IN THE MISSISSIPPI SUPREME COURT

**No. 2008-CA-01713-SCT** Ac3

DOUBLE QUICK, INC. APPELLANT/CROSS-APPELLEE

VS.

RONNIE LEE LYMAS APPELLEE/CROSS-APPELLANT

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**PROPOSED AMICUS BRIEF FILED ON BEHALF OF THE APPELLEE/CROSS-APPELLANT SUBMITTED BY THE MAGNOLIA BAR ASSOCIATION**

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## SUMMARY OF THE ARGUMENT

This is a premises liability case. Ronnie Lymas was exiting a Double Quick convenience store in Belzoni Mississippi after having just purchased a beverage when he was attacked by two men who had been arguing in the parking lot. One of those men, Orlando Newell, shot Lymas. A jury heard all of the evidence including experts for both sides and returned a verdict of a little more then $4 million for Lymas (this was substantially reduced by the trial court to comply with the $1 million cap provided for in M.C.A. § 11-1-60(2)(b)).

Appellant's Amici contend that this case should be used as a vehicle to change the law of premises liability so that 1) premises owners are never liable for criminal acts of third persons where those acts have no relationship to the business and 2) premises owners are not required to hire security guards to protect customers from "generalized crime." Amici, however, can cite to no jurisdictions adopting such measures. As shown below, Mississippi law on premises liability places it squarely within the majority of jurisdictions which require only that business owners take reasonable measures to protect the persons they invite onto their premises to do business.

Appellee Lymas argued below and on appeal that the cap on non-economic damages that was used by the trial court to reduce Lymas's damages is unconstitutional as a violation of the right to trial by jury as well as the constitutional provision requiring separation of powers. Both the Mississippi and United States Constitutions guarantee the right to trial by jury. This includes the right to have the jury determine damages. M.C.A. § 11-1-60(2)(b)'s cap on noneconomic damages violates the right to trial by jury.

The cap also violates the separation of powers provision of the state constitution which requires that no branch of government usurp powers exclusive to the others. The power to limit excessive jury awards, through the doctrine of remittitur, is exclusive to the judiciary. The legislature's attempt to limit this power through the adoption of a cap on jury awards violates the doctrine of separation of powers.

## LAW AND ARGUMENT

### 1. This Court should not adopt a rule that premises owners should be liable only for criminal acts that have a relationship to the business of the premises owner.

Amici argue that business owners should be liable for the criminal acts of third persons only when those acts have a relationship to the business. This would include bars and nightclubs. Since they serve alcohol to their patrons, it is reasonable to hold them liable when one patron assaults another. *Brief of Amici p. 8.* It is not reasonable, they argue, to hold the business owner liable where the criminal acts of third parties have no relationship to the business.

This argument is unavailing for several reasons. First of all, Amici fail to cite a single case from any jurisdiction adopting such a rule. Secondly, the argument that "[w]here crime is related to the premises only by happenstance, the customer's presence on the premises does nothing to increase his risk of harm; the risk to the customer is the same throughout the neighborhood, whether he is on the sidewalk or in the store parking lot"[1] ignores the fact that the neighborhood as a whole, as opposed to the individual business owner, is not inviting the customer onto its premises in order to do business. The reason that businesses have a special duty to their customers (also known as

[1] Brief of Amici p. 9.

"invitees") is because they invite the customer on to their premises "for some purpose of interest or advantage to him." *Strand Enterprises v. Turner*, 223 Miss. 588, 78 So.2d 769, 773 (1955).

It is also not true that "[r]etail businesses have no ability to reduce crime" or that premises owners cannot prevent "random conduct by third parties over whom the premises owner has no control". *Brief of Amici pp. 9, 14.* Individual businesses may not have the ability to affect the overall crime rate, but they must take reasonable steps to make their individual premises safe for their customers and others who have been invited to their premises. If this were not true, the law in most jurisdictions would not require them to do so. Businesses are not expected to eradicate all crime on their premises, only to make reasonable efforts to protect those on its premises. *Monk v. Temple George Associates, LLC*, 869 A.2d 179, 187 (Conn. 2005).

Courts have long recognized that business owners "are in the best position to control the risk of harm. Ownership or control of the premises, for example, enables a party to prevent the harm." *Jarrah v. Trump Hotels & Casino Resorts, Inc.*, 487 F.Supp.2d 522, 526 (D.N.J. 2007). Neighborhoods, as a whole, cannot eject loiterers from the property. Individual business owners can. Indeed, removing from the property persons who have no legitimate business on the property may be all that an individual business owner is required to do under the circumstances.

