

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**

BRIEF OF APPELLANT

Oral argument is not requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

- I. Rosie Thomas, Individually and on Behalf of the Wrongful Death Beneficiaries of Wilson Thomas, Jr., Deceased, Appellant
- II. The Columbia Group, LLC; The Columbia Group, LLC d/b/a Shady Lane Apartments; and John Does 1-10, Appellees
- III. Honorable Jannie Lewis, Circuit Judge
- IV. Honorable Mike Smith, Special appointed Circuit Judge
- V. Honorable Michael W. Baxter and Honorable Walker R. Gibson, of Copeland, Cook, Taylor and Bush, Attorneys for Appellees
- VI. Honorable J. Ashley Ogden, Attorney for Appellant

RESPECTFULLY SUBMITTED, this the 20 day of March, 2007.

BY: J. Ashley Ogden
J. Ashley Ogden

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STATEMENT OF THE ISSUES

1. Whether the lower court special judge erred in granting summary judgment in favor of the defendants after the sitting judge had already denied the motion.
2. Whether Wilson Thomas, Jr. is classified as an invitee.
3. Whether Plaintiff presented a genuine issue of material fact as to Shady Lane's actual or constructive knowledge of Cornelius Young's violent nature.
4. Whether Shady Lane's failure to enforce the banned list and hire security as promised made the shooting of Wilson Thomas, Jr. foreseeable.
5. Whether the evidence shows Shady Lane proximately caused the death of Wilson Thomas, Jr.
6. Whether this case is distinguished from *Martin v. Rankin Circle* and *Titus v. Williams*.
7. Whether the trial court erred in granting defendants' Motion to Strike Affidavit of Witness Sheaerica Parker.

STATEMENT OF THE CASE

This case is an action for damages by Rosie Thomas individually and on behalf of all wrongful death beneficiaries of Wilson Thomas, Jr. ("Thomas") against Defendants The Columbia Group, LLC and The Columbia Group d/b/a Shady Lane Apartments individually ("Shady Lane Apartments"), for negligent security, breach of contract, failure to provide security, failure to warn of a dangerous condition, failure to maintain the premises in a reasonably safe condition, among other things, and for not preventing the foreseeable shooting of Wilson Thomas, Jr. which occurred while Thomas was living on the premises of Shady Lane Apartment in August 2003. On April 28, 2006, the Circuit Court of Yazoo County, Mississippi, Honorable Jannie M. Lewis, presiding, weighing the greater weight of the credible evidence entered an Order DENYING the Defendants' Motion For Summary Judgment. On the date of the trial in this matter August 14, 2006, while Judge Lewis was out on medical leave a special appointed Circuit Judge, Honorable Mike Smith, weighing the same evidence, improperly reversed the Court's first ruling. Against the greater weight of the credible evidence Judge Smith entered an order GRANTING Defendants' Motion for Summary Judgment. Plaintiffs filed a Motion for New Trial, Amendment of Judgment, JNOV, and Motion for Relief from Judgment along with a Motion to Reconsider the Court's Granting of Summary Judgment. The Special Judge, whose last day of special appointment was October 13, 2006, having now created a conflict in the ruling on the Motion which in itself would indicate that reasonable minds could differ on the outcome entered an order on October 12, 2006 denying the Plaintiffs' request for relief. Having no alternative the Plaintiffs now perfect their appeal from the lower court's judgment.

FACTS

Wilson Thomas, Jr. was a resident at Shady Lane Apartments located at 740 Shady Lane Drive, Yazoo City, Mississippi from about August 2001 to August 2003. (R.107, pg. 13, ln. 1-4). He had been living with his girlfriend, Teresa Mitchell, at Shady Lane for about two years. (R. 105 pg. 5. ln. 25 to pg 6, ln. 2). The manager, Catherine Washington, knew he was a resident and never had a problem with him. (R.418). While a resident of Shady Lane, Wilson Thomas, Jr. was allowed to travel in and through the common areas of the apartment complex property.

During the 1980's, 1990's and 2000's Shady Lane experienced consistent problems with trespassers, shootings, drugs dealers and other general crimes. (R.426-427 and 240-390). Shady Lane installed an iron fence around the entire property in 1997 or 1998 (R. 171, pg. 8, ln.1) for the purpose of security (R.180, pg. 43, ln. 24 to pg. 44, ln. 2) and to control who was coming and going onto the property (R.180, pg.44, ln. 12 - 17; pg. 47, ln. 8-10). Shady Lane also added armed security guards around 1993 (R.185, pg. 64, ln. 23 to pg. 65, ln. 4) to provide a greater measure of security to deter crime (R.186, pg. 65, ln. 24 to pg. 66, ln. 9). The property installed a security guard booth at the front gate so the guards could monitor the entrance to the property from one main gate (R.186, pg. 68, ln. 1-12). The sole purpose of the gate and guard house was according to the manager, "to monitor the gate at certain times of the night." (R. 187, pg. 69, ln. 4-9). During the 1980's Shady Lane increased security at night from one to two security guards. (R.187, pg. 69, ln. 16-25). The guards came on from six (6) p.m. in the evening and stayed all night to five (5) a.m. in the morning. (R.188, pg. 3- 12; pg. 73, ln. 24 to pg 74, ln. 3). The guard's purpose was to "walk the property and to monitor the gate." (R.188, pg. 74, ln. 22-25), to prevent crime (R. 188, pg. 75, ln. 5-6) and to enforce the "banned from property" list that Shady

Lane created to keep certain people from entering the property. (R.89, pg. 78, ln. 12-25; R. 154, pg. 73, ln.11-19; R.154, pg. 75, ln. 11-14; R.154, pg. 76, ln. 3-8). At night the front gate was locked and security had to be there until the next morning. (R.183, pg. 55, ln. 7-11). In 2000 Shady Lane discontinued the security guards 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). At the time the attacker, Cornelius Young, entered Shady Lane no security guard was at the gate to stop him from entering or to enforce the banned list. Shady Lane had previously hired a security service to control the crime problem and guard the front gate but discontinued the security guards in 2000 to save money. (R.189, pg. 77). When there was a security guard at the front gate crime problems went down. (R.138, pg. 12, ln. 16). After the security guard was discontinued the crime problem worsened. (R.139, pg. 13, ln. 1). In the ten year history prior to Wilson Thomas Jr.'s shooting in August 2003 there had been a shooting resulting in a death on the property in 1993, 1995, 1996, and 2002. (R.196-225). Management was aware of all these shootings and deaths. (R.139, pg. 16, ln. 7).

On Thursday July 24, 2003 resident Wilson Thomas, Jr. came across Cornelius Young, a non-resident 17 year old male (R. 109, pg. 24 ln. 21), arguing with his resident girlfriend in the Shady Lane parking lot. (R.146, pg. 44, ln. 8-25). When Thomas tried to calm the argument Cornelius Young fired a shot at Thomas which grazed his head. (R.137, pg. 5, ln. 15). The head injury required medical treatment. (R. 410, pg. 77, ln. 16). The same day Wilson Thomas, Jr. filed assault charges against Young with the Yazoo Sheriff Department. (R.153, pg. 71, ln. 1-20; R.410, pg. 80, ln. 4-18). Apartment manager Catherine Washington was immediately informed of the shooting and began calling meetings with tenants the next day. (R.151, pg. 61, ln. 18-25).

