, until *after* Thomas heard Shady Lane's arguments during the summary judgment hearing and *after* learning of the trial court's ruling. The trial court's grant of summary judgment in favor of Shady Lane and denial of Thomas' Motion for New Trial, Amendment of Judgment, J.N.O.V. and Motion for Relief from Judgment was proper and should be affirmed.

Even if the Court were to consider the allegations of Parker in her affidavit, her statements would not require the reversal of the trial court's grant of summary judgment. Rule 60(b)(3), M.R.C.P. The Mississippi Court of Appeals in *Rankin Circle*, 941 So. 2d 854, and the Mississippi Supreme Court in *Titus*, 844 So. 2d 459, discussed *supra*, held that a premises owner and manager are not liable where the defendants 'furnished the condition'

in which the shooting occurred but did not 'put in motion' the shooting itself." *Rankin Circle* at ¶ 43, quoting *Titus*, 844 So. 2d at 466. Assuming Shady Lane manager, Catherine Washington, made these alleged statements to Wilson Thomas, Jr., which Washington has denied, neither she nor any other employee or owner of Shady Lane was guilty of any active conduct that proximately caused Thomas' death.

Like the defendants in *Rankin Circle*, at most Washington and Shady Lane here merely "furnished the condition" or location in which the shooting occurred, but did not "put in motion" the shooting itself. Shady Lane's actions amounted to, at most, passive negligence, which are non-actionable under *Rankin Circle* and *Titus*. As the trial court correctly held, Thomas failed to put together any set of facts that would show the defendants proximately caused Cornelius Young to shoot and kill Wilson Thomas, Jr. (RE 3:57) Parker's improper and belated affidavit does not change this fact nor the outcome of this case. Therefore, the consideration of Parker's improper affidavit does not require the reversal of the trial court's grant of summary judgment in favor of Shady Lane.

In the final analysis, it is undeniable that the August 1, 2003 shooting death of Thomas was the result of an ongoing feud with Cornelius Young, and that Young was out to get Thomas. Clear proof of Young's motive was his statement to Thomas at the time of the shooting that "I told you I was going to get you." No one could have avoided or prevented this incident, save the parties themselves. This shooting fortuitously happened at the very next place their paths crossed, which just happened to be the Shady Lane apartments. However, it could have just as easily happened somewhere else, such as Wal-Mart, a convenience store or wherever their paths crossed. In that event, no doubt there

would be a different defendant in this case. Regardless, nothing Shady Lane did or did not do proximately caused Cornelius Young to shoot and kill his friend, Wilson Thomas, Jr., during an ongoing feud and summary judgment should be affirmed on appeal.

CONCLUSION

For the reasons set forth herein, Appellees respectfully request the Court to affirm the trial court's grant of summary judgment in their favor, and dismiss this appeal with prejudice, with all costs taxed to Appellant.

Respectfully submitted, this the 22nd day of June, 2007.

THE COLUMBIA GROUP, LLC, THE COLUMBIA GROUP, LLC D/B/A SHADY LANE APARTMENTS, INC.

BY: _____

MICHAEL W. BAXTER (MSB NO. [redacted])
WALKER R. GIBSON (MSB NO. [redacted])

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CERTIFICATE OF SERVICE

I, Walker R. Gibson, do hereby certify that I have this day caused to be delivered via hand delivery, a true and correct copy of the above and foregoing Defendants/Appellees' Brief to:

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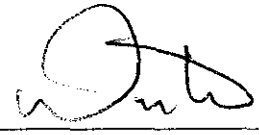
This the 22nd day of June, 2007.



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