Amici argue that protection of the public from random acts of violence is a duty of law enforcement and not private landowners. It is true that general police protection is provided by government-employed law enforcement. However, it is also true that law enforcement officers, unlike premises owners, do not owe any duty to individual persons.

*See DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195-96, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) (holding that the Fourteenth Amendment provides no affirmative right to governmental aid or protection against violence occurring at the hands of private individuals). In those few jurisdictions where a premises owner is not liable for the acts of third persons on the property, law enforcement may be the only protection a patron can count on when doing business in a particular location. But even law enforcement can't eject persons from a business without having been asked to do so by the premises owner where that person is not committing some illegal act.

At any rate, Mississippi, like most states, is not one of those jurisdictions where business owners have no duty to protect their clientele from the violent acts of third persons. Where, as in Mississippi, a business owner has a duty to its invitees, that burden may not be met by relying on law enforcement personnel who have no duty to the individuals patronizing a particular business. *See, e.g., Tarzia v. Great Atlantic & Pacific Tea Co.*, 727 A.2d 219, 225 (Conn. 1999) (holding that premises owner cannot contract away its duty of reasonable care).

Amici argue that crime exists everywhere and, thus, under the present law, all businesses are required to take steps to safeguard their patrons "and businesses become virtual insurers of their customers' safety." *Brief of Amici at p. 11.* This argument ignores the reality of how premises liability cases are tried. A plaintiff who comes to court arguing that a particular business owner failed in its duty to protect him from the criminal acts of third parties will have his case dismissed where his case is built on the premise that "crime is everywhere." *See, e.g. Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So.2d 1186, 1192 (Miss. 1994). In determining whether a particular

business satisfied its duty of reasonable care, the plaintiff must show that what happened to him was foreseeable and, thus, that a reasonable premises owner would have taken steps to prevent the same. This is done by showing that the premises owner had "actual or constructive knowledge of the assailant's violent nature, or actual or constructive knowledge that an atmosphere of violence exists on the premises." *Thomas v. The Columbia Group, LLC*, 969 So.2d 849, 854 (Miss.2007). In *Gatewood v. Sampson*, 812 So.2d 212, 220, 221 (Miss.2002), the plaintiff adduced evidence that "sixty violent crimes" had been reported to police in the neighborhood in the three years prior to the attack on the plaintiff. On the other hand, plaintiffs who have been unable to show that the area in which they were attacked was a violent one are typically out of court via summary judgment. *See, e.g., Stevens v. Triplett,* 933 So.2d 983, 985 (Miss.App. 2005); *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.,* 641 So.2d 1186, 1192 (Miss. 1994).

Indeed, the plaintiff in *Crain v. Cleveland Lodge, supra,* argued that "crime is everywhere" and urged the Court to require all premises owners to adopt security measures to guard against crime. *Crain,* 641 So.2d at 1190 (Miss. 1994). In rejecting this argument, this Court stated as follows:

> We doubt there exists a community in this State which is entirely crime-free. In the broadest sense, all crimes anywhere are "foreseeable." To impose a blanket duty on all merchants to afford protection to their patrons would be a result not intended by our courts and not condoned by public policy. Discharging such a duty would undoubtedly be inconvenient and expensive, and to impose a duty absent true foreseeability of criminal activity in a particular store would be grossly unfair.

*Crain*, 641 So.2d at 1191, *quoting Sawyer v. Carter,* 322 S.E.2d 813, 817 (N.C. 1984). *See also Simpson v. Boyd,* 880 So.2d 1047, 1051 (Miss. 2004) (affirming summary

judgment even though premises owner once admitted that the entire city in which his office was located (Greenville) was a high crime area).

The "crime is everywhere" argument has been soundly rejected by this Court as a reason to require all business owners to adopt the most stringent safeguards against crime. It should also be rejected as a rationale to exempt all business owners from adopting reasonable security measures to protect their clientele.

**2. Plaintiff is not requesting this Court to adopt a rule requiring all premises owners employ security guards.**

Amici argue that because Lymas contended that security guards, among other precautions, might have prevented his injuries, business owners need this Court to declare that there is no requirement that they hire security guards. Requiring premises owners to hire "full-time, armed security guards", they claim, is too great an expense for small businesses. *Brief of Amici p. 12.*

First of all, there is no need for such a rule. Affirming this case will not create such a requirement. Whether the conduct of a particular property owner meets the standard of reasonable care is a matter for jury determination. This includes a determination of whether the particular circumstances may have called for security guards.

