IN THE SUPREME COURT OF MISSISSIPPI

DOUBLE QUICK, INC., — Defendant-Appellant-Cross-Appellee

VS. — No. 2008-CA-01713

RONNIE LEE LYMAS, — Plaintiff-Appellee-Cross-Appellant

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

REPLY BRIEF OF APPELLANT DOUBLE QUICK, INC. AND OPPOSITION BRIEF OF CROSS-APPELLEE DOUBLE QUICK, INC. TO BRIEF ON CROSS-APPEAL OF CROSS-APPELLANT RONNIE LEE LYMAS

ORAL ARGUMENT REQUESTED

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IN THE SUPREME COURT OF MISSISSIPPI

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

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case.

1) Ronnie Lee Lymas, Plaintiff-Appellee/Cross-Appellant
2) Double Quick, Inc., Defendant-Appellant/Cross-Appellee
3) State of Mississippi, Non-aligned Intervenor
4) Butler, Snow, O'Mara, Stevens & Cannada, PLLC, Attorneys for Defendant-Appellant/Cross-Appellee
5) Mitchell, McNutt & Sams, P.A., Attorneys for Defendant-Appellant/Cross-Appellee
6) Tatum & Wade, PLLC, Attorney for Plaintiff-Appellee/Cross-Appellant
7) Latrice Westbrook, Attorney for Plaintiff-Appellee/Cross-Appellant
8) Tanisha Gates, Attorney for Plaintiff-Appellee/Cross-Appellant
9) Honorable Jim Hood, Attorney General of Mississippi
10) Bradley Arant Boult Cummings LLP, Attorneys for *Amicus Curiae,* Home Builders Association of Mississippi, et al.
11) Precious Martin & Associates, Attorneys for *Amici Curiae,* The Magnolia Bar Association

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

TABLE OF AUTHORITIES iv

REPLY BRIEF OF APPELLANT DOUBLE QUICK, INC. 1

LEGAL ARGUMENT 2

I. Lymas Still Has No Proof of Proximate Cause 2

II. Lymas Fails To Prove Foreseeability 10

A. The Evidence Is Insufficient as a Matter of Law to Show That Newell Had a "Violent Nature." 10

B. The Evidence Is Insufficient as a Matter of Law To Show That the Double Quick Store Was Located Within an "Atmosphere of Violence." 14

III. The Expert Testimony of Lymas' Two Liability Experts Was Both Conclusory and Wholly Speculative and Should Have Been Excluded Under the Standards Established by *Daubert/McLemore* and Miss. R. Evid. 702. 18

IV. Lymas's Defense of the Jury Instructions Is Unsuccessful. 20

OPPOSITION BRIEF OF CROSS-APPELLEE DOUBLE QUICK, INC. TO BRIEF ON CROSS-APPEAL OF CROSS-APPELLANT RONNIE LEE LYMAS 24

SUMMARY OF ARGUMENT 24

LEGAL ARGUMENT 26

I. Lymas Can Not Meet His Burden To Show Beyond a Reasonable Doubt That Section 11-1-60(2) Is Unconstitutional 26

II. As This Court Has Previously Held, the State Legislature Has the Constitutional Authority To Place a Legal Limit on the Amount of Damages To Be Recovered in Personal Injury Actions 27

III. Section 11-1-60(2) Does Not Interfere With the Jury's Function of Weighing Evidence and Finding Facts; Thus Section 11-1-60(2) Does Not Infringe the Right To Trial by Jury 34

IV. Section 11-1-60(2) Does Not Violate the Separation of Powers Provisions of the State Constitution 42

V. Section 11-1-60(2) Does Not Deprive Lymas of a Remedy by Due Course of Law as Granted by Section 24 of the State Constitution....43

VI. The Overwhelming Majority of State Supreme Courts That Have Examined the Issue Have Found That Statutes Placing Caps on Non-Economic Damages Are Constitutional Under Provisions Similar to Those Relied Upon by Lymas....45

CONCLUSION....48

ADDENDUM

CERTIFICATE OF SERVICE

CERTIFICATE OF FILING

TABLE OF AUTHORITIES

State Cases

3M Co. v. Johnson, 895 So. 2d 151 (Miss. 2005) 30

Adams By and Through Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. 1992) 46, 48

Albritton v. City of Winona, 181 Miss. 75, 178 So. 799 (1938) 26, 27

Alqasim v. Capitol City Hotel Investors, 989 So. 2d 488 (Miss. Ct. App. 2008) 3

AmFed Companies, LLC v. Jordan, 2009 WL 2595628 (Miss. Ct. App. Aug. 25, 2009) 21

American National Insurance Co. v. Hogue, 749 So. 2d 1254 (Miss. Ct. App. 2000) 15

Anderson v. Fred Wagner & Roy Anderson, Jr., Inc., 402 So. 2d 320 (Miss. 1981) 26, 29, 33

APAC Miss., Inc. v. Johnson, 15 So. 3d 465 (Miss. Ct. App. 2009) 21

Arbino v. Johnson & Johnson, 116 Ohio St. 3d 468, 880 N.E.2d 420 (2007) 39, 46, 47, 48

Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997) 42, 43, 46

Blizzard v. Fitzsimmons, 10 So. 2d 343 (Miss. 1942) 2

Brooks v. State, 769 So. 2d 218 (Miss. Ct. App. 2008) 22

Brown v. Estess, 374 So. 2d 241 (Miss. 1979) 44

Brown v. State, 19 So. 3d 85 (Miss. Ct. App. 2008) 21

Bullock v. State, 391 So. 2d 601 (Miss. 1980) 21, 22

Butler v. Flint Goodrich Hosp. of Dillard Univ., 607 So. 2d 517 (La. 1992) 46, 47

Causey v. Sanders, 998 So. 2d 393 (Miss. 2008) 21

City of Durant v. Laws Const. Co., 721 So. 2d 598 (Miss. 1998) 34

City of Jackson v. Clark, 118 So. 350 (Miss. 1928) 39

City of Jackson v. Spann, 4 So. 3d 1029 (Miss. 2009) 19

City of Savannah v. Cullens, 38 Ga. 334 (1868) 34

Clark v. Luvel Dairy Prods., Inc., 731 So. 2d 1098 (Miss. 1998) 26, 42, 44

Crain v. Cleveland Lodge 1532, Order of Moose, Inc. 641 So. 2d 1186 (Miss. 1994) 16

Davis v. Christian Brd. Homes of Jackson, Miss., Inc., 957 So. 2d 390 (Miss. Ct. App. 2007) 4, 17, 20

Dedeaux Util. Co. v. City of Gulfport, 938 So. 2d 838 (Miss. 2006) 19

DeMendoza v. Huffman, 334 Ore. 425, 51 P.3d 1232 (2002) 39

Donald v. Amoco Prod. Co. 735 So. 2d 161 (Miss. 1999) 2

Edmonds v. Murphy, 573 A.2d 853 (Md. Ct. Spec. App. 1990) 46, 47
Edmonds v. State, 955 So. 2d 787 (Miss. 2007) 15
Estate of Verba v. Ghaphery, 210 W. Va. 31, 552 S.E.2d 406 (2001) 46, 47, 48
Evans ex. rel Kutch v. State, 56 P.3d 1046 (Alaska 2002) 39, 45, 46, 47
Fair v. State, 2009 WL 1520110 (Miss. Ct. App. June 2, 2009) 21
Faulkner v. Middleton, 190 So. 910 (Miss. 1939) 40
Fein v. Permanente Med. Group, 695 P.2d 665 (Cal.), *appeal dismissed*, 474 U.S. 892 (1985) 47
Fluor Corp. v. Cook, 551 So. 2d 897 (Miss. 1989) 29
Fordice v. Thomas, 649 So. 2d 835 (Miss. 1995) 45
Fresenius Med. Care & Cont'l Cas. Co. v. Woolfolk ex rel. Woolfolk, 920 So. 2d 1024 (Miss. Ct. App. 2005) 20
Gamble v. Dollar Gen. Corp., 852 So. 2d 5 (Miss. 2003) 8
Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C., 95 P.3d 571 (Colo. 2004) 43, 47
Gatewood v. Sampson, 812 So. 2d 212 (Miss. 2002) 8, 16, 17
Glover ex rel. Glover v. Jackson State University, 968 So. 2d 1267 (Miss. 2007) 13, 14, 16
Goff v. State, 14 So. 3d 625 (Miss. 2009) 21
Goodyear Tire & Rubber Co. v. Kirby, 2009 WL 1058654 (Miss. Ct. App. Apr. 21, 2009) 21
Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc., 265 Neb. 918, 663 N.W.2d 43 (2003) 39, 45, 46, 47, 48
Gulf & S.I.R.R. v. Hales, 140 Miss. 829, 105 So. 458 (1925) 34
Hines v. McCullers, 121 Miss. 666, 83 So. 734 (1920) 28
Hubbard v. Wansley, 954 So. 2d 951 (Miss. 2007) 3, 10, 19
Hughes v. PeaceHealth, 344 Ore. 142, 178 P.3d 225 (2008) 38
In Interest of B.D., 720 So. 2d 476 (Miss. 1998) 28
In re Adoption of Minor Child, 931 So. 2d 566 (Miss. 2006) 44
Janssen Pharmaceutica, Inc. v. Bailey, 878 So. 2d 31 (Miss. 2004) 18, 19
Jensen v. Whitlow, 334 Ore. 412, 51 P. 3d 599 (2002) 39
Jones v. State, 918 So. 2d 1220 (Miss. 2005) 12
Judd v. Drezga, 103 P.3d 135 (Utah 2004) 39, 46, 47, 48
Kansas City S. Rwy. v. Johnson, 798 So. 2d 374 (Miss. 2001) 29, 30
Kelly v. Retzer & Retzer, Inc., 417 So. 2d 556 (Miss. 1982) 16
Kirkland v. Blaine County Med. Ctr., 134 Idaho 464, 4 P.3d 1115 (2000) 39, 46, 47

Lakin v. Senco Prods., Inc., 987 P.2d 463 (Ore.), *modified on rehearing*, 987 P.2d 476 (1999) 36, 38, 39, 45

Lawson v. Hoke, 339 Ore. 253, 119 P.3d 210 (2005) 39

Lewis v. Garrett's Adm'rs, 6 Miss. (5 Howard) 434 (Miss. Err. App. 1841) 34

Lyle v. Mladinich, 584 So. 2d 397 (Miss. 1991) 8, 15

Mathews v. Thompson, 95 So. 2d 438 (Miss. 1957) 2

Minor Child v. Miss. State Federation, 941 So. 2d 820 (Miss. 2002) 21

Miss. State Tax Comm'n v. Brown, 188 Miss. 483, 193 So. 794 (1940) 27

Miss. Transp. Comm'n v. McLemore, 863 So. 2d 31 (Miss. 2003) 18, 19

Mobile Infirmary Med. Ctr. v. Hodgen, 884 So. 2d 801 (Ala. 2003) 45

Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505 (1949) 28

Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1991) 45

Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991) 46

Murphy v. Edmonds, 601 A.2d 102 (Md. 1992) 48

Natchez & S. R.R. v. Crawford, 99 Miss. 697, 55 So. 596 (1911) 27, 28, 40

New Orleans, Jackson, & Great N.R.R. v. Hurst, 36 Miss. 660 (Miss. Err. App. 1859) 43

Newell v. State, 308 So. 2d 71 (Miss. 1975) 43

Noonan v. State, 9 Miss. 562, 1 S. & M. 562 (1844) 44

Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999) 46

Oliver v. Cleveland Indians Baseball Co. Ltd. P'ship., 123 Ohio St. 3d 278, 915 N.E.2d 1205 (2009) 46, 47

Phillips v. Mirac, Inc., 651 N.W.2d 437 (Mich. Ct. App. 2002) 39, 46, 47

Pickering v. Industria Masina I Traktora, 740 So. 2d 836 (Miss. 1999) 41

Pulliam v. Coastal Emer. Servs. of Richmond, Inc., 509 S.E.2d 307 (Va. 1999) 48

Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1 (2004) 46, 47

Robinson v. Stewart, 655 So. 2d 866 (Miss. 1995) 28

Rogers v. Barlow Eddy Jenkins P.A., 2009 WL 2232228 (Miss. Ct. App., July 28, 2009) 4, 20

Rose v. Doctors Hosp., 801 S.W.2d 841 (Tex. 1990) 48

S.R.R. v. Kendrick, 40 Miss. 374 (Miss. Err. App. 1866) 34, 43

Scholz v. Metro. Pathologists, 851 P.2d 901 (Colo. 1993) 47

Scott v. City of Goodman, 997 So. 2d 270 (Miss. Ct. App. 2008) 17

Singleton v. State, 948 So. 2d 465 (Miss. Ct. App. 2007) 11

Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987) 46

Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989) 36, 47

Sontay v. Avis Rent-A-Car Systs., Inc., 872 So. 2d 316 (Fla. Dist. Ct. App. 2004) 46
State v. J.J. Newman Lumber Co., 102 Miss. 802, 59 So. 2d 923 (1912) 28
State v. McPhail, 180 So. 387 (Miss. 1938) 45
Stevens v. Triplett, 933 So. 2d 983 (Miss. Ct. App. 2005) 17
Striebeck v. Striebeck, 5 So. 3d 450 (Miss. Ct. App. 2008) 21
Tatum v. Wheeless, 180 Miss. 800, 178 So. 95 (1938) 28
Towner v. Moore ex rel. Quitman County Sch. Dist., 604 So. 2d 1093 (Miss. 1992) 40
Townsend v. Estate of Gilbert, 616 So. 2d 333 (Miss. 1993) 29
Univ. of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993) 47
Vince v. State, 844 So. 2d 510 (Miss. Ct. App. 2003) 11
Walters v. Blackledge, 220 Miss. 485, 71 So. 2d 433 (1954) 25, 26, 28, 33, 35, 37, 45
Walton v. State, 998 So. 2d 971 (Miss. 2008) 21
Watts v. Radiator Specialty Co., 990 So. 2d 143 (Miss. 2008) 4, 19
Wells by Wells v. Panola County Bd. of Educ., 645 So. 2d 883 (Miss. 1994) 25, 28, 35, 44
Wessels v. Garden Way, Inc., 689 N.W.2d 526 (Mich. Ct. App. 2004) 48
Wimley v. Reid, 991 So. 2d 135 (Miss. 2008) 43
Zdrojewski v. Murphy, 657 N.W.2d 721 (Mich. Ct. App. 2002) 48

Federal Cases

Baker v. Elcona Homes Corp., 588 F. 2d 551 (6th Cir. 1978) 12
Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988) 12
Clark v. Clabaugh, 20 F.3d 1290 (3d Cir. 1994) 12
Combs v. Wilkinson, 315 F. 3d 548 (6th Cir. 2002) 12
Daubert v. Merrell Dow Phars., Inc., 509 U.S. 579 (1993) 15, 18, 19
Davis v. Omitowoju, 883 F. 2d 1155 (3d Cir. 1989) 48
Gregg v. Georgia, 428 U.S. 153 (1976) 21
Illinois Cent. R.R. v. Barron, 72 U.S. 90 (1866) 33
Melridge, Inc. v. Heublein, 125 B.R. 825 (D. Or. 1991) 12
Middleton v. Tex. Power & Light Co., 249 U.S. 152 (1919) 37
Miller v. Field, 35 F. 3d 1088 (6th Cir. 1994) 11
Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211 (1916) 34
Owen v. United States, 935 F.2d 734 (5th Cir. 1991) 48
Pipitone v. Biomatrix, Inc., 288 F. 3d 239 (5th Cir. 2002) 19
Silver v. Silver, 280 U.S. 117 (1929) 37, 38
Smith v. Botsford Gen. Hosp., 419 F.3d 513 (6th Cir. 2005) 48