Manager Washington told the tenants that she was “not going to have stuff like that going on at Shady Lane property, that she was going to get security.” (R.423 and R. 408, pg. 17, ln. 21 to pg. 18, ln. 12). Washington stated she was banning Young from entering Shady Lane (R. 423 and R. 109, pg. 24, ln. 5; R. 425 and R. 160, pg. 19, ln. 19 to pg. 20, ln. 16). The banning of Young was effective immediately and she started informing residents on the Monday after the shooting. (R. 432 and R. 145, pg. 38, ln. 22 to pg. 40, ln. 3; pg. 62, ln. 19-25). Washington also stated she was evicting Young’s mother and family from the property (R. 424 and R. 109, pg. 24, ln. 9; R 153, pg. 72, ln. 11-23). Also, Young’s girlfriend, Michelle, who was fighting with Young was evicted by Washington. (R. 140, pg. 17, ln. 20 to pg. 18, ln. 8). Washington stated publicly she would evict any resident who allowed Young to come to their apartment. (R. 425 and R. 145, pg. 38, ln. 22 to pg. 40, ln. 1). Washington also promised residents she would immediately secure the property by getting the security guards back to monitor the front gates to **specifically prevent Young from entering Shady Lane and assaulting Thomas again.** (R. 110, pg. 26, ln. 13; R. 431 and R.113, pg. 38, ln. 4-21). Washington conveyed this information to Thomas and other residents (R. 586-587). The security guards purpose was to patrol the front gate and sit at the guard booth from 6 p.m. to 5 a.m. each day to prevent banned people from entering the property. (R 154, pg. 73-74). Washington told residents, “I’m going to make sure Neil [Young] don’t come back out here no more [Shady Lane].” (R.137, pg. 6, ln. 9; R.139, pg. 16, ln. 17). She stated to residents she was getting security at the front gate to keep Young barred from the property. (R.113, pg. 38, ln. 18). Washington was worried about Young coming back and entering the property with a gun. (R. 113, pg. 37, ln. 19). Washington also stated to residents “I’m getting security ‘cause I don’t want Neil [Young] coming on the property with a gun.” (R. 113, pg. 38, ln. 11). Washington did not ban or evict victim Wilson Thomas, Jr. (R. 160, pg. 20.

ln. 17; R. 137-138, pg. 8, ln. 21 to pg. 9, ln.7; R. 140, pg. 17, ln. 25). Washington did not evict, ban, or blame victim Wilson Thomas, Jr. for the first shooting. (R. 137-138, pg. 8, ln. 21 to pg. 9, ln. 7).

One week later on August 1, 2003 there was no security guard at the front gate as promised by Washington to enforce the banning of Young and prevent his entry on the property. (R. 144, pg. 34, ln. 7). Young entered Shady Lane in a car (R. 157, pg. 6, ln. 17) at ten (10) p.m. (R. 389) by passing through the only entrance at the unmanned security guard house gate. (R. 157). Just inside the property in the main common area close to the unmanned security guard station Young found Wilson Thomas riding his bicycle and talking to witnesses Chakila Kyles and Sheaerica Parker. (R. 157, pg. 6, ln. 1-18). Cornelius walked up to Wilson and shot him twice while Wilson was sitting on his bicycle. (R.157 and R. 142, pg. 25)

After the second shooting manager Washington came to the crime scene within the hour. (R. 145, pg. 40, ln. 15). She admitted to several residents and witnesses that Thomas would not have been killed by Young 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). **She admitted that, “I should have kept him [Young] off the property.”** (R. 142, pg. 28, ln. 19) and she admitted that if she had kept Young off the property he would not have shot Wilson Thomas, Jr. (R. 143, pg. 29, ln. 1-17). She stated that having security at the gate would have made a difference preventing Young from shooting Wilson Thomas, Jr. (R. 143, pg 29, ln. 22 to pg. 30, ln. 10). Washington also admitted 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).

SUMMARY OF THE ARGUMENT

Rosie Thomas argues that the lower court, special judge presiding, erred in reversing the original trial court's denial of Defendants' Motion for Summary Judgment on April 28, 2006, when it granted the defendant's Renewed Motion for Summary Judgment on August 14, 2006. The trial court under the sitting judge, based on the same facts, on April 28, 2006 denied Defendants' Motion for Summary Judgment given there was a genuine issue of material fact concerning whether the second assault of Wilson Thomas, Jr. was reasonably foreseeable. The evidence clearly shows that during the assaults Thomas was an invitee at the property, and that the owner and managers had cause to anticipate the criminal assaults by Young through information which gave the Defendants (1) actual and constructive knowledge of Young's violent nature; and (2) actual or constructive knowledge that an atmosphere of violence existed on the premises. Further, the trial court special judge erred in ruling that the proximate cause of Thomas' death was not a question for the jury. The failure of the lower court special judge to correctly rule on these points was clear error and requires this Court to reverse the ruling. In considering the trial court special judge's failure to deny the Defendants' Motion for Summary Judgment, Rosie Thomas as Appellant asks this Court to address these issues:

1. Whether Thomas presented a genuine issue of material fact regarding whether defendants had actual or constructive knowledge of Cornelius Young's violent nature;
2. Whether Thomas presented a genuine issue of material fact regarding whether defendants had actual or constructive knowledge that an atmosphere of violence existed on or around the premises prior to and at the time that Wilson Thomas, Jr. was shot;
3. Whether Thomas presented a genuine issue of material fact as to whether the defendants were negligent for not complying with their explicit promises to provide security specifically to Wilson Thomas, Jr.;

4. Whether Thomas presented a genuine issue of material fact as to whether the issue of proximate cause of Wilson Thomas' injuries was a question for the jury.

ARGUMENT

I. THE LOWER COURT SPECIAL JUDGE ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AFTER SITTING JUDGE ALREADY DENIED THE MOTION BASED ON GENUINE ISSUES OF MATERIAL FACT

A. Standard of Review for Summary Judgments

This Court conducts a de novo review of orders granting or denying summary judgment. *Mantachie Natural Gas v. Mississippi Valley Gas Co.*, 594 So.2d 1170 (Miss. 1992). The moving party must show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss.R.Civ.P. 56(c). Upon review, "[a]dmissions, and pleadings, answers to interrogatories, depositions, affidavits are viewed in light most favorable to non-moving party, as he is given the benefit of every reasonable doubt." *Spartan Food Systems, Inc. v. American National Insurance Co.*, 582 So.2d 399, 402 (Miss.1991); *see also, McFadden v. State*, 580 So.2d 1210, 1213 (Miss.1991). "Summary Judgment in whole or in part, should be granted with great caution." *Brown v. Credit Center, Inc.*, 444 So.2d 358, 365 (Miss.1984).

Simply filing a motion for summary judgment does not entitle the movant to a favorable ruling. "The Court does not try issues; rather, the Court only determines whether there are issues to be tried." *Burkes v. Fred's Stores of Tennessee, Inc.*, 768 So.2d 325 (Miss. 2000). Further, "motions for summary judgment are to be viewed with a skeptical eye, and if a trial court should err, it is better to err on the side of denying the motion." *Id.* at 328; *See also, Ratliff v. Ratliff*, 500 So.2d 981, 981 (Miss. 1986). It is better for the circuit court to err on the

side of denying the motion. *Id.* **The Court will overrule a summary judgment motion unless “beyond any reasonable doubt [the] Court believes that [the] non-moving party would be unable to prove any facts which would support his claim.”** *McFadden* at 1213-1214 (emphasis added). 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).

B. Mississippi Premises Liability Law

Mississippi premises liability law is well settled. The duty owed to a person on another’s property is determined by reference to his/her status as an invitee, licensee, or trespasser. The status of an invitee on the property of another is stated in *Hoffman v. Planter's Gin Company*, 358 So.2d 1008, 1011 (Miss.1978), in the following language:

As to status, an invitee is a person who goes upon the premises of another in answer to the express or implied invitation of the owner or occupant for their mutual advantage. *Langford v. Mercurio*, 254 Miss. 788, 183 So.2d 150 (1966); *Wright v. Caffey*, 239 Miss. 470, 123 So.2d 841 (1960).

