

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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

APPELLANT

VS.

CAUSE NO. 2006-CA-01945

**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**

REPLY BRIEF OF APPELLANTS

Oral argument is not requested

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I. CONTESTED STATEMENT OF FACTS

Defendants allege plaintiff's statement of facts is inaccurate and misleading. But, the Plaintiff's statement of facts comes directly from the testimony of the witnesses. "When evidence is in conflict, the jury is the sole judge of both the credibility of a witness and the weight of his testimony." *Walker v. Gann*, 955 So.2d 920, 934 (Miss. Ct. App. 2007) (quoting *Ill. Cent. R.R. Co. v. Hawkins*, 830 So.2d 1162, 1183 (Miss. 2002)).

A. Shady Lane had knowledge that Thomas was an apartment resident.

Defendants deny Thomas was an apartment resident. Multiple witnesses testify that Shady Lane had knowledge that Wilson Thomas, Jr. ("Thomas") was residing at the apartment complex at the time of his death. Thomas was living with his girlfriend Teresa Mitchell ("Mitchell") at Shady Lane. Thomas did not randomly enter Shady Lane as a trespasser on August 1, 2003. Mitchell testified that Thomas had been living with her at Shady Lane for about two years. (R. 105, pg. 5, ln. 24 – pg. 6, ln. 2). He returned home from work the day he was killed around three or four p.m. (R.107, pg. 14, ln. 14). Mitchell testified Shady Lane knew Thomas was living with her (R. 127, pg. 95, ln. 14-15; pg. 95, ln. 18 to pg. 96, ln. 3) and never asked Thomas to leave (R. 105, pg. 7, ln. 23).

Witness Sheaerica Parker ("Parker") testified that Thomas had been dating Mitchell for "about three years [and] he had been staying with her about that long." (R. 137, pg. 7, ln. 4-9). Parker also testified that the apartment manager, Catherine Washington ("Washington"), was aware Thomas was residing with Mitchell. (R. 137, pg. 7, ln. 10-12).

Witness Chakila Kyles ("Kyles") testified that Thomas had been living with Mitchell at Shady Lane for a couple years and that manager Washington was aware Thomas was residing at Shady Lane. (R. 160, pg. 17, ln. 17-20, 22; pg. 18, ln. 14-19; pg. 19, ln. 2-4). The evidence

establishes Thomas was residing at Shady Lane with his girlfriend Mitchell for several years. Nowhere in the testimony did anyone testify that Washington considered Thomas a trespasser or that management tried to remove him from the apartments.

B. After security guards were discontinued at Shady Lanes crime worsened

In 2000 Shady Lane stopped using security guards at the front gate and in 2001 installed monitoring cameras (R. 188, pg. 75, ln. 21-24) to save the company money (R.189, pg. 77, ln. 8-13). Shady Lane began using monitoring cameras as the only form of security for the property. (R.190, pg. 83, ln. 16-19). Plaintiff's contention that crime increased after the installation of the camera system is not based on pure opinion testimony, it is supported by the Yazoo County Sheriff's office record "Shady Lane Calls for Service (10/93-8/03)." (R. 240-390). Nearly every month since security guards were discontinued, even after the monitoring cameras were installed in 2001, a violent crime occurred at Shady Lane. (R. 241-243). This includes a double homicide in December 2002. (R. 243, 362).

C. Young was a trespasser at the time of the shooting

Witness testimony shows Cornelius Young ("Young") was placed on a "banned" list after he first assaulted Thomas on July 25, 2003. Testimony shows Washington stated she was banning Young from entering Shady Lane. (R. 109, pg. 24, ln. 5; R. 110, pg. 25, ln. 17-18; R. 119, pg. 61, ln. 15-16; R. 129, pg. 102, ln. 4-8; R. 160, pg. 19, ln. 19 to pg. 20, ln. 16). Washington started informing residents on the Monday, after the first shooting of Thomas by Young, that effective immediately Young was banned from the property. (R. 116, pg. 39, ln. 9-15; R. 145, pg. 38, ln. 22 to pg. 39, ln. 3; R. 151, pg. 62, ln. 19-25). Washington also stated she was evicting Young's mother and family from the property. (R. 109, pg. 24, ln. 9; R. 110, pg. 25, ln. 19-24; R. 153, pg. 72, ln. 11-23). Also, Washington evicted Young's girlfriend, Michelle

Richardson, who was fighting with Young. (R. 140, pg. 17, ln. 20 to pg. 18, ln. 8; R. 161, pg. 22, ln. 10-12). Washington stated publicly she would evict any resident who allowed Young to come to their apartment. (R. 140, pg. 17, ln. 18-23; R. 145, pg. 38, ln. 21 to pg. 40, ln. 3; R. 153, pg. 72, ln. 15-18). This evidence proves Young was a trespasser at the time of the second shooting on August 1, 2003. Evidence shows Young was banned from the property and was not welcome to return to any apartment.

D. Shady Lane manager Washington promised to provide security

Witness testimony proves Washington promised residents she would immediately get security at the gate to specifically prevent Young from entering Shady Lane and assaulting Thomas again. (R. 110, pg. 26, ln. 13-20; R.113, pg. 38, ln. 4-21; R. 119, pg. 62, ln. 1-15; R. 137, pg. 6, ln. 2-12; R. 145, pg. 39, ln. 21 to pg. 40, ln. 3; R. 151, pg. 62, ln. 19-25; R. 431). Washington conveyed this information to Thomas and other residents. (R. 586-587).

Mitchell testified:

Q: [W]hat I'm asking is, you're saying that she said, "I'm going to take some steps to do some things to keep [Young] off the property, right?

