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IN THE SUPREME COURT OF MISSISSIPPI

DOUBLE QUICK, INC.,	Defendant –Appellant-Cross-Appellee
VS.	No. 2008-CA-01713
RONNIE LEE LYMAS,	Plaintiff –Appellee-Cross-Appellant

APPEAL FROM THE CIRCUIT COURT OF HUMPHREYS COUNTY, MISSISSIPPI
HONORABLE JANNIE M. LEWIS, CIRCUIT JUDGE

BRIEF OF *AMICI CURIAE*

HOME BUILDERS ASSOCIATION OF MISSISSIPPI, THE AMERICAN COUNCIL OF ENGINEERING COMPANIES-MISSISSIPPI, BEVERAGE ASSOCIATION OF MISSISSIPPI, NATIONAL FEDERATION OF INDEPENDENT BUSINESS-MISSISSIPPI CHAPTER, MISSISSIPPI BANKERS ASSOCIATION, MISSISSIPPI MANUFACTURED HOUSING ASSOCIATION, ASSOCIATED BUILDERS AND CONTRACTORS, DELTA COUNCIL, PREMIER ENTERTAINMENT BILOXI LLC d/b/a HARD ROCK HOTEL AND CASINO BILOXI, MISSISSIPPI MANUFACTURERS ASSOCIATION, MISSISSIPPI PROPANE GAS ASSOCIATION, MISSISSIPPI HOSPITAL ASSOCIATION, RETAIL ASSOCIATION OF MISSISSIPPI, MISSISSIPPI PETROLEUM MARKETERS & CONVENIENCE STORES ASSOCIATION, MISSISSIPPI POULTRY ASSOCIATION, INC., MISSISSIPPIANS FOR ECONOMIC PROGRESS

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DOUBLE QUICK, INC.,	**Defendant –Appellant-Cross-Appellee**
VS.	**No. 2008-CA-01713**
RONNIE LEE LYMAS,	**Plaintiff –Appellee-Cross-Appellant**

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 the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Ronnie Lee Lymas, Plaintiff-Appellee/Cross –Appellant
2. Double Quick, Inc., Defendant-Appellant/Cross-Appellee
3. State of Mississippi, Non- Aligned Intervenor
4. Butler, Snow, O'Mara, Stevens & Cannada, PLLC, Attorneys for Defendant-Appellant/Cross-Appellee
5. Mitchell, McNutt & Sams, P.A., Attorneys for Defendant-Appellant/Cross-Appellee
6. Tatum & Wade, PLLC, Attorney for Plaintiff-Appellee/Cross –Appellant
7. Latrice Westbrooks, Attorney for Plaintiff-Appellee/Cross-Appellant
8. Tanisha Gates, Attorney for Plaintiff-Appellee/Cross-Appellant
9. Honorable Jim Hood, Attorney General of Mississippi
10. Mississippi Economic Council
11. Mississippi Poultry Association, Inc.
12. Mississippi Petroleum Marketers & Convenience Stores Association
13. Retail Association of Mississippi

