IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO. 2008-CA-01713

DOUBLE QUICK, INC. — DEFENDANT-APPELLANT-CROSS-APPELLEE

VS.

RONNIE LEE LYMAS — PLAINTIFF-APPELLEE-CROSS APPELLANT

BRIEF OF APPELLEE-CROSS APPELLANT RONNIE LYMAS

(ORAL ARGUMENT REQUESTED)

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VS.

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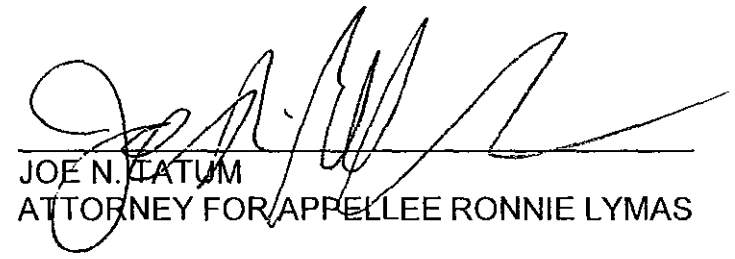
CERTIFICATE OF INTERESTED PERSONS

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

1. Honorable Jannie Lewis, Humphreys County Circuit Court Judge
2. Ronnie Lymas, Plaintiff-Appellee/Cross-Appellant
3. Double Quick, Inc, Defendant-Appellant/Cross-Appellee
4. Joe N. Tatum, Esquire, Tatum & Wade, Attorney for Ronnie Lymas
5. Latrice Westbrook, Attorney for Ronnie Lymas
6. Tanisha Gates, Attorney for Ronnie Lymas
7. John Brady, Esq., Mitchell, McNutt & Sams, P.A., Attorney for Double Quick, Inc.
8. Honorable Jim Hood, Attorney General of Mississippi
9. Willie Abston, Esq., Butler Snow Law Firm, Attorney for Double Quick, Inc.
10. John C. Henegan, Butler Snow Law Firm, Attorney for Double Quick, Inc.

11. State of Mississippi, Non-aligned Intervenor

12. W. Wayne Drinkwater, Bradley Arant Boult Cummings, LLP



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ATTORNEY FOR APPELLEE RONNIE LYMAS

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used the exact same data and methods which Mr. Lymas' expert used in reaching their opinions, albeit he reached opposite opinions on foreseeability and causation. Double Quick's security expert did not testify that he could not reach an opinion or that his opinions were conclusory or speculative. Instead, Double Quick's security expert testified to totally opposite opinions from Ronnie Lymas' security experts, making this case a classic "battle of the experts."

The issues on appeal are:

1. *Could reasonable minds differ based upon the evidence presented at trial as to whether Double Quick's employee's actions of ignoring a brewing altercation at its front door and allowing known violent persons to regularly loiter on its premises was the proximate cause of the unprovoked attack upon Ronnie Lymas by Orlando Newell making the proximate cause question ripe for jury determination in this case?*

2. *Could reasonable minds differ based upon the evidence presented at trial as to whether the attack upon Ronnie Lymas was foreseeable in light of the fact that two Double Quick employees had actual knowledge of the violent nature of Ronnie Lymas' assailants and in light of the prior criminal acts which occurred on and around Double Quick's premises, making the foreseeability question ripe for jury determination in this case?*

3. *Was the Court's decision to allow Ronnie Lymas' two security experts to testify at trial within its discretion and should Double Quick be estopped from arguing that Plaintiff's security experts should have been excluded when both Plaintiff and Defense security experts used the same data and procedures in reaching opposing opinions, making the matter a question of "weight of the evidence" and not admissibility?*

4. *Whether ample evidence was placed before the jury regarding Ronnie Lymas' theory of the case that Orlando Newell had a violent nature which Double Quick had actual or constructive knowledge of, thereby justifying the Court's jury instruction on Ronnie Lymas' "violent nature" theory of the case?*

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff originally filed a Complaint for negligence and inadequate security against Defendant Double Quick, Inc. on June 13, 2007 (1 R. 4)[1]*, due to an unprovoked aggravated assault committed upon him at the Double Quick Convenience store on January 26, 2007. The subject Double Quick store is located at 602 Martin Luther King Drive in Belzoni, Mississippi (1 R. 5). The case arose from Ronnie Lymas being shot and beaten in the parking lot of the subject Double Quick store after he had purchased a beverage item from the Double Quick and exited the store. Plaintiff also originally sued Gresham Service Stations, Inc. However after extensive discovery was taken by all the parties in this case, Gresham Service Stations, Inc. was dismissed from the case prior to trial. (2 R.213).*

B. Course of Proceedings Below

As noted above, extensive discovery occurred in this case by all of the parties, culminating with both parties filing motions for summary judgment as to the issue of whether Ronnie Lymas was an in fact an invitee of Double Quick at the time of the subject shooting and whether Ronnie Lymas' security experts opinions were reliable and admissible. (4 R. 537 & 5 R. 710). Both parties motions on these issues were eventually denied by the trial court.

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[1] For ease of reference, Appellee Ronnie Lymas will use the same cite notations as did the Appellant Double Quick in its brief. That is, the court record and the trial transcript are cited as "_R.__" with the volume number followed by the page number. The trial exhibits will be referenced as "Ex. P-__" or "Ex. D-__."

C. ***Disposition in the Court Below***

The trial of this case took a five days, with trial starting on Monday, June 23, 2008 and the jury reaching it decision on Friday, June 27, 2008. The jury returned a verdict in favor of Ronnie Lymas in the amount of $4,179,350.49, for which the trial court entered final judgment. (10 R. 1443).

After the trial, Double Quick moved to alter or amend the judgment under Miss. Code § 11-1-60(2)(b), which purports to place a $1,000,000.00 cap on non-economic damages in non-medical services tort actions, (10 R. 1446), and for other post-trial relief, including judgment notwithstanding the verdict, alternatively, for a new trial. (10 R. 1459).

After the trial, Ronnie Lymas filed a motion to declare section 11-1-60(2)(b) of the Mississippi Code unconstitutional on grounds that the same violates several provisions of the Mississippi and United States Constitutions. (10 R. 1453). The trial court granted Double Quick's motion to alter or amend the judgment, and it entered an Amended Final Judgment of $1,679,717.00 in favor of Lymas, (11 R. 1536). The trial court denied Lymas' motion to declare the caps imposed by section 11-1-60(b) unconstitutional. (12 R. 1662). The trial court denied Double Quick's remaining post-trial motions. (12 R. 1668. Double Quick's appeal and Ronnie Lymas' cross-appeal then ensued. (12 R. 1671 & 12 R. 1675).

D. ***Statement of the Facts***

On January 26, 2007 Ronnie Lymas went to work at McMillian Catfish Farm around 6:30 a.m where he had worked for more than fifteen years. (17 R. 476-477). He got off from work and went home around 3:30 p.m. After getting home, Mr. Lymas took a bath and later left walking to visit his friend Robert James who lives

on Church Street in Belzoni. Mr. Lymas visited with Robert James for five to ten minutes and left walking to the Shell gas station store which is directly across the street from the Double Quick on Martin Luther King Dive in Belzoni, Mississippi. (17 R. 479-480). While walking Mr. Lymas met his friend Donald Lucas who had just purchased some medicine for his niece. Donald Lucas then joined Mr. Lymas and they walked over to the Shell gas station. Mr. Lymas after determining that prices were little higher at Shell, walked across the street to the Double Quick to make his purchase. (17. R. 481-482).

Donald Lucas went into the Double Quick store, followed by Ronne Lymas five minutes later. (14 R. 234, lines 10-14). When Mr. Lymas walked onto the Double Quick parking lot he noticed two males loitering on the Double Quick parking lot arguing. (17 R. 484 & Ex. P-1). The two individuals arguing were Orlando Newell and Allen Unger. According to Double Quick argument at trial, Orlando Newell was inside the Double Quick store shortly before he shot Mr. Lymas. (23 R. 1092, lines 11-18). Mr. Lymas walked past the argument and went into the Double Quick where he purchased a beverage item. (17 R. 485). Donald Lucas saw Mr. Lymas enter the Double Quick store. (14 R. 219, lines 3-20).

The two people whom Ronnie Lymas saw arguing in the Double Quick parking lot, Orlando Newell and Allen Unger, were both under pending aggravated assault indictments in the Humphreys County Circuit Court for shooting other people prior to shooting Ronnie Lymas. (Ex. P-10, Ex. P-11 & 4 R. 421-24). At the time of the shooting of Ronnie Lymas, Orlando Newell had been indicted for shooting Calvin Johnson in the stomach with a sawed off shotgun on November 28, 2005. (Ex P-10). Allen Unger was under indictment for shooting Willie Earl Moore on March 11, 2006 in Belzoni, Mississippi. (Ex. P-11). In fact, at the time of the deposition of Allen

Unger in this case, he had already pled guilty to the charge of aggravated assault on Willie Earl Moore, and was serving a prison term for that prior shooting.

The similarities between Orlando Newell's shooting of Ronnie Lymas and Calvin Jefferson are striking. In each case, both victims were unarmed, both shootings involved Orlando Newell arguing with someone, but shooting another individual not involved in the argument, in both shootings Orlando Newell disposed of his weapon in a local lake and both victims were taken to the University Medical Center in Jackson for treatment. (16 R. 422-425 & 21 R. 969, lines 8-11). Belzoni being a very small rural town, Orlando Newell's shooting of victim Calvin Jefferson was well known in the Belzoni, Mississippi community. (16 R. 424, lines 22-28).

About the same time that Ronnie Lymas was going into the Double Quick store, Double Quick employee Shavon Ellis was walking out the front door and observed the same arguing loiters which Mr. Lymas noticed as he walked onto the Double Quick parking lot. (14 R. 271, lines 20-21). Instead of notifying management or calling the police, Shavon Ellis simply got into her car and drove away. (14 R. 272). About six minutes later after she drove away from the Double Quick, Shavon Ellis heard gunfire, which was Ronnie Lymas being shot in the Double Quick parking lot by Orlando Newell. (14 R. 281, lines 18-22).

Linda Davis, who was Shavon Ellis' manager at the time of the subject shooting, Dale Taylor who was the Double Quick's area manger at the time of the shooting, and Double Quick's security expert, Warren Woodfork, all testified at trial that Double Quick employee Shavon Ellis' actions were improper in ignoring a brewing altercation between two known shooters on the Double Quick parking lot and driving away. (14 R. 290, line 29 and 15 R. 291 (Linda Davis), 20 R. 810, lines 2-25 (Dale Taylor) & 21 R. 999-1000 (Warren Woodfork)).

A second employee of Double Quick , Shanetta Thurman, testified that she had actual knowledge that Orlando Newell and Allen Unger, both had pending aggravated assault charges against them at the time Ronnie Lymas was shot at the Double Quick. Double Quick employee Shanetta Thurman further testified that she obtained this actual knowledge of the pending aggravated assault charges because she also worked full time at the Humphreys County courthouse and she would see Orlando Newell and Allen Unger at the courthouse during their criminal proceedings. (14 R. 261-262). Shanetta Thurman also saw Orlando Newell and Allen Unger on the Double Quick property a few days before they shot Ronnie Lymas. (2 R. 261, lines 15-18).

Double Quick did not have a security camera outside the store which would enable its employees to monitor the area of the parking lot where Orlando Newell and Allen Unger were arguing on the day of the shooting. (21 R. 897, lines 3-6 & 15 R. 293, lines 18-23) Double Quick did not have a security guard on its premises at the time of the subject shooting of Ronnie Lymas. (20 R. 840).

Shortly after the shooting, several Belzoni Police Department officers arrived and began its investigation of the shooting by attempting to locate eyewitnesses. As part of the investigation, Double Quick shift manager Latrease Ward gave the following written statement to a Belzoni police department investigator:

> *Red Boy Newell did the shooting and Red Boy gave the gun to his cousin. Can't call his name, comes in store and buy chicken sandwich all the time. The guy that got shot name was Ronnie Lymas. Red Boy cousins stay on Price Avenue in a Blue house. He's about 5' 8", weighs 176 lbs, wears braids. When Ronnie Lymas got shot 4 or 5 boys ran behind the blue house on the corner. All 4 or 5 of the boys are Newells. All of them had black on. After Ronnie got shot the boys kicked him and then ran off.* ***When Ronnie came in the store and bought***

Faygo and went out the boys was waiting on him to come out.

(5 R. 726, emphasis added).

Despite this clearly worded statement, Latrease Ward denied its content at trial. (2 R. 238, lines 8-12 & Lymas' R.E.). Double Quick's Vice President of Operations, Scott Shafer, also testified similarly under oath as follows:

> *Q. Before being shot, what did Ronne Lymas purchase from the Double Quick?*
> *A. I believe he purchased a strawberry Faygo.*

(5 R. 722 & Lymas' R.E.). However, despite this overwhelming evidence, Double Quick argued throughout trial that Ronnie Lymas did not enter into the Double Quick store and make a purchase.

Nearly every Double Quick employee who testified at the trial of this case, testified that he or she was given no training or procedures to follow if a known violent person such as Orlando Newell or Allen Unger came on to the store premises. (14 R. 275, lines 21-26 (Shavon Ellis), 14 R. 263-264 (Shanetta Thurman) & 14 R. 249, lines 22-29 (Latrease Ward)). When asked at trial whether Double Quick employees were properly trained to deal with known violent persons, Double Quick's area manager, Dale Taylor, answered "no." (20 R. 807, lines 7-12).

In the four month period preceding the date of the attack on Ronnie Lymas, the neighborhood in the immediate vicinity of the Double Quick had five armed robberies, seventeen fights, five drug cases and one rape reported to the Belzoni Police Department. (Ex. P-8). The Double Quick itself, had two armed robberies and 14 fights reported to the Belzoni Police Department. (Ex P-8).[2]

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[2] According to the 2000 census, Belzoni, Mississippi has a population of about 2,600 people.

