IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-CA-01403I

RANDY SCOTT — APPELLANT

VS. — CAUSE NO. 2007-CA-01403

DICKERSON PETROLEUM, INC.
D/B/A BP CONVENIENCE AND
SERVICE STATION AND
THE CITY OF GOODMAN, MISSISSIPPI — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF HOLMES COUNTY, MISSISSIPPI

BRIEF OF APPELLEE, DICKERSON PETROLEUM, INC., D/B/A BP CONVENIENCE AND SERVICE STATION

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

In order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

a. Randy Scott, Appellant;

b. Marshall Sanders, Counsel for Appellant;

c. Dickerson Petroleum, Inc., d/b/a BP Convenience and Service Station, Appellee;

d. Thomas Y. Page, Jan F. Gadow, Page, Kruger & Holland, P.A., Counsel for Dickerson Petroleum, Inc., d/b/a BP Convenience and Service Station, Appellee;

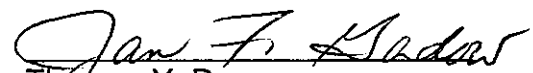
e. City of Goodman, Mississippi, Appellee;

f. Daniel J. Griffith, Griffith & Griffith, Counsel for City of Goodman, Mississippi, Appellee;

g. Mac Boutwell, City Attorney for City of Goodman, Mississippi, Appellee;

g. Honorable Jannie M. Lewis, Trial Judge.

This, the 12th day of March, 2008.



Thomas Y. Page
Jan F. Gadow

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I. STATEMENT OF THE CASE

Randy Scott filed a Complaint against Dickerson Petroleum on April 29, 2003, alleging that Dickerson had breached its duty to protect Scott from, or had negligently caused, a physical attack by Melvin Williams, an on-duty City of Goodman police officer, on Dickerson's property. (C.P. 9-10) Scott subsequently amended his complaint to add Melvin Williams[1] and the City of Goodman as defendants. (C.P. 18-20) Dickerson answered and thereafter filed a Motion for Summary Judgment, which the Circuit Court granted on April 28, 2006. (C.P. 80-84, 91) Following a bench trial that resulted in a defense verdict and Final Judgment in favor of the City of Goodman, Scott filed his notice of appeal[2] on August 13, 2007. (C.P. 145, 145 A)

II. STATEMENT OF THE FACTS

Prior to the incident that is the subject of this appeal, Officer Melvin Williams attempted to arrest Randy Scott for DUI, suspended driver's license, and speeding, but Scott resisted and fled the scene. (C.P. 38, 61) Although Scott succeeded in eluding Williams on that occasion, he was subsequently located, found guilty on all charges, and burdened with a fine of $2,600.00. (C.P. 39, 62)

About two weeks later, near midnight on the evening of February 26, 2003, Officer Williams was at the BP Convenience and Service Station[3] ("BP") on Highway 17 and I-55 in Pickens, Mississippi, taking a break from his duties as a police officer for the City of Goodman and purchasing some refreshments. (C.P. 40) Williams was working the City of

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1 Melvin Williams was later dismissed from suit because he was acting within the course and scope of his employment with the City of Goodman. (C.P. 135)
2 As to Dickerson, the appeal is from the April 28, 2006 Order granting summary judgment, which was interlocutory until Scott's remaining claims on his Complaint had been adjudicated. *See* ***Briscoe's Foodland, Inc. v. Capital Associates, Inc.,*** 502 So.2d 619, 622 (Miss. 1986).
3 The name under which Dickerson Petroleum, Inc., was doing business.

Goodman graveyard shift that night, from 10:00 p.m. until 6:00 a.m. (C.P. 40) In addition to Williams, two BP employees were present, as were two truck drivers, when Randy Scott entered the BP with two of his friends. (C.P. 40)

According to Officer Williams, he was standing inside the BP, next to the entrance door, but not blocking the doorway, when Scott entered the BP with his two friends. (C.P. 41, 43) At the time, Officer Williams did not know any of the men personally and did not know which one was Scott. (C.P. 43) Officer Williams greeted each man as he came into the BP. Scott, who was last of the three men to enter, responded "I don't f--k with you." (C.P. 43) Scott and his two friends then proceeded to the cooler at the back of the store. (C.P. 43) Scott opened and closed the cooler doors then headed back toward the front of the store, when Officer Williams, who wanted to find out why Scott was hostile toward him, asked "did you say what I thought you said?" (C.P. 44) Scott confirmed: "You heard me. I said I don't f--k with you." (C.P. 44) Officer Williams told Scott "you must got me mixed up with someone else", to which Scott responded "no, motherf--ker, I know you." (C.P. 44)