14. Mississippi Hospital Association

15. Mississippi Propane Gas Association

16. Premier Entertainment Biloxi LLC d/b/a Hard Rock Hotel & Casino Biloxi

17. Mississippi Manufacturers Association

18. National Federation of Independent Business (NFIB) - Mississippi Chapter

19. Delta Council

20. Mississippi Manufactured Housing Association ("MMHA")

21. Associated Builders & Contractors

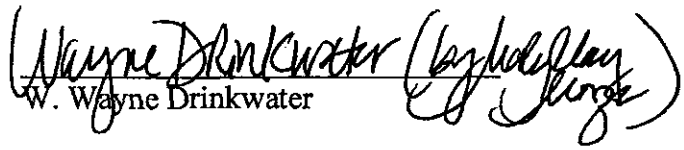
22. Mississippi Bankers Association

23. Beverage Association of Mississippi

24. American Council of Engineering Companies – Mississippi

25. Home Builders Association of Mississippi

26. Mississippians for Economic Progress



W. Wayne Drinkwater

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I. INTRODUCTION

Mississippi business owners have long been responsible to use reasonable care to maintain their premises in a reasonably safe condition. In recent years, however, this obligation has been expanded dramatically, to impose liability on premises owners for the criminal acts of third parties. Without guidance from this court, Mississippi retail businesses may be required to safeguard their customers from random acts of criminal violence committed on the premises by third parties over whom the premises owners have no control. In that case, liability could be imposed even if those acts were neither caused by or related to the business, but were part of "the overall pattern of criminal activity . . . that occurred in the general vicinity of the defendant's business premises[.]" *Lyle v. Mladinich*, 584 So. 2d 397, 399 (Miss. 1991).

Premises owners now face obligations that are difficult to understand and impossible to satisfy. Today, business owners cannot predict when or under what circumstances they might be held liable for the results of random acts of violence that happen to occur on their premises. This much can be said, however: despite judicial pronouncements to the contrary, some cases appear to require retail businesses to employ armed security guards to protect customers from general criminal violence that exists in our society, forcing private businesses to act as law enforcement agencies. This may impose ruinous expenses on businesses that operate in areas of significant criminal activity, and make private businesses insurers of their customers' safety.

The present case presents both an extreme example and extension of premises liability in Mississippi. The Court should reverse the judgment below, for the reasons stated in the Brief of Appellant Double Quick, Inc. But more is required. The Court should announce clear and workable standards governing the duties of premises owners for third party criminal acts. These standards should recognize at least three related principles.

First, the Court should reaffirm that business owners owe duties of reasonable care to their customers with respect to hazards that are created by or related to the business itself, or which involve foreseeable and imminent dangers to identified patrons. However, premises owners should not be required to protect invitees from criminal attacks that have no connection to the premises, and which arise out of criminal activity in the community.

Second, in recognition of the substantial and ongoing expense associated with the employment of private security guards, the Court should hold that business owners cannot be forced to provide private law enforcement services that are properly the duty of police departments. In the alternative, any obligation to provide security guards should only be triggered by prior similar incidents on the premises.

Finally, in cases in which a plaintiff seeks damages from a premises owner for harm caused by criminal conduct of third parties, the "reasonable care" obligations of the premises owner should consider not only the foreseeability of the criminal conduct, but also the expense and burden of the measures required to safeguard against that conduct.

II. FACTS RELEVANT TO THE INTERESTS OF *AMICI*

Taken most favorably to Plaintiff, the proof at trial established that Orlando Newell shot Ronnie Lymas in the parking lot of the Double Quick store in Belzoni. R. 278, 281. The attack was sudden and unprovoked. It occurred without warning in broad daylight.[1] Prior to the shooting, no one knew that Mr. Newell had a firearm. Mr. Lymas did not know Mr. Newell, and had not engaged in conversation or other contact with him on the day of the shooting. Tr. 488.

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[1] A few minutes prior to the shooting, Mr. Newell was seen arguing with Alan Unger in the parking lot. Tr. 484, 522-23. Neither man appeared to be armed, and there was no reason to be concerned about gun violence. Nor was there any reason to expect that either Mr. Newell or Mr. Unger would attack *Mr. Lymas*.

Mr. Newell's actions had no apparent motive. They were unrelated to Double Quick. They could easily have occurred at any other location.

Although some Double Quick employees had heard before the day of the shooting that Mr. Newell "had shot somebody" on a previous occasion, no employee possessing this hearsay information knew that Mr. Newell was on the premises on the day of the shooting; no Double Quick employee who saw Mr. Newell on the premises that day knew of his alleged history of violence.[2] Further, although Mr. Newell had been in the store on other occasions, he had never caused problems before.