Whitehead v. Food Max of Miss., Inc., 163 F.3d 265 (5th Cir. 1998) 7

Constitutional Provisions, Statutes and Rules

U. S. Const. Seventh Amendment 24, 34
Miss. Const. §§ 1-2 (1890) 24, 42
Miss. Const. § 24 (1890) 25, 43, 44, 45
Miss. Const. § 31 (1890) 24, 34, 38, 39, 42, 47
Miss. Const. § 33 (1890) 28
Alaska Stat. § 09.17.010 (2009) 47
Cal. Civ. Code § 3333.2 47
Colo. Rev. Stat. Ann. § 13-64-302 (2001) 47
Fla. Stat. Ann. § 766.209 (Supp. 1998) 47
Idaho Code Ann. § 6-1603 (1998) 47
La. Rev. State. Ann. § 40:1299.42 (West Supp. 1991) 47, 48
Md. Code Ann., Courts & Judicial Proceedings § 11-108 48
Mich. Comp. Laws Ann. § 600.1483 48
Mich. Comp. Laws Ann. § 600.2946a 48
Miss. Code § 11-1-55 ..... 42, 43
Miss. Code § 11-1-60 ..... passim
Miss. Code § 11-1-65 29
Miss. Code § 11-1-69 ..... 30, 42
Miss. Code § 11-33-85 31
Miss. Code § 11-46-15 31
Miss. Code § 11-7-165 31
Miss. Code § 11-7-15 36
Miss. Code § 11-7-17 (2009) 36
Miss. Code § 15-1-25 29
Miss. Code § 15-1-41 29
Miss. Code § 19-25-45 29
Miss. Code § 25-53-51 31
Miss. Code § 27-104-25 31
Miss. Code § 27-19-155 31
Miss. Code § 29-1-47 31
Miss. Code § 29-3-165 31
Miss. Code § 31-19-25 31
Miss. Code § 37-101-291 31

Miss. Code § 37-101-292 31
Miss. Code § 37-101-293 31
Miss. Code § 37-11-53 31
Miss. Code § 41-41-79 28
Miss. Code § 41-9-37 32
Miss. Code § 41-9-83 28
Miss. Code § 69-49-1 29
Miss. Code § 71-3-5 37
Miss. Code § 71-3-9 37
Miss. Code § 71-7-23 28
Miss. Code § 73-22-3 29
Miss. Code § 73-25-38 29
Miss. Code § 75-23-41 29
Miss. Code § 75-41-15 32
Miss. Code § 75-7-309 29
Miss. Code § 7-7-204 31
Miss. Code § 79-19-33 32
Miss. Code § 79-19-59 32
Miss. Code § 81-22-23 29
Miss. Code § 83-7-23 29
Miss. Code § 83-30-15 29
Miss. Code § 83-58-15 31
Miss. Code § 85-5-7 ..... 41, 42
Miss. Code § 89-8-21 29
Miss. Code § 93-13-2 31
Miss. Code § 95-5-10 29
Miss. Code § 11-7-15 36
Mo. Ann. Stat. § 538.210 48
Neb. Rev. Stat. § 44-2825 (Reissue 1998) 48
Ohio Rev. Code Ann. § 2315.18 48
Tex. Rev. Civ. Stat Ann. art. 4590i § 11.02(a) (Vernon Supp. 1991) 48
Utah Code Ann. § 78-14-7.1 (2002) 48
V.I. Code. Ann. tit.27, § 166b (1975) 48
Va. Code Ann. § 8.01-581.15 48
Miss. R. Evid. 403 ..... 1, 15
Miss. R. Evid. 702 ..... 18, 19

Miss. R. Evid. 801 12
Miss. R. Evid. 803 ..... 10, 11, 12
Miss. Laws ch. 1, § 2 (1st Ex. Sess. 2004) 27, 30
Miss. Laws ch. 2, § 7 (3d Ex. Sess. 2002) 30
Miss. Laws ch. 4, § 10 (3d Ex. Sess. 2002) 30
Miss. Laws ch. 354 (1948) 37
Miss. Laws ch. 412 (1950) 37

Other Authorities

Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359 (1951) 36

Charles T. McCormick, Damages (1935) 33

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"*Guarded by police, woman slain,*" http://www.upi.com/Top-News/US/2009/11/12/Guarded-by-police-woman-slain/UPI-56821258073017/ 7

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Table 107, "Percent distribution of incidents where police came to the victim, by police response time and type of crime," http://www.ojp.usdoj.gov/bjs/abstract/cvus/response_time_to_victim584.htm 7

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REPLY BRIEF OF APPELLANT DOUBLE QUICK, INC.

Double Quick showed in its opening brief that Lymas failed to prove his premises liability claim arising from the criminal acts of Orlando Newell, who shot Lymas on the Double Quick premises. The shooting incident was a random act of spontaneous violence that had no nexus to Double Quick's retail business. Nothing Double Quick did or failed to do impelled Newell's impulsive and unpredictable act of violence. Lymas failed to prove proximate cause and nothing in Lymas' response contradicts this fact.

Nor does Lymas' response further his claim that the incident was foreseeable because Double Quick knew about Newell's "violent nature," or that police call logs and incident reports indicated the Double Quick was located within an "atmosphere of violence."

Lymas' sole proof of Newell's "violent nature" is a November 2005 indictment in which Newell shot Calvin Jefferson. But Lymas' evidence on that point was inadmissible, and the incident, alone, proved nothing. The only evidence properly of record shows Newell acted in self-defense with respect to that November 2005 incident. Lymas also failed to rebut another point Double Quick made in its opening brief: The Double Quick employees who had "heard about" the 2005 incident had no duty to report what they had heard to Double Quick. Their purported "knowledge" of this incident did not put Double Quick on notice of what they had heard.

As to Lymas' "atmosphere of violence" claim, nothing in his response negates what Double Quick has already shown: The call logs upon which Lymas and his experts primarily rely should have been excluded from evidence under Miss. R. Evid. 403. And even if admissible, Lymas' proof of a surrounding "atmosphere of violence" falls far short of what the

Mississippi courts have relied upon to establish this factor.

Finally, because the evidence that Lymas' liability experts relied upon for their causation and foreseeability opinions was insufficient as a matter of law, their opinions should have been excluded at trial. For all the reasons set forth in Double Quick's opening brief and herein, the $1,679,717.00 judgment against Double Quick should be reversed and rendered or, in the alternative, reversed and remanded for a new trial.

LEGAL ARGUMENT

I. Lymas Still Has No Proof of Proximate Cause.

Double Quick's principal brief pointed out the complete absence of evidence sufficient to support a finding that anything Double Quick did or failed to do was a proximate cause of Newell's spontaneous "unprovoked" (Lymas' word--Lymas Brief p. 3) and wholly unpredictable crime. Double Quick Brief pp. 11-23; *see Blizzard v. Fitzsimmons*, 10 So. 2d 343, 345-46 (Miss. 1942) (reversing and rendering for defendant, where there was "no showing from which it can be determined which of several possible causes produced the injury where some of the causes do not involve negligence of the party charged"). What says Plaintiff in response?

First, that proximate cause is "traditionally" a jury question. Lymas Brief pp. 17-18. For this Lymas cites *Donald v. Amoco Production Co.,* 735 So. 2d 161, 174 (Miss. 1999) and *Mathews v. Thompson*, 95 So. 2d 438 (Miss. 1957). But *Donald* is about duty being a question of law; its statement about proximate cause was made in passing. And *Matthews* says merely that "when reasonable minds might differ on the matter, the question of what is the proximate cause of an injury is usually a question for the jury. . . ." *Matthews,* 95 So. 2d at 448 (emphasis supplied).

Lymas' second response is to point out that his experts, Dr. Smith and Commander Lewis, uttered the words "proximate cause" in their testimony (eight and thirty-eight words on the subject, respectively).[1] Lymas Brief p. 18. But this will be sufficient only when *Hubbard v. Wansley,* 954 So. 2d 951 (Miss. 2007), is overruled. The plaintiff in *Hubbard* had an expert whose affidavit "contained the 'magical' language: '[I]t is my opinion that had Ruby Hubbard been treated properly by Dr. Wansley, or if Dr. Wansley had notified appropriate personnel, it is my opinion that Ruby Hubbard would have had a greater than fifty percent chance of reduced neurological injury.'" The affidavit, however, "g[ave] very little in the way of specific facts and medical analysis to substantiate the claim." This Court held, quite properly, that the affidavit was insufficient to support finding of proximate cause and that the defendant was therefore entitled to judgment as a matter of law. *Hubbard*, 954 So. 2d at 965-66.

Commander Lewis offered the very same opinion in *Alqasim v. Capitol City Hotel Investors,* 989 So. 2d 488 (Miss. Ct. App. 2008) as he has in this case; the Court of Appeals rightly rejected it. Affirming summary judgment for the hotel, and against a patron who had been shot and robbed in the hotel parking lot, the Court held that Commander Lewis' "general statements and broad conclusions"[2] regarding the Hampton Inn's alleged negligence "are not sufficient to show that any action or inaction of Hampton Inn caused Alqasim's injury." *Id.* at 493. Continuing, the Court held that "Alqasim has not shown that if the security was somehow

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[1] Lymas complains that the thirty eight words merely summarized a great deal of prior testimony. Lymas Brief p. 23 at n. 1. The record, however, shows a great deal of prior testimony *on what Double Quick should have done.* None of it is on proximate cause. On proximate cause there really are only thirty-eight words.

[2] Just as in this case, Lewis' expert designation showed he would opine that the Hampton Inn "'did not provide adequate security'; 'had no surveillance cameras in place'; 'should have provided a fenced-in parking area'; 'should have provided for additional trained officers' [and] should have foreseen the incident 'in light of the atmosphere of violence which existed on the premises. . . .'" *Alqasim*, 989 So. 2d at 493.

different, the incident would not have occurred." *Id.*[3] The same is true in the case at bar.

In his search for proof of proximate cause, Lymas next turns to Shavon Ellis, and her act of "walking pass [sic] and ignoring Orlando Newell and Allen Unger arguing when she knew both men were presently charged with aggravated assault," rather than "calling the police or notifying her manager. . . ." Lymas Brief p. 18.[4] "Th[e] 5-6 minute time lapse" between when Ellis walked out and she heard shots, Lymas concludes, "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." Lymas Brief p. 18.

This argument is full of holes. To begin with, there *was* no "5-6 minute time lapse." Lymas cites the testimony of Shavon Ellis. Lymas Brief p. 18, citing "14 R. 281, lines 18-22." Let's look at the testimony of Ellis, who is being questioned by Lymas' attorney:

> 18 Q How long did it take you to get to that
> 19 one street over after you got in your car and backed
> 20 out and pulled out of there?
>
> 21 A No more than like five or six minutes, if
> 22 that long.

"**No more than** ***like*** five or six minutes, ***if that long***." (Emphasis added).

Was it even "that long"? No. Look at the entirety of Ellis' testimony on the subject:

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[3] *Accord Watts v. Radiator Specialty Co.*, 990 So. 2d 143, 150 (Miss. 2008) (affirming j.n.o.v., despite expert testimony "that 'to a reasonable degree of medical certainty'" Plaintiff's illness was caused by defendant's product, where data simply did not support the conclusion); *Davis v. Christian Brotherhood Homes of Jackson, Miss., Inc.*, 957 So. 2d 390, 409 (Miss. Ct. App. 2007) (Commander Lewis' conclusory proximate cause opinion in premises liability case *held:* insufficient, as a matter of law, to support finding of proximate cause); *Rogers v. Barlow Eddy Jenkins P.A.*, 2009 WL 2232228, at *5 (Miss. Ct. App. July 28, 2009) (conclusory expert opinion *held:* insufficient, as a matter of law, to support finding of proximate cause) (citing *Davis*).

[4] Lymas does his best to make it sound as though Unger's "violent nature" was also somehow at issue, *see, e.g.*, Lymas Brief p. 5 (Unger under indictment); p. 6 (Unger subsequently convicted), but this will not do. Not only was it never pled or tried, but the law simply will not accept the suggestion that Double Quick should be subjected to liability because, at the time of A's "unprovoked" (again, Lymas' word) attack on B, a third person, who had a "violent nature," was present.

Q Okay. How far did you get in your car before you realized something had happened, and what was that something that made you realize something had happened?

A I had got like right down the street.

Q How far?

A It was like a street over. A street over.

Q So one street over?

A Yes.

Q How long did it take you to get to that one street over after you got in your car and backed out and pulled out of there?

A No more than like five or six minutes, if that long.

Q Did you have to wait at the stop light or anything like that?

A No, I didn't. No.

Q Okay. So you backed out, pulled out, came around, drove down the street, and then you, what did you hear?

A Some gunshots.

14 R. 281.

Ellis was "right down the street . . . *one street over.*" That tallies perfectly with the fact that she was close enough to hear the shots. Had the shots come five minutes after she left she would have been over a mile and a half away, even creeping along at twenty miles per hour. No reasonable person could conclude, on this record, that there was a "5-6 minute time lapse" between when Ellis supposedly should have called the police[5] and when Newell shot Lymas.

[5] Even this is a leap, unsupported by the record. While two witnesses agreed that it was "not

Nor could they, without engaging in naked speculation, find that even five to six minutes would in fact have been "enough time" for the police to be called and to arrive. It is true that the police station was only a few blocks away, but this does not tell us anything, unless we posit that the City of Belzoni has an unlimited supply of police officers, sitting around the station like Maytag repairmen, and that an "argument in progress" call would have caused them to *dash* to the Double Quick. It may be that an officer was just around the corner, doing nothing. But it's equally possible that he was on the other side of town, actively engaged in something more important, for the moment, than an "argument in progress" call. He *might* have gotten there in five to six minutes, but there is no evidence that would allow a jury to find, as a fact, that he likely would have done so, because Plaintiff offered none (perhaps because the available evidence would have been fatal to Plaintiff's case).[6]

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proper" for Ellis to just "wal[k] past," Lymas Brief pp. 19-20 (testimony of Davis and Taylor), neither witness said what Ellis should have done instead. Lymas has cited no evidence that Ellis should have "call[ed] the police or notif[ied] her manager." For all that appears in the record, Ellis "should" have done no more than to speak a quiet word for the arguing men. It was, after all, only an "argument" (Ellis' word, 14 R. 271 line 22) – "a normal, everyday argument. I didn't think it escalated." 14 R. 281. No crime was being committed; indeed, the "argument" was so "normal" and "everyday" that four or five other men were standing around, listening, 21 R. 932-33, and customer Charles Gowdy led his daughter-in-law right past the men, less than five feet from them, into the store. *Id.* There was nothing threatening about the situation to him; "I just thought," he testified, "it was some guys just shooting the breeze." *Id.* at 934. No one can reasonably insist that the retailer's *first* reaction to such a situation must be to call the police on its customers, "to have [the arguing men] removed from the property."

The whole "argument" point is a red herring. Even if we suppose that an "argument" of this type poses a foreseeable risk of "escalation" – a dubious assumption that ignores the fact that different cultures are comfortable with different styles of interaction – a moment's reflection will show that the risk has nothing to do with the case at bar. Lymas didn't catch a stray bullet. He was the intended victim. Lymas himself emphasizes a witness statement that was given to the police: "When Ronnie Lymas got shot 4 or 5 boys ran behind the blue house on the corner. . . . All of them had black on. After Ronnie got shot the boys kicked him then ran off." Lymas Brief p. 7. Newell didn't shoot Lymas because there had been an "argument" on the premises. Newell shot Lymas because he wanted to shoot Lymas.