A: Um-hum (yes)

Q: Was she doing that because [Young] had shot [Thomas] the week before or a couple of days before?

A: She was doing it because – she was doing it because from the first shooting.

Q: That's what I'm asking... she didn't come to you and say, "I'm just going to add security" cause she just decided to add security?

A: No.

Q: It was because [Young] had shot [Thomas]?

A: Um-hum. (yes)

Q: You've got to say yes or no.

A: Yes.

(R. at 113 pg. 39, ln. 19 to pg. 40, ln. 19)

E. Shady Lane manager Washington admitted failure to provide security caused Thomas' death

Witnesses testify Washington admitted Young would not have killed Thomas if she had done what she said she was going to do by putting a security guard at the gate and enforcing the banned list. (R. 432 and R. 143, pg. 29, ln. 10 to pg. 30, ln. 1). She admits that, "I should have kept him [Young] off the property" (R. 142, pg. 28, ln. 19) and she admits that if she had kept Young off the property Young would not have killed Thomas. (R. 143, pg. 29, ln. 1-17; R. 168, pg. 50, ln. 24 – pg. 51, ln. 3). She states that having security at the gate would have made a difference preventing Young from shooting Thomas. (R. 143, pg 29, ln. 10 to pg. 30, ln. 10). Thomas was shot inside Shady Lane's common area within the view of the guard station at the front gate – the only entrance to Shady Lane. (R. 157, pg. 6, ln. 3-5). If a guard were in the guard station they would have control over if Young was to enter the premise and could have stopped him. Washington also admits that having the security at the gate would have prevented Young from entering the property and prevented Young from killing Thomas. (R.143, pg. 29, ln. 18 to pg. 30, ln. 3). (*See also*, R. 113, pg. 37, ln. 1-9; R. 134, pg. 123, ln. 5-9, 20-22; R. 168, pg. 50, ln. 11-15 and pg. 51, ln. 1-3).

These contested statements of fact are material and relate to proximate cause. The finder of fact must weigh the testimony. A "[m]otion for summary judgment should be denied unless it is established **beyond a reasonable doubt** the plaintiff would be unable to prove any facts to support the issues presented in the complaint." *Branch v. State Farm Fire and Casualty Co.*, 759 So.2d 430 (Miss. 2000). "Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite." *Titus v. Williams*, 844 So.2d 459, 464 (Miss. 2003).

Defendants claim Thomas was under the influence of alcohol and high on cocaine at the time of his death. While the autopsy toxicology report indicates some amounts of alcohol and cocaine in Thomas' system there is no testimony that these factors caused or contributed to the shooting. These points are immaterial unless they are a proximate cause of Thomas' injury. *Cf. Edwards v. World Wide Personnel Services, Inc.*, 843 So.2d 730, 733 (Miss. App. 2002). The proximate cause of Thomas' death was Shady Lane's failure to hire a security guard to enforce the ban list. Thomas' death was not proximately caused by any drug use or alcohol use. The defendant is attempting to prejudice this court against the plaintiff by incorrectly directing the court to inadmissible facts and it should be ignored as non-material to the case.

II. THOMAS MEETS THE BURDEN OF PROOF

Defendants argue that plaintiff cannot prove proximate cause. They are wrong. The proximate cause of Thomas' death was Shady Lane's failure to provide a promised security guard and enforce the banned list. Had Shady Lane fulfilled its promise and provided security at the front gate, banned Young and enforced the ban as promised Young could not have entered the property. Management had notice of the first shooting and promised to put the shooter, Young, on the banned list and have security guards work the gate to prevent his entrance. They did not follow up on their promise which proximately caused the second shooting. Premises security experts John Tisdale ("Tisdale") and Tyrone Lewis ("Lewis") presented the unchallenged opinion that failure to provide security and enforce the banned list was the proximate cause of Thomas' death. (R. 233; R. 238).

Premises security expert Tisdale presented opinions that state that the negligent acts of Shady Lane proximately caused the death of Thomas.

Management was going to get a security guard to monitor the front gate from 5 pm to 8 am to stop trespassers, they were going to put

Young on the list of people banned from the property and enforce it with security. They were going to evict Young's mother and girlfriend so Young would have no excuse to come to the property. All witness statements indicate this was not done and the failure to do this allowed Young to come onto the property and shoot Wilson the second time.... **Management's failure to follow through with security proximately caused the second shooting of Wilson Thomas.**
(R. 232-233).

Tisdale's expert conclusions submitted into evidence are as follows:

1. **Failure to have a security guard at front gate deterring Young from entering as promised by management.**
 2. **Discontinuing security guards** to patrol property and secure front gate at night.
 3. Failure to place a security guard or any other person at the front gate to monitor entrance and exit of people by use of the banned list as promised or **failure to enforce the "banned" list**
 4. Failure to institute a sign in or check in policy at front gate for all persons entering property
 5. Relying on monitoring cameras at property at night instead of actual security presence
 6. Discontinuing security guards in 2000 to save money since physical presence is greater deterrent than cameras.
 7. Not evicting the family and girlfriend of Young from property to eliminate excuse for Young to come to property
- (See, R. 231).

Premises expert Lewis also found that the negligence of Shady Lane proximately caused the death of Thomas. (R. 234). He found that Shady Lane's failure to place security at the gate to prevent Young's re-entry and failure to enforce the banned list along with several other factors caused the death of Thomas. (R. 238).