Although Scott had stopped "short" to respond to Officer Williams, after their verbal exchange Scott "started back toward" Officer Williams, who then put out his hand, toward Scott's chest, and said "hold up, sir". (C.P. 44, 45, 46) Scott walked into Officer Williams' hand, his chest making contact with the hand, then slapped Officer Williams' hand down and said "motherf--ker, get your hands off me." (C.P. 44-45, 46) Scott then stepped back, put his hands in his pockets, and fumbled around "in there" as though trying to retrieve something. (C.P. 45-46) Officer Williams reacted by unsnapping his weapon with his right hand and told Scott he was going to call someone else to get Scott. (C.P. 45) "I ain't going to motherf--king jail. You can call who you want to", was Scott's response. (C.P. 45) With his left hand, Officer Williams took out his radio, checked for the channel, and keyed it up

to transmit out for assistance, because he believed he had cause to detain or arrest Scott for slapping his hand. (C.P. 45-46, 49, 51)

With his hands still in his pockets, Scott kept repeating that he was not going to jail and that Officer Williams better handle his business tonight. (C.P. 45-46) Scott then came straight at Officer Williams and covered the short distance between them in only one or two steps. (C.P. 45-46) Officer Williams perceived a threat at this point, pulled his firearm, but didn't discharge it yet, keeping in mind the safety of the others present. Instead, he grabbed Scott in a sort of bear-hug to keep him from taking his hands out of his pants pockets, where Officer Williams thought he may have had a weapon. (C.P. 45-47, 51) Officer Williams spun Scott around, but was unable to keep Scott's hands in his pockets, so Williams let him go while shoving Scott away from him, at which point Scott's hands started to come out of his pockets. (C.P. 47) Things were happening so quickly now that Officer Williams couldn't tell what was in Scott's hands, but in light of the perceived threat and concern that Scott might be drawing a weapon from his pockets, Officer Williams fired at Scott's leg in an effort to make him drop whatever weapon he may have had. (C.P. 47, 51-52) Officer Williams then ordered Scott to stop, get down, and show his hands, but instead Scott tried to leave the BP. (C.P. 47)

Officer Williams put his weapon back and successfully radioed the Pickens police department, then pulled Scott back into the BP. (C.P. 47-48) By this time, Officer Williams was satisfied that Scott didn't have a weapon, but believed he continued to pose a threat because he refused to obey Williams' orders. (C.P. 48) After a physical struggle and a spray of mace, Officer Williams succeeded in handcuffing Scott and assisted him out the door. (C.P. 49)

Scott's version of the events differs somewhat. According to Scott, when he

entered the BP, Officer Williams started "talking crazy" and Scott responded in kind. (C.P. 63) A uniformed Officer Williams greeted Scott with "you're the man I've been looking for." (C.P. 63) Scott responded "man, I don't even f--k with you like that." (C.P. 63) Following another couple of expletive riddled exchanges, Officer Williams "flared" Scott in his chest. (C.P. 63) Scott blocked the second attempted hit, then tried to leave the store, but Officer Williams was between Scott and the door and, as Scott learned upon reaching the door, Officer Williams had locked it. (C.P. 63, 64) Officer Williams told Scott he was going to jail. (C.P. 64) Although Scott first testified he thought he was being arrested for the previous DUI or for getting "smart" with Officer Williams, he later contradicted himself and said he had not been under arrest and that he had refused to listen to Officer Williams because Scott believed Williams was out of his jurisdiction. (C.P. 64-65, 67, 69-70) In any event, Scott unlocked the door and left the BP. (C.P. 64-65, 67) Only after Scott was outside the BP did he realize he'd been shot in the leg. (C.P. 65-66)

Scott fell to the ground, but disobeyed Officer Williams' orders to not move. (C.P. 66, 70) Officer Williams then sprayed mace in Scott's face and handcuffed him. (C.P. 66, 70) Scott testified that he was wearing scrubs at the time of the incident, which had no pant pockets and only one chest pocket on the shirt. (C.P. 64) Scott presumed that Officer Williams was mad about the incident that had occurred two weeks earlier, when Williams had been unable to catch Scott and ticket him for his driving infractions. (C.P. 63) Officer Williams testified that he knew of two armed robberies at the subject BP that had occurred in the two to three month period before the subject incident. (C.P. 41, 42) Scott testified that the BP store was frequently robbed. (C.P. 70-71) Kirk Dickerson, president of Dickerson Petroleum, the owner/operator of the subject BP, testified that this BP had been robbed prior to the subject incident, though he did not know if there had been more than

one previous robbery. (C.P. 168-70) Scott provided an affidavit of Lindsey Horton, Deputy Chief Police for the City of Jackson, Mississippi, which states that his examination of Scott's Amended Complaint and his visit and inspection of the BP reveal a pattern of crimes and violence at that location such that Dickerson should have foreseen the subject incident and negligently failed to provide adequate security which would have "probably" prevented the shooting. (C.P. 175-76) Scott also provided an affidavit of Willie March, Sheriff of Holmes County, Mississippi, which states that he has personal knowledge of various criminal activities which transpired at the subject BP and that there were several robberies of that BP prior to the subject incident and that the BP is known as a place where personal assaults occur and that numerous personal assaults have occurred there. (C.P. 183)