[6] No one can expect that the Belzoni police department would have responded to an "argument in progress" call faster than to a violent crime call, yet U.S. Department of Justice statistics show that less than a third of violent crime calls bring police within five minutes. http://www.ojp.usdoj.gov/bjs/abstract/cvus/response_time_to_victim584.htm (Table 107, "Percent

Let us suppose that the officer does arrive before Newell shoots Lymas, and "removes" from the property the men who are arguing. Who, according to Ellis, the witness that Lymas cites on this key point, would be "removed"? Newell? No! According to Ellis, it was not Newell that she saw arguing with Unger. Ellis testified that she did not even see Newell on the Double Quick premises that day – not then, not at any time. 14 R. 282. Per Ellis, the man arguing with Unger was not Newell, but Lymas himself. *Id.* Lymas' position before this Court, then, is that *his* conduct was beyond the pale; therefore Double Quick should have had the police remove *him* from the premises, and had Double Quick done so he would not have been there to be shot.

This is every bit as untenable as it sounds. Beyond that, it demands yet more speculation. Where is the evidence that Newell wanted to shoot Lymas, but only if he could do so while Lymas was standing within the Double Quick property lines? On this record the jury could only speculate on all of these points.[7]

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distribution of incidents where police came to the victim, by police response time and type of crime").

[7] Even the notion that once the police arrived Newell would wait for a more convenient opportunity to shoot Lymas is speculation. As Double Quick observed in its principal brief, the presence of numerous witnesses – who could all identify Newell, and thus guarantee his eventual prosecution – did not deter Newell. Experience has shown that while some criminals can be deterred, others can not be. *Compare Whitehead v. Food Max of Miss., Inc.*, 163 F. 3d 265, 268 (5th Cir. 1998) (Mississippi law) ("Another of the Whiteheads' experts opined that Seaton and Jones were 'power reassurance rapists,' who probably chose Kmart because of its lack of security in its parking lot, and who would probably have been deterred by the presence of a uniformed security guard") *with* "West Pullman man charged after police witness shooting," http://www.chicagobreakingnews.com/2009/08/west-pullman-man-charged-with-attempted-murder.html ("A West Pullman man was charged today with attempted murder after police witnessed him shoot another man over the weekend, Chicago police said"); "Guarded by police, woman slain," http://www.upi.com/Top_News/US/2009/11/12/Guarded-by-police-woman-slain/UPI-56821258073017/ ("Investigators were trying to determine Thursday how a man got into a woman's apartment and killed her while police stood watch outside, Los Angeles police said. Police at the scene shot the attacker but not before he fatally stabbed the woman").

points to his conclusory expert testimony, and then attempts to supplement same by positing that a camera "would have allowed the store manager Frances Byest to view this brewing violent altercation . . . and take action to have Orlando Newell and Allen Unger removed from the property. . . given the 8 to 10 minute time length it spanned." Lymas Brief pp. 27-28. The problem with this theory (apart from the lack of record citation for the "8 to 10 minutes") is the same one we saw with the Ellis theory: it rests entirely on speculation. Would the camera have been pointing in the right direction? If so, what would it have shown? Ellis knew there was an argument because she could *hear* what was being said, but security cameras don't have audio. Where is the evidence that what could be *seen* would alert Byest to the fact that there was an "argument" in progress? There is none. Indeed, all of the evidence is to the contrary: Ellis walks right between the men and thinks nothing of it. Charlie Dowdy and his daughter-in-law walk right past them and think nothing of it. 21 R. 932-34. No rational jury could ever conclude, on this record, that arranging to have one more pair of eyes watch the scene on a television screen would have made a difference.

And if we get past all of this we still have to find that Byest would have noticed the "argument," and called the police, and that the police would have arrived (in response to an "argument in progress" call) all within the "8 to 10 minutes" that Lymas claims passed between the beginning of the argument and the shooting.

Lymas' last, best hope for evidence of proximate cause is the security guard argument. Lymas Brief pp. 29-30. Here again, though, Lymas can point to no evidence other than his experts' thirty-eight words. Lymas adds Commander Lewis' statement that "an armed uniformed security officer plays a big deterrent in crime occurrences," but even if this were not purely conclusory, and thus insufficient under *Hubbard,* it tells us nothing about this crime.

Lymas Brief p. 29. Newell was willing to shoot in broad daylight, in front of countless witnesses, in his own hometown, thus guaranteeing that he would be caught and prosecuted. To say that a guard would have deterred him is not just speculation; it is speculation in the teeth of common sense.

Double Quick's principal brief demonstrated that there was no proximate cause connection between anything that Double Quick did or failed to do, and Newell's spontaneous, unprovoked, and wholly unpredictable crime. Lymas' brief has, literally, no answer. This point alone entitles Double Quick to judgment as a matter of law.

II. Lymas Fails to Prove Foreseeability.

A. The Evidence Is Insufficient as a Matter of Law To Show That Newell Had a "Violent Nature."

Double Quick's principal brief pointed out (pp. 23-28) that Lymas' proof was, as a matter of law, insufficient to show that Newell had a "violent nature." Among other things, Double Quick pointed out that Lymas relied *exclusively* on the November 2005 incident in which Orlando Newell shot Calvin Jefferson -- but Lymas' evidence that Newell was the aggressor was inadmissible. Without such evidence the incident proved nothing. There is no record evidence Newell was convicted of anything with respect to the Jefferson incident, the shooting being, for all the record showed, an act of self defense. 21 R. 959.

Lymas responds that the police report by which he attempted to prove the criminality of the 2005 shooting was admissible under Miss. R. Evid. 803(8)(B) and 803(8)(C). Lymas Brief pp. 37-39. Lymas has, apparently, dropped the "business records" argument that he advanced at trial. Lymas Brief p. 37 & n. 14. The problem with his new argument, however, is essentially the same: At bottom, there is no exception to the hearsay rule for the part of the police report

that matters to Lymas, and upon which his case rests, viz., the statements made to the police by witnesses to the shooting.

Rule 803(8) permits use of a police report to prove that a particular statement was in fact made to a police officer. It does not, however, permit use of the police report to prove that the particular statement is true. *Miller v. Field*, 35 F. 3d 1088, 1091 (6th Cir. 1994) (plaintiff, a prisoner, brings 1983 action, alleging that he was assaulted in prison; defendants offer official reports reflecting, inter alia, that they interviewed fellow prisoners, and the fellow prisoners said that the assault did not take place; *held:* admission of reports under 803(8) was reversible error).

This makes perfect sense. "'[J]ustification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record.'" *Miller,* 35 F. 3d at 1090 (quoting notes prepared by the Advisory Committee on the federal rules). The witness who makes the statement to the officer, by contrast, is under no duty to speak the truth, nor is there any reason to fear, in the ordinary case, that he will be unable to remember what he saw.

The best treatment of the distinction in Mississippi is found in *Vince v. State,* 844 So. 2d 510 (Miss. Ct. App. 2003), where the Court explained that 803(8) permits admission of the State's own records of defendant's incarceration, but does not permit admission of

> NCIC records, which purport to be a compilation of information gathered from various jurisdictions throughout the country, the accuracy of which cannot necessarily be certified by the NCIC compiler. By way of example, though the NCIC custodian may properly certify that the NCIC report is an accurate transcription of criminal records supplied by the State of Idaho, that custodian is not in a position to assess the accuracy of the underlying information provided by the records custodian.

Vince, 844 So. 2d at 517-18 (emphasis supplied).[9]

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[9] *Accord, Singleton v. State*, 948 So. 2d 465, 471 (Miss. Ct. App. 2007) ("It is equally clear, possibly more so, that the NCIC report would not fall under M.R.E. 803(8)(B). Again, the NCIC is a database of information provided by other law enforcement agencies. As such, those working for the

The same is true of subsection (C) to Rule 803(8), for essentially the same reason. *See Jones v. State*, 918 So. 2d 1220, 1232-33 (Miss. 2005) (coroner's report not admissible under 803(8)(C), where it showed on its face that coroner relied on hearsay to prepare it, and it was "at least arguable" that he did so as to the important part, time of death; such a report "unquestionably lacked trustworthiness"). The cases that Lymas cites, Lymas Brief pp. 37-38, are not to the contrary.[10]

Neither the "business records" exception, invoked at trial, nor Rule 803(8), now advanced, made it permissible for Lymas to prove, through witnesses who never appeared at trial

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NCIC, and the NCIC itself, do not observe those matters reported upon within their reports. Furthermore, we have identified that 'an issue of trustworthiness arises when one organization seeks to introduce records in its possession that were actually prepared by another.' Therefore, the NCIC report in the case *sub judice,* as submitted by a member of the Madison County Sheriff's Department, cannot fall under the public records and reports exception.") (citation omitted).

[10] *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988) merely holds "that portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report." As for *Clark v. Clabaugh*, 20 F.3d 1290 (3d Cir. 1994), despite broad dicta, the holding was that a report was admissible to prove what one of the defendants had told the writer of the report. *Id.* at 1296. Under 801(d)(2) the admissions of a party opponent are not even within the hearsay rule, so there was no question in *Clark* of using 803(8) as a vehicle for admitting the hearsay statements of non-party witnesses. The Oregon bankruptcy court decision, *Melridge, Inc. v. Heublein*, 125 B.R. 825 (D. Or. 1991), does support Lymas' position, but it misread the case upon which it relied, *Baker v. Elcona Homes Corp.*, 588 F. 2d 551 (6th Cir. 1978). The *Baker* Court expressly rejected use of 803(8)(C) as a vehicle for admission of statements from non-party witnesses. *Baker,* 588 F. 2d at 559 ("The appellants also challenge the admissibility of the report insofar as it contained the statement of the driver Slabach. This would not, in our judgment, be admissible under Rule 803(8). The statement was neither an observation nor a factual finding of the police officer . . . .") (ultimately concluding that Slabach's statement was not hearsay because of 803(d)(1)(B)). Finally, in *Combs v. Wilkinson*, 315 F. 3d 548 (6th Cir. 2002), prisoners who claimed that officials of the Ohio Department of Rehabilitation and Correction had used excessive force quelling a prison riot were permitted to introduce, under 803(8), an investigative report rendered by the Ohio Department of Rehabilitation and Correction. *Id.* at 554-55. Although the report referenced witness interviews, it was admitted for its "factual findings, conclusions, and recommendations regarding the use of force," *id.* at 554, which findings, etc. tended to show that excessive force had in fact been used. *Id.* at 555. *Combs* stands for admitting against a defendant his own investigative report which tends to admit that he was in the wrong. None of Lymas' cases hold that one may prove that "X" happened via a report in which a public official writes "a private citizen told me 'X happened.'"

and who were never subjected to cross examination, that Newell was the aggressor in the 2005 incident. PX 10A should have been excluded, and a verdict directed for Double Quick. Instead the case was presented to a jury that had been improperly exposed to hearsay statements making Newell out to be a violent actor. This was error, and manifestly prejudicial.[11]

Double Quick also pointed out the Double Quick employees who had "heard about" the 2005 incident had no duty to report what they had heard to Double Quick, and thus Double Quick was not on notice of what they had heard.[12] Lymas responds by citing the opinion in *Glover ex rel. Glover v. Jackson State University,* 968 So. 2d 1267, 1280 (Miss. 2007) (Dickenson, J., with two justices concurring, and two justices concurring in result).[13] The difference is that the knowledge possessed by the employee in *Glover* was squarely within the scope of his responsibilities: Luster, the employee who was "aware of the two boys' violent history," was a Senior Aide for the NYSP program and "testified that his most important job was to supervise the children in the NYSP program. JSU had instructed that, once the children got on the bus, he was responsible for delivering the children to JSU, and that the program was

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[11] Lymas argues that Double Quick, having objected to PX 10A, should have objected again when the police officer was asked to state what was *in* PX 10A. The law neither requires nor desires such needless and pointless acts.

[12] Lymas lays great stress on the fact that Thurman, as a Courthouse employee, had "actual knowledge, not just street knowledge or rumor knowledge," Lymas Brief p. 32, but the Jury was expressly invited, by Plaintiff's expert, to find that a Double Quick employee should have "based her actions on gossip and rumor that she heard in the community." 18 R. 618-20 (Smith).

[13] Lymas also concludes from Glover that since "child fights" made rape foreseeable, it follows a fortiori that "the prior shooting aggravated assault charge and conviction on [sic] Newell and Unger are . . . enough to equate to a 'violent nature'. . . ." Lymas Brief p. 33. The assailants' prior behavior in Glover – the behavior that established foreseeability – was indisputably wrongful. One of the assailants had been expelled from the program on account of it, and the other had been threatened with expulsion. Glover, 968 So. 2d at 1270-71. Indeed, the Glover opinion expressly rejected the trial court's characterization of the behavior as "'adolescent horseplay." Id. n.1. The behavior in the case at bar, by contrast --Newell's shooting of Jefferson -- was not necessarily wrongful, and never proven to be wrongful. There is no evidence he was ever convicted of anything with respect to the Jefferson incident. As for Unger's past: Lymas' brief repeatedly refers to it, but it is simply irrelevant. It was Newell, not Unger, who shot Lymas. Whether Unger was a devout Quaker or a modern-day Attilla makes absolutely no difference.

responsible for the children from the time they boarded the bus." *Glover,* 968 So. 2d at 1271 (emphasis added). Once these two boys boarded Luster's bus, it was as if his employer, JSU, knew what he knew, because that knowledge was directly related to his job responsibilities. This is the context in which the *Glover* opinion stated that "[a]n employee's knowledge is imputed to his employer." *Glover,* 968 So. 2d at 1276 & n. 9. It is impossible to derive from *Glover* the rule for which Lymas contends, and on which his case depends, that everything an employee knows, regardless of how, or even whether, it relates to his job responsibilities, is also known to his employer.

B. The Evidence Is Insufficient as a Matter of Law To Show That the Double Quick Store Was Located Within an "Atmosphere of Violence."

Lymas and his liability experts rely upon incident lists from the Belzoni Police Department (Tr. Ex. P-8) to prove Double Quick had notice of an "atmosphere of violence" not merely on the premises but also in the surrounding one-mile radius of the store. Double Quick showed in its opening brief that these incident lists should have been excluded from evidence under Miss. R. Evid. 403. Other than just three incident **reports**, Lymas and his experts relied primarily on these call lists, without verification of their accuracy (18 R. 586 (Smith); 19 R. 769 (Lewis)), and in light of the fact that these lists did not indicate the actual circumstances or outcome of any listed incident. *See* Double Quick Brief pp. 29-30. The misleading, prejudicial effect of allowing these incident lists into evidence, and allowing Smith and Lewis to opine based on these incident lists, far outweighed any probative value. *Id.* at 29-31.

In response, Lymas first claims Double Quick "impermissibly" raised new objections on appeal; but this claim is unsupported by the record. Lymas Brief pp. 39-41. Double Quick raised **two** grounds for excluding Tr. Ex. P-8 at trial: (i) the incident lists covered off-premises occurrences exceeding the scope of the expert disclosures for Lymas' liability experts, Smith and

Lewis; **and** (ii) the incident lists should be excluded under Miss. R. Evid. 403 (16 R. 365) because they show only potential crimes, including those occurring at other locations, which is "highly prejudicial, and whatever probative value they have is outweighed by [their] prejudicial effect." 16 R. at 365-66. Double Quick properly raised both these objections at trial and preserved them both as grounds for appeal. Appellant's brief raised no "new objections" regarding the incident lists; Double Quick simply opted to pursue only its Rule 403 objection on appeal.