As a result of the shooting at the Double Quick, Ronnie Lymas was hospitalized for nearly two months, underwent several surgeries and had to where a colostomy bag for nearly one year after the shooting. (Ex. P-3, Vols. 1-5). As a result of the subject shooting, Ronnie Lymas incurred the following medical bills:

1.	Humphreys County Hospital	3/6/07	$ 2,676.90
		3/3/07	$ 882.10
2.	ER Physician	3/6/07;3/3/07	$ 746.00
3.	Radiology	3/6/07-3/3/07	$ 2,783.00
4.	University Medical Center	36/07-3/1/07	$258,278.40
		36/07 (helicopter)	$ 9,099.00
		3/6/07-ER (UTI infection)	$ 908.39
		3/7/07	$ 509.00
		3/9/07	$ 129.00
		3/14/07-Urology	$ 431.00
		3/16/07	$ 105.00
		3/21/07	$ 440.00
		4/9/07-Medical Mall	$ 1,024.00
	Nerve Conduction Study	4/16/07	$ 2,465.00
	Vascular Surgery	4/20/07	$ 105.00
	Hand & Trauma Clinics	5/9/07	$ 298.00
		8/1/07-Hand Clinic	$ 105.00
		8/31/07	$ 114.00
		9/4/07	$ 704.00
		9/5/07	$ 407.00
		9/11/07	$ 4,955.00
		9/25/07	$ 881.00
		9/28/07	$ 1,150.00
		10/15/07-10/23/07	$43,651.13
		11/6/07	$ 152.00
		12/4/07	$ 124.00
		1/16/08	$ 313.00
		2/1/08	$ 951.00
5.	UMC-ER Physicians	3/6/07;3/6/07	$ 746.00
6.	UMC Radiology Assc.	3/6/07-3/21/07	$ 2,783.00
7.	UMC Anaesthesia Services	3/6/07-2/26/07	$ 12,675.00
8.	UMC Internal Medicine	2/9/07	$ 730.00
9.	UMC Pathology Assc.	6/07;2/20/07	$ 602.50
10.	UMC Neurology Group	2/9/07	$ 200.00
11.	UPA PLLC Neurology	4/16/07	$ 2,030.00
12.	UMC Surgical Assoc.	2/5/07-5/21/07	$ 87,672.00
13.	Gorton Clinic	5/15/07	$ 54.00

Total Medical Bills to Date	*$381,050.29*

(Ex. P-3 & P-4).

Without objection, Ronnie Lymas' economic expert, David Channell testified that Mr. Lymas' past, present and future loss wages totaled $241,667.00 as a result injuries he sustained during the attack. (18 R. 660, lines 3-7).

Every Double Quick employee who testified at the trial of this case expressly stated that he or she knew of nothing Ronnie Lymas did to cause the shooting or instigate the violence, and no one saw Ronnie Lymas with a weapon or a weapon near Mr. Lymas as he lie gravely injured in the Double Quick parking lot . (14 R. 276, lines 17-19 and 15 R. 292, lines 5-8). Double Quick seems to admits this in its appellate brief on page 15 which states "the record establishes that there was in fact no "altercation" between anyone, much less between Newell and Lymas.[3]

SUMMARY OF THE ARGUMENT

Whether alleged conduct of an actor is the proximate cause of harm or damages, has traditionally been a jury question under Mississippi law. Ronnie Lymas' two security experts both testified in detail that the following actions or inactions by Double Quick or its employees caused the shooting of Ronnie Lymas on the Double Quick premises:

1. Double Quick employee Shavon Ellis walking pass two arguing individuals she knew were presently charged with prior shootings of other individuals, ignoring the argument and driving away, only to have at least one of them attack Mr. Lymas

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[3] However, Double Quick is wrong about some altercation occurring. Clearly its own employee Shavon Ellis saw two men arguing in the parking lot whom Ronnie Lymas definitively testified was Allen Unger and Orlando Newell.
(5 R. 484, lines 3-8).

5 to 6 minutes later after she drove away. This 5 to 6 minute time lapse while Ronnie Lymas was still in the store making his purchase, was more than enough time for Shavon Ellis to inform her supervisor or call the police to have Orlando Newell and Allen Unger removed from the property. Double Quick's own security expert, Warren Woodfork, and its two management employees, Dale Taylor and Frances Byest, all testified that Shavon Ellis' actions were improper and that she should have reported the argument to her supervisor or that otherwise she should have acted to get Orlando Newell and Allen Unger off of the property.

The jury was well within its right to decide had Shavon Ellis acted, given the 5 to 6 minute delay in the shooting after she drove away, that the shooting of Ronnie Lymas more likely than not would have been prevented had she alerted her supervisor and/or called the police in light of her knowledge that Orlando Newell and Allen Unger had previously shot other individuals.

2. Double Quick's complete failure to train or give instructions its employees on how to deal with a known violent person on its property.

3. Double Quick's failure to have a security camera on the outside of the store to monitor persons loitering outside the store. Orlando Newell and Allen Unger loitered and argued on the parking lot long enough for Ronnie Lymas to go into the store, make a purchase, and for Shavon Ellis to drive 5 to 6 minutes away before hearing gun fire. A security camera on the outside of the store would have allowed the store employees to view this brewing violent altercation from inside the store and take action to have them removed from the property. A video monitor was available for viewing immediately behind the cash register where manager Frances Byest was standing during the time Newell and Unger were arguing in the parking lot.

4. Failing to have an armed security guard on the premises at the time of the shooting on the single busiest day of the week for the Double Quick store, a Friday, January 26, 2007.

Combined, this testimony and evidence constitutes more than substantial, overwhelming and credible evidence to support the jury's verdict in this case.

With respect to its foreseeability argument, Double Quick appears not to argue foreseeability much at all, but whether Ronnie Lymas' shooter, Orlando Newell, had a violent nature in the first place. Double Quick's suggestion that only conduct adjudged to be criminal can qualify as "violent" for foreseeability purposes is not supported by Mississippi case law. Furthermore, at the time of trial, Allen Unger had pled guilty to his pending aggravated assault charge. In this case, two persons with pending aggravated assault indictments were allowed to loiter on Double Quick's parking lot arguing for several minutes while one employee walked right by them and drove away, only to have a customer, Ronnie Lymas, shot by them 5 to 6 minutes later. There could not have possibly been a more dangerous situation brewing on the Double Quick property than two known feuding shooters.

The shooting was also foreseeable in light of the fact that Double Quick employee Shavon Ellis testified that, "people are arguing and almost fighting at the Double Quick everyday." (14 R. 272, lines 11-14). Yet no action was taken to quell these altercations. Ronnie Lymas' security expert Tyrone Lewis testified that in his 25 year law enforcement career and experience as a police officer, ongoing altercations and fights on a premises are a good predictor that an escalation in

violence will occur, as arguing and fights tend to grow and fester if not addressed, and eventually escalate to much more serious violent crime.

As to the admissibility and reliability of the Ex. P-8, the Belzoni police department crime incident lists, The Mississippi Court of Appeals has specifically held that where a plaintiff presents crime statistics of calls made to the police department, "but not necessarily crimes committed, this evidence created a jury question of whether [defendant] was on notice that assaults were occurring.

Double Quick's argument that Ronnie Lymas' security experts testimony was unreliable and conclusory is disingenuous and plain wrong. The methods used to reach their opinions in this case and the facts and data they relied upon to reach their opinions are universally accepted in the premises security field to reach opinions about foreseeability and proximate cause of criminal attacks on commercial property. See Premises Security, William F. Blake and Walter F. Bradley (1999).

Furthermore, Double Quick's security expert, Warren Woodfork, used the exact same methods and data as did Ronnie Lymas' security experts, in reaching his opposing opinions in this case. Double Quick cannot point to one single method or piece of data that its security expert, Warren Woodfork, used in reaching his opinions in this case, which was different or in addition to Ronnie Lymas' security experts. Despite using the same methods and data as did opposing experts, Double Quick's security expert opined at trial that the shooting of Ronnie Lymas was not foreseeable and no action by Double Quick was the proximate cause of the shooting of Ronnie Lymas.

Double Quick's security expert Warren Woodfork did not testify that he could not reach an opinion in this case based on the crime statistics available from the Belzoni Police Department in Ex. P-8. Instead, Mr. Woodfork gave full and substantive opinions opposite of those given by Ronnie Lymas' security expert. This case presented a classic "battle of the experts", which Double Quick is attempting to manufacture into a Daubert issue. Double Quick's Daubert challenge to Ronnie Lymas' security expert is no real Daubert challenge at all, but instead is an invitation to this Court to impermissibly weigh in on the "credibility and weight" of opposing expert opinions. Double Quick is estopped from making this inconsistent argument on appeal.

Double Quick's argument that the introduction of Plaintiff's Exhibit P-10-A, the Belzoni Police Department's investigation findings for the prior aggravated assault by Orlando Newell on Calvin Johnson was reversible error is simply wrong. The police investigation findings were clearly admissible under Miss. R. Evid. 803(8)(C), as a public record of factual findings in a civil action resulting from an investigation made pursuant to authority granted by law.

Also, the Ex. P-10-A was admissible to show notice to Double Quick of Orlando Newell's violent nature because Double Quick argued throughout trial that it heavily relied upon the Belzoni Police Department for security, giving the jury the impression that it had a close relationship with the department. Finally, without objection, Belzoni Police Officer Truron Grayson testified at trial in great detail about the pending aggravated assault indictment against Orlando Newell , including its

similarities with the Ronnie Lymas shooting.[4] *Thus even assuming the Court was incorrect in admitting Ex. P-10-A, such was harmless error in light of Officer Grayson's unobjected to testimony about the aggravated assault charge.*

The indictments of Orlando Newell and Allen Unger in their prior aggravated assault charge were admissible under Miss. R. of Evid. 201, as the indictments were pending in the Humphreys County Circuit Court, the same court which tried this case. It is paramount, that a trial judge may take judicial notice of court documents in its own court file.

The jury instructions of which Double Quick now complains of comport with the Mississippi Model Jury Instructions and are supported by specific Mississippi premises liability case law. Taken as a whole, the jury instructions given in this case fairly announced the primary rules of law applicable to this case. Also, Double Quick failed to make an objection at trial to the jury instructions it now complains of and/or it waived any such objections.

STANDARD OF REVIEW

The standard of review for the denial of a motion for directed verdict and a motion for judgment notwithstanding the verdict are identical. Miss. Power and Light Co. v. Cook, 832 So.2d 474, 478 (Miss. 2002). The Mississippi Supreme Court has described the standard as follows:

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[4] Officer Grayson testified that both shootings appeared to be unprovoked shootings of unarmed victims, i.e. Calvin Johnson and Ronnie Lymas. Both shootings involve Orlando Newell arguing with one person, but shooting an innocent person. Also, after both shootings, Orlando Newell disposed of his weapon in a local river.

> *This Court will consider the evidence in the light most favorable to the appellee, giving the appellee the benefit of all favorable inferences that may be reasonably drawn from the evidence. If the facts are so overwhelmingly in favor of the appellant that reasonable jurors could not have arrived at contrary verdict, this Court must reverse and render. On the other hand, if there is substantial evidence in support of the verdict, that is evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, this Court must affirm.*

Id.

The standard of review for the trial court's admission or exclusion of evidence, including expert testimony, is abuse of discretion. "The appellate court gives great deference to the discretion of the trial judge regarding the admission or exclusion of evidence, and unless the appellate court concludes that the exercise of that discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion, that decision will stand." Tunica County v. Matthews, 926 So.2d 209 (Miss. 2006).

Finally, when reviewing a challenge to a jury instruction, Mississippi appellate courts asks whether the instruction at issue contains a correct statement of the law and whether the instruction is warranted by the evidence. Church v. Massey, 697 So.2d 407, 410 (Miss. 1997). "A party has a right to have jury instructions on all material issues presented in the pleadings or evidence." Glorioso v. YMCA, 556 So. 2d 193, 195 (Miss. 1989) and Alley v. Praschak Mach. Co., 366 So.2d 661 (Miss. 1979). When the Mississippi appellate court reviews a claim of trial court error in granting or denying jury instructions, all of the jury instructions are reviewed as a whole, and no instruction is read in isolation. Richardson v. Norfolk

S. Ry. Co., 923 So.2d 1002, 1010 (Miss. 2006) and Burton v. Barnett, 615 So.2d 580, 583 (Miss. 1993). "Defects in specific instructions do not require reversal where all instructions taken as a whole fairly, although not perfectly, announce the applicable primary rules of law." Burton, 615 So. 2d at 583.

ARGUMENT AND AUTHORITIES

A.

Substantial and Credible Evidence Supports the Jury's Verdict that Double Quick's Actions and Inactions Were the Proximate Cause Of the Shooting Attack Upon Ronnie Lymas.

It is well settled law in Mississippi that in order for a plaintiff to prevail on any claim for negligence, he must prove the following four elements: (1) the existence of a duty owed to him, (2) breach of such duty or standard of care, (3) a causal relationship between the breach and alleged injury, that is, the defendant's conduct must be the proximate cause of plaintiff's damages and (4) the plaintiff must prove damages. Donald v. Amoco Production Company, 735 So.2d 161, 174 (Miss. 1999) and Meena v. Wilburn, 603 So.2d 866, 869 (Miss. 1992). On its direct appeal herein, Appellant Double Quick apparently does not challenge Appellee Ronnie Lymas' proof on the first two elements of his negligence claim, that is, Mr. Lymas invitee status and attendant duties owed to him as an invitee, and whether Double Quick breached the standard care owed him. Double Quick does not even attempt to challenge or brief these two elements Ronnie Lymas' negligence claims. Whether alleged conduct of an actor is the proximate cause of harm, has traditionally been a jury question under Mississippi law. Donald v. Amoco Production Company,

735 So.2d 161, 174 (Miss. 1999) and Matthews v. Thompson, 95 So.2d 438 (Miss. 1957). At the trial of this case, Ronnie Lymas called two security experts to testify on his behalf. Michael C. Smith, a former professor of criminal justice at the University of Mississippi and Tyrone Lewis, the current Chief of Police of Jackson, Mississippi. Double Quick does not challenge either expert's qualifications regarding inadequate security cases. Ronnie Lymas' two security experts both testified in detail that following actions or inactions by Double Quick or its employees caused the shooting of Ronnie Lymas on the Double Quick premises on January 26, 2007:

A(1)

Employee Shavon Ellis' Actions Were A Proximate Cause of Ronnie Lymas' Shooting

Double Quick employee Shavon Ellis' actions of walking pass and ignoring Orlando Newell and Allen Unger arguing on the Double Quick parking lot when she knew both men were presently charged with aggravated assault for the prior shootings of individuals other than Ronnie Lymas contributed to the attack on Ronnie Lymas. (14 R. 271-272 & 14 R. 274, lines 18-29). Instead of calling the police or notifying her manager as Double Quick alleges she was trained to do, Shavon Ellis simply ignored the argument and drove away, only to have Mr. Lymas be attacked 5 to 6 minutes later after she drove away. (14 R. 281, lines 18-22).