III. SUMMARY OF THE ARGUMENT

As a matter of law, Dickerson owed its invitees, including Scott, a duty to keep its premises reasonably safe and to protect from reasonably foreseeable injury at the hands of a third party. However, Scott failed to offer sufficient evidence to present a genuine issue of material fact concerning the foreseeability of an on-duty police officer's actions within the course and scope of his employment constituting an alleged assault. Further weighing against foreseeability of Officer Williams' actions is the quick and unexpected manner of his acts, which occurred in the heat of the moment. Scott further failed to offer sufficient evidence to present a genuine issue of material fact concerning either the "but for" or the foreseeability prong of proximate cause. Because Scott has failed to meet his burden of presenting evidence sufficient to allow a jury to find breach of the duty owed or proximate cause, there is no need to address damages because Dickerson cannot be held liable for any that may be proven. Instead, the trial court properly granted summary judgment in

favor of Dickerson and this Court should affirm.

IV. LEGAL ARGUMENT

A. The Trial Court Properly Granted Summary Judgment in Favor of Dickerson Petroleum, Inc., d/b/a BP Convenience and Service Station.

Scott's Complaint and amended Complaint allege that Dickerson, as owner/operator of the subject BP, owed a duty to protect Scott from the unprovoked attack by Officer Williams, that Dickerson failed to use reasonable care to do so, and that the attack and Scott's injury were reasonably foreseeable by Dickerson. Further, the Complaint and amended Complaint allege that Dickerson's negligence proximately caused Scott's injury and damages. (C.P. 10, 19) Dickerson successfully sought summary judgment on the basis that Scott had failed to present any evidence of breach or of proximate cause. (C.P. 80-82)

On appeal, Scott claims that Dickerson owed him a duty to protect from reasonably foreseeable injury at the hands of other patrons and that the evidence of previous robberies on the premises "raised an issue of fact as to the foreseeability of the harm to Scott". (Appellant's Brief, p. 13) Further, Scott posits that the evidence "strongly tended to establish" Dickerson's actual or constructive knowledge of an atmosphere of violence on the BP premises. (Appellant's Brief, p. 13) Scott concludes that the evidence raised a genuine issue of fact as to whether the atmosphere of violence on and near the BP rendered foreseeable Officer Williams' assault on Scott. (Appellant's Brief, p. 14) In fact, the trial court properly granted summary judgment for Dickerson because Scott failed to show the existence of a genuine material issue on more than one element of his claim.

1. Standard of Review

This Court reviews orders granting summary judgment *de novo*. ***Magnusen v. Pine Belt Investment Corp.,*** 963 So. 2d 1279, 1281 (¶ 8)(Miss. App. 2007) (citing ***Mantachie Natural Gas v. Mississippi Valley Gas Co.,*** 594 So. 2d 1170, 1172 (Miss. 1992)). Summary judgment is appropriate, pursuant to Mississippi Rule of Civil Procedure 56, "'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, 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.'" ***Magnusen,*** 963 So. 2d at 1281 (¶ 8). A fact is material if it resolves any of the issues properly raised by the parties. ***Id.*** (citations therein omitted).

The party moving for summary judgment has the job of *persuading* the court, first, that there is no genuine issue of material fact and, second, that on the basis of the facts established, he is entitled to judgment as a matter of law. The movant carries a burden of persuasion, not a burden of proof. ***Fruchter v. Lynch Oil Co.***, 522 So.2d 195, 198 (Miss.1988) (citations therein omitted). In order for the non-moving party to survive a summary judgment, he must produce specific facts showing the existence of a genuine material issue for trial. ***Fruchter,*** 522 So. 2d at 198 (citations therein omitted). Courts must view the evidence in the light most favorable to the non-movant. ***Magnusen,*** 963 So. 2d at 1282 (citing ***Russell v. Orr,*** 700 So.2d 619, 622 (Miss. 1997)). Still, a mere scintilla of evidence for the non-movant is insufficient to withstand summary judgment. ***Davis v. Christiana Brotherhood Homes of Jackson, Mississippi, Inc.,*** 957 So. 2d 390, 397 (¶ 12) (Miss. App. 2007) (citations therein omitted).

This Court must apply this standard of review to each element of the plaintiff's claim. ***Davis,*** 957 So. 2d at 398 (¶ 13) (citing ***May v. V.F.W. Post # 2539,*** 577 So. 2d 372, 375

(Miss. 1991)). Grant of summary judgment is proper unless a genuine issue of material fact exists with respect to each contested element of negligence. ***Davis,*** 957 So. 2d at 398 (¶ 16). If the moving party can show a failure of proof on any essential element of the non-movant's claim, the moving party is entitled to summary judgment. ***Crain v. Cleveland Lodge # 1532, Order of Moose, Inc.,*** 641 So. 2d 1186, 1188 (Miss. 1994) (citations therein omitted).