Next, Lymas cites *American National Insurance Co. v. Hogue*, 749 So. 2d 1254 (Miss. Ct. App. 2000), as support for the "reliability" of the incident lists, but ignores that even the *Hogue* court recognized the potential **prejudicial effect** of such evidence where the jury is not "informed [by the trial judge] that the mere fact that a call was made did not necessarily mean that a crime had been committed." *Id.* at 1261. The jury was not so informed in this case. The prejudicial effect was made worse by Lymas' liability experts' adopting and relying upon these lists, given the undeniable tendency of jurors to give even more credence to their opinions in light of their "expert" status. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993); *Edmonds v. State*, 955 So. 2d 787, 792 (Miss. 2007).

Lymas cites *Lyle v. Mladinich,* 584 So. 2d 397 (Miss. 1991), to show this Court has accepted incident lists as evidence of an "atmosphere of violence." Lymas Brief p. 41. *Lyle* does not support this assertion. The plaintiff in that case relied upon "a compilation of criminal charges filed against persons from 1981 through 1989 in the Fiesta Night Club and the adjacent parking lot," 584 So. 2d at 398 (emphasis added) -- not a compilation of calls reporting potential crimes within a one mile radius of the subject premises, as reflected on the incident lists at issue here.

In any event, even considering (i) the lay witness testimony regarding fights on the Double Quick premises; and (ii) the calls for service listed on Tr. Ex. P-8, this evidence is insufficient to create a jury question on the "atmosphere of violence" issue. Lymas Brief pp. 41-42. Further, because Lymas' liability experts Smith and Lewis base their "atmosphere of violence" opinions on this same data, their opinions likewise are insufficient to create a jury question on this issue. The other decision cited by Lymas, *Gatewood v. Sampson*, 812 So. 2d 212 (Miss. 2002), actually shows why the evidence Lymas and his liability experts rely upon satisfies neither the proximity, nor the frequency, of reported crime that the Mississippi courts have found sufficient to create a jury question on the existence of an "atmosphere of violence" in other premises liability cases. In *Gatewood*, though calls for service may have been considered by the Court in that case (though there is no explicit description of what plaintiff's expert relied upon in that case), the relevant point is that it demonstrates the frequency and proximity of violent crimes necessary to uphold a jury verdict on the "atmosphere of violence" issue -- factors not met here. Sixty violent crimes in the preceding three-year period were reported in the neighborhood surrounding the Exxon where the incident occurred, including a bullet fired into the Exxon, and 32 of the 60 violent crimes occurred in the **adjacent** shopping center. *Gatewood*, 812 So. 2d at 220.[14]

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[14] *See also Glover ex rel. Glover v. Jackson State Univ.*, 968 So. 2d 1267, 1279 (Miss. 2007) ("sixty-three crimes . . . reported to have occurred **on the JSU campus** [the subject premises] during the three months prior to the rape" (emphasis added), of these 63 crimes "twenty-one . . . were violent, and four were reports of rape and sexual battery," held sufficient to allow jury to find existence of atmosphere of violence), **compare to** *Kelly v. Retzer & Retzer, Inc.*, 417 So. 2d 556, 559, 561-62 (Miss. 1982) (despite evidence of 28 reported crimes in the subject parking lot in the previous three years, including "three incidents of vandalism, two assaults, one attempted auto theft, one auto theft, one attempted fraud, an armed robbery in a restroom, one strong armed robbery of a child by a fifteen year old boy, one simple assault, and one unknown complaint," peremptory instruction for the defendant as to an atmosphere of violence affirmed on appeal); *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So. 2d 1186, 1187 (Miss. 1994) ("difficult to say the assault on [the plaintiff] was foreseeable" though the evidence showed crime in the preceding 60 months within two blocks of the business which included 110 commercial burglaries, 113 residential burglaries, 111 assaults, 152 larcenies, one bomb threat, and one

Lymas ignores this aspect of *Gatewood*, as well as the other cases cited by Double Quick in its opening brief that show the evidence Lymas and his liability experts rely upon is insufficient as a matter of law to show an "atmosphere of violence" existed on the Double Quick premises such that Double Quick would have "cause to anticipate" the unexpected, random shooting that caused Lymas' injuries. *See Davis v. Christian Bhd. Homes of Jackson, Miss., Inc.*, 957 So. 2d 390, 401 (Miss. Ct. App. 2007).

Finally, Lymas claims there is no basis for this Court to re-assess the "atmosphere of violence" standard "entrenched in Mississippi law for decades." Lymas Brief p. 42. But this conclusory pronouncement ignores what both Double Quick's opening brief and the supporting brief of amici have shown: The current ambiguous "atmosphere of violence" criteria leave business owners without clear and workable standards governing their duties with respect to third party criminal acts like that occurring in the instant case. Indeed, the term "atmosphere of violence" -- repeatedly used before the jurors in premises liability cases -- is highly inflammatory. Coupled with the current vague standards, this term allows jurors to impose liability essentially guided by their inherent desire that crime be prevented, without direction as to the reasonable standards that should govern their determination. As applied in this case, Double Quick has been imputed with knowledge of incidents occurring within an arbitrary one-mile radius of the premises as proof the actual premises was a "violent" place. This is wrong and demonstrates both an extreme example and extension of premises liability in Mississippi. The judgment should be reversed.

The Court should also use this opportunity to delineate appropriate standards which not

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indecent exposure); *Scott v. City of Goodman,* 997 So. 2d 270, 275 (Miss. Ct. App. 2008) (evidence that premises "was frequently robbed" held insufficient to show "atmosphere of violence"); *Stevens v. Triplett*, 933 So. 2d 983, 986 (Miss. Ct. App. 2005) ("A handful of burglaries and assaults, a rape, and a kidnapping, most of which occurred in the middle of the night, are not enough to show that [the property owner] breached the duty he owed to [plaintiff] when he invited her to see the property.").

only (a) reaffirm the duty of reasonable care owed customers for hazards created by or related to the business itself, or which involve foreseeable and imminent dangers to identified patrons; but also (b) make clear that premises owners are not required to protect invitees from criminal attacks that have no connection to the premises, and which arise out of criminal activity in the community. Business owners are entitled to clearly defined premises liability standards to enable them to determine what the law demands in this context.

III. The Expert Testimony of Lymas' Two Liability Experts Was Both Conclusory and Wholly Speculative and Should Have Been Excluded Under the Standards Established by *Daubert/McLemore* and Miss. R. Evid. 702.

Because "[t]he sufficiency of foundational facts or evidence on which to base an [expert] opinion is a question of law," *Janssen Pharmaceutica, Inc. v. Bailey,* 878 So. 2d 31, 60 (Miss. 2004) (citations omitted), this Court should review de novo the sufficiency of the "evidence" at issue here in assessing whether the trial court erred in failing to exclude the testimony of Lymas' liability experts, Michael Smith and Commander Tyrone Lewis. As shown above and in Double Quick's principal brief, Lymas had **no** evidence that anything Double Quick did or failed to do was a proximate cause of Newell's unprovoked and unpredictable crime, and Lymas' purported "evidence" of Newell's "violent nature" or the "atmosphere of violence" at the store was insufficient as a matter of law. The opinions of Plaintiff's liability experts, which were based upon such evidence, should have been excluded at trial for this precise reason: Their testimony was not "based upon sufficient facts or data" within the meaning of Rule 702. Because it had no basis in fact, their testimony was irrelevant and thus even failed Rule 702's basic requirement that it be first found to "assist the trier of fact to understand the evidence or to determine a fact in issue." *See* Double Quick Brief pp. 11-38.

Opposing Double Quick's reliance on these fundamental concepts, Lymas cites *Pipitone*

v. Biomatrix, Inc., 288 F. 3d 239 (5th Cir. 2002), a case in which the court recognized that where expert testimony was based on "competing versions of the facts," this factor, alone, was not a basis for excluding expert testimony as "unreliable." *Pipitone,* 288 F. 3d at 249. Lymas Brief pp. 44-45. Lymas claims this analysis applies here, suggesting that Double Quick's *Daubert* challenge "is an invitation to this Court to impermissibly weigh in on the 'weight' of opposing expert opinions." Lymas Brief p. 44.

But Double Quick does not challenge the expert testimony of Smith and Lewis because it rests on a "competing version" of the facts relied upon by Double Quick's expert, Warren Woodfork. On the contrary, the basis for Double Quick's *Daubert* challenge as to both experts is that the information upon which Plaintiff's experts' testimony is based (i.e., the purported "evidence" of causation, or Double Quick's notice of Newell's "violent nature" or the "atmosphere of violence" at the store) -- even taken as true -- is insufficient as a matter of law. *See* Double Quick Brief pp. 11-38; pp. 18-19, *supra.* As such, their opinions are unreliable and should have been excluded under Miss. R. Evid. 702 and *Daubert/McLemore* standards. *See Mississippi Transp. Comm'n v. McLemore*, 863 So. 2d 31, 36 (Miss. 2003) (expert's opinion must rest on "a reliable foundation" and "not merely [the expert's] subjective beliefs or unsupported speculation") (citing *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 590 (1993)).[15]

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[15] *See also City of Jackson v. Spann,* 4 So. 3d 1029, 1039 (Miss. 2009) (testimony based upon expert's "mere 'guess'" held insufficient to establish substantial, credible evidence to support future damages award); *Watts v. Radiator Specialty Co.,* 990 So. 2d 143, 146 (Miss. 2008) (trial courts must ensure data relied upon by expert "is relevant to the facts at hand"); *Hubbard v. Wansley,* 954 So. 2d 951, 965-66 (Miss. 2007) (affidavit which "g[ave] very little in the way of specific facts and medical analysis to substantiate the claim" insufficient to support causation opinion); *Dedeaux Util. Co. v. City of Gulfport,* 938 So. 2d 838, 843 (Miss. 2006) ("[Expert's] testimony was not based on sufficient facts and data and was therefore unreliable. . . . The trial court erred in admitting that testimony."); *Janssen Pharmaceutica, Inc. v. Bailey,* 878 So. 2d 31, 60 (Miss. 2004) (facts relied upon by expert must afford a "reasonably accurate basis" for the expert's conclusion)(citations omitted); *Davis v. Christian Bhd. Homes*

As to proximate cause, it is only pure speculation that anything Double Quick did or did not do caused Newell to shoot Lymas: As Double Quick points out, Newell was willing to shoot in broad daylight, in front of countless witnesses, in his own hometown -- to say that a guard -- or anything else -- would have deterred him is speculative and flies in the face of common sense. *See* p. 10, *supra.*

Lymas' experts likewise were without sufficient facts upon which to form "reliable" opinions as to both the "violent nature" and "atmosphere of violence" prongs of the foreseeability test for premises liability. As to Newell's "violent nature," Lymas exclusively relied upon a 2005 prior shooting incident involving Newell, but Lymas' evidence that Newell was the aggressor was inadmissible, and without such evidence the incident proved nothing. *See* pp. 10-13, *supra.* Moreover, even if Double Quick employees Thurman and Ellis "knew" of Newell's violent nature, neither had a duty to report this information to Double Quick, and thus Double Quick was not on notice of what they had heard. *See* pp. 13-14, *supra.* Finally, as to the "atmosphere of violence" factor, even considering the lay witness testimony about fights on the Double Quick premises, and the calls for service listed on Tr. Ex. P-8, this evidence is insufficient as a matter of Mississippi law to support the existence of an "atmosphere of violence." *See* pp. 14-18, *supra.* Because the information relied upon by Lymas' liability experts was insufficient as a matter of law, their testimony should have been excluded at trial.

IV. Lymas's Defense of the Jury Instructions Is Unsuccessful.

Double Quick's principal brief pointed out (pp. 38-40) that the jury instructions were

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of Jackson, Miss., Inc., 957 So. 2d 390, 409 (Miss. Ct. App. 2007); *Fresenius Med. Care & Cont'l Cas. Co. v. Woolfolk ex rel. Woolfolk,* 920 So. 2d 1024, 1032 (Miss. Ct. App. 2005) (reversing lower court allowing expert testimony premised on factual assumption unsubstantiated by any evidence in the record: "[I]f the premise upon which Dr. Stringer's opinion was based is flawed, then it necessarily follows that the opinion is also flawed."); *Rogers v. Barlow Eddy Jenkins P.A.*, 2009 WL 2232228, at *5 (Miss. Ct. App. July 28, 2009) (conclusory expert opinions held insufficient to support finding of proximate cause).

riddled with errors. Lymas attempts to defend the instructions, but his defense is unsuccessful. Lymas Brief pp. 46-50.

Double Quick pointed out, for example, that without the words "if any" in the first sentence of instruction seven, the instruction told the jury that there was in fact a foreseeable risk. Lymas responds by saying, first, that the words "if any" are not found in the case law, and are in any event "trivia words." Lymas Brief p. 46. This is no response at all. When this Court recited the rule in *Minor Child v. Mississippi State Federation,* 941 So. 2d 820 (Miss. 2002), it was speaking to the bench and bar; the "if any" was understood. A jury is an entirely different audience. *See Bullock v. State,* 391 So. 2d 601, 610 (Miss. 1980) ("Instruction D-31 would have told the jury it was instructed there is nothing that would suggest the decision to afford an individual defendant mercy violates the constitution. That statement was taken from language set forth in the opinion of *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 14 L.Ed.2d 859 (1976). It is simply a statement of the opinion, and was not intended as an abstract proposition of law to be given in jury instructions.") (emphasis added). To the jury in the case at bar, instruction seven really and truly did say that a foreseeable risk existed. And for Lymas to dismiss "if any" as trivial is to ignore stacks of Mississippi case law.[16]

Instruction seven also told the Jury that Double Quick was obligated to act upon any "cause to anticipate" the assault, not just "reasonable" causes to anticipate, and, further, that it

[16] *See, e.g., AmFed Companies, LLC v. Jordan*, 2009 WL 2595628, at *9 (Miss. Ct. App. Aug. 25, 2009) (quoting "if any" jury instruction); *Fair v. State*, 2009 WL 1520110, at *3 (Miss. Ct. App. June 2, 2009) (same); *Goff v. State*, 14 So. 3d 625, 657 (Miss. 2009) (same); *Goodyear Tire & Rubber Co. v. Kirby*, 2009 WL 1058654, at *13 (Miss. Ct. App. Apr. 21, 2009) (same); *APAC Miss., Inc. v. Johnson*, 15 So. 3d 465, 476 (Miss. Ct. App. 2009) (same); *Brown v. State,* 19 So.3d 85, 94 (Miss. Ct. App. 2008) (same); *Walton v. State*, 998 So. 2d 971, 977 (Miss. 2008) (same); *Causey v. Sanders*, 998 So. 2d 393, 410 (Miss. 2008) (same); *Striebeck v. Striebeck*, 5 So. 3d 450, 452 (Miss. Ct. App. 2008) (same).

told the Jury what was and was not foreseeable. Lymas defends this, again, by quoting what this Court said to an audience of lawyers. This is no defense. *Bullock,* 391 So. 2d at 610.

Finally, instruction seven told the Jury that Double Quick knew whatever its employees knew, regardless of whether the employee's knowledge was within the scope of her job responsibilities. Lymas defends this, with the same mistaken interpretation of *Glover* that we addressed at pp. 13-14, *supra.*[17] Lymas Brief pp. 47-48.