Amici argue that some states considering this issue "have either adopted specific standards for such [security guard] requirements or have declined to require them at all." They cite cases from Michigan and Wisconsin. Michigan courts, unlike the court in most other jurisdictions, have held that merchants have no duty to protect patrons from the criminal acts of third parties. *See, e.g., MacDonald v. PKT, Inc.*, 628 N.W.2d 33, 39 (Mich. 2001).

Washington, like Mississippi, follows the Restatement (Second) of Torts. *Nivens v. 7-11 Hoagy's Corner,* 943 P.2d 286, 293 (Wash. 1997). Amici cite *Nivens* as one of the cases refusing to impose a requirement that business owners hire security guards. Amici's argument, however, is somewhat misleading. The plaintiff in *Nivens* argued that **all** businesses have a duty to provide security personnel to prevent criminal behavior on their premises. The court in that case roundly rejected such a rule. Lymas' case was never premised on an argument that **all** business are required to hire security guards to protect their patrons from violent acts by third persons.

Amici also cite the District of Columbia as another jurisdiction holding that even a high incidence of crime does not require a premises owner to hire security personnel citing *Cook v. Safeway Stores, Inc.*, 354 A.2d 507, 509 (D.C. App. 1976). But *Cook* was decided over thirty years ago and its holding has been criticized by courts which have adopted the more flexible "forseeability" approach propounded by the Restatement (Second) of Torts. *See, e.g., Jardel v. Hughes*, 523 A.2d 518, 524 (Del. 1987) and *McClung v. Delta Square Limited Partnership*, 937 S.W.2d 891, 897 (Tenn. 1996) (characterizing *Cook* as one of the early cases recognizing no duty of premises owner to protect patrons from criminal attacks). Moreover, in more recent years, the D.C. courts will impose liability on business owners for the criminal acts of third parties where those acts were foreseeable. *Novak v. Capital Management and Development Corp.,* 452 F.3d 902, 913 (C.A.D.C. 2006).

### 3. Mississippi law, based on the Restatement (Second) of Torts is in line with most other jurisdictions on premises liability law and should not be changed.

At common law, the owner or possessor of property has the general duty to take reasonable measures to maintain his or her property in a reasonably safe way. *Titus v. Williams*, 844 So.2d 459, 466 (Miss.2003). This includes a duty to protect those invited on the premises from criminal acts of third parties where those acts are foreseeable. *See, e.g. Doe ex rel. Doe v. Wright Sec. Services, Inc.*, 950 So.2d 1076, 1079 (Miss.App. 2007). Most jurisdictions hold likewise; they differ only in the extent of the duty owed. "The broadest exposure of defendants to liability comes in those jurisdictions that follow the so-called 'totality of the circumstances" approach." 26 Causes of Action 2d 1 § 5. This includes Arizona, Massachusetts and California. At the other end are those jurisdictions like Alabama that impose liability only in exceptional circumstances. *Id.* Mississippi is one of the many states in the middle where liability is imposed via a "known aggressor/imminent danger" approach or a "prior similar incidents" approach. *See Corley v. Evans,* 835 So.2d 30, 41 (Miss. 2003) (rejecting plaintiff's request to adopt a totality of the circumstances standard for premises liability cases involving criminal conduct of third persons). *See also*, n. 2, *infra.*

Mississippi, like many jurisdictions, follows the Restatement (Second) of Torts with regard to the law of premises liability. *Green v. Dalewood Property Owners' Ass'n, Inc.*, 919 So.2d 1000, 1008 (Miss.App.2005); *Foradori v. Harris,* 523 F.3d 477, 491 (5th Cir. 2008). This includes premises cases wherein liability is based on the criminal act of a third party. As stated in *Foradori,*

> Mississippi courts, like those of other states, have refined general negligence principles to require an owner of a business catering to the

> public to maintain a reasonably safe environment to protect business invitees from foreseeable harm by employees and third persons. "Mississippi imposes on business owners 'the duty to maintain the premises in a reasonably secure or safe condition' for business patrons ...."

*Foradori*, 523 F.3d at 486 citing *Am. Guar. & Liab. Ins. Co. v. 1906 Co.*, 273 F.3d 605, 613 (5th Cir.2001).