2. Requisite Elements of Scott's Claim

It is well settled that the four elements of a claim of negligence are duty, breach, causation, and damages. ***Magnusen,*** 963 So. 2d at 1282 (¶ 10) (citing ***Price v. Park Management, Inc.,*** 831 So. 2d 550 (¶ 5) (Miss. App. 2002)). To prove that the circuit court should not have granted a motion for summary judgment, where all elements of negligence are contested, a plaintiff must show that a genuine issue of material fact exists concerning whether the defendant owed him a duty, whether defendant breached that duty, whether the plaintiff suffered damages, and whether there is a causal connection between the breach and the damages. ***Magnusen,*** 963 So. 2d at 1282 (¶ 10) (citing ***Crain v. Cleveland Lodge 1532, Order of the Moose, Inc.,*** 641 So. 2d 1186, 1189 (Miss. 1994) (citing ***Lyle v. Mladinich,*** 584 So. 2d 397, 398 (Miss. 1991))).

a. Duty and Breach

It is undisputed that Scott was, as a matter of law, an invitee at Dickerson's BP at the time of the subject incident. Accordingly, and also as a matter of law, Dickerson owed Scott the duty to keep the premises reasonably safe and to warn of hidden danger as well as to exercise reasonable care to protect him from reasonably foreseeable injury at the hands of a third party. ***Magnusen,*** 963 So. 2d at 1282 (¶ 11) (citing ***Little v. Bell,*** 719 So. 2d 757 (¶ 16) (Miss. 1998); ***Crain,*** 641 So. 2d at 1189). Or, restated, a business owner

has a duty to protect invitees from the reasonably foreseeable acts of third parties. ***Stevens v. Triplett,*** 933 So. 2d 983, 985 (¶ (8) (Miss. App. 2005) (citing ***Lyle v. Mladinich,*** 584 So. 2d 397, 399 (Miss. 1991)). This duty extends so far as to protect from reasonably foreseeable criminal acts of third parties. ***Davis,*** 957 So. 2d at 399 (¶ 18). Notwithstanding this duty, the premises owner is not an insurer of his invitees' safety. ***Crain,*** 641 So. 2d at 1189 (citations therein omitted).

If the premises owner had cause to anticipate the third party's act, then that act may be considered reasonably foreseeable. ***Magnusen,*** 963 So. 2d at 1282 (¶ 12) (citing ***Crain,*** 641 So. 2d at 1189). This "cause to anticipate" a third party's act may arise from actual or constructive knowledge of the third party's violent nature or from actual or constructive knowledge that an atmosphere of violence existed on the premises. ***Magnusen,*** 963 So. 2d at 1282 (¶ 12) (citing ***Crain,*** 641 So. 2d at 1189). In determining whether a defendant had knowledge that an atmosphere of violence existed, relevant factors to consider are the overall pattern of criminal activity that occurred prior to the event in question in the general vicinity of the defendant's business premises and the frequency of criminal activity on the premises. ***Magnusen,*** 963 So. 2d at 1282 (¶ 12) (citing ***Crain,*** 641 So. 2d at 1189-90); ***Davis,*** 957 So. 2d at 401 (¶ 22). An incident that occurs in a quick and unexpected manner weighs against negligence and foreseeability because defendants cannot reasonably prevent a sudden attack and because the defendant cannot be deemed on notice of a spontaneous act. ***May,*** 577 So. 2d at 376-77 (citations therein omitted).

While the parties agree that Dickerson owed Scott a duty to exercise reasonable care to protect him from the reasonably foreseeable acts of third parties, they disagree as to whether Officer Williams' subject acts were reasonably foreseeable. If Dickerson had cause to anticipate Officer Williams' actions, then they may be considered reasonably

foreseeable. ***Magnusen,*** 963 So. 2d at 1282 (¶ 12) (citing ***Crain,*** 641 So. 2d at 1189). If Dickerson had actual or constructive knowledge of Officer Williams' violent nature or actual or constructive knowledge that an atmosphere of violence existed on the BP premises, then he *may* have cause to anticipate Officer Williams' acts. ***Magnusen,*** 963 So. 2d at 1282 (¶ 12) (citing ***Crain,*** 641 So. 2d at 1189). The record is void of any evidence suggesting that Dickerson was aware of Officer Williams' violent nature, nor does Scott urge such a theory. It follows that if Dickerson was to have cause to anticipate Officer Williams' act, it must have arisen from actual or constructive knowledge that an atmosphere of violence existed on the BP premises. ***Magnusen,*** 963 So. 2d at 1282 (¶ 12) (citing ***Crain,*** 641 So. 2d at 1189).