This 5 to 6 minute time lapse while Ronnie Lymas was still in the store making his purchase, was more than enough time for employee Shavon Ellis to inform her supervisor and/or call the police to have Orlando Newell and Allen Unger removed from the property. Double Quick's own security expert, Warren Woodfork, and its

two Double Quick management employees, Dale Taylor and Linda Davis, all testified that Shavon Ellis' actions of ignoring Orlando Newell and Allen Unger were improper and that she should have reported the argument to her supervisor or otherwise she should have acted to get Newell and Unger off of the Double Quick property. More specifically, Double Quick manager Linda Davis testified at trial as follows:

> *Q. Now Shavon Ellis, she was your employee, correct*
> *A. Yes, she was.*
> *Q. You had direct supervisory authority over her, correct?*
> *A. Yes.*
> *Q. Okay. Now, she would have been wrong just walking past an argument that's going on and just leave, getting in the car and leaving, would it? That was not proper, was it?*
> *A. No.*

(14 R. 290, line 29 & 15 R. 291, lines 1-10).

Also, Double Quick 's area manager, Dale Taylor, testified at trial as follows:

> *Q. You were in the courtroom when [Double Quick manager Linda Davis][5] testified that when Shavon Ellis walked past the argument or some altercation out in the parking lot shortly before Ronnie Lymas had gotten shot, [Lynda Davis] testified to the question of was that proper, she said no, it was not proper." Do you disagree with that?*
> *A. No, I don't disagree, ...*
> *Q. Okay, But now you don't disagree that her actions were improper? You don't disagree that they were improper?*

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[5] During the examination of Dale Taylor, counsel for Ronnie Lymas inadvertently said the name Frances Byest which is in the transcript. The earlier testimony of Double Quick's employee Lynda Davis was actually being referred to. However, the testimony of Lynda Davis was precisely as transcribed above.

A. No.

(20 R. 810, lines 2-25).

Further, with respect to Shavon Ellis admission that "arguments and almost fights go on at the Double Quick everyday", (14 R. 272, lines 11-14), Double Quick's area manager Dale Taylor further testified as follows:

> *Q. And how could you possibly disagree with her if she say that they happen -- let me finish -- every day, and you're only there two days a week? How can you disagree with her?*
> *A. I don't disagree with her, because if something was happening out there every day, I do feel like she should have said something about it, But, you know, every day, that's like an expression to some people.*
> *Q. Well, we can only go by what she said, mam, and your testimony is if she, in fact, witnessed arguments every day, something should have been done about it. That's what you said; correct?*
> *A. If she said it happened every day, then,* ***yes, something should have been done about it.***
> *Q. Well being that something should have been done about it, what was done about it?*
> *A.* ***At that particular time, nothing.***

(20 R. 812, lines 2-24)(emphasis added).

Finally, with respect to Shavon Ellis admission that "arguments and almost fights" go on at the Double Quick everyday, Double Quick's own security expert, Warren Woodfork, testified as follows:

> *Q. Your heard [Lynda Davis][6] and you heard Dale Taylor say that it was improper for Shavonne Ellis to just simply walk past whatever commotion it was and drive away. You heard that, didn't you?*

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[6] See footnote 3 above. Ronnie Lymas' counsel was actually referring to testimony by Double Quick manager Linda Davis.

A. I heard that?
Q. You heard them both say that?
A. Yes
Q. Well, you don't disagree surely with them. I mean, you don't disagree with management, do you?
A. ***No****. What I disagree with is somebody constructing argument - - arguing isn't a violation of the law.*

(21 R. 999-1000).

Shavon Ellis' description of daily arguments and almost fights occurring at the Double Quick was also confirmed by witness Sheila Taylor who worked directly across the street from the Double Quick. Sheila Taylor testified at trial that she personally and often witnessed "arguing, fighting and drug activity " on the Double Quick property." (15 R. 326, lines 4-18), and that no Double Quick employee ever acted to stop loitering, fights and arguing at the Double Quick. (15 R. 329, lines 18-22).

There could not have been a more dangerous situation for Double Quick customers, including Ronnie Lymas, than two feuding known gun shooters. Yet Double Quick employee Shavon Ellis simply ignored this condition, which then escalated into gunfire and the shooting of Ronnie Lymas. Even Double Quick's own management and security expert testified that such actions were improper. See supra.

As to Shavon Ellis's testimony that "arguments and almost fights go on every day at the Double Quick", (14 R. 272, lines 11-14), Ronnie Lymas' security expert Tyrone Lewis connected this condition to Lymas' shooting in the following testimony:

Q. Well, let's start with the fights, Mr. Lewis. In your experience as a police officer, what's the significance of

fights occurring routinely particularly at a convenience store such as Double Quick ....

A. Well fights, as well as any other crimes that continue to occur on premises such as the Double Quick, if they go unaddressed, and it's just like a broken window theory. If you have a broken window in the neighborhood of a house that's vacant, and if you don't fix it, it's going to continue to grow, and somebody is going to throw another rock and break it again. These things continue to escalate if they're not addressed, and continually lead to incidents such as what happened on January 26, 2007, to Mr. Lymas.[7]

(19 R. 748, lines 6-27).

Ronnie Lymas' second security expert, Michael Smith, also connected Shavon Ellis' testimony that "arguments and almost fights go on every day at the Double Quick," to Lymas' shooting in the following testimony:

A. ... And Shavon Ellis, the employee we've talked about before, said in her deposition that, quote, usually - - people, quote, usually stand outside that store and argue every day, close quote.
Q. And what is the significance of that, Dr. Smith?
A. Well, you know, arguments lead to trouble. I mean, arguments are trouble, but arguments lead to worse trouble too an it - - part of that is environment that is problematic and is going to lead to serious injury just as it did.

(18 R. 609, lines 8-18).

With the above referenced testimony, the jury was well within its province to

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[7] Tyrone Lewis was referencing the "Broken Windows" theory of adequate security which is a well known principle used in law enforcement and the security expert field. This theory was also referenced by Double Quick's security expert, Warren Woodfork. (9 R. 1000, lines 13-24). "Broken Windows" was first published by social scientists James Q. Wilson and George L. Kelling in the March 1982 edition of the *The Atlantic Monthly*.

decide had Shavon Ellis acted, given the 5 to 6 minute delay in the shooting after she left the store's parking lot, that the shooting of Ronnie Lymas could have been prevented had she altered her supervisor and/or called the police in light of her knowledge that Orlando Newell and Allen Unger had previously shot other individuals.

This case is analogous to the Gatewood v. Sampson, 812 So. 2d 212 (Miss. 2002) case with respect to the proximate cause question raised by Double Quick. In Gatewood, a store patron went onto the property to use a pay phone and was assaulted. The defendants in Gatewood also argued a lack of proximate cause. In rejecting the defense and affirming liability on the part of the property owner, the Mississippi Supreme Court stated, "evidence establishing proximate cause and foreseeability was presented to the jury." Id. at 221. Likewise, as shown above, both of Ronnie Lymas' security experts testified that Shavon Ellis' actions of ignoring the argument between Newell and Unger, as well as unabated "arguing and fights going on daily at the Double Quick created the environment which led to Ronnie Lymas being shot. Using a well accepted security principle, "Broken Windows", both of Mr. Lymas' security experts expressly testified that these actions and conditions proximately caused the shooting of Ronnie Lymas. (18 R. 612, lines 4-11 and 19 R. 756-757).[8]

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[8] Contrary to Double Quick's assertion that these were conclusory proximate cause opinions, Mr. Lymas' security experts' testimony clearly was referencing all of their prior testimony concerning breaches of standard of care such as a lack of training, not having a security camera outside of the store and not having a security guard present, etc. These ending proximate cause opinions cannot be read in a vacuum as Double Quick urges this Court to do. They must be read in view of all of the experts' prior testimony.

This case's proximate cause question is also analogous to the Lyle v. Mladinich, 584 So.2d 397 (Miss. 1991) parking lot assault case. In Lyle, the Mississippi Supreme Court reversed a grant of summary judgment and returned the case to the lower court for trial, holding that a genuine issue of fact existed as to whether the breaches of the standard of care caused the assault upon the patron. Id. at 399-400. Just like Double Quick in this case, the property owner in Lyle made calling the police after an assault had been committed, its principal method of security. Id. 399-400. (14 R. 263, lines 1-8).

Based on Gatewood and Lyle, this Court should affirm the trial court's verdict.

A(2)

Double Quick's Failure to Train Its Employees Was A Proximate Cause of the Shooting of Ronnie Lymas

Ronnie Lymas' security expert Michael Smith testified that Double Quick failed to train its employees on how to deal with persons with known violent past who may come onto the Double Quick property, and that said failure to train was also a proximate cause of the shooting of Ronnie Lymas. (18 R. 592-596 & 18 R. 612, lines 4-15). Nearly every Double Quick employee who testified at trial stated that he or she was not trained to deal with persons with a known violent past who came onto the Double Quick property. (14 R. 275, lines 21-26 (Shavon Ellis), 14 R. 263-264 (Shanetta Thurman) & 14 R. 249, lines 22-29 (Latrease Ward)). When asked at trial whether Double Quick employees were properly trained to deal with known violent persons, Double Quick's area manager, Dale Taylor, answered "no." (20 R. 807, lines 7-12). This failure to train led directly to Shanetta Thurman's and Shavon Ellis'

failure to act prudently with the information each possessed about the assailants Orlando Newell and Allen Unger as admitted to by Double Quick's own security expert, Warren Woodfork who testified as follows:

> *Q. - - Of Orlando Newell's violent nature. You also heard her [Shanetta Thurman] say that even after she had known that, she saw him come to the Double Quick before and that he was even on the Double Quick the week of the shooting of Ronnie Lymas. You heard that too?*
> *A. Yes*
> *Q. Now as security expert, what should she have done with that information?*
> *A. Relayed it to her superiors.*

(20 R. 996, lines 17-27).

> *Q. But seeing Orlando Newell there [at the Double Quick] in the week of the shooting, though, it's your opinion that she [Shanetta Thurman] should have relayed that information to her supervisor, correct?*
> *A. Yes. It would have been a prudent thing to do.*

(20 R. 997, lines 13-18). Thus, Double Quick's own security expert testified that the information about Newell and Unger was mishandled. This testimony coupled with Lymas' experts testimony that Double Quick's employees were not trained to properly convey this type of information to management, and such failure to train was the proximate cause of the shooting of Lymas, the jury verdict is well supported by the evidence.

Double Quick should not be able to shield itself from liability because it failed to train its employees on how and when to inform management of the presence of persons with known violent pasts who come onto the Double Quick property or how to otherwise have such persons removed from the store property.

That is why Double Quick's employee knowledge is imputed to Double Quick. See discussion on imputed knowledge infra.

An employer's negligent training or failure to train employees on matters related to customer safety and security gives rise to viable claims under Mississippi law. See Gamble ex rel Gamble v. Dollar General Corp., 852 So.2d 5, 14 (Miss. 2003). In Gamble, the Mississippi Supreme Court held that no expert was needed to prove a failure to train claim versus an inadequate training claim. Id. at 14. In Gamble, a customer of Dollar General was assaulted by a store employee after being accused of shoplifting. The plaintiff, Gamble, sued Dollar General alleging that it failed to train its employee, and as a result she was assaulted by an employee of Dollar General. The Court affirmed a jury verdict in favor of the plaintiff. Id. Just like in Gamble, Ronnie Lymas' claims against Double Quick for failure to train its employees on how to deal with persons with known violent pasts or inform management of such person's presence on the property, are just as viable as was in Gamble.

In Gamble, it is noteworthy that the subject employee did receive some training from Dollar General, as well as an employee handbook. Id. at 14. However, the training and handbook did not address the proper way to confront a customer suspected of shoplifting. Id. This is analogous to Double Quick's alleged training in this case. Although Double Quick claims that it gave some training to its employees, as can be seen by its employees testimony at trial as shown above, the training did not include training on how to deal with persons with known violent pasts

or inform management of such persons presence on the property. This failure to train was a complete and utter failure by Double Quick in light of the fact that under Mississippi law, a premises owner can be found civilly liable to a customer if it has actual or constructive knowledge of an assailant's violent nature and such assailant injures one of its customers. Gatewood v. Sampson, 812 So. 2d 212 (Miss.2002).

Ronnie Lymas' security expert Michael Smith gave substantial and credible testimony regarding Double Quick's failure to train its employees. This testimony made a jury question as to whether Double Quick's failure to train its employees on how to deal with persons with known violent pasts or inform management of such persons presence on the property, was a proximate cause of Ronnie Lymas' shooting. (18 R. 592-596 and 18 R. 612, lines 4-15). Id.

A(3)

Double Quick's Failure to Have A Camera Outside Was A Proximate Cause of Ronnie Lymas' Shooting

Both of Ronnie Lymas experts testified that Double Quick's failure to have a security camera on the outside of the store to monitor persons loitering outside the store was also a proximate cause of the shooting of Ronnie Lymas. (18 R. 599-602 & 19 R. 754-757). Ronnie Lymas' expert Michael Smith testified that a camera was needed outside the Double Quick store because criminology statistics show that "fully half of the retail store crime - - serious crime problems happen in a parking lot." (6 R. 600, lines 17-26).