A landowner owes an invitee the duty to keep the premises reasonably safe and when not reasonably safe to warn where there is a hidden danger or peril that is not in plain and open view. *Gibson v. Wright*, 870 So.2d 1250, 1255 (Miss.2004); *Titus v. Williams*, 844 So.2d 459, 467 (Miss.2003), *Wilson v. Allday*, 487 So.2d 793 (Miss. 1986).

Mississippi follows these guidelines for invitees when determining the landowner's duty. *Little v. Bell*, 719 So.2d 757, 760 (Miss.1998); *Skelton v. Twin County Rural Elec. Ass'n*, 611

So.2d 931, 936 (Miss.1992) (citing *Payne v. Rain Forest Nurseries, Inc.*, 540 So.2d 35, 37 (Miss. 1989); *Hoffman v. Planters Gin Co.*, 358 So.2d 1008, 1011 (Miss.1978).

C. Duty Owed to Wilson Thomas, Jr. as Invitee for Third Party Criminal Acts

Commercial property owners and those in control of the premises owe a duty to invitees, tenants and their guests to exercise reasonable or ordinary care to keep their premises reasonably safe and secure. *Wilson v. Allday*, 487 So.2d 793 (Miss.1986); *Minor Child ex rel. John Doe v. Mississippi State Federation of Colored Women's Club Housing*, 941 So.2d 820 (Miss. 2006). Mississippi includes in its premises liability laws the duty to protect invitees against third party criminal acts. The commercial property owner owes a duty to the invitee and tenant 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); *Kelly v. Retzer*, 417 So.2d 556, 560 (Miss. 1982); *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). Generally, the "owner, occupant or person in charge" of the premises has the duty to make the premises reasonably safe from foreseeable criminal conduct. *Wilson v. Allday*, 487 So.2d 793, 794 (Miss. 1986); *Gatewood v. Sampson*, 812 So.2d 212 (Miss.2002); *Whitehead v. Food Max of Mississippi*, 163 F.3d 265 (5th Cir. 1998); *Price v. Park Management, Inc.*, 831 So.2d 550 (Miss.2002), *Gibson v. Wright*, 870 So.2d 1250 (Miss.2004); *Minor Child ex rel. John Doe v. Mississippi State Federation of Colored Women's Club Housing*, 941 So.2d 820 (Miss. 2006). The defendants in this case owed a duty to Wilson Thomas, Jr. to provide him reasonably safe premises, safe from foreseeable criminal conduct.

II. WILSON THOMAS, JR. IS CLASSIFIED AS AN INVITEE

A. Invitee is a Resident and/or Person Using Common Area of Property

In this case the resident Wilson Thomas, Jr. is classified as an invitee. An invitee is a “person who goes upon the premises of another in answer to the express or implied invitation of the owner or occupant for their mutual advantage.” *Little v. Bell*, 719 So.2d 757, 760 (Miss.1998); *Hoffman v. Planters Gin Co.*, 358 So.2d 1008, 1011 (Miss.1978). It is clearly established Mississippi law that apartment tenants are “invitees.” *Minor Child ex rel. John Doe v. Mississippi State Federation of Colored Women’s Club Housing*, 941 So.2d 820 (Miss. 2006). And the guests of apartment tenants are also “invitees.” *Lucas v. Mississippi Housing # 8*, 441 So.2d 101 (Miss.1983) (guest or visitor who drowned in apartment complex pool was invitee where injury occurred in common area of property intended to be used by residents and their guests). *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* at 760.

B. Evidence Proves Wilson Thomas, Jr. as Invitee

Wilson Thomas, Jr. is classified as an invitee. First, it is undisputed that Thomas was a resident of Shady Lane. An invitee is a “person who goes upon the premises of another in answer

to the express or implied invitation of the owner or occupant for their mutual advantage.” *Little* at 760; *Hoffman v. Planters Gin Co.*, 358 So.2d 1008, 1011 (Miss.1978). Theresa Mitchell provided testimony that Wilson Thomas was a resident of Shady Lane for at least two years.

Q: On August 1, 2003, the day that Chuck (Wilson Thomas) was shot and killed, was he a resident or living at Shady Lane?

A: Yes, sir.

Q: And was he living at your apartment that day?

A: Yes.

(R. 107, Mitchell depo. pg. 13, ln. 4-11)

See also,

Q: On the day of the second shooting where was Chuck (Wilson Thomas) living?

A: He was staying with me in my apartment complex in Shady Lane.

.....

Q: And how long had he been staying with you out there at Shady Lane?

A: He had been staying with me for a while... I say he had stayed with me bout two years. He done stayed with me two years out there.

(R. 105, Mitchell depo. pg. 5, ln. 16 to pg. 6, ln. 2)

Wilson Thomas’ residency was confirmed by witness Chakila Kyles.

Q: Now its my understanding that Chuck had been living with Teresa for a couple years at the property.

A: Right.

Q: But it’s also my understanding that he wasn’t on the lease?

A: No, he wasn’t.

Q: Do you have any information about whether or not Ms. Washington knew he was living there?

A: She knew. She know everything. She be knowing.

Q: And did you ever see her tell Teresa or tell (Wilson Thomas) that he couldn’t stay there?

A: No.

(R. 160, depo. of Chakila Kyles pg. 17, ln. 10 to pg. 18, ln. 1)

C. Shady Lane Derived Benefit From Wilson Thomas, Jr.’s Tenancy

Shady Lane derived a direct benefit from resident Wilson Thomas, Jr. since he paid costs of living at the complex. His apartment was a HUD apartment so no rent was paid. Thomas paid other benefits to Shady Lane besides the rent. He paid the apartment electric bills; he paid to use Shady Lane’s on property laundry-mat; and most importantly he paid Shady Lanes’ maintenance fees for the apartment maintenance charges of the apartment he stayed in.

Q: Did (Wilson Thomas) ever wash clothes up there at Shady Lane?

A: He gave me money to wash clothes up there.

Q: When you say that he gave you money, are you saying he paid for your wash and his wash?

A: My wash, his wash, and my children's wash.

(R. 106, Mitchell depo. pg. 9, ln. 13-21)

Q: ... I had heard that he washed some clothes that afternoon with you when he came in from work. Do you remember anything about that?

A: ...that was that day before that shooting.

(R. 107, Mitchell depo. pg.15, ln. 6-11)

See also,

Q: Do you pay electric bill or a gas or...

A: Yes sir. Yes sir, electric.

Q: Did (Wilson Thomas) ever help you pay that bill?

A: He helped me pay my light bill and my maintenance bill.

Q: What do you mean "maintenance bill"?

A: My maintenance bill is like when something end up broken or something need to be fixed and when I put in my- when I put in my- I had to put in the- I had to get- you know, call in for my work order and they (Shady Lane) put it in the computer. After they put it in the computer, the maintenance man get, they come out and fix it.

Q: You're saying, "the maintenance man." Who is the maintenance man? What company are you talking about?

A: For Shady Lane property.

Q: ... Your saying that at Shady Lane if something's broken in your apartment that you don't fix it, you call the management?

A. We call the manager and they put a work order in and they come out... and fix it.

Q: So they send their own...

A: They send their own maintenance people to fix it.

Q: And they charge you a bill for it?

A: And they charge us for it. Everything- everything that they fix, we have to pay for.

Q. And is that added to your rent every month or is it a separate bill?

A: It's a separate bill.

Q: So your saying when you got these bills for repairs to your apartment that Chuck [Wilson Thomas] paid those?

A: Yes, sir.

(R. 106, Mitchell depo. pg. 10, ln. 3 to pg. 11, ln. 20)

The evidence shows Thomas was living at Shady Lane and providing it a benefit by using its on-property laundry mat and paying its maintenance charges. Where a person confers a benefit to the property owner he is considered an invitee. *See, Gibson v. Wright*, 870 So.2d 1250 (Miss. 2004) (invitee status confirmed for plaintiff who was washing clothes at laundry mat).