It has been observed, quite correctly, that while this Court frowns on abstract instructions, it does not find them to be grounds for reversal save where they are misleading or confusing. *Brooks v. State*, 769 So. 2d 218, 227 (Miss. Ct. App. 2008) (Bridges, J., dissenting). Instruction nine was just such an instruction. That it was "black letter law," as Lymas pleads, is of no moment. Lymas Brief p. 49. The message it conveyed to this jury was that if *any* injury could be foreseen – as, for example, injury to one of the two "arguing" men, or injury to a bystander as a result of the argument (which is not what came to pass —*see* pp.5-6 & n. 5, *supra*) – then Lymas had satisfied his foreseeability burden. It is simply wrong to allow Double Quick to be cast into judgment with no assurance that the Jury actually made a proper finding on this element of Lymas' case.

Lymas turns, finally, to defending instruction 17, but Double Quick's principal brief meant to reference instruction 11 (which had been P-17, *see* 10 R. 1428) Lymas Brief p. 49. Double Quick stands by what it said about this instruction.[18]

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[17] The idea, by the way, that Double Quick waived its objection to this part of instruction seven because it did not renew its objection after Plaintiff's counsel argued for the instruction, Lymas Brief p. 49, is unsupported and unsupportable. If accepted it would require the objecting party to make sure that he always had the last word, a requirement as useless as it would be irritating to all concerned.

[18] "The second sentence of Instruction Number 17, by leaving out the concept of foreseeability, made Double Quick responsible for all criminal conduct, both foreseeable and unforeseeable. Double Quick's objection to this instruction (22 R. 1039) should have been sustained."

Taken as a whole the instructions did *not* fairly place the factual issues before the Jury. Instead they made it possible—indeed probable—for the jury to pass over key elements of Lymas's case. This was fundamentally unfair to Double Quick. To say, as Lymas says, that an audience of attorneys would have supplied, from their own understanding, the missing but implied words is no answer at all.

OPPOSITION BRIEF OF CROSS-APPELLEE DOUBLE QUICK, INC. TO BRIEF ON CROSS APPEAL OF CROSS-APPELLANT RONNIE LEE LYMAS

Lymas argues that Miss. Code § 11-1-60(2) (2009), which places a statutory cap of one million dollars ($1,000,000.00) on non-economic damages in non-medical tort actions, is unconstitutional under the State and Federal Constitutions. In support, Lymas erroneously relies on Sections 1-2 (separation of powers), 24 (the remedy clause), and 31 (trial by jury) of the State Constitution, Miss. Const. §§ 1-2, 24, 31 (1890), and the Seventh Amendment to the United States Constitution. Lymas made these same and other legal arguments in the Circuit Court.[19] *See* Plaintiff's Response and Motion to Declare Miss. Code Ann. Section 11-1-60[(2)'s] Limits on Non-Economic Damages Unconstitutional (July 7, 2008) ("Motion To Declare"); 10 R. 1453. After the State Attorney General intervened as a non-aligned party, Order (Sept. 16, 2008); 12 R. 1664, the parties briefed and argued these issues. The Circuit Court correctly found that Section 11-1-60(2) is constitutional. Order (Sept. 17, 2008), 12 R. 1662. This Court should affirm.

SUMMARY OF ARGUMENT

Miss. Code § 11-1-60(2) (1972), which places a cap of $1,000,000.00 on the total amount recoverable for non-economic damages, is constitutional and does not violate the right of trial by jury, the remedy clause, or the separations of powers provisions of the Mississippi Constitution of 1890 or the right to trial by jury under the Seventh Amendment to the United States Constitution. Nothing in the State Constitution restricts the authority of the Legislature to

[19] Before the Circuit Court, Lymas also argued that Miss. Code § 11-1-60(2) (2009) is unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Neither Lymas nor Amicus Magnolia Bar Association makes these arguments on appeal. Lymas' failure to address these issues in his principal brief makes the Circuit Court's ruling as to those issues final and res judicata as between the parties.

address the subject matter of the statute. It is clearly within the Legislature's police power to establish such legal limits. Lymas rightly admits that "[t]here can be no doubt that the legislature has the full power to change or abolish existing common law remedies or methods or procedures." Lymas Brief p. 58. With all respect, this admission, which is a correct statement of the law, should end any further inquiry into Lymas' cross-appeal.

Section 11-1-60(2) is no different in kind from a large number of other State statutes that alter or eliminate then existing common law claims, defenses, or remedies; impose limitations of liability or limitations on damages for certain types of injuries; or establish periods of limitations or repose. This Court has uniformly upheld these types of statutes as a proper exercise of the Legislature's police power under the Mississippi Constitution.

Section 11-1-60(2) is no different from numerous other statutes adopted by the Legislature that establish as a matter of law the maximum amount of damages that a jury can award for a particular type of injury. In *Walters v. Blackledge*, 220 Miss. 485, 71 So. 2d 433 (1954), and *Wells by Wells v. Panola County Board of Education*, 645 So. 2d 883 (Miss. 1994), the Mississippi Supreme Court expressly rejected the same types of legal attacks that Lymas makes here to statutory schemes that placed legal limits on the total amount of damages recoverable for certain injuries. The Court's analysis in those two decisions applies with full force here and forecloses further inquiry into the constitutional validity of Section 11-1-60(2) as infringing on Lymas' right to trial by jury. The Seventh Amendment does not apply to proceedings in state court, and Lymas' reliance on that provision has no merit as well.

The remedy clause of Section 24 of the State Constitution addresses legal injury or standing. It does not create or address substantive claims or remedies, and thus Section 11-1-60(2) does not violate the remedy clause. In any event, Section 11-1-60 does not deprive Lymas

of a legal remedy; it simply limits the total amount of recovery of non-economic damages, which are by their very nature inherently subjective, to $1,000,000.00. In addition, Section 11-1-60(2) is plainly substantive rather than procedural in nature, and thus does not violate the authority of the State judiciary under the separation of powers provisions of the State Constitution.

Lymas approaches this Court as though he has an individual liberty interest or entitlement to any amount of non-economic damages awarded by a jury. This is quite simply not the case. It is beyond cavil that the State Legislature may alter or repeal the common law. *Clark v. Luvel Dairy Prods., Inc.*, 731 So. 2d 1098, 1105 (Miss. 1998) (collecting cases). It has long been "well settled that there is no vested right in any remedy for torts yet to happen, and except as to vested rights a state legislature has full power to change or to abolish existing common law remedies or methods of procedure." *Walters, supra; followed, Anderson v. Fred Wagner & Roy Anderson, Jr., Inc.*, 402 So. 2d 320, 324 (Miss. 1981). Lymas' tort claim is based on an incident that took place on January 26, 2007, and thus it arose more than 2 years after the effective date of Section 11-1-60(2). Lymas does not have a vested interest or right in any claim, remedy, or rule of law that could be affected by the statute. Accordingly, Section 11-1-60(2) is constitutional, and the trial court correctly applied Section 11-1-60 to limit Lymas' recovery of non-economic damages to $1,000,000.00.

LEGAL ARGUMENT

I. Lymas Can Not Meet His Burden To Show Beyond a Reasonable Doubt That Section 11-1-60(2) Is Unconstitutional.

The standard of review is well established. "In determining whether an act of the Legislature violates the Constitution, the courts are without the right to substitute their judgment for that of the Legislature as to the wisdom and policy of the act and must enforce it, unless it appears beyond all reasonable doubt to violate the Constitution." *Albritton v. City of Winona*,

181 Miss. 75, 178 So. 799, 803 (1938). As this Court reviews the statute,

> [a]ll doubts are resolved in favor of the constitutionality of the statute. . . . If it is susceptible of two interpretations, one in favor of its constitutionality and the other against, it is the duty of the courts to uphold it.

Natchez & S. R.R. v. Crawford, 99 Miss. 697, 55 So. 596, 598 (1911).

To this end, "the Court should not attribute to the legislature a design to ignore constitutional limitation on their power to legislate." *Miss. State Tax Comm'n v. Brown,* 188 Miss. 483, 193 So. 794, 797-98 (1940). The State Legislature is "understood to have knowledge of the decisions existing at the time of their enactment and not be held to anticipate that the courts would afterwards change their decisions. Laws are presumed to be passed with deliberation, and with full knowledge of all existing laws on the subject, and it will be held reasonable to conclude that in passing a statute it was enacted with full knowledge of all such laws." *Id.* Under these standards, Section 11-1-60(2) is clearly within the power of our State Legislature and does not violate the constitutional rights of Lymas.

II. As This Court Has Previously Held, the State Legislature Has the Constitutional Authority To Place a Legal Limit on the Amount of Damages To Be Recovered in Personal Injury Actions.

Section 11-1-60(2)(b) places a limitation of $1,000,000.00 on the amount of non-economic damages to be awarded by the "trier of fact" in certain tort actions "in the event the trier of fact finds the defendant liable . . . ." *See* Miss. Code § 11-1-60(2)(b) (2009); attached at Addendum A. The statute further provides:

> The trier of fact shall not be advised of the limitations imposed by this subsection (2) and the judge shall appropriately reduce any award of noneconomic damages that exceeds the applicable limitation.

Miss. Code § 11-1-60(2)(C) (2009). The law became effective September 1, 2004. *See* Miss. Laws ch. 1, § 2 (1st Ex. Sess. 2004), *codified at,* Miss. Code § 11-1-60(2) (2009).

The "legislative power of this state shall be vested in" the Legislative Department. *See* Miss. Const. § 33 (1890). This includes the power to enact all "necessary and proper laws," *State v. J.J. Newman Lumber Co.,* 102 Miss. 802, 59 So. 2d 923, 925 (1912) (rejecting *Lochner*-era analysis then used by United States Supreme Court and upholding state laws establishing maximum 10-hour work day). In exercising its police powers, the Legislature has "very large authority and discretion as to the recognition of public needs." *Tatum v. Wheeless,* 180 Miss. 800, 178 So. 95, 101 (1938).

Our State Constitution does not grant specific legislative powers; it only limits them. *Moore v. Grillis,* 205 Miss. 865, 39 So. 2d 505, 509 (1949). No provision of the State Constitution prohibits the Legislature from addressing the subject matter of the statute at issue. Thus, Section 11-1-60(2)(b) is clearly within the legislative power granted by the State Constitution. The statute is no different in kind from a large number of other State statutes that alter or eliminate then existing common law claims, defenses, or remedies;[20] impose limitations of liability;[21] impose limitations on compensatory or exemplary damages for certain types of

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[20] ***Statutes That Alter or Eliminate Common Law Claims, Defenses or Remedies*** - *E.g., In Interest of B.D.,* 720 So. 2d 476 (Miss. 1998) (statute allowing restitution against parents for acts of children without showing of fault by parents was rationally related to legitimate governmental purpose, and was valid expression of state's police power); *Robinson v. Stewart,* 655 So. 2d 866 (Miss. 1995) (codified sovereign immunity constitutional; it is legislative branch's prerogative to address limitations upon suits filed against government entities); *Wells by Wells v. Panola County Bd. of Educ.,* 645 So. 2d 883, 888 (Miss. 1994) (State Accident Contingent Fund Law constitutional); *Walters v. Blackledge,* 220 Miss. 485, 71 So. 2d 433 (Miss. 1954) (Workers Compensation Act constitutional); *Hines v. McCullers,* 121 Miss. 666, 83 So. 734 (1920) (Wrongful Death Statute, which abolishes common law defense of contributory negligence of surviving beneficiary of estate in wrongful death action brought by estate, constitutional); *Natchez & S. R.R. v. Crawford,* 99 Miss. 697, 55 So. 596, 598 (1911) (State Comparative Negligence Statute which abolishes common law defense of contributory negligence constitutional).

[21] ***Statutes That Limit Liability*** - *E.g.*, Miss. Code § 41-9-83 (2009) (limiting recovery in civil actions in connection with preparation, preservation and destruction of hospital records to actual damages); *id.* § 41-41-79 (limiting recovery in civil actions in connection with Abortion Complication Reporting Act to actual damages); *id.* § 71-7-23 (limiting recovery for violation of drug and alcohol testing of employees statutes to compensatory damages; allowing recovery of attorney's fees if knowing

injuries;[22] or establish periods of limitations or repose.[23] When called upon to do so, this Court has uniformly upheld these types of statutes as a proper exercise of the Legislature's police power under the State Constitution and therefore as not infringing upon the State or Federal constitutional rights of a citizen who has filed an action in tort or contract in state court.

In May of 2001, this Court held for the first time that hedonic damages, or damages for the loss of enjoyment of life, are separately compensable from damages for pain and suffering. *See Kansas City S. Rwy. v. Johnson,* 798 So. 2d 374, 380-81 (Miss. 2001). Within six months, in October of 2001, a Holmes County Circuit Court jury awarded $25 million apiece to six

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or reckless violation of Statutes occur); *id.* § 73-25-38(2) (2009) (licensed physician, physician assistant, or certified nurse practitioner who volunteers services in response to emergency liable only for gross, willful or wanton acts of negligence); *id.* § 75-7-309 (contractual limitation of common carrier's liability for damaged goods except where carrier converts goods to its own use); *id.* § 81-22-23 (limiting recovery in civil action against debt management service provider for unfair, unconscionable or deceptive practices to actual damages plus costs and fees); *id.* § 83-7-23(9)(d)(10) (actuary liable for damages to any person, other than insurance company and commissioner, only in cases of fraud or willful misconduct in connection with opinion regarding sufficiency of insurance company's reserves); *id.* § 83-30-15(4) (director, officer, employee, member or volunteer of society serving without compensation liable for damages only for acts or omissions that involve willful or wanton misconduct).

[22] For examples of Mississippi statutes that cap compensatory damages or provide for liquidated damages, see cases cited at footnote 24, *infra.*

Statutes That Cap Punitive Damages Or Other Fines And Penalties In Civil Actions - e.g., Miss. Code § 11-1-65(3) (2009) (imposing caps on punitive damage awards based on net worth or size of company); *id.* § 19-25-45 (limiting damages for omission of monetary responsibilities by sheriff to money due upon execution or attachment plus 25% of that amount); *id.* § 69-49-1 (limiting damages for willful destruction of field crops to twice the market value of crop prior to destruction plus twice actual damages); *id.* § 73-22-3 (setting cap of actual damages plus $2,500.00 per incident for violation of statute governing licensing and regulation of practice of orthotics and prosthetics); *id.* § 75-23-41 (setting cap of treble damages for egregious violation of statute prohibiting sale of cigarettes intended for export); *id.* § 89-8-21 (limiting damages for unlawful retention of security deposit by landlord to $200.00 in addition to actual damages); *id.* § 95-5-10(1) (imposing cap of double fair market value of trees, plus reasonable cost of reforestation, not to exceed $250.00 per acre, on damages for cutting down or killing trees).

[23] ***Statutes That Establish Limitations Periods*** - *Townsend v. Estate of Gilbert,* 616 So. 2d 333 (Miss. 1993) (Miss. Code § 15-1-25 (1972), providing shorter limitations period for claims against estates than general limitations period, is constitutional); *Anderson v. Fred Wagner & Roy Anderson, Jr., Inc.,* 402 So. 2d 320, 324 (Miss. 1981) (Miss. Code § 15-1-41 (2009), statute of repose that bars claims against architects and builders 10 years after building is completed is constitutional); *accord, Fluor Corp. v. Cook,* 551 So. 2d 897, 898 (Miss. 1989) (exemption for wrongful death actions in Section 15-1-41, statute of repose for suits against architects and builders, is constitutional).

asbestos plaintiffs; the jury's award was **solely** for non-economic damages, with the plaintiffs testifying that they had never missed a day of work in their life and had had no restrictions placed on their daily activities. *See 3M Co. v. Johnson,* 895 So. 2d 151, 154, 155-56 (Miss. 2005). The State Legislature soon enacted legislation overruling *Kansas City S. Rwy., supra. See* Miss. Laws ch. 4, § 10 (3d Ex. Sess. 2002), *codified at* Miss. Code § 11-1-69 (2009). The State Legislature also adopted Section 11-1-60 as a part of its much publicized, much debated ongoing efforts over the course of three decades to address the broad subject of tort reform.