Orlando Newell and Allen Unger loitered and argued on the Double Quick parking lot long enough for Ronnie Lymas to go into the Double store, make a

purchase and for Shavon Ellis to drive 5 to 6 minutes away before hearing gun fire. (14. R. 281, lines 18-22). A security camera on the outside of the store would have allowed the store manager Frances Byest to view this brewing violent altercation from inside the store on the monitor behind her and take action to have Orlando Newell and Allen Unger removed from the property. Ms. Byest could not see the altercation as it was taking place on the south side of the Double Quick store. (21 R. 897, lines 3-6 & 15 R. 293, lines 18-23). A video monitor for the inside store cameras was available for viewing immediately behind the cash register where Frances Byest was standing. (15 R. 318-319). If a camera was outside the store as opined by Ronnie Lymas' two security experts, Ms. Byest would have been aware of the altercation between Newell and Unger and could have acted to remove them from the parking lot given 8 to 10 minute time length it spanned. The inside cameras were present only to combat employee theft.

It is important to understand that Ronnie Lymas is not arguing that a security camera by itself would have prevented the shooting. To the contrary, Lymas at trial argued and proved that given the length of the altercation between Newell and Unger, there was ample time for Double Quick to intervene and stop the altercation between Newell and Unger if a camera was outside the store monitoring the parking lot where the altercation was taking place.

Double Quick is attempting to shield itself from liability by arguing that it did not know that Newell and Unger were on the property at the time of the shooting. (See Double Quick's brief at page 8). This assertion is contradicted by Double

Quick's own argument at trial that Orlando Newell was seen in the store a few minutes before he shot Ronnie Lymas. (23 R. 1092, lines 11-18).[9] *In essence, Double Quick is arguing that it should not be liable for failing to know of Newell's and Unger's 8 to 10 minute altercation because it breached the standard of care by failing to have a camera monitoring the parking lot where Newell and Unger were arguing. This argument is untenable. A defendant should not be able to shield itself from responsibility for injury through a defense based on its own breach of the standard of care.*

A(4)

Double Quick's Failure to Have An Armed Uniformed Security Guard on the Premises at the Time of the Shooting Was A Proximate Cause of the Shooting of Ronnie Lymas

Finally, Ronnie Lymas' two security experts both testified that Double Quick's failure to have an armed uniformed security guard present at the time of the shooting, was also a proximate cause of the shooting of Ronnie Lymas. (18 R. 605). Security expert Tyrone Lewis testified that in his 25 year law enforcement career, he has found that "an armed uniformed security officer plays a big deterrent in crime occurrences. (19 R. 752). The shooting of Ronnie Lymas occurred on January 26, 2007 which was a Friday. Fridays typically were Double Quick's single busiest day of the week.

In a recent case regarding proximate cause relating to an inadequate security

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[9] Double Quick's employee Latrese Ward gave a statement to the Belzoni police department that it was Ronnie Lymas who purchased a red Faygo soda from Double Quick.(See the statement at 2 R.E. pg. 4).

case, the Mississippi Supreme Court stated that "[i]n this case, however, there is direct evidence from experts Tyrone Lewis[10] and John Tisdale that Shady Lane's failure to follow through with security proximately caused the second shooting of Wilson Thomas. This testimony from experts, coupled with the manager's statement that she was going to ban and evict Young as well as improve security, is clearly an issue of material fact that should be determined by a jury. " Thomas v. Columbia Group, LLC, 969 So. 2d 849, 855 (Miss. 2007)(emphasis added). Just as in the Thomas v. Columbia Group case, Ronnie Lymas security experts Tyrone Lewis' and Michael Smith's testimony, coupled with Double Quick's managers Dale Taylor and Linda Davis' testimony, as well as Double Quick's own security expert, Warren Woodfork's testimony that it was improper for Shavon Ellis to ignore the argument between Newell and Unger and that something should have been done about the daily arguing and fights at Double Quick, there "is clearly an issue of material fact [in this case] that should [have been and was] determined by a jury." Id. at 855.

This case is more analogous to Lyle, Gatewood and Thomas than the cases cited by Double Quick. For example, in the Grisham case cited by Double Quick, no evidence of proximate cause was given by the plaintiff. In this case, Ronnie Lymas' security experts gave detailed testimony concerning both breaches of the

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[10] Defendant speaks of much of the *Davis v. Christian Brotherhood Homes* case regarding Tyrone Lewis, however it fails to mention Mr. Lewis' successes in *Thomas v. Columbia Group, LLC*, 969 So.2 d 849 and *Gatwood v. Sampson*, 812 So. 2d 212 (Miss. 2002). These two cases are just two out of dozens of premises liability cases in which Tyrone Lewis was admitted into a Mississippi state court as a security expert and his opinions prevailed.

Newell's and Allen Unger's violent nature, the following testimony was given by Double Quick employee Shanetta Thurman:

> *Q. Okay. Well, my question is you had actual knowledge, not rumor, but actual knowledge that Orlando Newell had shot somebody before. That he had shot somebody other than Ronnie Lymas. You knew that, didn't you.*
> *A. Yes.*
> *Q. And you had actual knowledge, not just street knowledge or rumor knowledge; correct?*
> *A. Yes*
> *Q. Okay. And, in fact you had actual knowledge that Allen Unger had shot somebody, as well, not involving Ronnie Lymas, didn't you?*
> *A. Yes.*
> *Q. And I'm not talking about street or rumor. I'm talking about you knew it and you had actual knowledge; correct?*
> *A. Yes*
> *Q. And you knew that because you also worked at the courthouse full-time; correct?*
> *A. Yes*
> *Q. And you learned of these shootings through your job at the courthouse with them coming in and out in the court proceedings; correct*
> *A. Yes, sir.*

(14 R. 261-262).

To further prove that Double Quick had actual or constructive knowledge of Orlando Newell's and Allen Unger's violent nature, Double Quick employee Shavon Ellis admitted to the following:

> *Q. Now before Ronnie Lymas was shot, the man who got shot, didn't you know that Allen Unger had shot somebody else before, too, not necessarily related to this shooting that we're talking about today, but you had heard Allen had shot somebody before? And what was your answer?*
> *A. Yes*

Q. Okay, And, also, I asked you, And you had heard Orlando Newell had shot somebody before. You said "before," and what was your answer?
A. Yes.

(14 R. 274, lines 18-29).

With respect to this actual knowledge by Double Quick's employees Shanetta Thurman and Shavon Ellis, the Mississippi Supreme Court recently wrote that "[a]n employee's knowledge is imputed to his employer. 30 C.J.S. Employer-Employee § 211 (1992) and see also Restatement (Third) of Agency § 5.03 (2006)...." Glover v. Jackson State University, 968 So.2d 1267, 1276 (Miss. 2007). In Glover, a fourteen year old girl was raped on the campus of Jackson State University by two fifteen year old boys. Id. at 1270-71. Glover sued J.S.U. on a claim of inadequate security. In Glover, the Mississippi Supreme Court imputed to defendant Jackson State University, the knowledge that its bus driver Douglas Luster "knew that the assailants had been expelled from campus for fighting and that Luster knew that victim had been in the boys restroom." Id. at 1279. Based on this imputed knowledge, the Court held that defendant Jackson State University should have foreseen that the fifteen year old assailants would commit a violent rape. That is, in Glover, nothing more than fights by the assailants were held to put J.S. U. on notice of the fifteen year old assailants' "violent nature." In the face of Glover, Double Quick's argument that the prior shooting aggravated assault charge and conviction on Newell and Unger are not enough to equate to a "violent nature" is untenable. In Glover, based on child fights alone, the Mississippi Supreme Court held that it was foreseeable that a violent rape would occur. Id. Surely then, Orlando Newell's

shooting of an unarmed Calvin Johnson with a sawed-off shot gun in a town of 2,600[11] people and Allen Unger's shooting of Willie Earl Moore constitutes a "violent nature" on both their parts which was foreseeable to Double Quick through its employees knowledge Shanetta Thurman and Shavon Ellis.

It is important to note that the employee in Glover who knew about the assailants violent pasts was not a management employee of Jackson State. He was simply a bus driver who knew of the assailants dangerous propensities. "Luster testified that he was aware of the two boys' violent history." Id. at 1271. Double Quick's argument that only a management employee's knowledge can be imputed to an employer is simply wrong pursuant to Glover.

The purpose of the rule of imputed knowledge from an employee to an employer is typically applied so that the risks of an agent's infidelity or lack of diligence falls upon one who employs that agent, rather than upon innocent third parties. Stump v. Indiana Equipment Co., Inc., 601 N.E.2d 398 (Ind. App. 2nd Dist. 1992). This is precisely what ought to happen in this case. Double Quick invited Ronnie Lymas onto its property to purchase its products. Double Quick chose to employ Shanetta Thurman and Shavon Ellis. The risk of Thurman and Ellis not acting diligently with important information about violent persons upon Double Quick's property should fall upon Double Quick, who hired Thurman and Ellis, and who is in a better position to train them to act diligently with information which could impact the safety and security of their customers.

Double Quick's own security expert testified that both Shanetta Thurman and Shavon Ellis should have been more prudent in acting on the information they knew

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[11] See 2000 U.S. Census

about Newell and Unger. (21 R. 997, lines 13-18 & 21 R. 999-1000). The resulting burdens from Double Quick employees not acting diligently should fall upon Double Quick. Id.

Although Double Quick argues in its brief that employee Shanetta Thurman did not know that Orlando Newell was on the property at the time he shot Ronnie Lymas, this assertion aptly demonstrate that Shanetta Thurman failed to be observant of persons inside the store as required by Double Quick's own professed standards promulgated by the National Association of Convenience Stores. (18 R. 602, lines 21-23). This is so because by Double Quick's own argument at trial, the shooter Orlando Newell was seen in the Double Quick store a several minutes before he shot Ronnie Lymas. (23 R. 1092, lines 11-18).[12]

As to Double Quick's assertion on page 15 of its brief that it would be unreasonable for Orlando Newell and Allen Unger to be barred from every commercial establishment because of their aggravated assault charges, no such argument is advanced by Ronnie Lymas. However, in light of the daily arguments, fights, drug activity and loitering continually occurring at the Double Quick, coupled with Thurman's and Ellis's knowledge of Newell's and Unger's pending aggravated assault charges, Double Quick should have acted to remove them from the property before they attacked Ronnie Lymas. Think about it. How many of us know even one person who criminally shot another human being, let alone seeing two such persons openly engaged in hostility on a commercial establishment as did employee Shavon

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[12] Double Quick's arguments are contradictory. On one hand, at trial it argued that Orlando Newell came into the Double Quick, (11 R. 1092, lines 11-18). But on appeal in its brief, Double Quick implicitly argues that Orlando Newell did not come into the store. (See pg. 17, second paragraph of Double Quick's brief). These type arguments from Double Quick is what made this case ripe for jury determination.

Ellis.

Finally, it should be noted that in order to find foreseeability based on "violent nature," Double Quick did not have to have true actual knowledge of Newell's violent nature. The case law states foreseeability can be proven by showing that the premises owner "had actual or constructive knowledge of the assailants violent nature." Gatewood v. Sampson, 812 So. 2d 212, 220 (Miss. 2002). Constructive knowledge means "knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person. Black's Law Dictionary, 876 (7th ed. 1999). While Lymas argues Double Quick had actual knowledge of Newell's violent nature, alternatively, Double Quick had constructive knowledge of Newell's violent nature because: (1) through its two employees' knowledge of Newell's prior shooting and (2) Double Quick's touting of its relationship with the Belzoni Police Department and its making the police its primary security measure.

B(2).

Orlando Newell's Aggravated Assault Police Investigative Findings Was Admissible to Prove His Violent Nature

Also to prove his foreseeability theory of the case, Ronnie Lymas introduced into evidence findings of fact in the Belzoni Police Department criminal file for Orlando Newell's pending aggravated assault charge against Calvin Jefferson. (16 R. 386 and Ex. P-10-A). This was necessary in order to show the great similarity between the shootings of Calvin Jefferson and Ronnie Lymas by Orlando Newell after Double Quick objected to Ex. P-10-A on grounds of relevancy. Gatewood v.

Sampson, 812 So.2d 212, 220 (Miss. 2002). Double Quick objected to the introduction of this Belzoni Police Department investigative findings on grounds that the same was not relevant and hearsay.[13] *(16 R. 382) But two exceptions to the hearsay rule made the information perfectly admissible. First, Miss. Rule of Evid. 803(8)(B), and second, 803(8)(C).*[14] *Miss. Rule of Evidence 803(8) states as follows:*

> ***Public Records and Reports.*** *Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth ... (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.*

The Belzoni police investigation findings for the aggravated assault charge against Orlando Newell for shooting Calvin Johnson before he shot Ronnie Lymas clearly falls within both 803(3)(B) & (C) and was highly relevant to this case given the similarities between the two shootings. The investigation file simply contains factual findings by the Belzoni police department investigating officer regarding Newell's shooting of Calvin Johnson. Double Quick did not raise any issues that the file contains any information which was untrustworthy, nor did Double Quick attempt to review the file to see if it contained any information which falls outside 803(3)(B) &(C). See Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 161 (Miss. 1988); Clark v.

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[13] Double Quick also raised a relevancy objection but did not pursue the same at the trial court level and did not brief the relevancy issue in its brief. Thus that objection is waived.

[14] Counsel for Lymas mistakenly quoted Rule of Evidence 803(6) at trial as a bases for admission of Ex. P-10-A. However, for appellate purposes, any proper grounds for admission of Ex. P-10-A would require rejection of Double Quick's objection.

Clabaugh, 20 F.3d 1290, 1294 (3rd Cir 1994); Melridge, Inc. v. Heublein, 125 B.R. 825, 829 (D. Oregon 1991) and Combs v. Wikinson, 315 F.3d 548, 555 (6th Cir. 2002).

Ex P-10A, the Belzoni police aggravated assault file was also admissible to show that Double Quick had actual or constructive notice of the violent nature of Orlando Newell because Double Quick touted its close relationship with the Belzoni Police Department as a part of its overall security scheme and Double Quick's Vice President of Operations Scott Shafer testified that employees were trained to call the Belzoni police if a customer made them feel "uncomfortable." (8 R. 852, lines 26-29).