III. THE ABSENCE OF A SECURITY GUARD WAS ONE OF THE PROXIMATE CAUSES OF THOMAS' DEATH.

A. No proof of a feud over a girl in the record

Defendants' claim this case is a feud over a girlfriend and the facts are identical to *Martin, et al. v. Rankin Circle Apartments, et al*, 941 So.2d 854 (Miss. App. 2006). The facts

refute this contention. **No testimony in the record shows a feud over a girl or a general feud as defendant falsely alleges.** No witnesses testified Wilson was dating anyone at Shady Lane but Mitchell. Witness testimony does indicate that the shooter, Young, was dating both Richardson and her daughter. (R. 138, pg. 9, ln. 18 to pg. 10, ln. 3). The record is full of proof showing there was **no feud over a girl and no general feud** as the defendant alleges. Witness Parker testified Thomas and Young were not feuding.

Q: All right. Do you know if he [Thomas] was at war with [Young] or trying to kill [Young] before this occurred?

A: No. No.

...

Q: Was [Thomas] after [Young] in any way that you know of?

A: No.

...

Q: So this was a personal fight between these two guys, a feud?

A: No, it wasn't no -- it wasn't no personal fight.

...

Q: Okay. So at the second shooting -- I'm trying to clarify it. Walker has asked you several times, well, they were feuding and they weren't getting along, but that's not what I'm hearing.

A: [Thomas] did not have no problem with [Young].

(R. 143, pg. 32, ln. 6-9; R. 146, pg. 44, ln. 12-16; R. 153, pg. 71, ln. 21 -- pg. 72, ln. 2).

Mitchell also testified there was no feud:

Q: Do you know anything about [Thomas] trying to injure or hurt [Young] before this?

A: No, sir.

Q: Was [Thomas] after [Young]?

A: No, sir.

Q: Do you know anything about that at all.

A: No, sir.

Q: All right. So you haven't heard anything or you're not aware of [Thomas] being after [Young]?

A: No, sir.

(R. 119, pg. 63, ln. 18 -- pg. 64, ln. 5).

Rosie Thomas also testified that there was no feud:

Q: [T]here was a feud going on between those two over something. Correct?

A: No.

Q: Not to your knowledge?

A: Not to my knowledge.

(R. 401, pg. 43, ln. 8 – 12).

The defendants deliberately try to misrepresent the testimony of witness Kyles saying she confirmed an ongoing feud. That is not what she testified to. She testified that the first shooting stemmed from Thomas trying to break up a fight between Young and Young's girlfriend.

Q: All right. Tell me what you know about how that [first shooting] occurred?

A: [Young] and his girlfriend was fighting or whatever and [Thomas] was trying to break it up and that's how he [Thomas] got scraped with the gun the first time.

(R. 158, pg. 9 ln.18-23).

Q: So you don't know why [Thomas] and [Young] were fighting, do you?

A: Yeah.

Q: Why was that?

A: Because when they [Young and his girlfriend] were fighting, [Thomas] was trying to break it up.

Q: So that was a personal matter? That was a domestic dispute, right? [between Young and his girlfriend]

A: Um-hum. (Affirmative).

Q: That was something going on between [Thomas] and [Young] and Michelle [Richardson]?

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

(R. 164, pg. 33, ln. 17- pg. 34, ln. 6).

This testimony proves that Thomas was not participating in any feud or inciting trouble before he was killed a week later by Young. Thomas merely tried to break up a fight and was shot because he interfered. After the first shooting on July 25, 2003 occurred Shady Lane promised to put security at the gate to specifically keep Young off the property and away from Thomas. Shady

Lane's failure to put the guard at the gate therefore becomes a proximate cause of Thomas' death.

B. Plaintiff was not in a position to "observe and fully appreciate the peril"

Defendants speculate Thomas was in a position to "observe and fully appreciate the peril that was imminent." *Martin*, 941 So.2d at 864. No testimony in the record indicates Thomas was aware of the pending second attack. Defendant follows *Martin* to say Thomas was at fault because he could fully appreciate that he was going to get shot. No testimony in the record shows Thomas was "fully cognizant of the developing dangers around him." *Id.* at 863. Witness Kyles stated Thomas had told her he had forgotten about the first shooting incident and was moving on. (R. 164, pg. 36, ln. 11-15). Thomas was sitting on his bicycle in the general grassy area inside the front gate speaking to friends when Young, who was banned from the property, came through the gate, passed the unmanned guard booth, approached Thomas, and shot him. (R. 141, pg. 22, ln. 23 – pg. 24, ln. 21; R. 157, pg. 5, ln. 19 – pg. 8, ln. 20). The mere fact that Thomas had returned to his residence at the end of the workday and was in the common area riding his bike and conversing with others does not prove he would be able to fully appreciate the peril of a pending attack. A week had passed since Young first assaulted Thomas – Thomas was not evicted but Young was evicted. Thomas had filed charges against Young with the Sheriff's Department. Thomas would have no reason to believe he was in danger because management had promised to keep Young off the property.

In *Martin* the decedent had been coming and going from the property getting mixed up in his girlfriend's fight with another woman all day long on and off the property. But Thomas was minding his own business riding his bike in a common area at Shady Lane a week after the first shooting when Young illegally entered Shady Lane. Washington's choice to not put a

security guard at the gate to prevent Young from entering the property and to not enforce the banned list after she promised to directly allowed Young to approach and shoot Thomas. The proximate cause issue in *Martin* is not similar to this case.