See, *Green v. Dalewood Property Owners Assoc.*, 2005 WL 1530442 (Miss. Ct. App. 2005) (invitee status confirmed for paying dues for maintenance of property). When a person is paying money to the occupier of the land, the benefit to the land occupier makes the person an invitee. Person on property paying bill to company is an invitee. *Robinson v. Miss. Valley Gas Co.*, 760 So.2d 41 (Miss. 2000). *Corley v. Evans*, 835 So.2d 30 (Miss. 2003) (found invitee status to person who paid \$7.00 entrance fee).

D. Manager Knew and Approved of Wilson Thomas, Jr. as Tenant

The testimony showed that Shady Lanes apartment manager, Catherine Washington, knew Wilson Thomas was living as a resident at Shady Lanes and never complained about his residency.

Q: ...did the manager know that (Wilson Thomas) was living out on the property?

A: ...Yes, sir..... Because she always—she seen him come back and forth from back there. I knew that she knew that he was—me and him was dating—was going together.

(R. 105, Mitchell depo. pg. 7, ln. 3-15)

Q: She never asked him to leave the property that you know of, did she?

A: No, no sir.

Q: Did she complain to you about him living with you?

A: No, sir.

Q: What did she tell you as far as whether or not she liked Chuck?

A: She liked Chuck cause she never had no trouble or had no problems with him out there on the premises.

(R. 109, Mitchell depo. pg. 7, ln. 23 to pg. 8, ln. 9)

Q: But they didn't know he was a tenant...

A: Ms. Washington knew..... cause she seen him up there with me. She done seen him with me. She done seen him come and go from my apartment. She done been out there.

(R. 127, Mitchell depo. pg. 95, ln. 13 to pg. 96 ln. 3)

See also where witness Kyles states that Washington knew Wilson Thomas was a tenant living with Teresa Mitchell for a couple of years and never evicted him. (R.160, pg. 17, ln. 10 to pg. 18, ln. 1).

E. Manager Did Not Require Wilson Thomas, Jr. to be Listed on Lease

Defendants have asserted Thomas is a licensee because he was not listed on the lease for the apartment he stayed in with his girlfriend. Shady Lane contends that Thomas is not an invitee because Shady Lane violated the HUD apartment rules that Shady Lane was charged with enforcing. This argument is not relevant to Thomas' status and not acceptable since the management was not enforcing the policy of placing all residents on a lease. The management's failure to comply with HUD requests has no bearing on whether Thomas was a tenant or invitee. He had been living on the property for over two years with the manager's knowledge, consent and approval. The witnesses testified that the manager often did not enforce the HUD request to list all tenants on a lease.

Q: And then as far as Chuck staying there with you, at any time did Ms. Washington say, "Look, we need to add Chuck to the lease?"

A: No sir.

Q: Did Ms. Washington allow other people to stay in those apartments without being on the lease?

A: It's a lot of them stayed out there and wasn't on the lease.

Q: So the fact that Chuck was out at your place but he wasn't on the lease, that wasn't that big of a deal, was it?

A: No.

Q: Because Ms. Washington allowed that to go on, correct?

A: She knew that he was there.

(R. 134, Mitchell depo. pg. 121, ln. 9 to pg. 122, ln. 4)

See also,

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

A: Yeah, she did.

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

Q: So Ms. Washington would allow people to stay there even though they weren't on the lease, correct?

A: Right.

Q: And that was common occurrence out there?

A: Yes.

(R. 137-138, Parker depo. pg. 7, ln. 20 to pg. 8, ln. 3)

Q: So it's not uncommon back in 2003 for people to be living there but not on the lease?

A: No.

Q: Now back in 2003 had Ms. Washington ever thrown Chuck off the property?

A: No, sir.

Q: Had Ms. Washington banned Chuck from the property that you know of?

A: No sir.

(R. 137-138, Parker depo. pg. 8, ln. 17 to pg. 9, ln. 2)

F. Wilson Thomas, Jr. also Qualifies as Invited Guest in a "Common Area"

Testimony proves Wilson Thomas is an invitee resident. Thomas was also an invited guest in a common area at the time he was shot. Manager Washington admits she never evicted or banned Wilson Thomas from the property. (R. 176, pg. 26, ln.18-19); he was not a trespasser on the property (R.189, pg. 79, ln. 5-8); he was allowed to be a guest on the property and spend the night in the apartments (R. 189, pg. 79, ln. 10-13); he gave her no problems (R. 189, pg. 79, ln. 19-21); she liked him (R. 189, pg. 79, ln. 22-24); and, he was living in the apartments and she never asked him to leave (R. 105, pg. 7, ln. 12-15).

Mississippi law protects persons at apartment complexes in "common areas" the management retains control over. *Minor Child ex rel. John Doe v. Mississippi State Federation of Colored Women's Club Housing*, 941 So.2d 820 (Miss. 2006). It is established Mississippi law that guests of apartment tenants are "invitees." *Lucas v. Mississippi Housing No. 8*, 441 So.2d 101 (Miss.1983) (guest or visitor who drowned in apartment complex pool was invitee where injury occurred in the common area of property intended to be used by residents and their guests). "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). Where residential property leased to multiple tenants is involved, “lessor, with respect to common areas, has duty to use reasonable care to keep common areas reasonably safe and is liable for damages for failure to perform duty.” *Cappaert v. Junker*, 413 So.2d 378 (Miss. 1982). 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* at 760. Thomas is classified as an invitee and the defendants breached their duty to use reasonable care to prevent his injuries.

G. If Status of Wilson Thomas, Jr. is in Dispute it is a Question for Jury to Resolve

Since Shady Lane contends that Thomas may have been only a licensee when he was shot and the plaintiffs contend he was an invitee, the status of Thomas is a genuine issue of material fact. Thomas’s status is now a question for the jury. “The determination of which status a particular plaintiff in a premises liability case holds can be a jury question, but where the facts are not in dispute the classification becomes a question of law for the trial judge.” *Leffler v. Sharp*, 891 So.2d 152 (Miss. 2005). The facts of Thomas’ status are in dispute.

III. PLAINTIFF PRESENTED A GENUINE ISSUE OF MATERIAL FACT AS TO SHADY LANE’S ACTUAL OR CONTRUCTIVE KNOWLEDGE OF CORNELIUS YOUNG’S VIOLENT NATURE

A. Wilson Thomas, Jr. Meets Foreseeability Requirements

Plaintiff has raised sufficient evidence to prove the criminal attack against Wilson Thomas was “reasonably foreseeable.” To prove foreseeability the plaintiff must show the defendant had either (1) actual or constructive knowledge of the violent nature of the assailant; or (2) actual or constructive knowledge that the atmosphere or environment surrounding the property was conducive to criminal activity. *Grisham v. John Q. Long VFW Post*, 519 So.2d 413,

417 (Miss.1988). It is apparent that the proof needed to create a jury issue in Mississippi is very minimal. *See, O'Cain v. Freeman & Sons, Inc. of Mississippi*, 603 So.2d 824 (Miss.1991) (suggesting that criminal activity at an apartment complex is virtually per se “in realm of reasonable foreseeability”); *Lyle v. Mladinich*, 584 So.2d 397, 399 (Miss.1991) (prior crime “in the area” of the subject property is sufficient to create fact issue on “foreseeability”); *Kelly v. Retzer*, 417 So.2d 556, 561 (Miss.1982) (“all crimes are generally foreseeable”); *Pamela Lee B. v. Hayden*, No. B071806 (Cal. Ct. App. June 7, 1994)(landlord can be held liable to woman raped in underground parking garage even though no similar crimes in area because locks and light bulbs were in disrepair).