Section 11-1-60(2) places no limitation on a tort victim's right of recovery of "actual economic damages," that is, those "objectively verifiable pecuniary damages" that may be proven in a personal injury or property damage action. *See* Miss. Laws ch. 2, § 7 (3d Ex. Sess. 2002). As originally enacted, Section 11-1-60 placed a statutory cap on non-economic damages in all health care provider malpractice actions. *See* Miss. Laws ch. 2, § 7 (3d Ex. Sess. 2002). The Legislature defined "noneconomic damages" as

> "Noneconomic damages" means subjective, nonpecuniary damages arising from death, pain, suffering, inconvenience, mental anguish, worry, emotional distress, loss of society and companionship, loss of consortium, bystander injury, physical impairment, disfigurement, injury to reputation, humiliation, embarrassment, loss of the enjoyment of life, hedonic damages, other nonpecuniary damages, and any other theory of damages such as fear of loss, illness or injury. The term "noneconomic damages" shall not include punitive or exemplary damages.

Miss. Laws ch. 2, § 7 (3d Ex. Sess. 2002), *codified at,* Miss. Code § 11-1-60(1)(a) (2009). The Legislature later amended Section 11-1-60 to add the provision at issue on Lymas' cross-appeal. *See* Miss. Laws ch. 1, § 2 (1st Ex. Sess. 2004), *codified at,* Miss. Code § 11-1-60(2) (2009).

Notably, neither Lymas nor Amicus Magnolia Bar Association argues that Section 11-1-60(2) is so arbitrary or capricious as to be without a rational purpose or beyond the lawful police power of the State Legislature. To the contrary, the statute's limitation on non-economic

damages serves several salutary purposes.

Section 11-1-60(1)(a) expressly recognizes that the types of damages that fall within the category of "non-economic damages" - such as "inconvenience, mental anguish, worry, . . . bystander injury, . . . humiliation, embarrassment, loss of enjoyment of life, hedonic damages" - are so "subjective" in nature and subject to such vague, amorphous standards as to defy any rational fact finder and to escape any form of meaningful judicial review. Long before it adopted Section 11-1-60, the State Legislature had enacted numerous other state statutes that place a legal limit on the amount of *economic* damages that are recoverable in certain types of actions, either through a cap or as liquidated damages.[24] A common thread among these statutes is that the

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[24] ***Statutes That Cap The Amount Of Recoverable Compensatory Damages*** - *E.g.*, Miss. Code § 11-7-165 (2009) (limiting damages awarded in civil action against person who embezzles from vulnerable adult to treble damages, plus other damages); § 11-33-85 (imposing cap on damages recovered against sureties in wrongful attachment to penalty set forth in bond); *id.* § 11-46-15 (imposing caps of $50,000.00, $250,000.00, or $500,000.00, depending on the date of the act or omission giving rise to the cause of action, on damages recoverable against municipalities under State Tort Claims Act); *id.* § 37-11-53 (imposing cap of $20,000.00 on damages recoverable by school district for destruction of property by minor); *id.* § 83-58-15 (breach of warranty damages under New Home Warranty Act shall not exceed the purchase price of home); *id.* § 93-13-2 (imposing cap of $5,000.00 for damages recoverable by property owner for damage caused by ward).

Statutes That Provide For Liquidated Damages - *See, e.g.*, Miss. Code § 7-7-204 (2009) (providing for liquidated damages of $5,000.00 in addition to unearned income plus interest if paid intern fails to work at Office of State Auditor for period required by contract); *id.* § 25-53-51 (requiring that Information Confidentiality Officers with Department of Information Technology Services enter into bond of minimum of $5,000.00 conditioned to pay full amount as liquidated damages to person about whom confidential information is wrongfully disclosed); *id.* § 27-19-155 (requiring license plate vendor to enter into bond equal to amount of contract to be forfeited as liquidated damages for failure to comply with contract); *id.* § 27-104-25 (requiring that amount owed, plus liquidated damages of 25% of amount, be paid by responsible agency officer for obligations or indebtedness incurred contrary to provisions of statute); *id.* § 29-1-47 (providing that portion of purchase price paid by purchaser for state forfeited tax land be forfeited to state as liquidated damages on cancellation of contract of sale); *id.* § 29-3-165 (requiring that successful bidder on certain revenue bonds forfeit good faith check, which shall be at least 2% of the par value of the bonds offered for sale, as liquidated damages for failure to purchase bond pursuant to bid and contract); *id.* § 31-19-25 (same); *id.* § 37-101-291 (providing for liquidated damages of $5,000.00 in addition to payment of unearned paid leave plus interest if recipient of paid healthcare educational leave fails to work for required period of time with state health institution); *id.* § 37-101-292 (providing for liquidated damages of $5,000.00 in addition to payment of unearned paid leave plus interest if recipient of paid civil engineering educational leave fails to work for required period of time with Department of Transportation); *id.* § 37-101-293 (providing for liquidated damages of $2,000.00 in

criteria for the amount of damages to be awarded is either wholly subjective and thereby difficult to review, or the time and effort in establishing the proper amount of damages is so cumbersome and time consuming, that the Legislature chose to set the amount of damages as a matter of law. These statutes can be seen to facilitate compensation once liability has been established and to reduce the attendant burdens and expenses related to the issues otherwise placed on the litigants and the entire judicial system.

The limitations provision in Section 11-1-60(2) also enables individuals and businesses to make better informed risk assessment decisions in connection with purchases of real property, goods, and services, asset management, estate planning, personal careers, and business strategies. A simple example is that the statute can help inform an individual about the need for purchasing umbrella insurance, and in what amounts, or the owners of a business about the costs associated with offering a new product or service. The statute also provides casualty and property liability insurers with the ability to improve the predictability of the amount of damages that can be awarded for personal injury claims made against policies issued in Mississippi and for the purpose of loss planning in risk assessment for premium purposes. Thus the statute may also serve to foster the settlement of personal injury actions since all parties have more objective information about the permissible range of lawful verdicts, thereby producing the more prompt

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addition to payment of unearned paid leave plus interest if recipient of paid educational leave fails to work for required period of time with state agency); *id.* § 41-9-37 (providing for liquidated damages of $5,000.00 in addition to payment of unearned paid leave plus interest if recipient of paid educational leave provided by hospital fails to work for required period of time at sponsoring hospital); *id.* § 75-41-15 (providing that liquidated damages of $100.00 per bale for first five bales and $10.00 for each successive bale thereafter ginned a day by chain operator be awarded to persons damaged by chain operators of cotton gins who engage in prohibited trade practices); *id.* § 79-19-33 (allowing agricultural co-operative marketing associations to recover liquidated damages in an amount set by bylaws from member who breaches or threatens breach of certain provisions of contract); *id.* § 79-19-59 (providing that agricultural co-operative marketing association that recovers judgment as plaintiff in replevin for wrongful possession of property by member of association may recover sum equal to damages recoverable as liquidated damages under marketing agreement for breach of marketing agreement).

resolution of legal actions and reducing the case load of the State judiciary. Finally, the statute also has the ancillary purpose of enhancing the availability of professional health care and improving the business climate of the State by making it a more attractive place for professionals and businesses to operate, thereby creating greater employment opportunities and attracting more casualty and property liability insurers to offer their insurance products in the State. In short, any one of several plausible explanations supports the State Legislature's enactment of the statute.

Contrary to the argument of counsel for Lymas, our State legislature and others have historically enacted such statutes. Their validity has not been challenged or called into question as beyond the police power of a state legislature, even in many of the cases or secondary authorities cited by Lymas.[25] It has long been "well settled that there is no vested right in any remedy for torts yet to happen, and except as to vested rights a state legislature has full power to change or to abolish existing common law remedies or methods of procedure." *Walters v. Blackledge*, 220 Miss. 485, 71 So. 2d 433, 446 (1954), *followed, Anderson v. Fred Wagner & Roy Anderson, Jr., Inc.*, 402 So. 2d 320, 324 (Miss. 1981). Lymas' tort claim is based on an incident that took place on January 26, 2007; thus it arose more than 2 years after the effective date of Section 11-1-60(2). Lymas does not have an alleged vested interest or right in any claim,

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[25] In his Brief at pp. 53 & 54, Lymas quotes from *Illinois Cent. R.R. v. Barron,* 72 U.S. 90, 105 (1866), for the so-called proposition that "there can be no fixed measure of compensation for the pain and anguish of body and mind." Yet *Barron* involves a state statute that placed a $5,000.00 cap on the amount of damages that the jury was able to award in a wrongful death action. The constitutionality of this statutory cap was not at issue. Elsewhere Lymas quotes Professor McCormick in such a way as to imply that *only* a jury can determine the amount of damages to be awarded for a particular injury, Lymas Brief p. 54 & n. 17, citing Charles T. McCormick, Damages 24 (1935). In reviewing the historical development of the law of damages at common law, Professor McCormick reaches no such conclusion, and he makes it clear that the amount of damages that a jury might award for a particular injury has been based on the trial court's instructions of the law as established either by statute or other substantive legal principles such as the common law. For example, Professor McCormick explains how various States have enacted Wrongful Death Acts that place a cap on the amount of damages that might validly be awarded by a jury without questioning their constitutional validity. *See* Charles T. McCormick, Damages 358-59 (1935).

remedy, or rule of law affected by the State Legislature's enactment of the statute.

III. Section 11-1-60(2) Does Not Interfere with the Jury's Function of Weighing Evidence and Finding Facts; Thus Section 11-1-60(2) Does Not Infringe the Right to Trial by Jury.

Lymas erroneously argues that Section 11-1-60(2) violates his right to a jury trial under the Seventh Amendment to the United States Constitution *and* Section 31 of the State Constitution.[26] He makes this argument as though the two rights are equivalent interchangeable substitutes, seamlessly moving from precedents under Section 31 to precedents under the Seventh Amendment and then back to Section 31. Lymas fails to mention and thus misapprehends this Court's Seventh Amendment jurisprudence.

The Seventh Amendment guarantees a jury trial "[i]n Suits at common law . . . in any Court of the United States" where the amount in controversy exceeds $20.00. U. S. Const. Seventh Amend. As shown on its face, the Seventh Amendment applies to civil actions filed in federal court. It does **not** apply to Lymas' action filed and tried in Humphreys County Circuit Court. *E.g., City of Durant v. Laws Const. Co.,* 721 So. 2d 598, 607 (Miss. 1998) ("[T]his Court has held that state courts are not controlled by the Seventh Amendment."); *see Minneapolis & St. L. R.R. v. Bombolis,* 241 U.S. 211, 217 (1916). "The Seventh Amendment of the federal Constitution is addressed alone to the federal courts. It has no application to the state courts." *Gulf & S.I.R.R. v. Hales,* 140 Miss. 829, 105 So. 458, 460-61 (1925).

Section 31 of the State Constitution provides that "[t]he right of trial by jury shall remain inviolate . . . ." Lymas fails to cite any Mississippi appellate court decision holding that a legislatively enacted cap on the amount of damages recoverable for a civil wrong violates

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[26] On several occasions, Lymas Brief provides *purported* quotations from different appellate opinions which are, in fact, from the summary of the counsel's arguments or a headnote preceding the Court's opinion rather than the opinion itself. *Compare* Lymas Brief on pp. 51-52, *with Lewis v. Garrett's Adm'rs*, 6 Miss. (5 Howard) 434 (Miss. Err. App. 1841); *S.R.R. v. Kendrick*, 40 Miss. 374 (Miss. Err. App. 1866); and *City of Savannah v. Cullens*, 38 Ga. 334 (1868).

Section 31 of the State Constitution. Lymas admits that the only two times the Mississippi Supreme Court has addressed this issue, *see Wells by Wells v. Panola County Bd. of Educ.*, 645 So. 2d 883 (Miss. 1994), and *Walters v. Blackledge*, 220 Miss. 485, 71 So. 2d 433 (1954), the Court upheld the statutory damages limitations provisions at issue.[27]

Lymas also rightly admits that "[t]here can be no doubt that the legislature has the full power to change or abolish existing common law remedies or methods or procedure." Lymas Brief p. 58. With all respect, this admission, which, is a correct statement of the law, should end any further inquiry into Lymas' cross-appeal. Section 11-1-60(2) is nothing more than a statutory enactment that determines as a matter of law the maximum amount of damages recoverable for non-economic injury. As such, it is no different from a host of similar statutes enacted by the Legislature where the regulation and/or review of the measure of the damages addressed is difficult to determine. A party's right to trial by jury is not violated when the Legislature determines that an injured party's right to be compensated for a particular future injury shall be limited to a particular amount.

Lymas attempts to distinguish *Wells by Wells, supra*, on the grounds that the plaintiff's right to recover against the sovereign was unavailable at common law. This is correct but Lymas has himself failed to show either below or on appeal that a party's right to recover for personal injuries due to another party's act of negligence was likewise available at common law. For that matter, Lymas has also failed to show that a party's right to recover for personal injuries for the willful or criminal conduct of a third party not under the control of the alleged tortfeasor was

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[27] *See Wells by Wells v. Panola County Bd. of Educ.*, 645 So. 2d 883 (Miss. 1994) (upholding the Mississippi Accident Contingent Fund Statute under a Section 31 attack since the plaintiff's personal injury claim for negligence allegedly caused by the public school district's bus driver filed against the county school board was not available at common law); and *Walters v. Blackledge*, 220 Miss. 485, 71 So. 2d 433, 445 (1954) (upholding the Mississippi Workers' Compensation Act under a Section 31 attack since the statutory enactment 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").

also available at common law.

It is horn book law that the general tort of negligence, which is the gravamen of Lymas' claim, was not recognized at common law or even when Mississippi first became a State in 1817. The tort was first recognized after 1825 in the United States, and it did not become generally recognized in our country until after 1850.[28] Thus, since the tort did not exist at common law, Section 31 does not inhibit the ability of the State Legislature to adopt laws that affect the contours of this tort of negligence. Indeed, as already seen at page 28 and note 20, *supra,* the State Legislature has adopted numerous statutes that restrict the remedies available in negligence claims without violating Section 31, its most famous example being Miss. Code §§ 11-7-15 and 11-7-17 (2009), our State's comparative negligence statutes. This enactment, the first of its type in the nation, abolished the common law defense of contributory negligence and was upheld as constitutional under Section 31 in *Natchez & S. R.R. v. Crawford,* 99 Miss. 697, 55 So. 596, 598 (1911).

Lymas attempts to distinguish *Walters, supra,* on the grounds that when enacting the Workers Compensation Act, the Legislature had **fully** abolished or abrogated an employee's

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[28] Negligence began to take shape as a separate tort in the United States only after 1825. *See* W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, & David G. Owen, Prosser & Keeton on Torts 160 & n. 1 (5th ed. 1984); Percy H. Winfield, *The History of Negligence in the Law of Torts*, 42 L.Q. Rev. 184, 195-96 (1926); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359, 365-70 (1951); Wex S. Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 La. L. Rev. 1, 29-30, 32, 34-37, 39-40 (1970); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 Yale L.J. 1717, 1727-34 (1981); E. F. Roberts, *Negligence: Blackstone to Shaw to? An Intellectual Escapade in a Tory Vein*, 50 Cornell L.Q. 191, 200-02 (1965); Samuel T. Donnelly, *The Fault Principle: A Sketch of its Development in Tort Law During the Nineteenth Century*, 18 Syracuse L. Rev. 728, 728-30 (1967).