IV. SHADY LANE CREATED A DUTY TO PROTECT THOMAS FROM YOUNG BY PROMISING SECURITY

In this case resident Thomas is classified as an invitee. It is clearly established Mississippi law that apartment tenants are “invitees” and the guests of apartment tenants using common area are also “invitees.” *Minor Child ex rel. John Doe v. Mississippi State Federation of Colored Women’s Club Housing*, 941 So.2d 820 (Miss. 2006). *Lucas v. Mississippi Housing # 8*, 441 So.2d 101 (Miss.1983). *See, Joiner v. Haley*, 777 So.2d 50 (Miss. 2000) (Landlord had duty to extend to tenant and her invited guests reasonably safe premises). “Where the owner . . . expressly or impliedly reserves . . . entrances, halls, stairways, porches and walks, for the common use of different tenants, it is landlord’s duty to exercise reasonable care to keep safe such parts over which he reserves control, and, if he is negligent in this respect, and personal injury results to a tenant *or to a person there in the right of the tenant*, he is liable in tort.” *Lucas* at 103 (citing 32 Am.Jur., Landlord and Tenant, Section 688) (Emphasis added). The landowner owes the invitee the duty to keep the premises reasonably safe, to use reasonable care to prevent his injury and to warn where there is hidden danger or peril that it is not in plain and open view. *Little v. Bell*, 719 So.2d 757, 760 (Miss.1998).

Shady Lane held a duty to Thomas because they publicly promised they would protect him from Young. Restatement Second of Torts section 324A states,

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm **resulting from his failure to exercise reasonable care to protect his undertaking**, if (a) his

failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Witness Parker testified that Washington stated, "I'm going to put [Young] on this [banned] list. I'm going to make sure he don't come back out there." (R. 137, pg. 6, ln. 5-10). "Like she'll call everybody to the office... when the first shooting she had everybody in the office...and when she was talking about shooting and stuff and she was telling her people that stay out there in Shady Lane when she put people on the banned list, she mean she don't want them out there." (R.138, pg. 10, ln. 25 to pg. 11, ln. 12); "the reason I say she know about everything cause that's just like what we going through now with [Thomas] and them, the night that – it was a weekend. Monday morning she was calling everybody to the office from that first shooting." (R.139, pg. 16, ln. 10-14). See also, "I'm going to make sure that [Young] don't come out here no more." (R. 139, pg. 16, ln. 13-18). See also Parker's testimony,

Q: So the first shooting was Friday night?

A: Um-hum (yes)

Q: Monday Ms. Washington knows about it?

A: Yes she knew.

Q: Tell me what you heard her telling everybody Monday morning after the first shooting.

A: That she- she's passing out some lists and if [Young]– if [Young] - if anybody on this list be caught in your house, you will be evicted.

(R. 140, pg. 17, ln. 9-20)

Q: Between the first shooting and the second shooting, did you ever hear Ms. Washington talking about banning [Young] from the property?

A: Yes. She had—she banned him that Monday.

Q: Did she have a meeting or she call people up? How did she go about telling people that he was banned?

A: She called everybody to the office.

(Lines 10 –16 omitted for space)

Q: And so she called people up there and said, "Look, here's the problem and I'm going to put a stop to it?"

A: Um-hum. “[Young] is not allowed on these premises. If he be— if I hear that he’s been anybody apartment out here, they will be evicted.

Q: And was that because...

A: This is because of the first shooting.

(R. 145, pg. 38, ln. 22 to pg. 40, ln. 1).

Washington’s failure to follow through with this promised protection proximately caused Thomas’ death. Washington “made the effort. She just didn’t enforce it.” (R. 119, pg. 63, ln. 16-17).

Defendants deny responsibility and blames Thomas for not observing and fully appreciating the peril of being shot by Young a second time. They also claim his status is “irrelevant” and Shady Lane has no duty to warn or protect Thomas under *Martin*, 941 So.2d at 863 because Thomas “knowingly interjected himself into a peril that he not only observed, but helped create.” To the contrary, Thomas had no reason to think he was in jeopardy. The testimony of witnesses showed Shady Lane had undertaken and promised to ban Young from the premises, Young’s mother would be evicted, and security would be hired to enforce the banned list. Based on this promise why would any tenant or guest be worried about Young. Witness Kyles testified that Thomas was not worried about Young. “[Thomas] had already said, he said, ‘I’m over that, you know.’” (R. 164, pg. 36, ln. 6) and “I’m going to forget about it.” (R. 164, pg. 36, ln.14). There is no testimony in the record showing Thomas was able to appreciate being attacked by Young a second time since Thomas and all other guests were relying on the statements of the manager Washington to keep Young off the property. The testimony shows that Thomas was not worried about an attack, a week later he was not initiating any trouble with Young, and he assumed he was protected at Shady Lane due to Washington’s promise to get a security guard.

V. YOUNG’S ATTACK WAS NOT A SUPERSEDING, INTERVENING, AND INDEPENDENT CAUSE OF THOMAS’ DEATH

Shady Lane’s intentional acts to promise security against Young specifically and then its choice to not put it in place directly caused Young to enter the property and shoot Thomas. Young’s act was not a superseding, intervening, and independent cause of Thomas’ death. Young was able to enter the property because the manager, who stated specifically that she was going to get security to keep Young from entering the property, did not do so. A superseding intervening cause is “[a]n event that comes between the initial event in a sequence and the end result, thereby altering the natural course of events that might have connected a wrongful act to an injury.” Black’s Law Dictionary (8th ed. 2004). Shady Lane’s choice to not follow through with a promise of security allowed the shooting to occur. The proximate cause of Thomas’ death was Shady Lane’s failure to follow through with security measures promised to keep Young from the property. See testimony of Parker,

Q: Between the first shooting and the second shooting, did you ever hear Ms. Washington talking about banning [Young] from the property?

A: Yes. She had—she banned him that Monday.

Q: Did she have a meeting or she call people up? How did she go about telling people that he was banned?

A: She called everybody to the office.

(Lines 10 –16 omitted for space)

Q: And so she called people up there and said, “Look, here’s the problem and I’m going to put a stop to it?”

A: Um-hum (Yes). “[Young] is not allowed on these premises. If he be—if I hear that he’s been anybody apartment out here, they will be evicted.