B. Shady Lane Held Actual and/or Constructive Knowledge of Cornelius Young's Violent Nature From First Shooting on July 24, 2003

The fact that management knew Young had shot Thomas in the head a week before on Shady Lane property gave defendants knowledge of Young's violent nature. The testimony by the witnesses is that immediately after the first shooting 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. 11-18; R. 137, pg. 6, ln. 6). Teresa Mitchell confirmed she spoke with Washington “about two days after the first shooting... in Shady Lane in her office...and Ms. Washington was saying that she was going to get—that she won't have stuff like that going on at Shady Lane property, that she was going to get security.” (R. 108, pg. 17, ln. 21 to pg. 18, ln. 12). Mitchell testified that Washington also said she was going to bar Young from the property and evict his mother (R.109, pg. 24,ln. 5-11), and that Washington, after the first shooting was going to evict Young's mother, Patricia Young, and Young's girlfriend's family (R. 109, pg. 24, ln. 9;R. 135, pg. 124, ln. 21 to pg. 125, ln. 12) and

that Young was not a resident on the property and was not living at Shady Lane (R. 109, pg. 24, ln. 21-25).

Witness Sheaerica Parker confirmed that Washington was aware that Cornelius had shot Wilson on July 24, 2003. **"I walked in (the office) she (Washington) was talking about the shooting the first time and she said well I got to get Neil (Young) off this premises. I'm going to put him on this 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 Chuck 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,

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 Neil [Young]– if Neil- if anybody on this list be caught in

your house, you will be evicted.

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

Q: Between the first shooting and the second shooting, did you ever hear Ms. Washington talking about banning Neil [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. “Neil [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, Parker depo. pg. 38, ln. 22 to pg. 40, ln. 1)

Witness Chakila Kyles also testified that after the first shooting that Washington stated she was going to ban Young (R. 160, pg 19, ln. 19 to pg. 20, ln. 5). Witnesses Theresa Mitchell, Sheaerica Parker, and Chakila Kyles’ testimony creates a question of fact for the jury regarding whether the defendants had actual and/or constructive knowledge of Cornelius Young’s violent nature. Washington’s acknowledgement of the first shooting, and her reaction and response to ban Young from the property, and her promise to re-hire security guards after Young shot Thomas the first time, indicates that the defendants had actual and constructive knowledge of Young’s violent nature. The defendants were given notice of Young’s violent nature after he shot Wilson in the head on July 24, 2003. Washington made statements about banning Young and getting security to prevent him from coming onto the property, but she took no precautions to secure the front gate or enforce the banned list to prevent Young from entering the property to stop his future attacks. Shady Lane responded to the assault of Thomas by promising action and then taking no action. Based on the testimony of the witnesses a question of fact has been raised regarding whether Shady Lane held actual and/or constructive notice of Young’s violent nature.

C. Shady Lane Held Actual or Constructive Knowledge that an Atmosphere of Violence Existed on the Premises

1. Prior Hiring of Security Guards for Property and Adding Cameras Indicates Defendant’s Knowledge of Presence and Pattern of Crime on Property

Shady Lane would be able to anticipate that a trespasser would repeatedly enter the property and attack a resident based solely on their own knowledge of the property’s violent

history. The property owners installed an iron fence around the entire property in 1997 or 1998 (R. 71, pg 8) for the purpose of security (R.180, pg. 43, ln. 24 to pg. 2) and to control who was coming and going onto the property. (R 180-181, pg.44, ln. 12- 17; pg. 47, ln. 8-10) and added armed security guards on the property from before 1993 (R.185-86, pg. 64, ln. 23 to pg. 65, ln. 4) to provide a measure of security to deter crime. (R. 86, pg. 65, ln. 24 to pg. 66, ln. 9). The property installed a security guard booth at the front gate so the guards could monitor the entrance to the property from one main gate. (R.186, pg. 68, ln. 1-12). The sole purpose of the gate and guard house was, according to the manager “to monitor the gate at certain times of the night.” (R.187, pg. 69, ln. 4-9). During the 1980’s Shady Lane increased security at night from one to two security guards. (R 187, pg. 69, ln. 16-25). The guards came on from 6 p.m. in the evening and stayed all night to 5 a.m. in the morning. (R.170-172, pg. 3- 12; R. 188, pg. 73, ln 24 to pg. 74, ln. 3) and their purpose was to “walk the property and to monitor the gate.” (R.188, pg. 74, ln. 22-25) and to prevent crime (R.188, pg. 75, ln. 5-6) and to ban individuals from the property list that Shady Lane created to keep certain people out of the property (R.179, pg. 78, ln. 12-25; R. 154, pg. 73, ln. 11-19, pg. 75, ln. 11-14; pg. 76, ln. 3-8). At night the gates were locked and security had to be there until the next morning. (R.149, pg. 55, ln. 7-11). In 2000 Shady Lane discontinued the security guards and in 2001 installed surveillance cameras (R.188, pg. 75, ln. 21-24) and to save the company money (R.189, pg. 77, ln. 8-13). Shady Lane began using surveillance cameras as the only form of security for the property. (R.190, pg. 83, ln. 16-19). At the time Young entered the property at 10 p.m. Friday night no security guard was at the gate to stop him from entering or to enforce the banned list on which Young was listed.

2. History of Shady Lane's Property Shows Over Five Shootings Resulting in Death on Property

Over a period of ten years from 1993 to 2003 the Defendants were aware of at least five separate shootings on the property that resulted in a death. In 1993, Mathew Wright was sitting in his truck in the parking lot when he was shot and killed. (R. 196). This case resulted in a lawsuit where manager Washington gave a deposition and testified at trial claiming she knew nothing about crime on the property. In 1995, Harry Smith was shot and killed on the property and the reporting party was manager Ms. Washington. (R. 205). In 1996, James Clark was shot and killed in the parking lot in a personal dispute with a tenant. (R. 211). In 2002, two victims identified only as Mexican men sitting in their truck in the parking lot were shot and killed. (R. 217). Manager Washington acknowledges being aware of all these shootings (R. 179, Washington depo. pg. 39, ln. 1 to pg. 43, ln. 7). And witness Sheaerica Parker verifies Washington's knowledge of the multiple shootings (R. 139, Parker depo. pg. 15-16). It is impossible for Defendants to say they were not aware of a pattern or presence of criminal activity on the property. They hired security guards because of the problem and kept the security for over ten years. Defendants' hiring of a security service to patrol the property presents a question of fact for the jury regarding whether the Defendants knew there was a presence of criminal activity on their property.

3. Premises Security Experts Testified Shady Lane's Actions Made the Shooting of Wilson Thomas, Jr. Foreseeable

Thomas consulted two separate premises security experts who are current active law enforcement officers. Both agreed that evidence from witness testimony, manager Washington's statements, the crime statistics and calls for service to the property, and the review of the property's security history indicated that Shady Lane was aware of problems and was not

addressing the problems to protect the tenants and visitors. Expert John Tisdale, a police officer with over 30 years of experience and 25 years of service with the Jackson Police Department conducted an in depth review of Shady Lane apartment's on property crimes and general vicinity crimes. His findings showed that Shady Lane had a consistent pattern of criminal activity on the property and around the property that required security guards, a security gate and that security cameras were not a effective deterrent. The property had recorded five known shootings resulting in deaths in the ten years between 1993 and 2003. The property and surrounding area also has a reputation for criminal activity higher than other parts of the county. Tisdale testified Shady Lane originally used security guards to patrol and control the property entrance from 5 p.m. to 8 a.m. The guards also enforced a list prepared by management to ban certain people who were not allowed on the property. Shady Lane discontinued security guards in 2000 and later replaced them with monitoring cameras in an attempt to save money in 2001. Tisdale testified the absence of security guards to monitor the gate at night and prevent trespassers and the reliance on ineffective monitoring cameras in 2003 on the property created a foreseeable criminal attack on Wilson Thomas which was also preventable.(R. 233) The cameras were ineffective, not a deterrent and acted as a false sense of security to the residents. (R. 233). The management was aware 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 and that was a proximate cause of the second shooting. Based on the above stated facts and the expert opinions of John Tisdale, Thomas has raised a question of fact for the jury regarding whether the frequency and consistency of criminal activity at Shady Lane and in the general vicinity creates actual or constructive knowledge of an atmosphere of violence which caused the death of Wilson Thomas.