One of the cases relied on by Lymas, *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636. 771 P. 2d 711, 718-719 (1989), holds that the right of jury trial attaches to the common law when the State of Washington was admitted in 1889 to the Union, and correctly concludes that the tort of negligence was recognized by then. Another case relied on by Lymas, *Lakin v. Senco Products, Inc.,* 987 P.2d 463, 473 (Ore.), *modified on rehearing*, 987 P.2d 476 (1999), which examines the common law as of 1857 when Oregon was admitted to the Union, is to the same effect.

common law right of recovery for personal injuries arising from the negligent acts of her employer **and** the attendant defenses available to the employer and replaced the common law right and defenses **altogether** with an entirely new statutory scheme. This was obviously not the case. The Act as adopted applied only to those employers who had a minimum of eight employees, which is one of several reasons why employers attacked the constitutionality of the Act on equal protection grounds among others.[29] In addition, employers who failed to obtain workers compensation coverage became subject not only to the fines and other penalties imposed by the Mississippi Workers Compensation Act but also to an ordinary negligence claim without benefit of the limited indemnity schedule available under the Act.[30] Thus, it is incorrect to say that an employee's right of recovery against the employer in negligence was abrogated altogether.

As the *Walters* Court explained, the correct inquiry is whether legislation statute is an appropriate exercise of the Legislature's police power. *Walters,* 71 So. 2d at 444-45. The people having expressly given this police power to their duly elected legislators, the "'liberty of the citizen does not include among its incidents any vested right to have the rules of law remain unchanged for his benefit.'" *Walters,* 220 Miss. at 509, 71 So. 2d at 441 (quoting *Middleton v. Tex. Power & Light Co.,* 249 U.S. 152, 163 (1919)). Neither the Mississippi nor the United States Constitutions "'forbid the creation of new rights, the abolition of old ones recognized by the common law, to attain a permissible legislative object,'" *Walters,* 71 So. 2d at 441(quoting *Silver v. Silver,* 280 U.S. 117, 122 (1929)), including such objects as "the evils of vexatious

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[29] *See Walters,*71 So. 2d at 437-38, 442-43 (1954).

[30] *See* Miss. Laws ch. 354 (1948), *as amended,* Miss. Laws ch. 412 (1950). Today, the Workers' Compensation Act applies to employers with fewer than five employees. Miss. Code § 71-3-5 (2009). If a covered employer fails to procure workers compensation insurance, the employee has the option to sue for negligence or file a suit under the Act. Miss. Code § 71-3-9 (2009).

litigation . . . [which is] for legislative determination, and, . . . not the concern of courts." *Silver,* 280 U.S. at 122.

Quoting Section 31 of the Mississippi Constitution that the "right to trial by jury shall remain inviolate," Lymas argues that this Court should apply and follow the same interpretation placed on "inviolate" as the Oregon Supreme Court did in *Lakin v. Senco Products, Inc.,* 987 P.2d 463, 473 (Ore.), *modified on rehearing,* 987 P.2d 476 (1999), under the 1857 Oregon Constitution. In *Lakin,* the Oregon Supreme Court found that "inviolate" meant "not violated; free from violation or hurt of any kind; secure against violation or impairment" and, after a tortured legal analysis, held that the Oregon Legislature's statutory $500,000.00 cap on non-economic damages violated the plaintiff's right to trial by jury under the Oregon Constitution. *Lakin,* 987 P.2d at 468, 474.

Before turning to the Mississippi Supreme Court's prior interpretations of the term "inviolate" under Section 31, which employ a pragmatic construction of the term and rightly reject the artificial, wooden gloss that the *Lakin* Court placed on the term, a few points should be made about *Lakin* as a precedent. First, *Lakin* assumed, without examining the issue, that a negligence action for personal injuries was available at common law in 1857. As already shown, the negligence action was not generally recognized at common law in this country until well after the admission of Mississippi to the Union and the adoption of the first Mississippi Constitution. Second, *Lakin*'s discussion of the term "inviolate," while perhaps interesting to some, can only fairly be characterized as dicta: the Oregon Supreme Court has since refused to follow *Lakin* on at least four occasions, holding that none of the four Oregon statutes at issue violated the "inviolate" right of trial by jury.[31] Third, numerous other state appellate courts have

[31] *E.g., Hughes v. PeaceHealth,* 344 Ore. 142, 178 P.3d 225, 231-34 (2008) (Oregon statute placing a $500,000 cap on non-economic damages in wrongful death actions does not violate state right to

considered *Lakin,* disagreed with its reasoning, and refused to follow its holding.[32] For these reasons, *Lakin* is not persuasive authority for the issue at hand.

In *City of Jackson v. Clark,* 118 So. 350, 353-54 (Miss. 1928), the Mississippi Supreme Court expressly refused to adopt an "absolutist" construction of the term "inviolate," noting that Section 31 "does not mean that it shall be totally immune from all reasonable regulations. Any reasonable regulation, free from arbitrary and unreasonable provisions regarding the enjoyment of the right, will not be a denial or impairment thereof." *City of Jackson,* 118 So. at 351 (trial court's order finding that the defendant had waived its right to a jury trial by failing to request trial by jury as authorized by state statute when filing its answer did not violate Section 31). The Mississippi Supreme Court did so over the vigorous dissent of Justice Ethridge, who argued that the "inviolate" right of trial by jury under Section 31 meant that it was "free from interference by any department of the government" and "no conditions can be imposed upon the exercise of the right that shall impair its value or usefulness." *City of Jackson,* 118 So. at 353-54 (Ethridge, J., dissenting).

A primary limitation upon the right of trial by jury is that issues of law are for the court while genuine issues of material fact are for the jury, The "inviolate" right granted by Section 31

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trial by jury); *Lawson v. Hoke,* 339 Ore. 253, 119 P.3d 210, 216-17 (2005) (the Oregon statute that precludes awards of non-economic damages altogether to uninsured motorists who bring a suit for negligence action for personal injuries does not violate state right to trial by jury); *DeMendoza v. Huffman,* 334 Ore. 425, 51 P.3d 1232, 1244-45 (2002) (Oregon split-recovery statute that allocates 60 percent of each punitive damages award to the State's Criminal Injuries Compensation Account without advising the jury does not violate state right to trial by jury); and *Jensen v. Whitlow,* 334 Ore. 412, 51 P. 3d 599, 603-04 (2002) (Oregon statute that limits causes of action for a tort committed by an agent of a public body to a cause of action against only the public body and caps the amount of damages recoverable against the public body does not violate state right to trial by jury).

[32] *E.g., Evans ex rel. Kutch v. State,* 56 P.3d 1046, 1051 (Alaska 2002); *Kirkland v. Blaine County Med. Ctr.,* 134 Idaho 464, 4 P.3d 1115, 1120 (2000); *Phillips v. Mirac, Inc.,* 651 N.W.2d 437, 447-48, (Mich. Ct. App. 2002) (Meter, J., dissenting); *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.,* 265 Neb. 918, 663 N.W.2d 43, 75 (2003); *Arbino v. Johnson & Johnson,* 116 Ohio St.3d 468, 880 N.E.2d 420, 451-53 (2007) (O'Donnell, J., dissenting); *Judd v. Drezga,* 103 P.3d 135, 148-50 (Utah 2004) (Starcher, J., dissenting).

does not restrict a trial court's authority to decide as a matter of law that a party is entitled to judgment notwithstanding the verdict, a directed verdict, or a summary judgment. Indeed, it is "the power and duty of the court to set aside verdicts when manifestly against the overwhelming weight of the evidence. That rule has prevailed ever since the establishment of the constitutional judicial system in this state, and existed at the common law." *Faulkner v. Middleton,* 190 So. 910, 910 (Miss. 1939). "[T]he common-law jury, guaranteed by section 31, is a jury with power alone to try issues of fact, and not of law. * * * The court has the power, which cannot be taken from it, to determine the legal sufficiency of the evidence . . . . If the evidence never reaches the point of raising issues of fact to be determined, then there is no question for the jury." *Natchez & S.R.R. Co. v. Crawford,* 55 So. 596, 598-99 (Miss. 1911). Likewise, "[t]here is no violation of the right of trial by jury when judgment is entered summarily in cases where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Towner v. Moore ex rel. Quitman County Sch. Dist.,* 604 So. 2d 1093, 1097-98 (Miss. 1992) (collecting cases).

The proper role of the jury is to weigh the evidence, assess the credibility of the witnesses, and determine the facts based on the law as instructed by the court. Nothing contained in Section 11-1-60(2) interferes with the jury's role. The State Legislature has concluded as a matter of law that no person in our State is entitled to recover more than $1,000,000.00 in non-economic damages in certain personal injury actions. The subject is clearly within the police power of the State Legislature. By creating this cap, Section 11-1-60(2) does not infringe on Lymas' right to have the finder of fact determine if he is entitled to recover non-economic damages when a genuine issue of material fact exists as to this issue. Similarly, it does not limit either party's right to request an additur to or a remittitur of the damages awarded

if either side believes that it is entitled to such relief, subject of course to the limitation of $1,000,000.00 contained in the statute.

Contrary to Lymas' argument, Section 11-1-60's prohibition against telling the fact-finder about the existence of the statute or the amount of the cap does not make the finder of fact's decision advisory. By including this prohibition, the Legislature appears to have made the policy decision that the disclosure of the existence and the amount of the cap would be prejudicial to the legal rights of the defendant. For the same reasons, the Mississippi appellate courts followed a similar practice when the Mississippi Supreme Court adopted the common law rule that a defendant was entitled to a monetary credit whenever the plaintiff had settled with another joint tortfeasor before trial. When retiring to render its verdict, the jury was not entitled to know if the plaintiff had previously settled with a joint tortfeasor or the amount of the settlement; if the jury awarded the plaintiff damages, the trial judge then reduced the amount awarded by the amount of the settlement that the plaintiff received from the other joint tortfeasors. *See, e.g., Pickering v. Industria Masina I Traktora,* 740 So. 2d 836, 841 (Miss. 1999). Section 85-5-7(5), which addresses the apportionment of liability among joint tortfeasors, adopts a similar approach by providing that "[i]n actions involving joint tortfeasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault without regard to whether the joint tortfeasor is immune from damages." Miss. Code § 85-5-7(5) (2009).

Neither one of these components of Section 11-1-60 interferes with a party's right of trial by jury because the fact finder still determines whether the alleged injured party is entitled to recover damages. The statute simply limits the amount to be recovered as opposed to eliminating the right of recovery altogether, which is clearly within the power of the Legislature to do. Lymas' arguments are wholly insufficient to establish beyond a reasonable doubt that

Section 11-1-60(2) violates the right to trial by jury under Section 31.

IV. Section 11-1-60(2) Does Not Violate the Separation of Powers Provisions of the State Constitution.

Lymas erroneously contends that Section 11-1-60 violates the separation of powers provisions of the State Constitution, Miss. Const. §§ 1-2 (1890), arguing that "the amount of damages has long been in the province of the judiciary at common law" and that Section 11-1-60 "usurps the court's inherent authority" to order an additur or a remittitur or conforming the jury's award of damages to the evidence. Lymas Brief p. 63. This argument has no merit.

The erroneous nature of the first half of this argument has already been addressed. The Legislature has the constitutional authority to modify, repeal, or abolish the common law, including common law rules that address the subject of compensatory damages, *Clark v. Luvel Dairy Prods., Inc.*, 731 So. 2d 1098, 1105 (Miss. 1998), and it has exercised this authority. *See, e.g.*, Miss. Code § 11-1-69 (2009) (restrictions on hedonic damages); Miss. Code § 85-5-7(5) (2009) (establishing legal requirements for the apportionment of damages among joint tortfeasors). The Legislature has the authority to determine as a matter of public policy the maximum amount of damages that are recoverable by an injured party, and, as already seen, it has frequently exercised this power.[33]

The second premise is equally erroneous. Lymas cites *Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1080 (Ill. 1997), for the proposition that a statutory cap on non-economic damages acts as a "legislative remittitur" and thus violates separation of powers principles. The authority to order an additur or remittitur is not "inherent"; that authority is granted *by the Legislature* in Miss. Code § 11-1-55. More fundamentally, nothing in Section 11-1-60 on its face, or as applied by the trial court in this case, encroaches upon the judicial authority of the

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[33] See pp. 27-34, *supra.*

trial court to review the sufficiency or weight of the evidence or to grant an additur to or remittitur of damages as provided in Miss. Code § 11-1-55 (2009). Numerous state supreme courts have considered *Best, supra,* and have expressly rejected its reasoning. *E.g., Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.,* 95 P.3d 571, 581-82 & n.10 (Colo. 2004) (collecting cases).

Two of the four Mississippi cases cited by Lymas - *Southern Railroad v. Kendrick,* 40 Miss. 374 (Miss. Err. App. 1866), and *New Orleans, Jackson, & Great Northern Railroad v. Hurst,* 36 Miss. 660 (Miss. Err. App. 1859) – fail to discuss the issue of separation of powers altogether, much less as applied to a duly enacted statute addressing the subject of damages. As for the other two, *Newell v. State,* 308 So. 2d 71 (Miss. 1975), merely discusses the State Supreme Court's inherent authority to adopt rules of procedure, and *Wimley v. Reid,* 991 So. 2d 135 (Miss. 2008), holds that certain statutory requirements as to the filing of a complaint were unconstitutional because they directly conflicted with procedural rules promulgated by the Mississippi Supreme Court. *Wimley*, 991 So. 2d at 138. Neither the authority nor the procedure by which a trial court may decrease or increase a jury's award is governed by procedural rule; the authority and procedure are controlled by statute – Section 11-1-55. Thus, *Newell* and *Wimley* are inapposite. Whether contained in a statute or established by common law, the legal principles that govern the amount of damages that compensate an injured party for a particular injury are substantive, not procedural, legal rules. As such, they are plainly outside the office and function of the State judiciary's inherent authority to establish rules of procedure and do not encroach upon that authority, which is derived from the separation of powers of the State Constitution.

V. Section 11-1-60(2) Does Not Deprive Lymas of a Remedy by Due Course of Law as Granted by Section 24 of the State Constitution.

Without citing any legal authority to support the proposition, Lymas argues in the most conclusory of terms that Section 11-1-60(2) violates Section 24 of the 1890 State Constitution, which provides in pertinent part that "every person for an injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law," because a cap of $1,000,000.00 "arbitrarily limit[s]" the amount of non-economic damages that he receives. *See* Lymas Brief p. 65. This Court should reject the argument out of hand. "This Court routinely holds an appellant's failure to cite to any legal authority to support her argument will procedurally bar that issue from being considered on appeal." *In re Adoption of Minor Child,* 931 So. 2d 566, 578 (Miss. 2006).

Lymas approaches this Court as though he has an individual liberty interest or entitlement to any amount of non-economic damages awarded by a jury. This is simply not the case. It is beyond dispute that the State Legislature may alter or repeal the common law. *Clark v. Luvel Dairy Prods., Inc.,* 731 So. 2d 1098, 1105 (Miss. 1998) (collecting cases).[34] As this Court's precedents firmly establish, it is clearly within the police power of the State Legislature to adopt a statutory scheme that limits the amount of damages a party may recover for personal injuries without violating Section 24. *Wells by Wells,* 645 So. 2d at 890-92 (Section 24 "has not been construed as guaranteeing limitless or absolute recovery for injury"); *Brown v. Estess,* 374 So. 2d 241, 242 (Miss. 1979) (corporate officer is immune from liability under Workers Compensation Act in a common law tort action brought against him by the survivors of a deceased employee

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[34] Addressing this issue, the *Clark* Court wrote:

> That the common law . . . was adopted to remain perpetual, unaltered, and unalterable, and not to be tempered to our habits, wants and customs, . . . was never . . . the wisdom of those who established our fundamental law. . . . Many of its rules are now vexatious, and have become unnecessary, and unfitted to our occasions, and are properly repealed when they are found to obstruct the current of justice or the interests of the whole people.