To show that Double Quick should have foreseen Mr. Newell's attack on Mr. Lymas, Plaintiff presented evidence that other crimes had occurred within a one-mile radius of Double Quick in the preceding five years. *See* Tr. 585-87, 745-49, Ex. P-8. Although perhaps three such incidents reflected a Double Quick address, Tr. 390-99, Ex. P-12, it was not possible to determine whether Double Quick was the location of the prior incidents, or the location from which the events had been reported. Tr. 402-03, 405. Uncontradicted proof showed that the reports were either materially inaccurate or did not support a conclusion that violent events had occurred at Double Quick. Tr. 390-99.

Plaintiff's experts Michael Smith and Tyrone Lewis opined that a history of crime in the vicinity and Double Quick's "knowledge" of Newell's previous gun violence made this event foreseeable. They testified that Double Quick should have installed exterior cameras and

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[2] *See* Testimony of Latrease Ward at Tr. 246-47, 255 (unaware of Newell's history, did not see him at store); Shanetta Thurman at Tr. 260-62, 264, 267-68 (knew that Newell had shot someone, not aware that he was on premises); Shavon Ellis at Tr. 272-73, 282-83 (had heard that Newell had shot someone, did not see him on the property); Linda Davis at Tr. 294 (did not know Newell); Frances Byas at Tr. 310 (did not know that Newell had shot someone, did not recall seeing him on property).

increased employee training,[3] Tr. 592-603, 753-56, although there was no evidence that either of these precautions could have prevented the shooting. Smith and Lewis also testified that Double Quick should have employed security guards, which were "the most effective crime deterrents[,]" and the "single best thing that could have been done for security[.]" Tr. 604, 605; *accord,* Tr. 751-52. Smith and Lewis offered conclusory opinions that these inadequate security measures caused Plaintiff's injuries. Tr. 612, 757.

III. ARGUMENT

A. Imposition of Liability on Premises Owners for Criminal Acts of Third Parties Creates Unfair and Unworkable Legal Obligations.

At common law, premises owners had no obligation to protect others from criminal acts by third parties. W. Prosser, *The Law of Torts* § 33 (4th ed. 1971); Annot., *Private Person's Duty and Liability for Failure to Protect Another Against Criminal Attack by Third Person,* 10 A.L.R. 3d 619 § 3 (1966).[4] In Mississippi, the first reported attempt to create such obligations came in *Kelly v. Retzer & Retzer, Inc.*, 417 So. 2d 556 (Miss. 1982), where a sudden shooting occurred in a restaurant parking lot. The restaurant had no security guards, and to show that such criminal acts were foreseeable, the plaintiff introduced police reports of crime on and near the premises. *Id.* at 559. Rejecting the plaintiff's claim, the Court found that even had the shooting been foreseeable, the restaurant had no duty to hire security guards to protect customers from a risk of violence that existed in the community at large. *Id.* at 560-61. The Court noted that crime is

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[3] Plaintiff suggested that Double Quick employees should have been trained to bar from the premises any person who had been involved in a past violent episode, whether or not such person had been convicted of crime. Tr. 246-48, 451, 457, 606. This incredible assertion, not supported by law in any jurisdiction, would ban all persons with "bad" reputations from every retail establishment in Mississippi. It would impose impossible burdens on premises owners and probably increase violence.

[4] Such duties were imposed only on landowners who had special relationships with invitees, such as common carrier-passenger or innkeeper-guest. *See* Dennis T. Yokoyama, *The Law of Causation in Actions Involving Third-Party Assaults When the Landowner Negligently Fails to Hire Security Guards: A Critical Examination of Saelzler v. Advanced Group,* 40 Cal. West. L. Rev. 79, 85 (2003).

always foreseeable, and that if foreseeability alone created a duty to provide security guard protection, all retail businesses would be required to employ private police. *Id.* at 561. The Court specifically held that retail establishments had no such duty, an obligation that "would make this burden of prevention extremely high and in all likelihood make the cost of running a small business prohibitive." *Id.* at 562. The Court concluded that "the responsibility of enforcing the law is on the government chosen by the people of the area and does not necessarily rest upon the business involved." *Id.* at 563.