To determine whether Dickerson had knowledge of an atmosphere of violence, the overall pattern of criminal activity in the general vicinity of the BP prior to the subject incident and the frequency of criminal activity on the BP premises are relevant factors to consider. ***Magnusen,*** 963 So. 2d at 1282 (¶ 12) (citing ***Crain,*** 641 So. 2d at 1189-90); ***Davis,*** So. 2d at 401 (¶ 22). The record contains no evidence concerning the overall pattern of criminal activity in the general vicinity of the BP prior to the subject incident other than Lindsey Horton's affidavit. This affidavit states that his research, visit, and inspection of the BP and his examination of Scott's amended Complaint, witness statements, and depositions revealed a pattern of crimes and violence at the BP and *in the general area,* such that Dickerson should have foreseen the subject incident. (C.P. 175-76) This conclusory affidavit, with reference to no specific facts and lacking any analysis of the dangerous nature of the property, is equivalent to no evidence at all. *See* ***Stevens,*** 933 So. 2d at 986 (¶ 11).

The evidence regarding the frequency of criminal activity on the BP premises is,

therefore, limited to Officer Williams' testimony of two armed robberies in a two or three month period before the subject incident, Scott's testimony that the BP was frequently robbed, Willie March's affidavit which states only that various criminal activities, including several robberies and numerous personal assaults, have occurred at the BP, and Kirk Dickerson's testimony that the BP had been robbed (once that he knew of) before this incident. (C.P. 41, 42, 70-71, 183, -70)

Surely, Kirk Dickerson's actual knowledge of one prior robbery can not constitute *actual* notice of an atmosphere of violence. Consequently, Dickerson may have only *constructive* notice, if any at all, of an atmosphere of violence at the BP. Dickerson urges that the evidence in the record is insufficient evidence to find Dickerson had constructive notice that an atmosphere of violence existed and, therefore, is insufficient to create a genuine issue of material fact regarding the foreseeability of Officer Williams' "assault" on Scott. And if Officer Williams' act was not reasonably foreseeable, Dickerson had no duty to protect Scott from it. ***Stevens,*** 933 So. 2d at 5 (¶ 8).

The ***Stevens*** case is instructive. In ***Stevens,*** the plaintiff's evidence on reasonable foreseeability was limited to a police report showing only a "handful" of violent crimes (including burglaries, assaults, a rape and a kidnapping) in the five year period prior to the incident at issue, none of which actually occurred on the subject premises, and a single expert witness affidavit which merely stated the incident was foreseeable[4]. The ***Stevens*** Court found this evidence insufficient to put the owner on any sort of notice that an atmosphere of violence existed and insufficient to create a genuine issue of material fact regarding the foreseeability of the third party's assault on the plaintiff. ***Stevens,*** 933 So. 2d at 985-86 (¶ 9-11). Consequently, there was no genuine issue of material fact

4 The Court noted that an expert affidavit would also need to provide an analysis of the

regarding breach. ***Id,*** at 986 (¶ 11).

In contrast, the Mississippi Court of Appeals has found a genuine issue of material fact concerning whether the premises owner had actual or constructive knowledge that an atmosphere of violence existed where the record contained evidence of all of the following: sworn deposition testimony of two different persons describing several specific shootings they had personally witnessed at the premises at issue; deposition testimony of a security company owner who had provided security to the premises reflecting that he had heard gunshots in the general vicinity and that one of his security guards was shot while on duty at the premises; deposition testimony of an employee of the premises owner describing a shooting incident that occurred on the premises in daylight hours, describing hearing gunshots on the premises, and reflecting that the employee disagreed if the premises owner claimed to be unaware of criminal activity at the premises; deposition testimony of another employee of the premises owner revealing that the premises had been burglarized; deposition testimony of another person claiming fights and shootings every day at the premises; deposition of a police officer familiar with the premises because it was located in the precinct he patrolled, revealing that he knew of fights and shootings at the premises all the time and, further, that the subject shooting did not surprise the officer because of the area and the number of homicides in the area; police statistics reflecting 676 crimes against persons in the precinct encompassing the premises over the course of the three year period prior to the subject incident; and where a police activity log contained reports of hundreds of incidents involving police which either originated or referenced the subject premises covering a period of three years before and about a year and a half after the incident, including shots fired, fights, man with gun, arson, possession of narcotics,

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dangerous nature of the property for the plaintiff to prevail. ***Stevens,*** 933 So. 2d at 986 (¶ 11).

malicious mischief, disturbance, stabbing, simple and aggravated assaults, rape, auto theft, shooting with intent, disturbing the peace, burglary, armed robbery, and trespassing. ***Davis,*** 957 So. 2d at 401-03 (¶¶ 24-28).

In ***Davis,*** the decedent was injured by a third party's criminal activity on the defendant's premises. This is precisely the risk and type of harm against which the defendant had a duty to protect invitees, including the decedent. The Court concluded that, in light of the nature, amount, and frequency of crimes against persons reported at and in the vicinity of the subject premises, a reasonable jury could find it foreseeable that an individual would be shot and killed by a person committing a criminal act on the premises. ***Davis,*** 957 So. 2d at 405, 406 (¶¶ 33, 36).