Expert, Commander Tyrone Lewis, conducted a thorough review of the facts and history of Shady Lane and found that the property had a preexisting atmosphere of violence. (R. 234). Lewis determined that the frequency of calls for service to the property along with the manager's knowledge of a pattern of murders at the property was consistent to provide the owners with the foreseeable knowledge of the shooting. (R. 236-237). Lewis also determined that the management had ended security guards at the front gate and installed cameras around the property but not at the front gate (R. 236). Management claimed the cameras to be better for security but according to Lewis the cameras were ineffective and did not represent an adequate deterrent to stop crime. (R. 237). Also, Lewis found that the manager had direct knowledge of the first shooting of Thomas by Young on July 24, 2003 and her promise to put Young on the banned list and get security to stop Young from coming onto the property was sufficient to constitute knowledge of the direct dangerous propensity of Young and to foresee a second shooting. (R. 237). Lewis' expert opinion found that Shady Lane failed to protect Young and their lack of security proximately caused his death. (R. 238).

4. Crime Statistics From Shady Lane and in General Vicinity of Shady Lane Document an Atmosphere of Violence on the Property.

Thomas submitted the 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, trespasser, drugs, burglary, grand larceny, auto theft, public drunkenness, suspicious person to other general crimes. (R. 240-390). Shady Lane held notice that crime was occurring consistently and would continue to occur on the property.

IV. SHADY LANE'S FAILURE TO ENFORCE BANNED LIST AND HIRE SECURITY AS PROMISED MADE SHOOTING FORSEEABLE

A. Shady Lane Made Specific Promises to Provide Security against Young

After Young shot Thomas the first time there is testimony from witnesses that manager Washington told the residents that she would not have this type of behavior on the property. (R. 137, pg. 6). The purpose of the security guard was to monitor the gate at night. (R.187, pg. 69 ln. 4). She promised to ban Young (R.145, pg. 39; R. 142, pg. 26, ln. 18) and evict his mother and girlfriend from Shady Lane. (R.153, pg. 72, ln. 19). She promised to get a security guard back at the front gate to stop Young from entering the property. (R. 108, pg. 18). Washington did not set in motion her own directives which allowed Young a week later to enter the property and shoot Thomas. (R. 112). See testimony of Theresa Mitchell:

A: And Ms. Washington was saying that she was going to get- that she won't have stuff like that going on in Shady Lane property, **that she was going to get security**. But when - she never did enforce it. She made an effort, but she didn't enforce it to make sure that nothing like that would happen again, cause if that's the case, he (Thomas) never would have ended up dead. (R. 108, Theresa Mitchell depo. pg. 18, ln. 9-16)

Q: And Ms. Washington said that she was going to get security, correct?

A: She said she was going to get security
(R. 109, Mitchell depo. pg. 23, ln. 13-17)

A: She said that she was going to bar Neil [Young] from off Shady Lane premises.

Q: Did she say if she was going to evict anybody:

A: She said that she was going to evict Neil's [Young] family and Michelle.
(R. 109 Mitchell depo. pg. 24, ln. 5-11)

Q: After the shooting did you get a chance to talk to Ms. Washington?

A: She said that she hated that something like that had happened. She hated that Neil had kilt Chuck. She felt bad about it. She had hated it. Said she wish she had went on and got the security that she supposed been got for Shady Lane.
(R. 111, Mitchell depo. pg. 31, ln. 13 to pg. 32 ln. 6)

Q: And as far as security, on the day (Wilson Thomas) got shot, were you aware of whether or not they had got the security out there?

A: It wasn't no security.

Q: So on the day of the shooting, even though Ms. Washington said she was going to get security, she hadn't got them yet?

A: No sir.

Q: Well, so on the day of the shooting there was no security on Shady Lane—

A: No sir.

(R. 112, Mitchell depo. pg. 34 ln. 24 to pg. 35, ln. 15)

Q: So did she say anything to you about "I'm getting security cause I don't want Neil [Young] coming on the property with a gun"?

A: She said she was going to get security.

Q: Did she say she was getting it to keep Neil [Young] off the property or to just improve the property in general? Did that even come up at all?

A: She said that she was going to get it to keep him barred from off Shady Lane premises so he wouldn't be allowed on Shady Lane, but she never did.

(R. 113, Mitchell depo. pg. 38, ln. 4-21)

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

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

(R. 113, Mitchell depo. pg. 39, ln. 25 to pg. 40, ln. 5)

Q: Did she [Washington]tell you that?

A: She was telling me that she was going to bar him (Young) from off Shady Lane premises because she wasn't going to have nothing like that going on, and that she was going to have a security to make it stick, make sure that he wouldn't come on back on Shady Lane premises.

(R. 118, Mitchell depo. pg. 58, ln. 13-21)

Q: When she said she felt bad about what happened, did she say that Neil [Young] was banned after the first shooting?

A: ...She said she knew that something like this was going to happen.

(R. 134, Mitchell depo. pg.123, ln. 16-22)

See further testimony of Sheaerica Parker which proved manager Washington had promised the residents security to keep Young away from Thomas and off the property after the first shooting:

A: ...I walked in she (Washington) was talking about the shooting the first time, and she said, "Well, I got to get Neil (Young) off this premises. I'm going to put him on this list." And she—and she say, what she say, she said, "I'm going to make sure he don't come back out there." This far she was talking to Teresa Mitchell, this morning – that morning, cause Chuck (Wilson Thomas) stay with Teresa.

(R. 137, Parker pg. 6, ln. 5-12)

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

A: Yes. She banned him that Monday.....She called everybody to the office.
(lines 10 –16 omitted)

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). “Neil [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 because of the first incident.

Q: Because of the shooting?

A: Yes

(R. 145, Parker depo. pg. 38 ln. 22 to pg. 40, ln. 3; R. 151 pg. 62, ln. 19-25)

And see manager Washington’s admissions regarding how if she had followed through with her promise to ban Young and get security that the shooting would have been prevented.

Q: Who did she tell, who did she say to, you know, “I should have kept him off the property”?

A: She saying that to everybody that was standing round in the little group, which is me, Chakila, and a couple more people. It was just Shady Lane.

Q: And did she say that if she had kept him [Young] off the property then Neil [Young] couldn’t have shot Chuck [Thomas] or- -

A: No. He would - - he’ll still be here.

Q: That’s what she said?

A: He’ll still be here if she would have put some force into 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. 143, Parker depo. pg. 29, ln. 3-17)

Q: Tell me again what you said and use names so I’ll understand.

A: Ms. Washington was telling Teresa that she- - that she was sorry, you know, she wished she could have did something, but it was too late.

(R. 168, Kyles depo. pg. 50, ln. 24 to pg. 51, ln. 3)

Based on the above witness testimony an issue of fact exists regarding whether the Defendants were affirmatively representing to provide security specifically against Young and take precautions to stop Young from entering the property. The witnesses state that manager Washington stated she would provide security to specifically keep Young off the property and

after the second shooting Washington admitted to not following through with her promise to do so. This testimony proves Shady Lanes knowledge of a duty and failure to respond to its own directive to get security to protect Thomas.