Kelly therefore rejected the foreseeability of crime as a factor that would create a duty to hire security guards, and held that no such duty existed. Unfortunately, *Kelly*'s clear rules have been abandoned or ignored in a series of later cases. These subsequent decisions have grossly expanded the bases of premises owner liability for third-party criminal acts.

Since *Kelly*, more than 15 reported Mississippi decisions have considered premises owner liability for criminal acts of others. The cases point in different and often inconsistent directions.[5] For example, this Court has nominally rejected the "totality of the circumstances"

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[5] American jurisdictions have created at least four different liability standards for premises owner liability for third-party criminal acts:

a. the "imminent harm" test requires, as a prerequisite for liability, that the defendant knew or should have known that crimes were occurring on the premises, and that an attack on a specific customer was imminent. Without such specific knowledge, criminal acts are not legally foreseeable events that impose obligations on business owners. *See* Uri Kaufman, *When Crime Pays: Business Landlords' Duty to Protect Customers From Criminal Acts Committed on the Premises,* 31 S. *Tex. L. Rev.* 89, 95-96 (1990); *Smith v. Lagow Constr. Co.*, 642 N.W.2d 187, 189 (S.D. 2002).

b. the "totality of the circumstances" test allows the court to consider any facts thought to be relevant. *See Isaacs v. Huntington Memorial Hospital*, 695 P.2d 653 (Cal. 1985). The "totality of the circumstances" test has now been rejected even in the state that created it. *See Ann M. v. Pacific Plaza Shopping Center*, 863 P.2d 207 (Cal. 1993). The test is inherently ambiguous, and does not establish meaningful standards by which premises owners can guide their conduct. *See, e.g., Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968) (enumerating factors to be considered). Mississippi has also rejected the "totality of the circumstances" test, *Crain v. Cleveland Moose Lodge 1532*, 641 So. 2d 1186, 1191-92 (Miss. 1994), but later Mississippi cases appear to have reinstated the test without discussion.

c. the "prior similar incidents" test requires that at least one prior similar incident occur on the premises before a premises owner can be required to adopt measures such as the employment of security guards. *See*

test, finding that the test "was often interpreted to place a burden on business owners approaching strict liability for attacks upon patrons who are on its premises." *Gatewood v. Sampson*, 812 So. 2d 212, 220 (Miss. 2002) (citing *Crain,* 641 So. 2d at 1192). The Court has also held, consistent with *Kelly*, that "merchants are not required to carry out the duties of the police force. Crime has become so prevalent in recent years that even without taking the financial burden into consideration it would be impossible for a business to guarantee the safety of everyone coming onto its premises." *Crain*, 641 So. 2d at 1192.

In other cases, however, our courts have found that a premises owner's failure to provide security guards makes the owner liable for third party criminal acts, holdings that are at odds with *Kelly* and *Crain*. *Minor Child v. Mississippi State Federation of Colored Women's Club Housing for the Elderly in Clinton, Inc.*, 941 So. 2d 820, 830-31 (Miss. Ct. App. 2006); *Lyle*, 584 So. 2d at 399-400; *American Nat'l Ins. Co. v. Hogue*, 749 So. 2d 1254, 1258-59 (Miss. Ct. App. 2000); *Gatewood*, 812 So. 2d at 221.

In some cases, reports of area crime did not make a subsequent assault foreseeable. *Crain*, 641 So. 2d at 1192; *Kelly*, 417 So. 2d at 559, 561-62; *Stevens v. Triplett*, 933 So. 2d 983, 985-86 (Miss. Ct. App. 2005). In other cases, such reports were found to create jury issues on foreseeability. *Davis v. Christian Brotherhood Homes of Jackson, Mississippi, Inc.*, 957 So. 2d 390, 401-03 (Miss. Ct. App. 2007); *Gibson v. Wright*, 870 So. 2d 1250, 1257 (Miss. Ct. App. 2004); *Gatewood*, 812 So. 2d at 220; *Lyle*, 584 So. 2d at 399-400.