Also, without objection in the trial court from Double Quick, Officer Truron Grayson of the Belzoni Police Department testified in detail about Orlando Newell's shooting of Calvin Johnson. (16 R. 419-425). In fact, Officer Grayson's testimony was wholly consistent with the factual findings introduced into evidence through Ex. P-10A. Thus, even if the trial court was incorrect in placing into evidence Ex. P-10A, such was harmless error in light of Officer Truron Grayson's unobjected to, detailed testimony concerning the contents of Ex. P-10-A.

The similarities between Orlando Newell's shooting of Ronnie Lymas and Calvin Johnson are striking. In each case, both victims were unarmed, both shootings involved Orlando Newell arguing with someone, but shooting another individual not involved in the argument, in both shootings Orlando Newell disposed of his weapon in a local lake and both victims were taken to the University Medical Center in Jackson for treatment. (16 R. 422-425 and 21 R. 969, lines 8-11).

Finally, Double Quick's arguments that Newell was not convicted of the

shooting of Calvin Johnson at the time he shot Ronnie Lymas is not a matter which go to the admissibility of the Ex. P-10A. That issue may bear on the "weight" of the evidence. The jury heard this argument from Double Quick and placed the weight on it deemed appropriate. Double Quick's assertions that the admission of Ex. P-10 was reversible error is simply without merit.

B(2).

Double Quick Had Actual or Constructive Knowledge of An Atmosphere of Violence at the Double Quick

To prove an atmosphere of violence, Ronnie Lymas introduced into evidence a "call for service log" from the Belzoni Police Department for the subject Double Quick and its surrounding neighborhood. This was accomplished through the custodian of records for the Belzoni Police Department, Dorothy Elders. (16 R. 376 and Ex. P-8).

On this appeal, Double Quick has greatly expanded its objection to Ex. P-8, the "calls for service logs." At trial, Double Quick objected to Ex. P-8 only on grounds that, "if Double Quick could not show crimes happened at other locations near the Double Quick, then Ronnie Lymas should likewise not be able to use crimes off the Double Quick premises to prove foreseeability." This is clear from the record (16 R. 365, lines 17-29 and 366).[15] *In other words, Double Quick was attempting to prove earlier in the trial that: "look, the other stores in the area have*

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[15] Double Quick spent the great majority of its time objecting to Ex. P-8 by making a baseless assertion that Ronnie Lymas' security expert designation did not disclose that his experts would talk about off premises crime. (4 R. 365-376). However, Double Quick does not raise this same objection on appeal. Its does raise new ones for the first time on this appeal which is impermissible.

crime to, so we are not so bad." (16 R. 366, lines 16-29). This was objected to by Ronnie Lymas and not allowed by the trial court on grounds of irrelevance.

The reason that Mr. Lymas could use off premises crimes and Double Quick could not is simple. Mississippi case law permits a plaintiff to show an atmosphere of violence "on and around the premises" to prove foreseeability. Lyle v. Mladinich, 584 So.2d 397 (Miss. 1991); Gatewood v. Sampson, 812 So.2d 212, 220 (Miss. 2002) and Thomas v. Columbia Group, LLC, 969 So. 2d 849, 854 (Miss. 2007).

For the first time on appeal, Double Quick now raises other objections to Ex. P-8 which it did not raise in the trial court, such as: (1) how and why crimes within a one mile radius of the Double Quick were used by Ronnie Lymas' security experts[16], and (2) the call for service logs contained dissimilar crimes from the aggravated assault on Lymas. Neither of these two specific objections were made in the trial court to Ex. P-8. Double Quick does not and cannot show these two purported objections in the record. Contrary to Double Quick's assertion that expert Michael Smith did not explain why he factor in crimes from property around the Double Quick, he did so in detail. (18 R. 574).

As can be seen from the trial transcript, Double Quick's main objection to Ex. P-8 was regarding the adequacy of Ronnie Lymas' expert designation. (16 R. 365-

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[16] Lymas' expert Michael Smith, who is a criminologist, explained because Belzoni is a very small town, he used mapquest and information from the Belzoni police department to determine if crime locations were within a one mile radius of the Double Quick. (18 R. 587). However as can be seen from the trial transcript, Double Quick never objected to this testimony or raised the slightest bit of concern regarding crimes within a one mile radius. Again, Double Quick's objection to Ex. P-8 was principally on grounds of the adequacy of Ronnie Lymas' expert designation, which Double Quick abandoned on this appeal.

375). This expert designation objection to Ex. P-8 takes up ten pages of trial transcript. As for Double Quick's two new objections on appeal, alleged errors by the trial court will not be entertained for the first time on appeal. Chantey Music Publ'g, Inc. v. Malaco, Inc., 915 So. 2d 1052, 1060 (Miss. 2005) and In re Adoption of Minor Child, 931 So.2d 566, 578-79 (Miss. 2007).

As to Double Quick's assertions that Ex. P-8 is not reliable, this issue has been dealt with by the Mississippi appellate courts time and again. In American National Insurance Co. v. Hogue, 749 So.2d 1254, 1259 (Miss. Ct. App. 2000), the Mississippi Court Appeals held that where plaintiffs presented crime statistics of calls made to the police department, "but not necessarily crimes committed, this evidence created a jury question of whether [defendant] was on notice that assaults were occurring." Id. at 1259. The Mississippi Supreme Court has also approved of the use of "calls for service logs." See Lyle v. Mladinich, 584 So.2d 397 (Miss. 1991) and Gatewood v. Sampson, 812 So.2d 212 (Miss. 2002).

Ex. P-8 shows that in the four month period preceding the attack on Ronnie Lymas, the area in the immediate vicinity of the Double Quick had five armed robberies, seventeen fights, five drug cases and one rape reported to the Belzoni Police Department. (18 R. 587, lines 12-21 & Ex. P-8). The Double Quick itself, had two armed robberies and 14 fights reported to the Belzoni Police Department.

Michael Smith, Ronnie Lymas' security expert, testified that based on his study and analysis of criminal statistics, incidences of fight are well under reported at convenience stores such as Double Quick, and that their report rate is as low 20 to 30 percent of actual fights. (18 R. 586). The jury could infer from this testimony that fights were much more prevalent at the Double Quick than what the Belzoni

Police Department crime statistics show. Double Quick employee Shavon Ellis testified that "arguments and almost fights go on every day at the Double Quick." (14 R. 272, lines 11-14). Shavon Ellis' description of daily arguments and almost fights occurring at the Double Quick was also confirmed by witness Sheila Taylor who worked directly across the street from the Double Quick. Sheila Taylor testified at trial that she personally and often witnessed "arguing, fighting and drug activity " on the Double Quick property." (15 R. 326, lines 4-18).

With respect to Double Quick's assertion that the Ex. P-8, the calls for service log, is not reliable, Dr. Smith testified that from his personal study of similar call logs around the country, he has found that such calls for service logs have a 96 percent reliability rate. (18 R. 584, lines 3-16). This testimony was unrebutted .

Based upon Ex. P-8, the testimony of Shavon Ellis, the testimony of Sheila Taylor and Lymas' two security experts' testimony, Smith and Lewis, a reasonable jury could have found that an atmosphere of violence existed on and around the Double Quick.

Finally, as to Double Quick's invitation to the Court to "jettison" the "atmosphere of violence" standard for some other untested standard, this writer respectfully request the Court to decline such invitation. The "atmosphere of violence" standard has been entrenched into Mississippi law for decades and has served the state well. The standard is based on objective criteria from an independent law enforcement agency which has a duty to gather, collect and report crime statistics to its community. With a 96 percent reliability rate, calls for service logs have become widely used all around the nation. (18 R. 584, lines 11-16). Thus, the Court should preserved the "atmosphere of violence" standard.

C.

Double Quick's Daubert Challenge to Ronnie Lymas' Security Experts Improperly Challenges the Credibility and Weight of the Security Experts Testimony and Not The Reliability of Their Opinions

Double Quick's argument that Ronnie Lymas' security experts' opinions were unreliable and conclusory is disingenuous and plain wrong. The methods used to reach their opinions in this case and the facts and data they relied upon to reach their opinions are universally accepted in the premises security field to reach opinions on foreseeability of a criminal attack and proximate cause of criminal attacks on property. See Premises Security, William F. Blake and Walter F. Bradley (1999).

Furthermore, Double Quick's security expert, Warren Woodfork, used the exact same methods and data as did Ronnie Lymas' security experts in reaching his opposing opinions in this case. (18 R. 571-75, 19 R. 743 & 21 R. 978-79). Double Quick cannot point to one single method or piece of data of any substance which its' security expert, Warren Woodfork, used in reaching his opinions in this case that was different from or in addition to what Ronnie Lymas' security experts used. Despite using the same methods and data as did opposing experts, Double Quick's security expert opined at trial that the shooting of Ronnie Lymas was not foreseeable, (21 R. 980) and that no action by Double Quick was the proximate cause of the shooting of Ronnie Lymas. (21. R. 988).

Double Quick's security expert Warren Woodfork did not testify that he could not reach an opinion in this case based on the crime statistics available from the Belzoni Police Department in Ex. P-8, or because his method was unreliable.

Instead, Mr. Woodfork performed the exact same analysis as did Lymas' security experts and gave full and substantive opinions opposite those given by Lymas' security experts. This case presented a classic "battle of the experts" which Double Quick is attempting to manufacture into a Daubert issue. Double Quick is estopped equitably and/or judicially from taking this inconsistent position. See Grand Casino Tunica v. Shindler, 772 So.2d 1036 (Miss. 2000), stating that, "as a general rule a party is estopped from taking a position which is inconsistent with the one previously assumed in the course of the same action or proceedings." Id. at 1039.

Double Quick's Daubert challenge to Ronnie Lymas' security expert is no real Daubert challenge at all, but instead is an invitation to this Court to impermissibly weigh in on the " weight" of opposing expert opinions. Double Quick should not be permitted to make this inconsistent argument on appeal, which basically is: "our experts can make substantive opinions using the same data and methods as did yours, but Lymas' experts' opinions should not be allowed."

Double Quick simply makes generic arguments that the Plaintiff's security expert opinions are "unreliable" and/or are not based on "sufficient facts and data". These generic and conclusory objections are not proper grounds to exclude expert testimony under Daubert. It has long been held by federal courts, including Mississippi's federal Fifth Circuit Court of Appeal, that the trial judge's Daubert gatekeeping responsibilities as to expert testimony should not invade the province of the jury, should not judge the weight of the evidence and the trial judge should not exclude expert testimony based on its belief of one version of a disputed issue. See Pipitone v. Biomatrix, Inc. 288 F.3d 239, 249 (5th Cir. 2002). The type of Daubert analysis disapproved of in Pipitone is precisely what Double Quick is inviting this

Court to do.

Double Quick first argues that the evidence on which Lymas' security experts rely upon to show notice of Orlando Newell's violent nature was speculative and insufficient as a matter of law to support a finding of violent nature. What could be more reliable than two employees saying I knew of these two assailants' prior aggravated assaults before they assaulted Mr. Lymas. This argument on its face, objects only to the weight given by the jury to the trial evidence and does not seriously challenges the reliability of Lymas' security experts opinion on foreseeability.

Michael Smith's and Tyrone Lewis' methodologies are also supported by Mississippi case law. In American National Insurance Company v. Hogue, the Mississippi Court of Appeals held that where plaintiffs presented crime statistics of calls made to the police department, "but not necessarily crimes committed, this evidence created a jury question of whether [defendant] was on notice that assaults were occurring." Id. at 1259.

Lymas' experts Smith's and Lewis' proximate cause opinions were also supported by the evidence. Given the great length of time which Newell and Unger stood out on the Double Quick parking lot feuding, coupled with Shavon Ellis' ignoring this condition and driving away for 5 to 6 minutes, Smith's and Lewis' proximate cause opinions were supported by the evidence and based on a well accepted security principle, the "Broken Windows." See experts Smith's and Lewis opinions discussed, supra.

Finally, Double Quick speaks of much of the Davis v. Christian Brotherhood Homes case regarding Tyrone Lewis. However it fails to mention Mr. Lewis'

successes in Thomas v. Columbia Group, LLC, 969 So.2 d 849 and Gatewood v. Sampson, 812 So. 2d 212 (Miss. 2002). These two cases are just two out of dozens of premises liability cases in which Tyrone Lewis was admitted into a Mississippi state court as a security expert and his opinions prevailed.

D.

The Jury Instructions Correctly Stated the Principles of Law Applicable to This Case based on the Pleadings and Evidence Presented at Trial and in light of Ronnie Lymas' Theory of the Case.

The Mississippi Supreme Court reads jury instructions as a whole, and imperfections in particular instructions do not require reversal where all seen together fairly announce primary rules applicable to case. Flight Line, Inc. v. Tanksley, 608 So.2d 1149 (Miss. 1992).

The first sentence of Jury Instruction Number 7 is a correct statement of the law and the exact words are contained in numerous appellate cases rendered over more than a decade. See Minor Child Jane Doe v. Miss. State Federation of Colored Women's Club Housing for Elderly In Clinton, 941 So. 2d 820, 826-27 (Miss. 2002)(stating "it is well settled that a landlord owes his tenants a duty to keep the premises in a reasonably safe condition, and that this duty extends to protecting tenants from the foreseeable criminal acts of others"). The words "if any" are contained in no case law. It is a stretch by any measure for Double Quick to suggest that a week long trial with nearly twenty witnesses, turned on two trivia words, "if any." Double Quick has failed to point out any facts to support its assertion that Jury Instruction Number 7 "created confusion." (10 R. 1423)

With respect to Jury Instruction Number 7 stating "cause to anticipate" the

subject criminal assault, this phrase is also directly supported by the case law. See Davis v. Christian Brotherhood Homes of Jackson, Mississippi, Inc., 957 So.2d 390, 401 (Miss. Ct. App. 2007(stating "cause to anticipate" may be imputed to the premises owner by virtue of his ... knowledge); Gatewood v. Sampson, 812 So. 2d 212, 220 (Miss. 2002)(stating the requisite "cause to anticipate" the assault . . .) and Lyle v. Mladinich, 584 So.2d 397, 399 (Miss. 1991)(stating the requisite "cause to anticipate" the assault . . .). None of the case law uses the phrase "reasonable cause to anticipate" as urged by Double Quick. Furthermore, Jury Instruction Number 7 contains the word reasonable in the very first sentence. Thus the trial court was correct in denying Double Quick first two noted objections to Jury Instruction Number 7.