However, the evidence in the case *sub judice* falls far short of that offered in ***Davis.*** In the first instance, the evidence in the record before this Court is insufficient to create a genuine issue of material fact regarding an atmosphere of violence. Nonetheless, Scott was injured by an on-duty police officer, not by an armed robber. As Scott alleges in his amended Complaint, and as incorporated in the trial court's order, Officer Williams was operating within the scope of his authority as a police officer and employee of the City of Goodman. (C.P. 19, 135) An attack by an on-duty policy officer is *not* the type of harm against which Dickerson had a duty to protect invitees. So even if the evidence concerning the nature, amount, and frequency of crimes at the BP is considered sufficient to create a genuine issue of material fact regarding whether an atmosphere of violence existed, a reasonable jury could not find it foreseeable that an invitee would be injured by an on-duty police officer's unprovoked attack[5]. ***Davis,*** 957 So. 2d at 405, 406 (¶¶ 33, 36). There is insufficient evidence to present a genuine issue of material fact concerning the

5 Scott characterized Officer Williams' acts as an unprovoked attack.

foreseeability of an on-duty police officer's actions within the course and scope of his employment constituting an alleged assault on an invitee; therefore, Dickerson had no duty to protect Scott from Officer Williams' acts. ***Stevens,*** 933 So. 2d at 985 (¶ 8). Without a duty to protect from such acts, there can be no breach for failing to do so.

Additionally, the incident between Scott and Officer Williams occurred in a quick and unexpected manner, further weighing against foreseeability. ***May*** 577 So. 2d at 376-77. Dickerson cannot be deemed to have had either constructive or actual notice of Officer Williams' spontaneous act, nor can he have reasonably anticipated or prevented it. ***Id.*** Dickerson was not required to be an insurer of Scott's safety. ***Crain,*** 641 So. 2d at 1189.

Even viewing the evidence in the light most favorable to Scott, it can be said as a matter of law that Dickerson had no duty to protect Scott from Officer Williams' subject acts. Consequently, and also as a mater of law, there can be no breach. This Court should find that Scott failed to meet his burden of showing a genuine issue of material fact concerning duty and breach and, further, should affirm the trial court's grant of summary judgment. ***Davis,*** 957 So. 2d at 398 (¶ 16). Alternatively, should this Court disagree and find a material issue of genuine fact on duty and/or breach, there is a complete failure of proof on the element of proximate cause.

b. Proximate Cause and Damages

Two distinct concepts comprise proximate cause, to wit: cause in fact and foreseeability. ***Davis,*** 957 So. 2d at 404 (¶ 32) (citing ***Johnson v. Alcorn State Univ.,*** 929 So. 2d 398, 411 (¶ 48) (Miss. App. 2006) (citing ***Osborn v. City of Wiggins,*** 919 So. 2d 85, 91 (¶ 21) (Miss. App. 2005))). "'Cause in fact means that the act or omission was a substantial factor in bringing about the injury, and without it the harm would not have occurred. Foreseeability means that a person of ordinary intelligence should have

anticipated the dangers that his negligent act created for others.'" ***Id.*** Foreseeability, however, does not require that the defendant anticipate the precise manner in which injury will occur once he has created the dangerous situation through his negligence. ***Davis,*** 957 So. 2d at 405 (¶ 33) (citing ***Osborn,*** 919 So. 2d at 92 (¶ 21). Instead, it is the general nature of the event or the harm that the defendant must foresee. ***Davis,*** 957 So. 2d at 405 (¶ 33) (citations therein omitted). Cause in fact requires proof that but for the negligent act or omission, the injury would not have occurred. ***Davis,*** 957 So. 2d at 406 (¶ 38). To survive summary judgment on this element, there must be evidence that, had the defendant provided the security measures the plaintiff claimed he had a duty to provide, the third party would not have injured the plaintiff on the date of the incident at issue. ***Davis,*** 957 So. 2d at 406 (¶ 38).

On appeal, Scott gives short shrift, at best, to the element of proximate cause. He simply says that the evidence of previous criminal activity at the BP is sufficient to raise an issue of fact as to foreseeability of harm to Scott and to establish the breach of duty as proximate cause of Scott's injuries. (Appellant's Brief, p. 13) Additionally, although not mentioned by Scott as relevant to the element of proximate cause, Lindsey Horton's affidavit states that adequate security would have "probably" prevented the shooting. (C.P. 175-76) This is, quite simply, not enough.