Comment, *A Landowner's Duty to Guard Against Criminal Attack: Foreseeability and the Prior Similar Incidents Rule*, 48 Ohio St. L.J. 247, 250 (1987).

d. the "balancing test" requires courts to weigh the foreseeability and gravity of crime against the burden and expense of guarding against it, in order to determine whether a premises owner has met his duty of reasonable care. *Ann M.*, 863 P.2d at 215; *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891 (Tenn. 1996).

Finally, several Mississippi cases have found an absence of proof that enhanced security measures would have prevented an assault, *Alqasim v. Capital City Hotel Investors, LLC*, 989 So. 2d 488, 493 (Miss. 2008); *Grisham v. John Q. Long V.F.W. Post No. 4057*, 519 So. 2d 413, 417 (Miss. 1988); *May v. V.F.W. Post No. 2539*, 577 So. 2d 312 (Miss. 1991), while in other, factually similar cases, the courts have found causation to be a jury issue. *Davis,* 957 So. 2d at 404; *Minor Child*, 941 So. 2d at 830; *Lyle*, 584 So. 2d at 400.

The cases create further complications. First, they do not define the number or types of crimes that must occur in an area before security measures are required. Nor do the cases define the geographic area or period of time that must be considered in assessing prior off-premises criminal activity. The cases also do not specify acceptable sources of information about crime, or the premises owner's duty to monitor those sources. May the premises owner rely on call or incident reports? On arrest or conviction records? On state or federal crime statistics?

Without defined standards on this issue, it is impossible for premises owners to know or meet their legal responsibilities. The absence of understandable standards also permits expert witnesses to testify to virtually anything about a premises owner's obligations.

Today, the sole test for premises owner liability appears to be simple foreseeability:

> the criminal acts of a third party may be deemed reasonably foreseeable if the premises owner had cause to anticipate such acts. "Cause to anticipate" may be imputed to the premises owner by virtue of his (1) actual or constructive knowledge of the third party's violent nature, or (2) actual or constructive knowledge that an atmosphere of violence existed on the premises. The overall pattern of criminal activity prior to the event in question that occurred in the general vicinity of the defendant's business premises, as well as the frequency of criminal activity on the premises are both relevant factors in determining whether an atmosphere of violence exists on the premises.

Davis, 957 So. 2d at 401 (internal citations and quotations omitted); *accord Minor Child*, 941 So. 2d at 826-27; *Grisham,* 519 So. 2d at 416; *Lyle,* 584 So. 2d at 399; *Gatewood,* 812 So. 2d at 220. No case holds that in evaluating whether the duty of reasonable care has been met, the expense and burden to the business owner of security precautions may be considered.

B. Premises Owners Should Not Be Responsible for Random Criminal Acts That Have No Relationship to the Business of the Premises Owner.

In some cases, third-party criminal conduct may be related to, or caused by, the business or actions of the premises owner. Bars and nightclubs may serve alcohol to customers, who may assault other customers. Other businesses may create or encourage volatile behavior. In cases where criminal conduct is predictably related to the defendant's business, it is not unfair to require a premises owner to protect customers from dangers that the owner has created or enhanced. Where the premises owner's own business choices spawn an "atmosphere of violence," or "impel" violent conduct, it may be appropriate to require the owner, as a cost of doing business, to provide safeguards from these dangers.[6]

This is a theme of *Newell v. Southern Jitney Jungle Co.,* 830 So. 2d 621 (Miss. 2002), in which the Court refused to hold a grocery store liable for injuries to one of its employees, which occurred when her estranged husband entered the store and shot her. The Court held that the defendant did not "impel" the assault by Newell's husband. *Id.* at 624. Noting that imposing liability on the store under these circumstances "would impose a duty approaching strict liability on landowners[,]" *id.*, the Court held that "[t]he liability of landowners must end somewhere." *Id.* at 625.

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[6] The concept of responsibility for conditions created or permitted by the premises owner underlies the liability of premises owners in other contexts, in which unsafe physical conditions exist on the premises. *See* Robert A. Weems & Robert M. Weems, *Mississippi Law of Torts* §§ 5.4, 5.5 (2002).