Jury Instruction Number 7's definition of foreseeability comes word for word from Lyle v. Mladinich, 584 So.2d 397, 399 (Miss. 1991) and Gatewood v. Sampson, 812 So. 2d 212, 220 (Miss. 2002)(stating "the existence of an atmosphere of violence may include 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."). There was no comment on the evidence in Jury Instruction Number 7 because the wording is expressly approved in Lyle and Gatewood.

Jury Instruction Number 7 last sentence concerning imputed knowledge is supported by recent Mississippi Supreme Court case law which states that "[a]n employee's knowledge is imputed to his employer. 30 C.J.S. Employer-Employee § 211 (1992) and see also Restatement (Third) of Agency § 5.03 (2006)...." Glover

v. Jackson State University, 968 So.2d 1267, 1276 (Miss. 2007). This instruction was given based on the following testimony by Double Quick employee Shanetta Thurman:

> *Q. Okay. Well, my question is you had actual knowledge, not rumor, but actual knowledge that Orlando Newell had shot somebody before. That he had shot somebody other than Ronnie Lymas. You knew that, didn't you.*
> *A. Yes.*
> *Q. And you had actual knowledge, not just street knowledge or rumor knowledge; correct?*
> *A. Yes*
> *Q. Okay. And, in fact you had actual knowledge that Allen Unger had shot somebody, as well, not involving Ronnie Lymas, didn't you?*
> *A. Yes.*
> *Q. And I'm not talking about street or rumor. I'm talking about you knew it and you had actual knowledge; correct?*
> *A. Yes*
> *Q. And you knew that because you also worked at the courthouse full-time; correct?*
> *A. Yes*
> *Q. And you learned of these shootings through your job at the courthouse with them coming in and out in the court proceedings; correct*
> *A. Yes, sir.*

(2 R. 261-262). The purpose of the rule of "imputed knowledge" from an employee to an employer is typically applied so that the risks of an agent's infidelity or lack of diligence falls upon one who employs that agent, rather than upon innocent third parties. Stump v. Indiana Equipment Co., Inc., 601 N.E.2d 398 (Ind. App. 2nd Dist. 1992). This is precisely what ought to happen in this case. Double Quick invited Ronnie Lymas onto its property to purchase its products. Double Quick chose to employ Shanetta Thurman and Shavon Ellis. The risk of Thurman and Ellis not acting diligently with important information about violent persons upon Double Quick's property should fall upon Double Quick, who hired Thurman and Ellis, and

who is in a better position to train them to act diligently with information which could impact the safety and security of their customers.

Jury Instruction Number 7's "imputed knowledge" component was limited and greatly narrowed by the words, "knowledge which may impact the safety and security of invitees." These words clearly narrowed the scope of the instruction and made Double Quick's objection moot because it did not voice any further objection after the above language was brought to its and the Court's attention. (10 R. 1034). Thus any objection which Double Quick raised in the trial court was cured and/or waived.

Jury Instruction Number 9 is a "black letter law" definition of proximate cause. Any further definition on proximate cause as urged by Double Quick would have certainly required the trial court to impermissibly comment on the evidence. This same instruction is quoted with approval many times in Mississippi negligence case law. (Citations omitted). (10 R. 1426).

Jury Instruction Number 17 is supported directly by case law which holds that intentional criminal conduct cannot be apportioned with negligent conduct under Section 85-5-7 of the Mississippi Code. See Whitehead v. Food Max of Mississippi, 163 F.3d 365 (5th Cir. 1998). (10 R. 1435). Furthermore, Double Quick made no objection to Jury Instruction Number 17 at trial. Jury Instruction Number 17 was Ronnie Lymas' proposed Jury Instruction Number P-13. (10 R. 1435). As can be seen from the trial transcript, Double Quick's counsel Mr. Frey, agreed to Jury Instruction Number 17 after an amendment was made by striking the first sentence. After the amendment was made, Mr. Frey stated, "where are we next." (22 R. 1039, lines 12-18). Thus Double Quick either did not make an objection to Jury Instruction Number 17 at trial or waived such objection after the amendment was made.

When a Mississippi appellate court reviews a claim of trial court error in

granting a jury instruction, all of the jury instructions are reviewed as a whole, and no instruction is read in isolation. Richardson v. Norfolk S. Ry. Co., 923 So.2d 1002, 1010 (Miss. 2006). "Defects in specific instructions do not require reversal where all instructions taken as a whole fairly, although not perfectly, announce the applicable primary rules of law." Id. It can be fairly said in this case that the jury instructions given by the trial court contained a correct statement of the law.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's judgment and rulings on Double Quick, Inc.'s direct appeal.

RONNIE LYMAS' CROSS APPEAL

A.

SECTION 11-1-60(2)(b)'s CAP ON NON-ECONOMIC DAMAGES VIOLATE PLAINTIFF'S SUBSTANTIVE STATE AND UNITED STATES CONSTITUTIONAL RIGHTS

Effective September 1, 2004 for non medical negligence cases filed on and after that date, Mississippi Code § 11-1-60(2)(b) purports to limit "non-economic" damages to ($1,000,000.00). The trial court reduced Mr. Lymas' jury verdict from $4,179,350.40 to $1,679,717.00 based on the caps in Section 11-1-60(2)(b). (11 R. 1536-37). Because Section 11-1-60(2)(b) violates several provisions of the United States and Mississippi Constitutions, Plaintiff request this Court to declare that Mississippi Code § 11-1-60(2)(b) is unconstitutional and void.

A(1)

Section 11-1-60(2)(b)'s caps usurp the "inviolate" right to trial by jury

Mississippi Code Section 11-1-60(2)(b) violates the right to trial by jury

under both the United States Constitution's, Seventh Amendment and the Mississippi Constitution's, Article 3, Section 31, which states that, "right to trial by jury shall remain inviolate...." Going back as far as 1841, the highest court of Mississippi has held the right to trial by jury a fundamental right, holding that :

> *The fundamental law of the land has placed the right of trial by jury on the same bases with the inalienable rights of life, liberty, and the pursuit of happiness. It is not granted as a privilege, but established as a subsisting right, over which the legislative power can exercise no control.*

Lewis v. Garrett's Adm'rs, 5 Howard 434, 1841 WL 1846 (Miss. Err. App. 1841)(emphasis added).

The cap purports to limit the amount of non-economic compensatory damages that may he awarded in a non-medical case, and thus deprived Ronnie Lymas of the right to have the jury determine the damages due in this case. There are four essential points which the Double Quick cannot deny:

- *That the Mississippians who drafted and ratified every version of the Mississippi Constitution, starting with the original 1817 version on, insisted that the right to trial by jury remain "inviolate." (cit. omitted).*
- *The Mississippi's highest court has recognized that the right to jury trial is "`fundamental." (Lewis v. Garrett's Adm'rs, 5 Howard 434, 1841 WL 1846 (Miss. Err. App. 1841)).*
- *That the Mississippi Supreme Court has emphasized that this fundamental right is "`preserved'" just "as it existed at common law in 1817. Specifically including "in all suits in which legal rights were to be ascertained and determined ... to this extent was the right of trial by jury secured in the Mississippi Constitution." Id.*
- *That "one of the `essential elements' of a jury trial 'as it existed at common law' was to have the jury be the judge of damages," because the jury alone has the "'discretionary power of giving what damages they think proper.'" (Southern Railroad Co. v. Kendrick, 10 Miss. 374, 1866 WL 1887 (Miss. Err. App. 1866).*

The last point deserves particular attention. Awarding damages for

*. . . an open question as to the right of the jury to consider" a tort victim's pain and suffering in fixing the damages" due. Drysdale, 51 Ga. 644, 1874 WL 2824 at *2.*

Decisions about the size of a damage award in a tort case, especially damages for pain and suffering, have always been the jury's exclusive domain. "Where damages are of a character in the fixing of the amount of which the discretion of the jury is involved, as in cases of general damages, or damages for pain and suffering, or the like, the determination of the amount is peculiarly for the jury." Seaboard Air Line Ry. v. Bishop, 132 Ga. 71, 63 S.E. 1103, 1105 (1909)(emph. added).

There is not, never has been, and cannot be any a priori, "fixed," or "objective" method of ascertaining what amount of compensatory damages is appropriately due a tort victim in a specific case, including the correct amount of damages for "pain and anguish." Thus, as the U.S. Supreme Court noted long ago: "there can he no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body." Illinois Cent. R. Co, v. Barron, 72 U.S. 90, 108 (1866)(emph. added). Instead, the assessment of the amount of damages due for a tort victim's pain and suffering is a factual determination. St. Louis, I.M. & S.R. Co. v. Craft, 237 U.S. 648. 661 (1915) (explaining that pain and suffering compensation "involves only a question of fact"), cited with approval in Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437 (2001). "The monetary extent of [such] damage[s] can[not] be . . . ascertained as matter of law," and the determination of what quantum of damages is appropriate in a given

case "must be left to turn mainly upon the sound sense and deliberate judgment of the jury." Barron, 72 U.S. at 108-09.

Indeed, "nothing is better settled than that, in . . . actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict." Barry v. Edmunds, 116 U.S. 550, 565 (1886). [17] *Nor are these views mere historical curiosities. To the contrary, the U.S. Supreme Court relied on these 18th and 19th century cases and authorities, and similar ones of identical provenance, in recently holding that "if a party so demands, a jury must determine the actual amount of . . . damages." Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998). See id., 523 U.S. at 354-55.*

As the U.S. Supreme Court has explained, the plaintiff "remain[s] entitled . . . to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact." Dimick v.

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[17] *See Day v. Woodworth, 54* U.S. 363, 371 (1852)(assessment of tort damages "has always been left to the discretion of the jury"); *Missouri Pac. Ry. Co. v. Humes,* 115 U.S. 512, 521 (1885)("The discretion of the jury in [tort] cases is not controlled by *any* very definite rules; yet the wisdom of allowing such additional damages is attested by the long continuance of the practice"). *See also Townsend v. Hughes, 86* Eng. Rep. 994, 995 (C.P. 1677)("the jury are judges of the damages."); *Wilford v. Berkeley,* 97 Eng. Rep. 472, (K.B. 1758)("the damages to be assessed ... [are] strictly and properly the province of the jury"). *See generally* Charles T. McCormick, HANDBOOK ON THE LAW OF DAMAGES 24 (1935)("The amount of damages . . . from the beginning of trial by jury, was a `fact' to be found by the jurors."); 3 William Blackstone, COMMENTARIES ON THE LAW OF ENGLAND 398 (1765)(facs. ed., Univ. of Chicago, 1979) ("[W]here damages are to be recovered, a jury must be called to assess them.") Blackstone's "COMMENTARIES . . . greatly influenced the generation that adopted the Constitution." *See Schick v. United States,* 195 U.S. 65, 69 (1904) ("Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England, . . . undoubtedly, the framers of the Constitution were familiar with it.").

Schiedt, 293 U.S. 474, 486 (1935) (emphasis added). Any other approach, the Court more recently said, would fail "to preserve the substance of the common-law right of trial by jury,"as required by the Constitution. Feltner, 523 U.S. at 355 (cit. omitted).

The right to a jury's assessment of damages would be hollow and thus fail to "preserve the substance of the common law-right" if the jury's preeminent and fundamental role in assessing damages were subject to arbitrary revision through a cap. For that reason, the U.S. Supreme Court has held that recalculating damages after the jury had awarded those damages constitutes a remittitur. Helzel v. Prince William County, 523 U.S. 208, 211 (1998). The Court further said that "requiring the District Court to enter judgment for a lesser amount than that determined by the jury without allowing petitioner the option of a new trial, cannot be squared with the Seventh Amendment." Id.

Hetzel held that Kennon v. Gilmer, 131 U.S. 22, 26 (1889), correctly stated the law when it held that a "court has no authority . . . in a case in which damages for a tort have been assessed by a jury at an entire sum, . . . to enter an absolute judgment for any other sum than that assessed by the jury [unless] the plaintiff elected to remit the rest of the damages, and that if he did not so remit there should be a new trial of the whole case, each party was prejudiced and either, therefore, is entitled to have the judgment reversed by writ of error." Id. at 29-30, cited with approval in Hetzel, 523 U.S. at 211. Kennon further held "it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded." Id.

Ten years ago, in evaluating whether a cap on non-economic damages trenched on the jury trial right incorporated in Oregon's 1857 constitution, the Supreme Court of that state methodically analyzed both the ancient history of the right to trial by jury and the meaning of the term "inviolate" in colonial America. After completing that research, the Oregon Supreme Court concluded that

> *[a]lthough it is true that [the Oregon cap statute] does not prohibit a jury from assessing . . . damages, to the extent that the jury's award exceeds the statutory cap, the statute prevents the jury's award from having its full and intended effect. We conclude that to permit the legislature to override the effect of the jury's determination of . . . damages would "violate" plaintiffs' right to "Trial by Jury" guaranteed in [the Oregon Constitution]. Limiting the effect of a jury's . . . damages verdict eviscerates "Trial by Jury" as it was understood [at common law] and, therefore, does not allow the common-law right of jury trial to remain "inviolate."*

Lakin v. Senco Products, Inc., 987 P.2d 463, 473, op. clarified, 987 P.2d 476 (Or. 1999) (emphasis added).