Scott has provided absolutely no proof that had Dickerson provided "adequate security", Officer Williams would not have injured Scott on the date of the incident at issue. ***Davis,*** 957 So. 2d at 406 (¶ 38). Even Horton's affidavit is ineffective as "but for" evidence, because it allows that Scott's injury could still have occurred even with "adequate security". Moreover, Scott does not specify what he believes would have constituted "adequate security". In fact, had security guards been on duty at the BP at the time of this

incident, Scott's injury would still have occurred because a security guard would have deferred to a uniformed, on-duty police officer. There is no "but for" proof in the record, therefore no evidence of cause in fact. ***Id.*** Assuming, *arguendo,* Dickerson's failure to provide "adequate security" constitutes breach of the duty owed, said breach was not a substantial factor in bringing about Scott's injury. ***Davis,*** 957 So. 2d at 404 (¶ 32).Not only has Scott failed to provide evidence that Officer Williams would not have injured him but for Dickerson's failure to provide adequate security, he has also failed to specify what security measures he believes Dickerson had a duty to provide. It follows that Scott cannot survive summary judgment on the but for prong of proximate cause. ***Davis,*** 957 So. 2d at 406 (¶ 38).

Scott similarly fails to meet his burden on the foreseeability prong of proximate cause, as a person of ordinary intelligence could have had no way to anticipate that a lack of "adequate security" would result in an unprovoked attack by an on-duty police officer. ***Davis,*** 957 So. 2d at 404 (¶ 32). Although it is not the precise manner of injury that must be anticipated to establish foreseeability, even the general nature of the subject event – harm to an invitee by an on-duty police officer acting in the course and scope of his employment – was not foreseeable. ***Davis,*** 957 So. 2d at 405 (¶ 33). Based on the evidence in the record, if any harm to an invitee was foreseeable, it would be harm by a criminal incidental to the commission of a crime. It follows that Scott has failed to present any evidence on the foreseeability prong of proximate cause also. Assuming, *arguendo,* Dickerson's failure to provide "adequate security" constitutes a breach of the duty owed, such breach did not create a foreseeable danger to invitees, including Scott. ***Davis,*** 957 So. 2d at 404 (¶ 32). Again, summary judgment in favor of Dickerson is proper. ***Davis,*** 957 So. 2d at 406 (¶ 38).

When asked what the defendant in ***May*** could have done to protect him from the acts of the third party assailant, the plaintiff in that case said he didn't know, then suggested the defendant might have had more than one security guard. In fact, there were two security guards present, one of whom was involved in coming to the plaintiff's aid when he was assaulted by another patron. So, while the plaintiff claimed the defendant was negligent in failing to provide adequate security, he failed to make any showing that an increased number of security guards would have prevented the third party from attacking him. ***May,*** 577 So. 2d at 374, 376.

In ***Davis,*** the plaintiff urged that security guards or increased lighting would have prevented the third party's shooting of the decedent invitee. The evidence showed that the decedent and the third party who eventually shot the decedent had entered the defendant's premises together and were socializing peacefully for several hours prior to the shooting. The shooting later occurred in the heat of the moment during an argument between the decedent and the third party, while they were both in the back seat of a vehicle in the parking lot of the defendant's premises. Notably, police were present on the premises when the shooting occurred, which did nothing to deter the third party. The Court concluded that there was no evidence in the record to support the plaintiff's contention that the presence of security guards or improved lighting would have prevented the shooting, which was sudden, unexpected, and occurred in the heat of the moment. ***Davis,*** 957 So. 2d at 407-08 (¶ 40-42). Similarly, although Scott has not specified what type of "adequate security" Dickerson should have provided, there is no evidence in the record tending to show that the presence of security guards would have prevented Officer Williams' sudden, unexpected, heat of the moment shooting, particularly as he was acting in the course and scope of his employment. ***Davis,*** 957 So. 2d at 407-08 (¶ 40-42).

Additionally, the plaintiff in ***Davis*** submitted an affidavit of a police officer designated as an expert in the fields of security and law enforcement, which clearly and unambiguously stated that the cause of death was the defendant's failure to have security guards or other security measures in place. The Court disregarded this affidavit because it contained only conclusory statements with no factual basis in the record. ***Davis,*** 957 So. 2d at 408-10 (¶¶ 43-47). Lindsey Horton's affidavit is likewise conclusory, with no factual basis in the record and without referencing any specific instances to support his statements. But, more importantly for this issue, Horton's affidavit is not a clear or unambiguous statement of causation. Instead, Horton's affidavit merely states that adequate security would "probably" have prevented the shooting. (C.P. 176) As stated previously, this is equivalent to a statement that Scott's injury could still have occurred even with "adequate security". Just as in ***Davis,*** Scott has failed to meet his burden on the element of proximate cause. Without a genuine issue of material fact concerning proximate cause, summary judgment in favor of Dickerson is proper. This Court must affirm.

As in the case at bar, the record in ***Crain*** contained absolutely no evidence showing a causal link between the adequate security urged by the plaintiff (increased lighting in the defendant's parking lot) and the injury plaintiff sustained at the hands of the third party. Moreover, the plaintiff made no showing that any omission on the part of defendant was the proximate cause of the attack or injury. Because the plaintiff failed to provide any evidence on proximate cause, which was an essential element of his premises liability claim, the Court affirmed summary judgment in favor of the defendant. ***Crain,*** 641 So. 2d at 1192. Because Scott failed to meet his burden of presenting evidence sufficient to allow a jury to find proximate causation, there is no genuine issue of material fact concerning

whether the lack of "adequate security" is the proximate cause of Scott's injuries; therefore, summary judgment is appropriate and this Court must affirm. ***Davis,*** 957 So. 2d at 410 (¶ 48).