But where criminal conduct is random, or unrelated to the premises owner's business, and occurs as a consequence of general criminal activity in the area, requiring a premises owner to hire security guards or take other protective measures imposes a duty to protect customers from the consequences of crime that the owner did nothing to cause. Such a requirement would only serve to make commercial activity more expensive. The economic burdens associated with employing security guards will either be passed on to local consumers (the very people who can least afford it), or may force businesses to close or relocate. Imposition of liability for third-party crimes may therefore effectively result in economic redlining that prevents businesses from locating in areas of high crime. *See Boren v. Worthen Nat'l Bank*, 921 S.W.2d 934, 941-42 (Ark. 1996).

Where 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. That risk arises from the threat of crime that all citizens face, the prevention of which is assigned to public law enforcement.

Retail businesses have no ability to reduce crime. They exist to serve the consuming public, and must provide easy access to their premises. Retail businesses cannot feasibly erect security fences, build guardhouses or install metal detectors to exclude persons with no legitimate reason to be on the premises.

Even if such measures were possible, a business owner should not be required to create a fortress or sanctuary from the violence that exists in the community at large. Other states recognize the unfairness and impossibility of any such requirement. For example, the Michigan Supreme Court has recognized that "although a defendant can control the condition of his

premises by correcting physical defects that may result in injuries to his invitees, he cannot control the incidence of crime in the community. Today a crime may be committed anywhere and at any time." *Williams v. Cunningham Drug Stores, Inc.*, 418 N.W.2d 381, 384 (Mich. 1988). Although a merchant in Michigan has a duty to protect his patrons if he knows or should know that the patron is specifically in danger, he has no duty to protect customers from random assaults by third parties if those customers are not identifiable as endangered persons. *Mason v. Royal Dequindre, Inc.*, 566 N.W.2d 199 (Mich. 1997); *accord Errico v Southland Corp.*, 509 N.W.2d 585 (Mich. Ct. App. 1993).

In Arkansas, business owners have no duty "to guard against random criminal acts by third parties." *Boren*, 921 S.W.2d at 941. There, it is not "appropriate as a matter of policy to impose a higher duty on business owners who are willing to provide their services in 'high crime areas' or 'near a housing project' – most commonly the areas in which low and moderate income residents are to be found." *Id.* at 942; *accord Papadimas v. Mykonos Lounge*, 439 N.W.2d 280, 283 (Mich. 1989) (no higher duty just because store is in high crime area).

Premises owners also face the practical impossibility of obtaining ongoing and accurate information on criminal activity. Premises owners cannot be expected to monitor police reports, or arrest or conviction records. Also, as noted above, the premises owner cannot determine the geographic area or period of time that he is required to assess, or the types of crimes he must review.[7] Imposition of a duty to guard against crime unrelated to the premises imposes a quasi-public duty, akin to that of law enforcement officials, to remain abreast of and guard against criminal activity.

[7] Do reports of embezzlements or house burglaries create a reasonable basis for concern for violent assaults or drive-by shootings? *See Savannah College of Art and Design, Inc. v. Roe*, 409 S.E.2d 848 (Ga. 1991); *Doe v. Prudential Bache/A.G. Spanos Realty Partners*, 474 S.E.2d 31, 34 (Ga. App. 1996), *aff'd*, 492 S.E.2d 865, 866-68 (Ga. 1997).