Mississippi's "inviolate" right to a trial by jury is a near-mirror image of the Oregon guarantee.[18] *If anything, Mississippi's constitution is even more emphatic on this point, insisting not only that "[t]he right to trial by jury shall remain inviolate" but also that "the legislature may, by enactment, provide that in all civil suits tried in the circuit and chancery court, nine or more jurors may agree on the verdict and return it as the verdict of the jury." Thus the legislative power to alter the right to trial by jury is expressly limited in Article 3, Section 31 of the Mississippi Constitution to deciding if 9 or more jurors would have to agree to reach a verdict. Section 11-1-60(2)(b)'s caps implement the same type of change*

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[18]Art. I, §17 of the Oregon Constitution specifies that "In all civil cases the right of Trial by Jury shall remain inviolate."

that was condemned by the Oregon Supreme Court and eviscerates "trial by jury" as it was understood when Mississippi's first constitution was framed in 1817.

Section 11-1-60(2)(b)'s caps disdain these well-settled traditions and principles and replaces them with a hard, fast, and completely arbitrary measure of damages, a compulsory, pre-established "one size-fits-all" formula that courts are commanded to apply in every case, without regard for the evidence and without allowing a plaintiff the option of a new trial. As a result, Section 11-1-60(2)(b)'s caps do exactly what Mississippi courts have steadfastly abjured: usurp the jury's role in calculating a civil litigant victim's damages. Thus, unless this Court holds that Section 11-1-60(2)(b)'s cap is unconstitutional, the trial court will be required to reduce the jury's award of damages to an arbitrary, preset amount, and to do so even though the jury had been correctly instructed, even though its findings were sufficiently supported by the evidence, even though there was no hint of passion or prejudice in its verdict, and even though no legal error exists in the record. Such a regime is an anathema to a plaintiff's constitutionally guaranteed right to have his damages determined by a jury.

Section 11-1-60(2)(b)'s cap turns centuries of practice and accumulated judicial wisdom upside down. In this topsy-turvy world, the greater the harm suffered by the plaintiff and the greater the damages the jury awards, the less important the jury's decision on damages becomes. This result is not only perverse, it is unconstitutional. Simply put, the legislature has no legitimate authority to impair the fundamental right to trial by jury and substitute its determination of a proper compensatory award for that of a jury whose verdict reflects the evidence presented at trial. By capping non-economic damages, the

legislature has invaded the "inviolate" province of the jury, and Section 11-1-60(2)(b)'s cap should be struck as unconstitutional.

Its is expected that Double Quick will point out that the Mississippi Supreme Court has upheld changes in remedies and caps on damages in the cases of Walters v. Blackledge, 71 So.2d 433 (Miss. 1954)(Workers' Compensation Act) and Wells by Wells v. Panola County Bd. Of Educ., 645 So.2d 883 (Miss. 1994)(governmental immunity). However, those cases are readily distinguishable from the jury trial issue presented today. The Mississippi legislature's right to place caps on governmental liability and to change remedies and procedures in the workers compensation area, involve remedies and claims which were either not cognizable at common law (suits against the state or its political subdivisions) or the legislature's complete usurp of the common law and replacing it with a statutory scheme (Workers' Compensation Act). The legislative action involved in enacting Section 11-1-60(2)(b) was outside the bounds of both Walters and Wells by Wells.

There can be no doubt that the legislature has the full power to change or to abolish existing common law remedies or methods or procedure. Walters v. Blackledge, 71 So.2d 433 (Miss. 1954). That is exactly what the legislature did in enacting the Mississippi Workers' Compensation Act. The Mississippi Workers' Compensation Act completely took away an employee's right to bring suit against his or her employer for personal injury, in trade for the certainty of near universal recovery for injured workers. As the Mississippi Supreme Court stated in Walters:

> *The [worker's compensation] act here in question takes away the cause of action on the one hand and the ground of defense on the other and merges both in a statutory indemnity fixed and certain. If the power to do away with the cause of action in any case exists at*

> *all in the exercise of the police power of the state, then the right of trial by jury is therefore no longer involved in such cases. The right of jury trial being incidental to the right of action, to destroy the latter is to leave the former nothing upon which to operate.*

Walters at 516(emphasis added).

In fact the Mississippi Workers' Compensation Act expressly states that, " [t]he liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee...." Miss. Code Ann. § 71-3-9. Thus, the legislature completely took away the common law right of an employee to bring suit against his employer for injury on the job and substituted a statutory scheme for remedy pertaining to on the job injury. The one exception to the Workers Compensation Act's exclusive remedy provision of course is where the employer intentionally injures the employee. In that case, the right to trial by jury is still preserved to the employee. Franklin Corp. v. Tedford, 2009 WL 1015170 (Miss. 2009).

In adopting Section 11-1-60(2)(b), the legislature did not completely take away the common law claim of personal injury, nor did it take away the common law right to non-economic damages such as "pain and suffering" or damages for "mental and emotional suffering," which were both recognized at common law at the time of the adoption of the first constitution of the state of Mississippi in 1817 and in the Magna Charta of England. See Lewis v. Garrett's Adm'rs, 5 Howard 434, 1841 WL 1846 (Miss. Err. App. 1841). Article 3, Section 24 of the Mississippi Constitution of 1890 also recognized a cause of action for personal injury as it states, "[a]ll courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course

of law."

In enacting Section 11-1-60(2)(b), the legislature impermissibly and arbitrarily set an amount of damages for all litigants regardless of their actual damages. This actions was outside the bounds of Walters and violates Article 3, Section 31 of the Mississippi Constitution.

The Wells by Wells v. Panola County Bd. Of Educ., 645 So.2d 883 (Miss. 1994) case is also inapposite to the jury trial question presented today. Wells pertained to a suit against a political subdivision of the state of Mississippi, Panola County. Until, 1982, personal injury claims against the state of Mississippi or its political subdivisions were barred by the doctrine of sovereign immunity. See Pruett v. City of Rosedale, 421 So.2d 1046 (Miss. 1982). However, by act of the legislature in adopting the School Bus Accident Contingency Fund (Section 37-41-37) and the Mississippi Tort Claims Act (Section 11-46-1), a new tort claim was created by the legislature against the state and its political subdivisions. In creating this new cause of action, the legislature was well within its rights to cap damages and design procedures to administer claims against the state. The court in Wells by Wells expressly recognized that a new tort claim was created by the enactment of the Workers' Compensation Act and the School Bus Accident Contingency Fund. Wells by Wells at 890.

The Mississippi legislature created and authorized these rights of action, and thus could condition these new causes of action in any way it chose. "Where the grant of a substantive right is inextricably intertwined with" various limitations on that right, the beneficiary of the statutorily created right has no cause to complain, but "must take the bitter with the sweet." Arnett v. Kennedy, 416 U.S.

134, 153-54 (1974).

As discussed above, the notion that the right to trial by jury means only the right to obtain the jury's recommendation on damages was repudiated by two recent U.S. Supreme Court decisions, Feltner v, Columbia Pictures Television, Inc. and Hetzel v. Prince William County. This notion also has been expressly rejected as unsound by at least five state supreme courts, in decisions construing jury trial rights nearly identical to Mississippi's.

As the Washington Supreme Court has explained, the view that the jury's function is merely to recommend damages:

> *ignores the constitutional magnitude of the jury's fact-finding province, including its role to determine damages. Defendants are essentially saying that the right to trial by jury is not invaded if the jury is allowed to determine facts which go unheeded when the court issues its judgment. Such an argument pays lip service to the form of the jury but robs the institution of its function.*

Sofie v. Fibreboard Corp., 771 P.2d 711, 721 (Wash. 1989), amended 780 P.2d 260 (1989). Accordingly, the Washington Supreme Court categorically spurned this cramped view of the right to a jury trial, holding that it would "not construe constitutional rights in such a manner." 771 P.2d at 721. The Oregon, Illinois, Florida, and Alabama Supreme Courts agree.[19]

These decisions are consistent with the "well-established principle in this

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[19]*See Lakin,* 987 P.2d at 473 (a cap on damages simply "plays lip service to the form of the jury but robs the institution of its function."). *Smith v. Dept. of Ins.,* 507 So. 2d 1080, 1089 (Fla. 1987) (invalidating damages cap, explaining that "[t]here are political systems where constitutional rights are subordinated to the power of the executive or legislative branches, but ours **is** not such a system."); *Moore v. Mobile Infirmary Assn,* 592 So. 2d 156, 159-65 (Ala. 1991); *Best v. Taylor Mach. Works,* 689 N.E.2d 1057, 1077-78 (Ill. 1997). *Cf. State ex rel Ohio Acad. of Trial Lawyers v. Shewarcl,* 715 N.E.2d 1062, 1091 (Ohio 1999); 11M1orzls *v. Savoy,* 576 N.E.2d 765, 768-69 (Ohio 1991).

state that in a case at common law," litigants "ha[ve] the constitutional right to have all questions of fact passed upon by a jury, and a legislative denial of that right is unconstitutional." Lewis v. Garrett's Adm'rs, 5 Howard 434, 1841 WL 1846 (Miss. Err. App. 1841).

For these reasons this Court should hold that Section 11-1-60(2)(b) is unconstitutional as it violates the right to trial by jury embedded in Article 3, Section 31 of the Mississippi Constitution and the Seventh Amendment to the United States Constitution.

A(2)

Section 11-1-60(2)(b)'s caps violate the constitutional separation of powers.

It is not only the right to trial by jury and decades of Mississippi Supreme Court decisions interpreting that "fundamental" right, that Section 11-1-60(2)(b) cap treats with disdain. As demonstrated below, Section 11-1-60(2)(b)'s caps also treat the separation of powers as a dead letter. In the case of the jury trial right, the legislature sits in the jury box as a sort of super juror, one who ignores the evidence presented in a fair and impartial trial but yet has the final say on damages. In the case of the separation of powers, the legislature sits on the judge's bench, grabbing the gavel while again ignoring the evidence in particular cases. For these reasons, Section 11-1-60(2)(b) usurps the judicial province and usurps judicial powers, in violation of the Separation of Powers clause of Article 1, Section 1 of the Mississippi Constitution, which mandates three separate and co-equal branches of government, they being: The Legislative, Judiciary and Executive branches. The Mississippi Supreme Court has long ago declared it authority over matters involving the judiciary and courts. See Cecil Newell v. State

of Mississippi, 308 So. 2d 71 (Miss. 1975). The amount of damages has long been in the province of the judiciary at common law. Southern Railroad Co. v. Kendrick, 10 Miss. 374, 1866 WL 1887 (Miss. Err. App. 1866) and New Orleans, Jackson, and Great Northern Railroad Co. v. Hurst, 7 George 660, 36 Miss. 660 (Miss. Err. App. 1859).

The Mississippi Supreme Court recently reaffirmed the Separation of Powers provisions of the Mississippi Constitution. See Wimley v. Reid, 991 So.2d 135 (Miss. 2008). The following statement from Wimley is just as applicable to this case today, which is, "[i]ndeed we guard just as diligently the Legislature's prerogative to set forth in legislation whatever substantive pre-suit requirements for causes of action . . . it deem appropriate. Id. 139. With this statement, the Mississippi Supreme Court is clearly drawing the line of separation at the "courthouse door." While the legislature may properly create and abolish causes of actions and remedies, under Wimley, however, it cannot sit in the jury box or administered judicial powers in the determination of facts or amounts of compensatory damages to be awarded injured victims.

Pursuant to the judiciary's inherent, exclusive, and constitutionally protected powers, a court traditionally has had the power to review a jury's verdict and then uphold the verdict, increase it, or reduce it, in light of the evidence. Section 11-1-60(2)(b)'s caps usurp the court's inherent authority to correct excessive (or inadequate) damage awards under the doctrine of remittitur (or additur), and forbid a judge from conforming the ultimate award to the evidence, if, in the judge's view, the evidence demonstrates that the award should be increased above the cap's predetermined amount or, if the judge finds that the

ultimate award should be reduced but not reduced as much as the cap specifies.

Instead of a remittitur or additur considered on a case-by-case basis in light of all the evidence in a particular case, a cap requires the court to take a fairly rendered verdict that accurately reflects the evidence and reduce it to a one-size-fits-all amount, an amount that ignores the evidence. Section 11-1-60(2)(b) compounds this arrogation of the judiciary's inherent authority, and a litigant's jury trial rights, by denying the option of a new jury trial in lieu of the additur or remittur.

Indeed, by commandeering the judiciary's sole and absolute authority to reduce excessive damage awards through remittiturs and by abrogating the judiciary's power to augment inadequate damage awards through additurs, Section 11-1-60(2)(b) 's cap contravene the separation of powers in the same manner identified by the Illinois Supreme Court in striking down a $500,000 cap on non-economic damages, the cap:

> *disregards the jury's careful deliberative process in determining damages that will fairly compensate injured plaintiffs who have proven their causes of action. The cap on damages is mandatory and operates wholly apart from the specific circumstances of a particular plaintiffs ... injuries. Therefore, `it] unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law . . . . [It] . . . forces the successful plaintiff to forgo part of his or her jury award without the plaintiffs consent, in clear violation of the well-settled principle that a trial court does not have authority to reduce a damages award by entry of a remittitur if the plaintiff objects or does not consent. As such, the statutory scheme unduly expands the remittitur doctrine.*

Best v. Taylor Machine Works, 689 N.E.2d 1057, 1080 (I11. 1997)(cits omitted;

emphasis added).

A(3)

Section 11-1-60(2)(b)'s Caps Violates the "Open Courts" Provision of the Mississippi Constitution

Finally, Section 11-1-60(2)(b) violates Article 3, Section 24 of the Mississippi Constitution, which provides that "[a]ll courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and the right and justice shall be administered without sale, denial, or delay." No"remedy by due course of law" can exist if the jury's determination herein on the value of non-economic damages is arbitrarily limited by law without any consideration of the individual harm done to Ronnie Lymas.

CONCLUSION

More than half of our sister states' highest courts have invalidated similar caps on non-economic damages as is provided in Section 11-1-60(2)(b) pursuant to their state constitutions which contain very similar provisions as provided in the Mississippi constitution as discussed supra.[20] *No matter how noble or worthy the legislature's intentions may have been in enacting Section 11-1-60(2)(b), its merits cannot trump the rule of law as provided in this state's constitution. The legislature can accomplish its objective through legal means such as putting forth a referendum to amend the state's constitution to include caps on damages or authorizing it to place caps on damages as did the state of Texas in 2003. See Texas Proposition 12 (September 13, 2003).*

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[20] See Appendix A at the end of this brief

For the foregoing reasons, this Court should reverse the trial court's ruling on the constitutionality of Section 11-1-60(2)(b) of the Mississippi Code and declare the same to be unconstitutional pursuant to Ronnie Lymas' cross appeal and reinstate the full jury's verdict in the amount of $4,179,350.00.