The issue of a business owner's liability for the criminal acts of third persons is addressed by § 344 of the Restatement (Second) of Torts.[2] It provides as follows:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
>
> (a) discover that such acts are being done or are likely to be done, or

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[2] Also following the Restatement (Second) of Torts § 344 when it comes to liability for criminal acts of third persons are the following jurisdictions: Alaska: *Gordon v. Alaska Pacific Bancorporation*, 753 P.2d 721, 722 (Alaska 1988); Arizona: *Martinez v. Woodmar IV Condominiums Homeowners Ass'n, Inc.*, 941 P.2d 218, 222 (Ariz. 1997); Colorado: *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 46 (Colo.1987); Delaware: *Furek v. University of Del.*, 594 A.2d 506, 520-21 (Del.1991); Georgia: *Wilks v. Piggly* Wiggly, 429 S.E.2d 322, 323 (Ga. 1993); Hawaii: *Maguire v. Hilton Hotels Corp.*, 899 P.2d 393, 396-97 (Hawaii 1995); Idaho: *McGill v. Frasure*, 790 P.2d 379, 382 (Idaho App. 1990); Illinois: *Gilley v. LTMX Enterprises, Inc.*, 2009 WL 2489268 *2 (S.D.Ill. 2009); Iowa: *Bruning ex rel. Bruning v. Carroll Community School Dist.*, 486 F.Supp.2d 892, 922 (N.D.Iowa 2007); Kansas: *Nero v. Kansas State Univ.*, 861 P.2d 768, 777-78 (Kan. 1993); Kentucky: *Ferrell v. Hellems*, 408 S.W.2d 459, 463 (Ky. 1966); Louisiana: *Patrick v. Employers Mut. Cas. Co.*, 745 So.2d 641, 649 (La.App. 1999); Maryland: *Corinaldi v. Columbia Courtyard, Inc.*, 873 A.2d 483, 491 (Md.App. 2005); Missouri: *Whitlock v. Key Properties I, L.C.*, 2005 WL 1498845 *5 (W.D.Mo. 2005); New Jersey: *Butler v. Acme Mkts., Inc.*, 89 N.J. 270, 275 (1982); New York: *Nash v. Port Authority of New York and New Jersey*, 856 N.Y.S.2d 583, 590 (N.Y.A.D. 2008); North Carolina: *Brown v. North Carolina Wesleyan Coll.*, 309 S.E.2d 701, 702 (N.C. 1983); North Dakota: *Hoff v. Elkhorn Bar*, 613 F.Supp.2d 1146, 1154 (D.N.D. 2009); Ohio: *Krause v. Spartan Stores, Inc.*, 815 N.E.2d 696, 699 (Ohio App. 2004); Oklahoma: *Bray v. St. John Health System, Inc.*, 187 P.3d 721, 724 (Okla. 2008); Oregon: *Fazzolari ex rel. Fazzolari v. Portland Sch. Dist. No. 1J*, 734 P.2d 1326, 1337 (Ore. 1987); South Dakota: *Small v. McKennan Hosp.*, 437 N.W.2d 194, 199 (S.D.1989); Texas: *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex.1998); Washington: *Nivens v. 7-11 Hoagy's Corner*, 943 P.2d 286, 293 (Wash. 1997).

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Restatement (Second) of Torts § 344.

The reason for requiring business owners to exercise due care with respect to persons invited on the premises is because business owners "are in the best position to control the risk of harm. Ownership or control of the premises, for example, enables a party to prevent the harm." *Jarrah v. Trump Hotels & Casino Resorts, Inc.*, 487 F.Supp.2d 522, 526 (D.N.J. 2007). Whether the conduct of a particular property owner meets the standard of reasonable care is a matter for jury determination.

Mississippi's law regarding a business owner's liability for the criminal acts of third persons, when compared to other jurisdictions, is squarely in the middle.[3] This being the case, there is no reason to change Mississippi premises liability law to be more accommodating to the business owner.

**4. M.C.A. § 11-1-60(2)(b)'s cap on non-economic damages is unconstitutional.**

The jury in this case awarded Lymas $4,179,350.49. The trial court, over Lymas's objection, reduced this amount to $1,679,717.00 to conform to the $1 million cap on non-economic damages imposed by M.C.A. § 11-1-60(2)(b). Lymas argued at trial, and in his cross-appeal, that the cap was unconstitutional as a violation of his right to a jury trial and as a violation of the separation of powers doctrine.