It is no answer to say that if random criminal acts are predictable, premises owners must protect against them. If foreseeability alone imposes such duties on the premises owner, then all businesses are required to take such steps, and businesses become virtual insurers of their customers' safety. This is so because crime exists everywhere; it can occur anywhere, at any time. *See Crain*, 641 So. 2d at 1192; *Williams*, 418 N.W.2d at 384; *Radloff v. National Food Stores, Inc.*, 121 N.W.2d 865 (Wis. 1963). In a word, crime is predictable. Foreseeability alone would require all businesses to hire full-time security guards. The irony of such a result is enormous: the failure of public law enforcement to control crime has made crime commonplace; therefore, responsibility for law enforcement is shifted to the private sector, crime's primary victim. This is neither practicable nor fair:

> Defendant simply does not have that degree of control and is not an insurer of the safety of his invitees. . . . The inability of government and law enforcement officials to prevent criminal attacks does not justify transferring the responsibility to a business owner such as defendant. To shift the duty of police protection from the government to the private sector would amount to advocating that members of the public resort to self-help.

Williams, 418 N.W.2d at 384-85. If crime cannot be controlled by professionally trained police, it is unfair to impose liability for such events on private businesses who lack expertise, as well as investigatory and other resources.

Before a business owner should be held liable for random acts of violence committed on his property, some specific notice of imminent danger to the customer must appear. Such a requirement is faithful to our historic understanding that business owners are generally not responsible for crimes committed by others. It is also consistent with our understanding that protection of the public from crime is a government duty, not an obligation of private landowners. *See Goldberg v. Housing Authority of Newark*, 186 A.2d 291, 297-99 (N.J. 1962); *Nivens v. 7-11 Hoagy's Corner*, 943 P.2d 286, 293 (Wash. 1997); Glisner, *Landlords as Cops:*

Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises, 42 Case W. Res. L. Rev. 679, 784-89 (1992).

C. Premises Owners Should Not Be Required To Employ Security Guards To Protect Customers From Generalized Crime.

Here, as in many cases, the principal security precaution about which Plaintiff complains is the employment of full-time, armed security guards. More than any other, this measure imposes enormous and continuing costs on small businesses.

Because a requirement for security guards is qualitatively different than other safety requirements, some states have either adopted specific standards for such requirements or have declined to require them at all. The Washington Supreme Court refuses to impose any such requirement:

> [Plaintiff argues that] a business generally owes a duty to provide security personnel to prevent criminal behavior on the business premises. We decline to find such a duty. To do so would unfairly shift the responsibility for policing, and the attendant costs, from government to the private sector.

Nivens, 943 P.2d at 293. In Michigan, in recognition of the substantial cost of security guards, and the fact that their presence forces the premises owner to assume law enforcement duties, security guards cannot legally be required. *Williams* 418 N.W.2d at 384; *MacDonald v. PKT, Inc.*, 628 N.W.2d 33 (Mich. 2001).

In the District of Columbia, a high incidence of crime does not impose an obligation on private businesses to hire security guards. *Cook v. Safeway Stores, Inc.*, 354 A.2d 507, 509 (D.C. App. 1976). Likewise, Wisconsin recognizes that if the foreseeability of crime created a duty to provide private security protection for others, all stores would have to hire such guards. *Radloff*, 121 N.W.2d 865. In Oregon, although a restaurant owner may be required to hire armed guards to protect patrons from foreseeable conduct by other patrons, there is no duty to hire

guards to protect against the chance that "outsiders will elect to use the restaurant rather than the street as their battleground." *Rosensteil v. Lisdas*, 456 P.2d 61, 63 (Ore. 1969).

In California, security guards may be required only where a high degree of foreseeability of harm exists to the business's customers. This high foreseeability ordinarily must be shown by prior similar incidents on the premises. *Ann M. v. Pacific Plaza Shopping Center*, 863 P.2d 207, 212 (Cal. 1993); *Delgado v. Trax Bar & Grill*, 113 P.3d 1159, 1166-67 (Cal. 2005) . Louisiana recognizes similar rules. *Roberts v. Tiny Tim Thrifty* Check, 367 So. 2d 64, 65 (La. App. 1979) (requiring full time armed guards would make burden of prevention of assaults very high and cost prohibitive); *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 768 (La. 1999) ("A very high degree of foreseeability is required to give rise a duty to post security guards, but a lower degree of foreseeability may support a duty to implement lesser security measures such as using surveillance cameras, installing improved lighting or fencing, or trimming shrubbery"); *see* Dennis T. Yokoyama, *The Law of Causation in Actions Involving third-Party Assaults When the Landowner Negligently Fails to Hire Security Guards: A Critical Examination of Saelzler v. Advanced Group*, 40 Cal. West. L. Rev. 79 (2003).