V. EVIDENCE SHOWS SHADY LANE PROXIMATELY CAUSED THE DEATH OF WILSON THOMAS, JR.

A. Proximate Cause is Question for Jury

Plaintiff Thomas proved a correlation between Shady Lane's failure to provide security or to secure the property and the second shooting of Wilson Thomas, Jr. The evidence presented clearly proves proximate cause. 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. In fact, proximate cause as an issue can not be assessed by the Court. Experts Tisdale and Lewis both submitted uncontested reports testifying the proximate cause of Thomas' death was Shady Lane's failure to secure the property and failure to keep Young off the property. (R. 233 and R. 238).

The Mississippi Court has left proximate cause issues 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). "[W]hether proximate cause of collision was negligence of defendant or negligence of plaintiff . . . [is a] question for jury." *Planters Wholesale Grocery v. Kincade*, 50 So.2d 578. "Question whether motorist,

whose automobile struck minor bicyclist at intersection, was negligent, particularly in failing to see bicyclist, was for jury.” And, “question whether the fact that bicycle had no lights on it was sole, proximate cause of accident . . . was for jury.” *Swan v. Campbell*, 172 So.2d 566 (Miss. 1965).

B. Defendant’s Failure of its Duty to Provide Security Proximally Caused the Death of Wilson Thomas, Jr.

For Plaintiff to prevail the negligence of Shady Lane must have been the proximate cause of the Wilson Thomas, Jr.’s injury. *Hughes v. Star Homes, Inc.*, 379 So.2d 301, 304 (Miss.1980). Proximate cause in a premises liability case is defined as the “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.” *Titus v. Williams*, 844 So.2d 459 (Miss.2003). **“Proximate cause arises when the omission of a duty contributes to cause an injury.”** *Crain v. Cleveland Lodge 1553, Order of Moose, Inc.*, 641 So.2d 1186, 1192 (Miss.1994); *Drummond v. Buckley*, 627 So.2d 264, 270 (Miss.1993).

There is an implied warranty of habitability for residential leases. *O’Cain*, 941 So.2d at 831. Thomas as an invitee resident of Shady Lanes was owed a duty of habitability. Under an implied warranty of habitability a landlord has a duty to provide a safe premises. *Id.* at 833. Shady Lane did not provide a safe premises for Wilson Thomas, Jr.

It is foreseeable for that Shady Lane was were creating the opportunity for a volatile situation that would one day endanger one of its residents when they discontinued security guards at the front gate. They knew that the Shady Lane property was systematically plagued by crime for a period of over ten years prior to the shooting of Thomas. They hired security guards to control the entrance to the property at night and crime went down. (R. 138, pg. 12). Then

around 2000 they abandoned the security service to save money and replaced the guards with cameras and crime went up. (R. 139, pg. 13).

Manager Washington knew that Young had shot Thomas in the head a week earlier (R. 110, pg. 25, ln. 13) and knew Young would try to return to the property because his girlfriend and mother stayed there. (R. 110, pg. 25). Manager Washington promised residents she would get security guards back at the front gate and she would put Young on the banned list and she would enforce the banned list to keep Young off the property but did not follow through with her promises. (R. 109-110, pg. 23, ln. 13-1; pg. 24, ln. 5-25; pg. 25, ln. 13-24; pg. 26, ln. 13-20). Washington told Thomas she would evict Young and place security at the front gate. (R. 586-587). Young entered Shady Lane and shot Wilson Thomas because no security guard was at the gate to stop him from entering.

Premises security expert John Tisdale has presented opinions which state that the negligent acts of Shady Lane proximately caused the death of Wilson 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.... **Managements failure to follow through with security proximately caused the second shooting of Wilson Thomas.** (R. 232-233).

Tisdale's expert conclusions are as follows:

My conclusions as to how Shady Lane caused the second shooting of Wilson by Young:

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

If Young had been banned from the property and security had been reinstated at the gate the second shooting would not have occurred on the Shady Lane property. Shady Lane provided motive and opportunity to Young by not placing a security guard at the front gate and enforcing the banned list. Based on the statements of the witnesses and the conclusions of the experts, John Tisdale and Tyrone Lewis, Thomas has proven that a genuine issue of material fact exists regarding whether Shady Lane's failure to provide security or to keep Young off the property was the proximate cause of Thomas' death. The special sitting judge's granting of Defendants' Motion for Summary Judgment on this point should be reversed.

VI. DISTINGUISHING THIS CASE FROM CASES LIKE *MARTIN V. RANKIN CIRCLE* AND *TITUS V. WILLIAMS*

A. Wilson Thomas, Jr. was an Invitee Not a Licensee or Trespasser

The special judge based his granting of the Renewed Motion for Summary Judgment on his conclusion that Thomas' situation was the same as the facts in *Martin v. Rankin Circle*. He stated "The status of the deceased...doesn't make any difference." (pg. 55 of Motion for Summary Judgment transcription of oral argument) and "The *Martin* case is on all fours with the

case here.” (pg. 54). The Court is incorrect. Thomas’ case is not about a dispute over a woman and he was not a licensee or trespasser. There was no testimony that the Thomas shooting was a dispute over a woman. The testimony showed the first shooting was Thomas breaking up a fight. The second shooting was a criminal assault. Shady Lane wants to equate the Thomas case facts to *Martin v. Rankin Circle Apartments*, 941 So.2d 854 (Miss. Ct. App. 2006). They are incorrect; Thomas’ case is distinguishable.

Rankin Circle involved a **licensee** whose girlfriend was engaged in a back-and-forth dispute in and off the subject property over an entire day. The series of events had actually started months earlier when Martin’s current girlfriend became aware that the deceased, Martin, had fathered another woman’s child. The two women engaged in a back-and-forth taunting incident off the property. When the fight boiled over at the apartment complex, Martin, who was at best a **licensee**, was shot and killed while fighting with the crowd who had followed him and his girlfriend back to the property. The testimony showed the apartment complex had an atmosphere of violence but there was no testimony that the management was asked to specifically prevent the shooter, Campbell, from entering the property. The manager said she knew the shooter and was aware of his criminal history. She had also taken generic precautions to secure the property. The plaintiffs in *Rankin Circle* alleged that the theory of implied warranty of habitability should be considered as a standard to apply against a shooting or assault on the property. In this case, the Court found that implied warranty of habitability is not a useful alternative perspective to view whether a defendant should have had a security guard, a crime management plan or other heightened measures. *Rankin Circle* also lacks direct active promises by the manager to specifically protect residents against a specific attacker.

Rankin Circle's forefather, *Titus v. Williams*, 844 So.2d 459 (Miss. 2003) is also a different set of facts than Thomas. In *Titus* the Court found that a **licensee** who is aware of the peril or dangers or has participated in the atmosphere of violence should not be able to recover for damages. The Court stated that the Defendant must “put in motion” the shooting itself and not just furnish the condition. Titus went back to the store as a **licensee** and eventually became a **trespasser** when he started a fight. He was not an invitee like Wilson Thomas, Jr.

Wilson Thomas, Jr.'s case is distinguishable since the deceased, Thomas, was an **invitee** and because the owner specifically undertook or promised to undertake to provide security to prevent Thomas from being injured or shot a second time by Young. In Thomas' case the manager of Shady Lane, Catherine Washington, was made aware that Cornelius Young had shot Wilson Thomas on July 25, 2003. The next day she specifically told witnesses that she was going to get a security guard to keep Young off the property, place Young on a banned list, ban Young from the property and evict Young's mother and girlfriend from Shady Lane. This was going to be done as a response to prevent a second attack from occurring. When the manager stated she would actively resolve the problem by putting a security guard at the gate, placing Young on a list of people banned from the property, evicting Young, his mother, and girlfriend from the apartments, she undertook an affirmative duty to directly prevent another attack by Young against anyone on Shady Lane property. After a week had passed manager Washington had failed to put into place any of the promised security measures. That failure directly allowed Young to enter the property. Washington knew Young was dangerous and knew he would return to Shady Lanes. By promising several levels of protection and then failing to institute any of them, she “put in motion” and allowed the shooting itself to occur.