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[3] The Courts of this state have long looked to and adopted the guidance provided by the Restatement of Torts. The cases are legion. *See, e.g., Franklin Corp. v. Tedford*, 2009 WL 2883139, *22 (Miss.) (Graves, P.J. specially concurring) (relying on Restatement definition of "intent"); *Niunez v. Spino*, 14 So.3d 82, 85 (Miss.App. 2009) (relying on Restatement's definition of "invitee"); *Evans v. Hodge*, 2 So.3d 683, 687-88 (Miss.2008) (same); and *Causey v. Sanders*, 998 So.2d 393, 404 (Miss. 2008) (relying on Restatement's definition of "superceding cause"). There is no justification for this Court to part ways with the Restatement on this issue.

### a. M.C.A. § 11-1-60(2)(b) violates the right to trial by jury.

The right to trial by jury is guaranteed by both the Seventh Amendment and the Mississippi Constitution Article 3, Section 31. It is one of the most important features of American jurisprudence. *See, e.g., Taylor v. Sorsby*, Walk. (1 Miss.) 97 (1821). "To the jury exclusively, pertained the province to compare and weigh the testimony, and pronounce the result." *T Dickson v. Parker*, 3 How. 219, 34 Am. Dec. 78 (Miss. 1839). Jurors are the fact-finders. One of the fact questions that is for the jury and not the court (or the legislature) is the amount of damages to be awarded to an injured litigant. *Boyd v. Smith*, 390 So.2d 994 (Miss.1980); *New Orleans and N.E. R.R. Co. v. Weary*, 217 So.2d 274 (Miss.1968); *Jones v. Welford*, 215 So.2d 240 (Miss.1968). The legislature's decision to place a cap on that amount as per M.C.A. § 11-1-60(2)(b) violates the constitutional right to a jury trial.

Many courts have invalidated limitations on damages based on their respective state constitutions. *See, e.g. Smith v. Dep't. of Ins.*, 507 So.2d 1080 (Fla.1987) (invalidating a damages cap on personal injury awards); *Wright v. Central Du Page Hosp. Ass'n*, 347 N.E.2d 736 (Ill. 1976) (statutory provision limiting recovery only in medical malpractice actions to $500,000 was arbitrary and constituted special law in violation of equal protection provisions of 1970 Constitution); *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H.1991) (statutory cap of $875,000 for noneconomic loss in personal injury action violates state equal protection clause); *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991) (provision setting $200,000 cap on general damages that may be awarded for medical malpractice was in violation of due process provision of State Constitution); *Lucas v. United States*, 757 S.W.2d 687 (Tex.1988) (statutory limitation on medical

malpractice damages violated open courts provision of state constitution); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989) (statute imposing a cap on noneconomic damages for personal injury at a rate of 0.43 x average annual wage and life expectancy violated right to jury trial under provision of state constitution); *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 701 N.W.2d 440 (Wis. 2005) (invalidating $350,000 cap on noneconomic damages in medical malpractice actions as not rationally related to legislative objective of compensating victims fairly); *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156, 163 (Ala.1991) (damages assessments of Alabama juries are protected by constitutional guarantee of right to trial by jury); *Condemarin v. University Hosp.*, 775 P.2d 348, 365-66 (Utah 1989) (plurality opinion) (striking balance in favor of constitutional right of jury trial); *Arneson v. Olson*, 270 N.W.2d 125, 137 (N.D.1978) (Medical Malpractice Act violated jury trial provision of state constitution); *Lakin v. Senco Products, Inc.*, 987 P.2d 463 (Or. 1999) (holding that a statute capping jury awards violates a plaintiffs' right to trial by jury).

The right to a jury trial has, since its inception, meant that a jury was uniquely qualified to determine damages. The common law rule as it existed at the time of the adoption of the U.S. Constitution was "that in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it." *Dimick v. Schiedt*, 293 U.S. 474, 480, 55 S. Ct. 296, 79 L. Ed. 603 (1935). *See also Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353, 118 S. Ct. 1279, 140 L. Ed. 2d 438 (1998) ("there is historical evidence that cases involving discretionary monetary relief were tried before juries," and "[i]t has long been recognized that 'by the law the jury are judges of the damages' " and that "there is

overwhelming evidence that the consistent practice at common law was for juries to award damages"); *Hetzel v. Prince William County, Va.*, 523 U.S. 208, 211, 118 S. Ct. 1210, 140 L. Ed. 2d 336 (1998), *leave to file for reh'g denied,* 524 U.S. 934, 118 S. Ct. 2336, 141 L. Ed. 2d 708 (1998) (imposition of a remittitur without the option of a new trial "cannot be squared with the Seventh Amendment").