The Court should follow the lead of these jurisdictions, and hold either that retail businesses have no duty to employ security guards, or that such duty can arise only if there is a heightened foreseeability of harm.

D. The Court Should Adopt a Balancing Test That Considers The Expense and Burden of Safety Precautions.

The overarching standard that governs the duty of premises owners to third parties is one of reasonable care. *Mississippi Winn-Dixie Supermarkets v. Hughes*, 156 So. 2d 734 (Miss. 1963); *J. C. Penney Co. v. Sumrall*, 318 So. 2d 829 (Miss. 1975); *Lyle*, 584 So. 2d at 399. The concept of reasonable care contemplates that, where a premises owner is charged with failing to

maintain reasonably safe conditions on the premises, he may offer proof that certain safety precautions are disproportionate in burden or expense to anticipated risks. *See, e.g., Caruso v. Picayune Pizza Hut, Inc.*, 598 So. 2d 770, 773-74 (Miss. 1992).

Perversely, however, when the danger at issue is not conditions within the premises owner's control, but is random criminal conduct by third parties over whom the premises owner has no control, Mississippi apparently does not permit consideration of whether precautions are burdensome to, or even unaffordable by, the owner.

The Court should specifically require that, in determining the reasonableness of a defendant's conduct with respect to third party violence, juries may consider the expense of relevant precautions, the owner's ability to afford them, the likely effect such expenditures would have on the ability of businesses to exist in neighborhoods where crime is prolific, and similar factors. Such a balancing test has already been adopted elsewhere, *McClung*, 937 S.W.2d 891; *Ann M.*, 863 P.2d at 215; W. Marshall Sanders, *Between Bystander and Insurer: Locating the Duty of the Georgia Landowner to Safeguard Against Third-Party Criminal Attacks on the Premises*, 15 Ga. St. U. L. Rev. 1099, 1110 (1999) (factors include the probability and gravity of the harm, the utility of the actor's conduct, and the feasibility and costs of alternative conduct."), and has been suggested in a thoughtful concurrence by a member of the Mississippi Court of Appeals:

> There is a duty imposed on a business owner "to exercise reasonable care to protect the invitee from reasonably foreseeable injury at the hands of other patrons." *Lyle v. Mladinich*, 584 So. 2d 397, 399 (Miss. 1991). What is reasonable appears in the caselaw on turn solely on what will be effective in light of the foreseeable harm. The actual language of the standard-a duty to exercise reasonable care-would permit consideration of the reasonableness of the protective measures in light of more than just their effectiveness, but I find no precedents that do so. Mississippi caselaw appears to examine reasonableness solely from the perspective of prevention. . . .

* * *

> The question should not only be what it would take to prevent crime, but what is reasonable for this defendant to have done in light of its size, location, and profitability. I find that the foreseeability of the assault should be balanced with the burden of the measures necessary to prevent it. Among the considerations can be the "probability and gravity of the harm, the utility of the actor's conduct, and the feasibility and costs of alternative conduct." Sanders, "Between Bystander and Insurer, 15 GA. ST. U.L.REV. at 1110 (1999).

Gibson v. Wright, 870 So. 2d 1263-64, 1265 (Southwick, J., concurring).

CONCLUSION

The judgment of the Circuit Court of Humphreys County should be reversed, and the Court should adopt workable standards defining the obligations of premises owners for criminal acts committed on the premises by third parties.

Respectfully Submitted, this, the 11th day of June, 2009.

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CERTIFICATE OF SERVICE

I, W. Wayne Drinkwater, do hereby certify that a true and correct copy of the above and foregoing Amicus Brief In Support Of Appellant Double Quick, Inc. was served by U. S. Mail, first class, postage pre-paid, upon the following:

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