Also applicable and relevant to the proximate cause element is ***Titus v. Williams,*** 844 So. 2d 459 (Miss. 2003). In ***Titus,*** the plaintiff sued a convenience store and others for the death of a family member, Titus, who was shot by a third party on the store's property. Titus had attempted to break up an argument that occurred in the convenience store parking lot one evening. Store employees cleared the parking lot and called the police, who arrived quickly and dispersed the remaining crowd. Titus told officers nothing was going on, that he had not been fighting, then he left the premises. Forty minutes later, one of the parties who had been involved in the parking lot argument, Butcher, returned to the store for gasoline. Titus decided to get Butcher's license plate number for the police because he had been told that Butcher had a gun. Butcher saw Titus, retrieved a gun, and fired two shots at the car Titus was in. A store employee was advised to call the police about the shooting, but declined to do so. Instead, Titus drove to the police station and reported the shooting. The police advised Titus to stay away from the store and let police handle the situation. Titus drove away and soon saw Butcher inside the store, where he was apologizing for the parking lot shooting. Again, the store employee did not call police. Titus got out of the car and ran into the store, where he fought with Butcher. Butcher retrieved a gun, ran after Titus behind the building, and shot and killed him. From start to finish, these events occurred over a period of about an hour. ***Titus,*** 844 So. 2d at 462-64 (¶¶ 6-14).

The Court concluded that the plaintiff failed to establish that Titus' death was proximately caused by the convenience store. Instead, the fact that Titus had confronted a

dangerous person, known to Titus to possess a gun which he was not afraid to use, was an intervening cause which relieved the store of any alleged liability. ***Titus,*** 844 So. 2d at 466 (¶ 26). Titus "created and caused this unfortunate event." ***Id.*** Although the decedent had been a licensee or trespasser, the Mississippi Supreme Court found his status irrelevant to their decision. ***Titus,*** 844 So. 2d at 467 (¶ 33). The Court reasoned that even using the highest standard of care owed pursuant to Mississippi premises liability law, which is the duty owed an invitee such as Scott, any duty to warn (or to protect) disappears entirely when it is shown that the injured person observed and fully appreciated the peril. ***Id.***

Scott argues that the facts in the case at bar are inapposite to those presented in ***Titus,*** because Scott was attempting to avoid a confrontation with Officer Williams. Scott even states that "nothing" in the record suggests that he caused the confrontation with Officer Williams. (Appellant's Brief, p. 14) Despite the conflicting evidence in the record about who caused this confrontation, we will view the evidence in the light most favorable to Scott and assume, *arguendo,* that he was indeed attempting to avoid a confrontation. Still, even Scott's deposition testimony reveals that he knew the following: he thought Officer Williams was "talking crazy"; that Officer Williams was trying to arrest him; that Scott did not listen to Officer Williams and did not intend to allow the arrest because he thought Officer Williams was outside of his jurisdiction; that he had gotten "smart" with officer Williams; and that he had disobeyed Officer Williams' orders. (C.P. 63-70) Given that Officer Williams was in uniform and was carrying a gun, Scott also knew that Officer Williams was an armed police officer, who would not likely be afraid to use a gun. So, similar to the situation in ***Titus,*** Scott intentionally resisted arrest, refused to listen to and obey a uniformed police officer who was "talking crazy" and who possessed a gun which he was not likely afraid to use, therefore Scott was an intervening cause, which relieved

Dickerson of any alleged liability. ***Titus,*** 844 So. 2d at 466 (¶ 26). Scott "created and caused this unfortunate event" by refusing to comply with Officer Williams. ***Id.*** Any duty Dickerson may have owed Scott, to protect him from reasonably foreseeable acts of third parties, was wholly negated because Scott observed and fully appreciated the peril Officer Williams presented. ***Titus,*** 844 So. 2d at 467 (¶ 33).

Given Scott's failure to show a genuine issue of material fact regarding breach of the duty owed and proximate cause, there is no need to address damages. Regardless, Dickerson concedes that Scott suffered damages for the shooting, but none for which Dickerson can be held liable.

V. CONCLUSION

For all of the above and foregoing reasons, this Court should affirm the Holmes County Circuit Court's Order granting summary judgment in favor of Dickerson Petroleum, Inc., d/b/a BP Convenience and Service Station.

RESPECTFULLY SUBMITTED this the 12th day of March, 2008.

DICKERSON PETROLEUM, D/B/A BP CONVENIENCE AND SERVICE STATION

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CERTIFICATE OF SERVICE

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