APPENDIX A: 28 STATE SUPREME DECISIONS INVALIDATING CAPS

Ferdon v. Wisconsin Patients Compensation Fund, 701 N.W.2d 440, 465 (Wisc. 2005) (invalidating a $350,000 cap on non-economic damages on equal protection grounds because the burden of the cap falls entirely on the most seriously injured victims, who will not be fully compensated for their non-economic damages, while those who suffer relatively minor injuries with lower non-economic damages will be fully compensated. The greater the injury, the smaller the fraction of non-economic damages the victim will receive.);

Duncan v. Scottsdale Medical Imaging, Ltd., 70 P.3d 435, 442-44 (Ariz. 2003) (provision of medical malpractice statute that abolished common law right to bring sue in battery against a licensed health care provider violated state constitutional guarantee that the right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any pre-established statutory limitation);

Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 361-63 (Or. 2001) (holding that where capped workers' compensation damages were denied because plaintiff had failed to prove that his work-related exposure to chemicals was the "major contributing cause" of his injury, plaintiff entitled to bring suit for unlimited damages, both economic and non-economic, pursuant to the state's constitutional guarantee of a complete remedy for all tortious injuries, i.e., injuries, to person, property or reputation).

State of Ohio ex rel. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1092 (Ohio 1999) (striking down an omnibus tort reform statute that, inter alia, limited non-economic damages, as violative of the state's separation of powers and single subject provisions, and endorsing an earlier decision, Morris v. Savoy, 576 N.E.2d 765, 769 (Ohio 1991), which had held that a cap on non-economic damages was utterly irrational and thus violated state constitutional guarantee of due process; see discussion of Morris, infra);

Lakin v. Senco Products, Inc., 987 P.2d 463, 475 (Or. 1999), opinion clarified by Lakin v. Senco Products, Inc., 987 P.2d 476 (Or. 1999) (holding that state constitution guarantees a jury trial in civil actions for which the common law provided a jury trial when the constitution was adopted and in cases of like nature; that in any such case, the trial of all issues of fact must be by jury; that the determination of damages in a personal injury case is a question of fact; that the damages available in a personal injury action include compensation for non-economic damages resulting from the injury; that the legislature may not interfere with the full effect of a jury's assessment of non-economic damages, at least as to civil cases in which the right to jury trial was customary when the constitution was adopted;, and, therefore that the statutory $500,000 cap on non-economic damages in personal injury and wrongful death actions violates the `'inviolate" state constitutional right to jury trial);

Trujillo v. City of Albuquerque, 965 P.2d 305, 317 (N.M. 1998) (applying

heightened/intermediate scrutiny to equal protection claims and holding that because [d]efendants failed to demonstrate the ... cap bore a substantial relationship to an important government interest ... [p]laintiffs are entitled to their full measure of damages obtained upon judgment.);

Best v. Taylor Machine Works, 689 N.E.2d 1057, 1075-78, 1080 ((Ill. 1997) (holding a $500,000 cap on non-economic damages in tort cases to be arbitrary and unreasonable discrimination, in violation of the state constitutional proscription against special legislation, as judged according to the same analysis and standards used in equal protection cases, and because the cap functions as a legislative remittitur, one which usurps the judiciary's powers to review and revise a jury's award and therefore violates the constitutionally guaranteed separation of powers);

Knowles v. United States, 544 N.W.2d 183, 191 (S.D. 1996) (applying heightened/intermediate scrutiny and holding $1 million cap on damages in medical malpractice cases does not bear a real and substantial relation to the objects sought to be obtained and thus violates substantive due process);

Galayda v. Lake Hospital Systems, Inc., 644 N.E.2d 298, 301-02 (Oh. 1994), cert. denied sub. nom. Damian v. Galayda, 516 U.S. 810 (1995) (holding that statute that caps damages awards that must be paid immediately to successful plaintiffs in personal injury suits violates due process);

Zoppo v. Homestead Insurance Co., 644 N.E.2d 397, 401-02 (Ohio 1994), cert. denied. 516 U.S. 809 (1995) (statute requiring court to determine amount of punitive or exemplary damages violates state constitutional right to trial by jury);

Hanvey v. Oconee Memorial Hospital, 416 S.E.2d 623, 625-26 (S.C.,1992) (holding that statute limiting hospital's liability for injuries caused by medical malpractice to $100,000 was irrational and thus violated state constitutional guarantee of equal protection)

Brannigan v. Usitalo, 587 A.2d 1232, 1235 (N.H. 1991) (applying heightened/intermediate scrutiny to a $250,000 cap on non-economic damages in all personal injury cases and concluding that the cap violated equal protection because it failed the fair and substantial relation test articulated in Carson v. Maurer, 424 A.2d 825, 830-31, 836-37 (N.H., 1980);

Moore v. Mobile Infirmary Association, 592 So.2d 156, 170 (Ala.,1991) (applying heightened/intermediate scrutiny to a $400,000 cap on non-economic damages in medical malpractice and conclud[ing] that the correlation between the damages [non-economic damages] cap . . . and the reduction of health care costs to the citizens of Alabama is, at best, indirect and remote. Although there is evidence of a connection between damages caps and the size of malpractice claims filed, the size of claims is merely one among a host of factors bearing on the cost of malpractice insurance. Even more significantly, the cost of malpractice insurance ranks near the bottom of the list of expenses incurred by health care

providers. Consequently, the size of claims against health care providers represents but one among many elements composing the cost of malpractice premiums, which, in turn, represent only a small component of the total burden borne by health care consumers. By contrast, the burden imposed by [the cap] on the rights of individuals to receive compensation for serious injuries is direct and concrete. The hardship falls most heavily on those who are most severely maltreated and, thus, most deserving of relief. Unlike the less severely injured, who receive full and just compensation, the catastrophically injured victim of medical malpractice is denied any expectation of compensation beyond the statutory limit. Moreover, the statute operates to the advantage not only of negligent health care providers over other tortfeasors, but of those health care providers who are most irresponsible.) (citations omitted);

Morris v. Savoy, 576 N.E.2d 765, 769 (Ohio 1991) (holding a cap on non-economic damages violated due process on both the traditional rational basis and de facto heightened/intermediate scrutiny grounds; the court held that the cap was irrational and thus violated due process, explaining that it had been unable to find . . . any evidence to buttress the proposition that there is a rational connection between awards over [the cap] and malpractice insurance rates. The court noted that [t]here is evidence of the converse, however and opined that it was irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice, and that any cap on damages was unconstitutional because it does not bear a real and substantial relation to public health or welfare and further because it is unreasonable and arbitrary.) (internal quotation marks and citations omitted);

Richardson v. Carnegie Library Restaurant; Inc., 107 N.M. 688, 763 P.2d 1153, 1164 (N.M. 1989) (damage cap in Dramshop Act cases held unconstitutional on equal protection grounds), overruled in part by Trujillo v. City of Albuquerque, 125 N.M. 721, 965 P.2d 305 (1998);

Sofia v. Fibreboard Corp., 771 P.2d 711, 715-23 (Wash.,1989), reconsideration denied, opinion amended on other grounds 780 P.2d 260 (Wash.,1989) (considering, but reserving opinion of due process and equal protection challenges, while squarely holding that cap on noneconomic damages (in an amount equal to 0.43 times average annual wage and life expectancy) in cases involving personal injury and wrongful violates the state constitutional right to trial by jury, which includes the historic and essential feature of' permitting the jury to conclusively decide the appropriate measure of non-economic damages);

Condemarin v. University Hospital 775 P.2d 349, 352, 353, 364-366 (Utah 1989) (applying a de facto heightened/intermediate standard of reasonableness and holding that cap on a state hospital's liability violated equal protection because minimally injured victims receive all of a jury's award but the most severely injured receive only a fraction);

Lucas v. United States, 757 S.W.2d 687, 691 (Tex.1988) (invalidating a

cap on access to the court grounds, reasoning that it is unreasonable and arbitrary for the legislature to conclude that arbitrary damages caps, applicable to all claimants no matter how seriously injured, will help assure a rational relationship between actual damages and amounts awarded and noting that one blue-ribbon study could not conclude there was any correlation between a damage cap and the stated legislative purpose of improved health care, stating that adequate data was lacking while a second independent study ha[d] concluded that there is no relationship between a damage cap and increases in insurance rates and thus holding that the cap violated the state constitutional guarantee of a remedy for all injuries because it is unreasonable and arbitrary for the legislature to conclude that arbitrary damages caps, applicable to all claimants no matter how seriously injured, will help assure a rational relationship between actual damages and amounts awarded.);

Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988), overruled in part by Bair v, Peck 811 P.2d 1176 (Kan. 1991) (medical malpractice damage caps violated right to trial by and due process rights and constituted a pre-established statutory remittitur)

Smith v. Department of Insurance, 507 So.2d 1080, 1089 (Fla.1987) (invalidating a cap on damages on access to the courts grounds, explaining that a constitutional right which may not be restricted simply because the legislature deems it rational to do so. Rationality only becomes relevant if the legislature provides an alternative remedy or abrogates or restricts the right based on a showing of overpowering public necessity and that no alternative method of meeting that necessity exists. Here, however, the legislature has provided nothing in the way of an alternative remedy or commensurate benefit and one can only speculate, in an act of faith, that somehow the legislative scheme will benefit the tort victim. We cannot embrace such nebulous reasoning when a constitutional right is involved. Further, the trial judge below did not rely on-nor have appellees urged before this Court-that the cap is based on a legislative showing of an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown');

Boswell v. Phoenix Newspapers, Inc., 730 P.2d 186, 194-95, (Ariz. 1986), cert. denied, 481 U.S. 1029 (1987) (state statute that allowed new organization to print of a retraction in order to avoid payment of damages for defamation violated state constitutional guarantee that the right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation);

Carson v. Maurer, 424 A.2d 825, 830-31, 836-37 (N.H.,1980) (applying heightened/intermediate scrutiny, i.e., asking Whether the challenged classifications are reasonable and have a fair and substantial relation to the object of the legislation -to a $250,000 cap on non-economic damages in medical malpractice and concluding that the cap violated equal protection because it both creates an arbitrary damage limitation and thereby precludes only the most seriously injured victims of medical negligence from receiving full compensation

for their injuries and arbitrarily distinguishes not only between malpractice victims and victims of other torts but also between malpractice victims with non-economic losses that exceed $250,000 and those with less egregious non-economic losses. Thus, the cap does not provide adequate compensation to patients with meritorious claims; on the contrary, it does just the opposite for the most seriously injured claimants. It does nothing toward the elimination of nonmeritorious claims. (citations omitted));

Arneson v. Olson, 270 N.W.2d 125, 133, 135-36 (N.D. 1979) (applying heightened/intermediate scrutiny to a $300,000 cap on med-mal damages, finding that no insurance availability or cost crisis in this State, and holding that the cap violated equal protection because it does not provide adequate compensation to patients with meritorious claims; on the contrary, it does just the opposite for the most seriously injured claimants. It does nothing toward the elimination of nonmeritorious claims. Although [r]estrictions on recovery may encourage physicians to enter into practice and remain in practice, but do so only at the expense of claimants with meritorious claims. Similarly, although tort reform proponents argue that there is a societal quid pro quo in that the loss of recovery potential to some malpractice victims is offset by lower insurance premiums and lower medical care costs for all recipients of medical care, this quid pro quo does not extend to the seriously injured medical malpractice victim ....);

Wright v. Cent'al Du Page Hospital Association, 347 N.E.2d 736, 741-44 (Ill. 1976) (invalidating a $500,000 cap on all damages, both economic and non-economic, in medical malpractice actions as completely arbitrary, unreasonable, and unconstitutionally discriminatory "special legislation");

Grace v. Howlett, 283 N.E.2d 474, 478-79 (Ill. 1972) (invalidating cap on recovery applicable to damages inflicted by commercial motorists, but not private motorists, as completely arbitrary, unreasonable, and unconstitutionally discriminatory "special legislation");

St. Louis & N. A. Ry. Co. v. Mathis, 91 S. W. 763, 764-65 (Ark. 1905) (striking statute, as unconstitutional, that attempted to limit prevailing party's rights to refuse reduction of damages, holding that statute functioned as a legislative remittitur);

Park v. The Detroit Free Press Co., 40 N.W. 731, 735 (Mich. 1888) (holding unconstitutional a statute that provided that, in suits for publication of libels in newspapers, only actual damages proved can be recovered, as depriving persons of all adequate remedy for injuries and as providing an unequal and special privilege and immunity to some, but not all, citizens);

Thirteenth & Fifteenth St. Passenger Ry. v. Boudrou, 92 Pa. 475, 481-82 (1880)(holding that cap on damages in certain negligence case violates the state constitutional guarantee of the right to a remedy by due course of law).

See also Waggoner v. Gibson, 647 F. Supp. 1102, 1105-06

(N.D.Tex.1986) (follow[ing] the unanimous view among the Texas appellate courts and the more persuasive reasoning of the state courts in New Hampshire, North Dakota, Ohio, and Illinois in holding that a $500,000 cap on non-economic damages arbitrarily discriminated among classes of litigants and thus violated the state constitutional guarantee of equal protection because the cap impos[ed] recovery limitations on only the most severely injured victims of malpractice without providing a fully adequate societal quid pro quo for the displacement of the victims' common-law right of recovery).

Respectfully submitted, this the 8th day of September, 2008.

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CERTIFICATE OF FILING

I, Joe N. Tatum, do certify that I have hand delivered the original and three copies of the Brief of Appellee/Cross-Appellant Ronnie Lymas and an electronic diskette containing same on September 8, 2009, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

DATED: This the 8th day of September, 2009.

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