Q: And was that because...

A: This is because of the first shooting.

(R. 145, pg. 38, ln. 22 to pg. 40, ln. 1).

Washington’s failure to follow through with this promised protection proximately caused Thomas’s death. The absence of a security guard as stated in *Martin* and *Davis v. Christian*

Brotherhood is not in itself negligence under certain circumstances. But the absence of a security guard who is promised for the sole purpose of preventing a specific person from entering the property must be considered an issue of proximate cause. “If the security guard was out there when [Young] was trying to come through the gates, he wouldn’t have never got through the gates in the first place.” (R. 129, pg. 101, ln. 16-19). Defendants want the rule to be no security guard is ever able to prevent a crime. But there must be liability if a specific promise for protection is made and then broken.

VI. SHADY LANE’S DIRECT ACTS OF NEGLIGENCE CREATE LIABILITY

Defendants argue Shady Lane’s negligence, if any, was passive and Shady Lane’s actions were not concrete acts that caused the death of Thomas. Shady Lane’s acts of negligence were not passive acts. Shady Lane committed intentional and willful actions by **promising to protect Thomas** from Young and then choosing not to make good on the promise. After the first shooting Washington stated, “[s]he won’t have stuff like that going on on Shady Lane property, that she was going to get security.” (R. 108, pg. 18, ln. 10-12). “She said that she was going to get security.” (R. 113, pg. 39, ln. 8-10). Washington stated she was going to bar Young from the property. (R. 109, pg. 24 ln. 5-6). “She said, ‘I’m going to make sure that [Young] don’t come back out here no more.’” (R. 139, pg. 16, ln. 17-18). “She said that she was going to get [security] to keep [Young] barred from off Shady Lane premises so he wouldn’t be allowed on Shady Lane, but she never did.” (R. 113, pg. 38, ln. 18-21). Active negligence has been defined as actively “**participating in some manner in conduct or omission which caused injury.**” *Titus*, 844 So. 2d at 466 (citing *Hughes v. Star Homes, Inc.*, 379 So.2d 301, 304 (Miss. 1980)). Shady Lane’s failure to provide promised security to specifically keep Young off the property is a “participating” that actively caused Thomas’ death. Washington “made the effort. She just

didn't enforce it." (R. 119, pg. 63, ln. 16-17). Witness Parker testified Washington admitted not following through on her promise to get security to keep Young off the property and that caused Thomas' death. Witness Parker testified:

Q. Who did she tell, "I should have kept him [Young] off the property"?

A. She saying that to everybody that standing round in the little group, which is me, Chakila and a couple more people.

Q: And did she say that if she had kept him [Young] off the property then [Young] couldn't have shot [Young]

A:.. he'll [Thomas] still be here.

Q: That's what she said?

A: He'll [Young] still be here if she would have put some force to it.

Q: What do you mean put some force to it?

A: Put her feet down.

Q: About keeping him [Young] off the property?

A: Off the property

(R. 142, pg. 28, ln. 19 to pg. 29, ln. 17).

Washington stated she would ban Young and get security to prevent his re-entry. (R. 118, pg. 58, ln. 16). **Washington admitted, "She knew something like this was going to happen"** (R. 134, pg. 123, ln. 21). **Washington admitted after the murder of Thomas, "I should have kept him [Young] off the property."** (R. 142, pg. 28, ln. 20 to pg. 29, ln. 11).

VII. PROXIMATE CAUSE IN THIS CASE IS A JURY QUESTION

Plaintiff proved a correlation between Shady Lane's promise to get a security guard to specifically keep Young off the property, its promise to place Young on the banned list and enforce it, and its failure to complete the promises. The evidence proves Young was able to enter Shady Lane because no security guard was at the gate to stop Young. Remember Shady Lane has only one entrance and this entry has a guardhouse. The rest of the property is completely gated. So there is only one way in and one way out, which is past the guardhouse. In a Summary Judgment Motion proximate cause is not at issue. The Court is not trying the case.

All Thomas must show is a question of material fact for the jury to review. To this end Thomas's experts Tisdale and Lewis submitted uncontested reports testifying the proximate cause of Thomas's death was Shady Lane's failure to put security at the front gate to keep Young off the property and failure to enforce the banned list that Young was listed on. (R. 233 and R. 238). Shady Lane's manager Washington testified that if she had kept Young off the property then Young could not have shot Thomas. (R. 142-43, pg. 28, ln. 19 to pg. 29, ln. 17). Witness Parker testified that Young would not have come on the property if security had stopped him at the gate because he would have obeyed a person with a suit, badge, and gun. (R. 143, pg. 30, ln. 3-23). Parker also testified that Young was afraid of the manager and would have listened to her to stay off the property if told to do so since everyone respected her and would not "buck" her. (R. 144, pg. 34, ln. 12 to pg. 35, ln. 25). Under these fact scenarios the Mississippi Supreme Court has left the final determination of proximate cause solely up to the jury. **"When reasonable minds differ on the matter, questions of proximate cause and of negligence and of contributory negligence are generally for determination of jury."** *American Creosote Works of Louisiana v. Harp*, 60 So.2d 514 (Miss. 1952). "Proximate cause of injury need not be established by direct or positive evidence, but may be proved by circumstantial evidence. Evidence both direct and circumstantial, causally connecting injury with accident was sufficient to warrant jury finding that accident was proximate cause of injuries suffered...." *Dr. Pepper Bottling Company of Mississippi v. Bruner*, 148 So.2d 1999 (Miss. 1962).