Capping damages limits the effect of a jury's damages verdict and eviscerates trial by jury as it was understood when the constitutions of Mississippi and the United States were first adopted. Thus, in *Lakin v. Senco Products, Inc.*, 987 P.2d 463 (Or. 1999), the Oregon Supreme Court found that a statute limiting the amount awarded to $500,000 "violates the injured party's right to receive an award that reflects the jury's factual determination of the amount of the damages." The same result was had in *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989) wherein the Washington Supreme Court struck a cap on noneconomic damages for personal injury as violative of the right to jury trial under the state constitution.

**b. M.C.A. § 11-1-60(2)(b) violates the constitutional requirement of separation of powers.**

The Mississippi Constitution contains a provision requiring that the powers of the three branches of government be separate. Mississippi Const. Art. 1, Sect. 1. Specifically, it states:

> The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.

Mississippi Const. Art. 1, Sect. 1. The duty of determining "whether in specific instances the other two departments have exceeded the powers granted to them by the

Constitution" necessarily devolves "[u]pon the judicial department, because of the nature of its duties." *Albritton v. City of Winona*, 181 Miss. 75, 178 So. 799, 803 (Miss. 1938).

Historically, the Mississippi Supreme Court has reserved for itself the authority to prescribe the procedures that must be followed in filing and litigating lawsuits in the various courts that make up the Mississippi judicial system. "The inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts." *Wimley v. Reid*, 991 So.2d 135, 138 (Miss. 2008) *quoting Newell v. State*, 308 So.2d 71, 76 (Miss.1975). "The powers vested in this Court by the Constitution of the State of Mississippi are very broad. 'The judicial power has been authoritatively read as including the power to make rules of practice, procedure, and evidence.'" *Mississippi Ethics Comm'n v. Committee on Prof'l Responsibility of Mississippi Bar*, 672 So.2d 1222, 1225 (Miss.1996). Indeed, inasmuch as the judiciary "is conversant with the law through years of legal study, observation and actual trials", judges, rather than "well-intentioned, but overburdened, legislators" are better suited to know what procedural changes are "needed to meet the needs of a particular era and to maintain the judiciary's' constitutional purpose." *Newell*, 308 So.2d at 76.

The power to limit excessive jury awards, through the doctrine of remittitur, is exclusive to the judiciary. *Hansen v. Boyd*, 161 U.S. 397, 412, 16 S.Ct. 571, 576, 40 L.Ed. 746, 751 (1896); *Dimick v. Schiedt*, 293 U.S. 474, 484-85, 55 S.Ct. 296, 300, 79 L.Ed. 603, 610 (1935). In *Dimick*, the United States Supreme Court recognized that remittitur of an excessive portion of a jury verdict is a question of law for the court. *Dimick*, 293 U.S. at 486, 55 S.Ct. at 301, 79 L.Ed. at 611. For this reason, a statute that

places a categorical cap on damages irrespective of the facts violates the constitutional requirement of separation of powers by undercutting the power and obligation of judiciary to reduce excessive verdicts. *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 228 Ill. Dec. 636, 689 N.E.2d 1057 (Ill. 1997) ($500,000 cap on noneconomic damages functioned as a "legislative remittitur" which violated separation of powers).

In *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989), the Washington Supreme Court held that a statute capping noneconomic damages violated the right to trial by jury as well as the separation of powers doctrine. The court observed that remittitur is wholly within the power of the trial judge, and it is the judge who is empowered to make the legal conclusion, on a case-by-case basis, that the jury's damage award is excessive in light of the evidence. Consequently, because the "[l]egislature cannot make such case-by-case determinations," separation of powers concerns would be violated by the "legislative attempt to mandate legal conclusions." *Sofie*, 771 P.2d at 721.

The duty of determining whether any particular jury award is excessive is one reserved for the courts of this State. For this reason, M.C.A. § 11-1-60(2)(b)'s cap on noneconomic damages violates the separation of powers doctrine.

**Conclusion**

For the above reasons, this Court should affirm the judgment of the lower court in all aspects except for the trial court's application of the cap on damages contained in M.C.A. § 11-1-60(2)(b). The Court should find the cap unconstitutional.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Gale Nelson Walker, hereby certify that I have this day mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing Proposed Amicus Brief to the following:

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This, the 24th day of September, 2009.

Gale N. Walker