B. Testimony showed an exclusive duty undertaken or promised by Shady Lane to protect Wilson Thomas, Jr.

Over a ten year period when no security was present at the gate there were at least five separate shootings on the property resulting in a death. Manager Washington had knowledge of all these shootings and the first shooting of Thomas and she indicated that she would provide a security guard to stop another shooting incident. By following her own directive manager Washington actively chose to not provide security, ban Young or evict Young and his mother. This failure to act was the direct proximate cause of the shooting. 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 later admitted after the murder, "I should have kept him [Young] off the property." (R. 142, pg. 28, ln. 20 to pg. 29, ln. 11).

Manager Washington knew that Young had shot Wilson Thomas in the head a week earlier on July 24, 2004 and knew Young would try to return to the property because his girlfriend and mother lived there. In direct response to the first shooting manager Washington told residents she would get security guards back at the front gate, put Young on the banned list, and she would enforce the banned list to keep Young off the property but did not follow through with her promises. (See R. 109, pg. 23, ln. 13-1; R. 109, pg. 24, ln. 5-25; R. 110, pg. 25, ln. 13-24; R. 110, pg. 26, ln. 13-20). Young came on the property and shot Wilson Thomas, Jr. because no one was there to stop him from entering.

Premises security expert John Tisdale has presented opinions which state that the negligent acts of the defendants proximately caused the death of Thomas. "Management was going to get a security guard to monitor the front gate from 5 p.m. to 8 a.m. to stop trespassers. They were also 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." (R. 231).

Premises expert Tyrone Lewis also found that the Defendants' refusal to act on its promises caused the death of Wilson Thomas, Jr. (R. 238-239). He found that Shady Lane failed to place security at the front gate to prevent Young's reentry, and failed to enforce the banned list along with several other factors which caused the death of Thomas. (R. 239).

If Young had been banned from the property and security had been reinstated at the gate as promised by management the second shooting would not have occurred on the Shady Lane property. Shady Lane provided motive and opportunity to Young by not placing a security guard at the front gate and not enforcing the banned list. Based on the statements of the witnesses and the expert opinions John Tisdale and Tyrone Lewis Plaintiffs prove that a genuine issue of material fact exists regarding whether Shady Lane's failure to provide security or to specifically keep Young off the property was the proximate cause of Wilson Thomas, Jr.'s death. The lower court's granting of Defendant's Renewed Motion for Summary Judgment on this point should be reversed.

The acts of the manager were both active negligence and passive negligence. Passive negligence is defined as "the failure to do something that should have been done." Black's Law Dictionary 718 (6th ed. 1991). Active and passive negligence are distinguished as follows: One is only passively negligent if he merely fails to act in fulfillment of duty of care which law imposes upon him, while one is actively negligent if he participates in some manner of conduct or omission which caused injury. *Hughes*, 379 So. 2d at 304. The defendants in the *Rankin Circle* case and *Titus* case had properties with crime problems but the actions of the plaintiffs as

trespassers contributed to their injuries. In the case at bar the plaintiff did not initiate the shooting and was an invitee who was not actively fighting or trying to start trouble with the shooter. The deceased, Thomas, at the time he was shot was riding his bike and talking to two other persons in the common area grounds at Shady Lane. Young entered the property unchecked and not stopped because the promised security measures were never instituted. Shady Lane actively and passively promised security and did not follow through. Under these circumstances the *Martin v. Rankin Circle* and *Titus v. Williams* cases are not similar in facts or outcome and must be disregarded.

VII. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO STRIKE AFFIDAVIT OF WITNESS SHEAERICA PARKER

Thomas submitted an affidavit from witness Sheaerica Parker (R. 586) to bolster and confirm the testimony that Washington promised protection from Young to Thomas. Defendants filed a motion to strike the affidavit and the special judge struck the affidavit (R. 598) on the grounds that the evidence would not change the outcome of the special judge's ruling based on his opinion that the case *sub judice* was the same as the *Rankin Circle* case. (R. 598). This ruling was incorrect since the affidavit struck by the Court is admissible and relevant. The affidavit contained first-hand knowledge and lay opinion testimony of a lay witness admissible under Mississippi Rules of Evidence 401, 402, 404, 701, 704, 801 and 803. The affidavit testimony is admissible under Mississippi Rule of Evidence 401, relevant evidence; and 402, relevant evidence admissible; 404(b), other crimes, wrongs to prove defendants' knowledge or absence of mistake; 801(d)(2) admissions by a party opponent; and 701-opinion of lay witness, since it is based on the witness' perception and helpful in resolving the issues; and 704 opinion on ultimate issue- testimony in form of opinion otherwise admissible is not objectionable because it embraces an ultimate issue; and 803 hearsay exceptions #1- present sense impression; #3-

then existing mental, emotional condition; and #24- other exceptions. Based on the applicable evidence rules and the numerous exceptions to hearsay as noted above the trial court erred when it chose to order the affidavit of Parker to be struck. Thomas appeals to this Court to reverse the decision of the trial court special judge and allow the statements to be considered as part of Thomas' evidence in creating a question of material fact.

Rule 56(e) states that, with regard to a summary judgment motion, supporting affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence" Miss.R.Civ.P 56(e). Parker would be allowed to testify at trial as to the assertions contained in her affidavit. If her affidavit statements are admissible at trial, they may be used to create a genuine issue of material fact with regard to a summary judgment motion. See, *Watts v. Kroger Co.*, 955 F.Supp. 674, 678 (N.D.Miss. 1997) where court determined that if affidavit statements were admissible at trial then they were admissible for summary judgment phase. The factual basis for Parker's opinions is relevant and helpful to the legal determination of whether Thomas proves Defendants' foreseeability of the assault. *Watts* at 678.

A trial court's decision to strike an affidavit is subject to review under an abuse of discretion standard. *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1109 (5th Cir. 1991). Thomas requests this Court to review the Parker affidavit to determine its admissibility at trial and its relevance as admissible evidence in Thomas' case.

CONCLUSION

The testimony from Defendants and the Plaintiffs' witnesses contain sufficient discrepancies and present an issue of fact that is best resolved by the trier of fact. The facts

presented prove that Wilson Thomas, Jr. was an invitee of Shady Lane Apartments in August 2003. Shady Lane was aware that both an atmosphere of violence existed historically at the property and that a week before Young had shot Thomas in the head. Shady Lane failed to meet its burden proving beyond a reasonable doubt that there are no issues of material fact and at best have raised issues for the trier of fact to determine Shady Lane owed invitee Thomas a duty of care to keep the premises reasonably safe. They fell below the standard. The facts raised by Plaintiff and presented to the trial Court indicate that the deceased, Wilson Thomas, Jr., was an invitee and that there is a genuine issue of material fact best answered by the jury in regards to whether Shady lane had either (1) actual or constructive knowledge of the violent nature of the assailant; or (2) actual or constructive knowledge that the atmosphere or environment surrounding the property was conducive to criminal activity. There further exists a question of fact as to whether Shady Lane's failure to provide security guards and evict Young from the property and enforce the banned list proximately caused the death of Thomas. These issues 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. Plaintiffs move 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 20 day of March, 2007.

BY: J. Ashley Ogden
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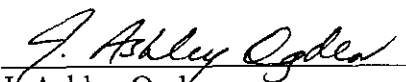
CERTIFICATE OF SERVICE

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' Brief to:

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So certified, this the 20 day of March, 2007


J. Ashley Ogden