In support of its finding of no proximate cause the trial court made a broad based personal generalization assuming no proximate cause existed based on the Court's prior personal experiences with HUD projects and totally ignored the case specific facts of Thomas's case. The trial court said,

This *Martin* case is on all fours with the case here. You have a HUD project. You have the same situation in Martin that we have here. **You've got that same crime situation in every HUD project that I know anything about.** In fact, in my district, the last killing was a doper who had spent all his money on beer and crack cocaine, and came back to the project, was sitting around there, and another doper who had spent all his money on crack cocaine, pulled a nine millimeter, said give me what you got. Well, he didn't have anything to give. He shot him right in the mouth, took him about two minutes for him to pump out. Had a pool of blood on the floor big as this desk. That crime situation got him in the wrong place at the wrong time. **That's a common, garden variety happening at one of these HUD projects. The status of the deceased, Chuck is his nickname, doesn't make any difference.**

(See pg. 54-55 of transcript from Second Motion for Summary Judgment hearing). The previous trial court ruling under a different judge denied the defendant's motion for summary judgment and determined proximate cause was for the jury. The second judge determined the opposite based on personal feelings and not on the facts in the record. The facts in Thomas create an issue of proximate cause for the jury.

VIII. THE LATEST MISSISSIPPI APPELLATE CASE INVOLVING A PREMISES SHOOTING IS NOT ON POINT WITH THIS CASE

Defendants assert this case is the same as *Davis v. Christian Brotherhood* on two bases: lack of proximate cause and heat of the moment domestic quarrel. The defendants are incorrect. In *Davis v. Christian Brotherhood Homes of Jackson, et al.*, ___ So.2d ___, 2007 WL 1334380 (Miss. App. Ct. 2007) the court struck the affidavit of expert Lewis and then determined that the shooting was not proximately caused by lack of security based on the absence of admissible expert opinion on proximate cause. In *Davis*, the plaintiff had no specific fact witness testimony to support the proximate cause issue. The grant of summary judgment in *Davis* by excluding an affidavit does not equate to a grant of summary judgment in this case. Thomas presented lay witness and expert testimony supporting the proximate cause claim. In this case there is a

genuine issue of material fact as to negligence supported by fact witness testimony. In this case two experts provided un-refuted admissible opinions regarding the preventability issue. The trial court denied the defendant's Motion to strike the expert reports of Tisdale, Lewis and the 911 calls. (R. 521 and Appellant's record excerpt 2). Witnesses Parker, Kyles, and Mitchell have testified that the manager, after the first attack of Thomas, made a specific promise to get security at the property entrance to prevent Young from entering the property, ban Young from the property, evict Young's family, and to prevent any subsequent attack on Thomas. (See pg. 24-26 of Appellant's Brief for a chain of statements already cited). Parker testified that manager Washington admitted after Thomas was shot the second time she could have prevented the shooting if she had followed through on her promise to do something. (R. 142-43, pg. 28, ln. 19 to pg. 29, ln. 17).

This case was not an unexpected heat of the moment domestic quarrel between Thomas and Young. In *Davis* the court held that there was no proximate cause because nothing the defendant's did or did not do would have stopped the shooting. *Id.* at ¶ 41-42. In this case, multiple witnesses have testified if security had been put in place as promised this shooting would not have occurred. Witness Parker specifically testified:

Q. Who did she [manager Washington] tell, "I should have kept him [Young] off the property"?

A. She saying that to everybody that standing round in the little group, which is me, Chakila and a couple more people.

Q: And did she say that if she had kept him [Young] off the property then [Young] couldn't have shot [Young]

A:.. he'll [Thomas] still be here.

Q: That's what she said?

A: He'll [Young] still be here if she would have put some force to it.

Q: What do you mean put some force to it?

A: Put her feet down.

Q: About keeping him [Young] off the property?

A: Off the property
(R. 142, pg. 28, ln. 19 to pg. 29, ln. 17).

A: The security would have made a difference for him. He'll still be here. 'Cause [Young] wouldn't have came out there in them gates if we had security.

...

Q: Why would [Young] have not come on anyway?

A: 'Cause he would have turned around 'cause once he looked at that lease and see Young on there, he would have told him, "You're not allowed out here," and [Young] would have took off.
(R. 143, pg. 29, ln. 23 – pg. 30, ln. 1, 4-10).

Witness Kyles testified:

Q: [I]f there was a security guard there for the second shooting, would [Young] have been able to get on the property and shoot him?

A: No.

(R. 168, pg. 52, ln. 12-15).

Q: All right. So if she had banned him -- if Ms. Washington had banned him from the property and then she was there when he was trying to come on, would he have pushed through Ms. Washington or would he have listened to her?

A: No, he would have left. He would have left. He would have listened to her.

(R. 169, pg. 53, ln. 13-20 (ln. 18 omitted)).

Thomas's mother testified:

Q: How would a security guard have prevented this?

A: ... if the security guard is there and keeping down the crimes and keeping an eye on the tenants and then the one that's coming in got -- watching the one that's coming, in screening the one that's coming in. And the one that they consider as a criminal, they wouldn't let in. And the one that's not resident out there shouldn't be there.

(R. 402, pg. 47, ln. 15-25).

And Thomas's girlfriend Mitchell testified:

Q: How would a security guard have stopped [the shooting]?

A: How would -- because if the security guard was out there when [Young] was trying to come through the gates, he wouldn't have

never got through the gates in the first place.
(R. 129, pg. 101, ln. 14-19).

Unlike *Davis*, in this case there was something that the defendant's did not do that they promised to do that would have made a difference. Testimony shows that had Shady Lane followed through with the security promised Thomas would not have been shot a second time on August 1, 2003 at Shady Lane. Washington told residents, "I should have kept him [Young] off the property." (R. 142, pg. 28, ln. 20-21). This statement alone distinguishes this case from the facts in *Davis*.

IX. SHADY LANE BREACHED A DUTY OWED TO THOMAS

As a resident of Shady Lane Thomas was an invitee. Defendants call Thomas a licensee but the facts dispute their contention. Thomas was living at Shady Lane for at least two years. Manager Washington was aware Thomas was residing at the complex. Mitchell testified:

Q: [T]hey didn't know he was a tenant. They didn't know he was living with you.

A: Ms. Washington knew.

Q: How do you know that?

A: I know she knew.

Q: How do you know that? How do you know what Ms. Washington knew?

A: I know.

Q: How is that?

A: 'Cause she seen him up there with me. She done seen him come and go from my apartment. She done been out there.

(R. 127, pg. 95, ln. 14-15; pg. 95, ln. 18 to pg. 96, ln. 3).

Parker testified that Washington knew Thomas was staying with Mitchell.

Q: Do you know if Ms. Washington knew that [Thomas] was staying out there?

A: Yeah, she knew

(R. 137, pg. 7, ln. 10-12).

Q: All right. How do you know that she knew?

A: Because that's automatic. She got to let -- she -- you got to let her know if you got live-ins, so went up there and talked to her and

told her.
(R. 137, pg. 7, ln. 14-19).

Kyles also testified Washington knew Thomas was living at Shady Lane. (R. 160, pg. 17, ln. 17-20). Kyles stated that Washington was aware of what was going on around the complex. “She know everything. She be knowing.” (R. 160, pg. 17, ln. 22; See also R. 160, pg. 18, ln. 14-19; pg. 19, ln. 2-4). **“An occupant is an invitee where the owner of the premises and the occupant receive mutual benefits.”** *Leffler v. Sharp*, 891 So.2d 152, 157 (Miss. 2004) (citing *Corley v. Evans*, 835 So.2d 30, 37) (Miss. 2003) (emphasis added). Thomas provided benefit to Shady Lane by paying maintenance fees (R. 106, pg. 10, ln. 6 – pg. 11, ln. 20) and laundry fees (R. 106, pg. 9, ln. 13 – ln. 24). Whether or not Thomas was on the lease he was an invitee at Shady Lane because the owner of the premises and Thomas received mutual benefits. A commercial property owner owes a duty to an invitee to use ordinary care to protect them from reasonably foreseeable dangers (in this case, preventable criminal conduct). *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So.2d 1186 (Miss.1994); *O’Cain v. Freeman & Sons, Inc. of Mississippi*, 603 So.2d 824 (Miss.1991); *May v. VFW, Post No. 2539*, 577 So.2d 372 (Miss.1991); *Grisham v. John Q. Long VFW Post*, 519 So.2d 413 (Miss.1988); *McWilliams v. City of Pascagoula*, 657 So.2d 1110, 1111-1112 (Miss.1995); *Gibson v. Wright*, 870 So.2d 1250 (Miss.2004). Where there are disputed facts the determination of the status of a plaintiff is a jury question. *Leffler*, 891 So.2d at 156. The defendant’s contention that Washington claimed Thomas to not be a tenant and that she had no knowledge of him living at the complex is disputed by fact witness testimony. The jury should determine the issue of Thomas’s status and its relation to proximate cause.

X. YOUNG'S CRIMINAL ACTS WERE FORESEEABLE BY 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. *Price v. Park Management, Inc.*, 831 So.2d 550, 551 (Miss. App. 2002); *Crain*, 641 So.2d at 1188; and *Grisham*, 519 So.2d at 416. In this case, Thomas has shown both that Shady Lane had constructive knowledge of the assailant's violent nature and that there was knowledge of an atmosphere of violence on the premises. Young was engaged in a fight with his girlfriend in a common area of the complex on July 25, 2003, when Thomas tried to break up the fight he was shot by Young. This incident gave Shady Lane constructive knowledge of Young's violent nature. Witness testimony shows Washington held actual notice of the July 25, 2003 incident. Testimony shows that immediately after the first shooting by Young manager Washington was made aware of the first shooting and acknowledged that the problem with Young entering the property had to be fixed. (R. 113, pg. 37-40; R. 137, pg. 6; R. 140, pg. 17-18; R. 137, pg. 6, ln. 6). Parker testified:

Q: So the first shooting was Friday night?

A: Um-hum (yes)

Q: Monday Ms. Washington knows about it?

A: Yes she knew.

Q: Tell me what you heard her telling everybody Monday morning after the first shooting.

A: That she- she's passing out some lists and if [Young]- if [Young]- if anybody on this list be caught in your house, you will be evicted.

(R. 140, pg. 17, ln. 9-20).

Washington stated she would ban Young and get a security guard to prevent his re-entry. (R. 118, pg. 58, ln. 16). **Washington admitted, "She knew something like this was going to happen."** (R. 134, pg. 123, ln. 21). **Washington admitted after the murder of Thomas, "I**

should have kept him [Young] off the property.” (R. 142, pg. 28, ln. 20 to pg. 29, ln. 11).

Defendants argue no parties or witnesses considered Young dangerous. It does not matter what people thought about Young. “Foreseeability” is about what the defendant knows or should reasonably expect to indicate upcoming criminal acts. Washington’s statement after the first shooting that she was getting security and banning Young from the property and evicting his family is either direct or circumstantial inference of her awareness of Young’s dangerous propensity. That is why she was promising to make attempts to prevent a subsequent shooting or assault of Thomas. If Washington was not anticipating any problems from Young, why was she promising to institute a banned list, evict Young’s family, and keep Young off the property? Washington’s statements alone indicate she anticipated more problems from Young.

Additionally, Thomas submitted Yazoo County Sheriff’s office calls for service for Shady Lane Apartments and its surrounding area. It shows that from October 1993 to August 2003 there is a common pattern of fights, shootings, illegal activity, use of guns, and other serious crimes occurring repeatedly and consistently at Shady Lane. (R. 240-390). The incidents range from strong-arm robbery, assault, trespass, drugs, burglary, grand larceny, public drunkenness, suspicious persons to other general crimes. (R. 240-390). Shady Lane had notice that crime was occurring consistently and would continue to occur on the property. Washington testified that she was aware of those who had been fatally shot on the property. (R. 179, pg. 38, ln. 14-15). There were fatality shootings on or around Shady Lane in 1993 (Matthew Wright), 1995 (Harry Smith), 1996 (Willie James Clark), and December 2002 (two Mexican males). (R. 179-180).

XI. CRIME STATISTICS CREATE A PRESUMPTION OF AN ATMOSPHERE OF VIOLENCE ON THE PREMISES

Defendants argue that crime statistics cannot provide actual or constructive notice of an atmosphere of violence. The Court held recently in *Davis* that crime statistics could be used to evince an atmosphere of violence. ¶ 26. The Court stated, “There is ample authority for the use of such reports and statistic in determining whether criminal activity was reasonably foreseeable.” *Id.* In *Davis* the Court held that the criminal statistics “presented a factual issue as to whether [the defendant] had actual or constructive knowledge that an atmosphere of violence existed on the premises” *Id.* at ¶ 28. In this case the calls for service from the Yazoo County Sheriff’s department along with the criminal reports for murders on the property support the existence of an atmosphere of violence at Shady Lane.

Evidence shows murders on or in front of the property. There were fatality shootings on or around Shady Lane in 1993 (Matthew Wright), 1995 (Harry Smith), 1996 (Willie James Clark), and December 2002 (two Mexican males). (R. 179-180). Thomas was murdered in August 2003. In a ten-year period Shady Lane is averaging a murder on the property every two years, a very telling average. Washington admits she was aware of the shootings resulting in death on the property. A double homicide occurred during December 2002 in the same common area where Thomas was shot, less than a year prior to Thomas’s death. (R. 180, pg. 42, ln. 4-12). Washington testified, “There are shootings that goes on throughout the neighborhood, and everything that happens in that area, they always say Shady Lane Apartments.” (R. 180, pg. 42, ln. 21-23). Witness Kyles testified that there was less crime when Shady Lane had a guard and that there was a need for security prior to Thomas’ death. (R. 158, pg. 11, ln. 10 to pg. 12, ln. 7). It would be illogical to assume the consistent crime problem at Shady Lane and the average

murder every two years would not give rise to the management being aware of problems on the property.

XII. THE LOWER COURT DID NOT DISREGARD THE OPINIONS OF JOHN TISDALE NOR DID THE LOWER COURT FIND THEM INADMISSIBLE

The defendants argue on pg. 32-34 of their Appellee brief that the lower court properly disregarded the testimony of expert Tisdale. This statement is totally false, misleading, and deceptive. In fact trial court Judge Lewis denied defendant's Motion to Strike Plaintiff's Experts. (See R. 521 and Motion Hearing Transcripts pg. 24, ln.20 –24). Defendants filed a Renewed Motion to Strike Plaintiff's Experts but this motion was not addressed by Judge Smith at the Renewed Motion for Summary Judgment hearing on August 14, 2006. (See Motion Hearing Transcripts pg. 27 – 59).

Defendants claim that, under *Davis*, plaintiff's experts should be excluded. *Davis* does not stand for the exclusion of all premises security experts and their testimony. The *Davis* ruling indicates experts cannot reach random conclusions without supporting evidence. In *Davis* an expert report with methodology and supporting facts was not provided to the court. The only document submitted to the court in *Davis* was a limited Affidavit of the expert with findings. In the instant case Tisdale, as well as plaintiff's other expert witness Lewis, provided expert reports containing more than just subjective conclusions. (R. 226 – 233; R. 234 – 239). Tisdale's report lists documents, witness statements, and materials relied upon in formulating his opinions. It also provides an analysis of foreseeability, its elements, and how the facts support his findings. (R. 226 – 227). Likewise, Lewis's report indicates the documents, witnesses, and materials relied upon in formulating his opinions. (R.234 – 235). Tisdale's conclusions on proximate cause are based on the testimony of independent witnesses and on the "defendant's actions and inactions." (R. 233). Since the trial court did not strike the testimony of the plaintiff's expert the

testimony of the experts is relevant, admissible and provides direction regarding proximate cause that would create a question of fact for the jury.

XIII. CONCLUSION

There is only one question for this court to consider. Does a direct promise by a property owner to provide protection to specific residents from a specific person create a duty by the property owner to follow through with its promise? Thomas is an invitee. Shady Lane knew about the first attack on Thomas and specifically promised to prevent a second attack from occurring on Shady Lane property. They then did not follow through on their promise and Thomas was killed. The evidence presented would confirm the sitting trial judge's ruling *denying* the Defendant's Motion for Summary Judgment and preclude the special sitting trial judge's *granting* of the Defendants' Summary Judgment Motion. Plaintiff moves that the trial court's Order granting the Defendants' Motion for Summary Judgment be reversed and this matter remanded for a trial on the merits.

Respectfully submitted this the 26th day of July, 2007.

BY: 
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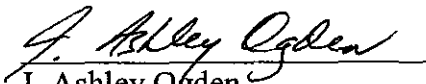
CERTIFICATE OF SERVICE

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

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Honorable Jannie Lewis Circuit Court Judge
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So certified, this the 26th day of July, 2007.


J. Ashley Ogden