731 So. 2d at 1105 (quoting *Noonan v. State,* 9 Miss. 562, 573, 1 S. & M. 562 (1844)).

because of his alleged negligence that contributed to the employee's death during the course of his employment); *Walters v. Blackledge*, 220 Miss. 485, 71 So. 2d 433 (1954).

Section 24 is concerned with the concept of "legal injury" or standing, and it does not create a substantive remedy. *Compare State v. McPhail*, 180 So. 387, 392 (Miss. 1938), *with Fordice v. Thomas*, 649 So. 2d 835, 840 (Miss. 1995). As is readily apparent, Section 11-1-60(2) does not deprive Lymas of standing or of a remedy; it merely places a legal limit on the amount of money recoverable for a certain type of damages and thus passes muster under Section 24.

VI. The Overwhelming Majority of State Supreme Courts That Have Examined the Issue Have Found That Statutes Placing Caps on Non-Economic Damages Are Constitutional Under Provisions Similar to Those Relied Upon by Lymas.

Including *Lakin v. Senco Products, Inc.*, 987 P.2d 463, 473 (Ore.), *modified on rehearing*, 987 P.2d 476 (1999), Lymas cites decisions from six state supreme courts that have held that a cap on non-economic damages violates the right to trial by jury under those state's constitutions. As already seen, the Oregon Supreme Court has subsequently severely limited *Lakin*.[35] As with *Lakin*, other state supreme courts have refused to follow these five states, and in several instances, their respective state supreme courts have similarly upheld other statutes placing a cap on damages or severely restricted if not overruled the decisions cited by Lymas.[36]

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[35] See page 38 & n. 31, *supra*.

[36] *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991) - ***Alabama Cases*** - *Mobile Infirmary Med. Ctr. v. Hodgen*, 884 So. 2d 801, 813-14 (Ala. 2003) (noting erosion of support for the *Moore* decision but declining to revisit the opinion because the Legislature had, subsequent to *Moore*, chosen to enact a new law capping punitive damages at the greater of three times compensatory damages or $1.5 million rather than adopt limits on both noneconomic and punitive damages awards); ***Other State Cases*** - *Gourley ex rel. Gourley v. Neb. Methodist Health Syst., Inc.*, 265 Neb. 918, 953, 663 N.W.2d 43, 70-77 (2003) (holding statutory cap on damages recoverable in medical malpractice action did not violate principles of equal protection, open courts provisions of State Constitution, state constitutional right to jury trial, or separation of powers); *Evans ex. rel Kutch v. State*, 56 P.3d 1046, 1050-57 (Alaska 2002) (holding statutory caps on noneconomic and punitive damages do not violate right to trial by jury, state

constitution's equal protection clause, substantive due process rights, separation of powers, or right of access to courts); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517, 522 (La. 1992) (Calogero, J., dissenting); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 451-53 (Ohio 2007)(O'Donnell, J., dissenting); *Estate of Verba v. Ghaphery*, 210 W. Va. 31, 552 S.E.2d 406, 413-17 (2001) (Starcher, J., dissenting); *Judd v. Drezga*, 103 P.3d 135, 148-50 (Utah 2004) (Durham, J., dissenting).

Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987) - ***Florida Cases*** - *Sontay v. Avis Rent-A-Car Systs., Inc.*, 872 So. 2d 316, 319 (Fla. Dist. Ct. App. 2004) (statute capping liability of short term vehicle lessors did not deprive plaintiff of benefit of jury trial); ***Other State Cases*** - *Adams By and Through Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 906-07 (Mo. 1992) (statute capping damages does not violate right to open courts, right to trial by jury, or due process); *Edmonds v. Murphy*, 573 A.2d 853, 859 (Md. Ct. Spec. App. 1990); *Evans ex. rel Kutch v. State*, 56 P.3d 1046, 1051 (Alaska 2002); *Estate of Verba v. Ghaphery*, 210 W. Va. 31, 552 S.E.2d 406, 413-17 (2001) (Starcher, J., dissenting); *Phillips v. Mirac, Inc.*, 651 N.W.2d 437, 447-48, (Mich. Ct. App. 2002)(Meter, J., dissenting); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 451-53 (Ohio 2007)(O'Donnell, J., dissenting).

Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997) - ***Other State Cases*** - *Gourley ex rel. Gourley v. Neb. Methodist Health Syst., Inc.*, 265 Neb. 918, 953, 663 N.W.2d 43, 70-77 (2003) (holding statutory cap on damages recoverable in medical malpractice action did not violate principles of equal protection, open courts provisions of State Constitution, state constitutional right to jury trial, or separation of powers); *Kirkland v. Blaine County Med. Ctr.*, 134 Idaho 464, 467- 471, 4 P.3d 1115, 1118-1122 (2000) (holding statutory cap on noneconomic damages did not violate right to jury trial, did not constitute impermissible special legislation, and did not violate separation of powers doctrine); *Evans ex. rel Kutch v. State*, 56 P.3d 1046, 1050-57 (Alaska 2002) (holding statutory caps on noneconomic and punitive damages do not violate right to trial by jury, state constitution's equal protection clause, substantive due process rights, separation of powers, or right of access to courts); *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 168-79, 594 S.E.2d 1, 7-15 (2004) (holding caps do not violate separation of powers or right to trial by jury); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 430-45 (Ohio 2007)(holding that statute limiting noneconomic damages in certain tort actions does not violate Ohio's constitutional right to jury trial, Ohio Constitution's open courts and right to a remedy provisions, due process, or equal protection, and that statute limiting punitive damages in certain tort actions does not violate right to jury trial, due process or equal protection); *Estate of Verba v. Ghaphery*, 210 W. Va. 31, 552 S.E.2d 406, 413-17 (2001) (Starcher, J., dissenting); *Phillips v. Mirac, Inc.*, 685 N.W.2d 174, 193-98, (Mich. 2002)(Cavanagh, J., dissenting).

Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999) - ***Ohio Cases*** - *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 440-41 (Ohio 2007)(holding that statute limiting punitive damages, in certain tort actions, does not violate Ohio's constitutional right to jury trial; *Oliver v. Cleveland Indians Baseball Co. Ltd. P'ship.*, 123 Ohio St. 3d 278, 281, 915 N.E.2d 1205, 1209 (2009) (holding that statutory cap of $250,000.00 on political subdivision's liability for noneconomic compensatory damages did not unconstitutionally restrict the right to jury trial); ***Other State Cases*** - *Evans ex. rel Kutch v. State*, 56 P.3d 1046, 1050-1057 (Alaska 2002) (holding statutory caps on noneconomic and punitive damages do not violate right to trial by jury, state constitution's equal protection clause, substantive due process rights, separation of powers, or right of access to courts); *Estate of Verba v. Ghaphery*, 210 W. Va. 31, 552 S.E.2d 406, 413-17 (2001) (Starcher, J., dissenting); *Phillips v. Mirac, Inc.*, 651 N.W.2d 437, 447-48, (Mich. App. 2002)(Meter, J., dissenting).

Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991) - ***Ohio Cases*** - *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 430-45 (Ohio 2007)(holding that statute limiting noneconomic damages, in certain tort

In any event, those states are in the definite minority on this issue, and legislative enactments imposing caps on non-economic damages have been upheld by state or federal appellate courts in approximately 16 states.[37] In applying its Section 31 precedent, this Court should reach the same conclusion and find that Section 11-1-60(2) is constitutional.

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actions, for all but the most serious injuries, does not violate Ohio's constitutional right to jury trial, Ohio Constitution's open courts and right to a remedy provisions, due process, or equal protection and that statute limiting punitive damages in certain tort actions does not violate right to jury trial, due process, or equal protection.); *Oliver v. Cleveland Indians Baseball Co. Ltd. P'ship.*, 123 Ohio St. 3d 278, 281, 915 N.E.2d 1205, 1209-10 (2009) (holding that statutory cap of $250,000.00 on political subdivision's liability for noneconomic compensatory damages did not unconstitutionally restrict right to jury trial); ***Other State Cases*** - *Phillips v. Mirac, Inc.*, 685 N.W.2d 174, 193-98, (Mich. 2002)(Cavanagh, J., dissenting).

Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989) - **Other State Cases** - *Phillips v. Mirac, Inc.*, 651 N.W.2d 437, 591-92 n.5 (Mich. Ct. App. 2002); *Gourley ex rel. Gourley v. Neb. Methodist Health Syst., Inc.*, 265 Neb. 918, 953, 663 N.W.2d 43, 75 (2003); *Edmonds v. Murphy*, 573 A.2d 853, 859 (Md. Ct. Spec. App. 1990); *Kirkland v. Blaine County Med. Ctr.*, 134 Idaho 464, 469, 4 P.3d 1115, 1120 (2000); *Evans ex. rel Kutch v. State*, 56 P.3d 1046, 1051 (Alaska 2002); *Judd v. Drezga*, 103 P.3d 135, 144 (Utah 2004); *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) (holding caps do not violate separation of powers or right to trial by jury); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 451-53 (Ohio 2007) (O'Donnell, J., dissenting); *Estate of Verba v. Ghaphery*, 210 W. Va. 31, 552 S.E.2d 406, 413-17 (2001) (Starcher, J., dissenting).

[37] *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002).17.010 (2009) – cap of $400,000 or injured person's life expectancy in years multiplied by $8,000, whichever is greater, on non-economic damages for claims arising out of a single injury or death in personal injury or wrongful death actions; when damages are for severe permanent physical impairment or disfigurement, cap is extended to $1,000,000 or person's life expectancy in years multiplied by $25,000, whichever is greater); *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal.), *appeal dismissed*, 474 U.S. 892 (1985) (Cal. Civ. Code § 3333.2 – cap of $250,000 on non-economic damages in medical malpractice cases); *Scholz v. Metro. Pathologists*, 851 P.2d 901 (Colo. 1993) (Colo. Rev. Stat. Ann. § 13-64-302 (1992 Supp.) – cap of $250,000 on non-economic damages in civil actions for damages in tort brought against healthcare institution or healthcare professional *Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571 (Colo. 2004)(Colo. Rev. Stat. Ann. § 13-64-302 (2001) – cap of $250,000 on non-economic damages in civil actions for damages in tort brought against healthcare institution or healthcare professional); *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993)(Fla. Stat. Ann. § 766.207 (Supp. 1998) – cap of $250,000 per incident, calculated on a percentage basis with respect to capacity to enjoy life, on non-economic damages in medical malpractice claims when party requests arbitration, and Fla. Stat. Ann. § 766.209 (Supp. 1998) – cap of $350,000 per incident on non-economic damages awardable at trial in medical malpractice claims where claimant refuses arbitration); *Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115 (Idaho 2000) (Idaho Code Ann. § 6-1603 (1998) – cap of $400,000 on non-economic damages in personal injury actions, to be adjusted in subsequent years; does not apply to actions arising out of willful or reckless misconduct or acts which would constitute a felony under state or federal law); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1992)(La. Rev. State. Ann. § 40:1299.42 - cap of

CONCLUSION

For the forgoing reasons, this Court should reverse and render a judgment in favor of Double Quick, Inc. or it should reverse and remand the case to the Circuit Court for a new trial. In addition, this Court should go ahead and uphold the constitutionality of the $1,000,000.00 cap on non-economic damages contained in Miss. Code § 11-1-60(2) (2009), because of the

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$500,000 on total amount recoverable for all medical malpractice claims for injuries or death of patient, exclusive of future medical care and related benefits); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992) (Md. Code Ann., Courts & Judicial Proceedings § 11-108 – cap of $350,000 on non-economic damages in personal injury actions arising on or after July 1, 1986; *Wessels v. Garden Way, Inc.*, 689 N.W.2d 526 (Mich. Ct. App. 2004)(Mich. Comp. Laws Ann. § 600.2946a – cap of $280,000 on non-economic damages in products liability cases; cap of $500,000 where defective product caused person's death or permanent loss of vital bodily function); *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. Ct. App. 2002)(Mich. Comp. Laws Ann. § 600.1483 – cap of $280,000 on non-economic damages in medical malpractice action, except for certain injuries where cap is increased to $500,000); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (Mo. Ann. Stat. § 538.210 – cap of $350,000 for non-economic damages in medical malpractice actions, adjusted to $430,000 for inflation); *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003)(Neb. Rev. Stat. § 44-2825 (Reissue 1998) –cap of $1,250,000 for any occurrence after December 31, 1992, for total damages recoverable in medical malpractice actions); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007)(Ohio Rev. Code Ann. § 2315.18 - cap of $250,000 or three times economic loss, whichever is greater, for non-economic damages in certain tort actions for all but most serious injuries, with maximum of $350,000 per plaintiff and $500,000 for each occurrence that is basis of action); *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990)(Tex. Rev. Civ. Stat Ann. art. 4590i § 11.02(a) (Vernon Supp. 1991) - cap of $500,000 per damages per defendant in wrongful death healthcare liability claim; *Judd v. Drezga*, 103 P.3d 135 (Utah 2004) (Utah Code Ann. § 78-14-7.1 (2002), - cap of $250,000 on quality of life damages in medical malpractice actions for cause of action arising before July 1, 2001; *Pulliam v. Coastal Emer. Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999) (Va. Code Ann. § 8.01-581.15 – cap of $1,900,000 on total damages in medical malpractice action; *Estate of Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001) (W. Va. Code Ann. § 55-7B-8 (1986) – cap of $1,000,000 on non-economic damages in medical malpractice action; *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989) (Virgin Island law)(V.I. Code. Ann. tit.27, § 166b (1975) – cap of $250,000 on non-economic damages in medical malpractice actions; *Smith v. Botsford Gen. Hosp.*, 419 F. 3d 513 (6th Cir. 2005) (Mich. law)(Mich. Comp. Laws. Ann. § 600.1483 - cap of $280,000 on non-economic damages in medical malpractice action, adjusted annually; *Owen v. United States*, 935 F.2d 734 (5th Cir. 1991) (La. law)(La. Rev. State. Ann. § 40:1299.42 (West Supp. 1991) - cap of $500,000 on total amount recoverable for all medical malpractice claims for injuries or death of patient, excluding necessary expenses).

paramount importance of this issue to the State of Mississippi and the likelihood that this issue will recur on appeal until this Court definitively addresses this issue.

THIS, the 10th day of December, 2009.

Respectfully submitted,

DOUBLE QUICK, INC.

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IN THE SUPREME COURT OF MISSISSIPPI

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

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

ADDENDUM TO REPLY BRIEF OF APPELLANT DOUBLE QUICK, INC. AND OPPOSITION BRIEF OF CROSS-APPELLEE DOUBLE QUICK, INC. TO BRIEF ON CROSS-APPEAL OF CROSS-APPELLANT RONNIE LEE LYMAS

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1. Miss. Code § 11-1-60 (2009)

Miss. Code Ann. § 11-1-60

West's Annotated Mississippi Code Currentness
Title 11. Civil Practice and Procedure
Chapter 1. Practice and Procedure Provisions Common to Courts (Refs & Annos)

§ 11-1-60. Medical malpractice; limitation on noneconomic damages

(1) For the purposes of this section, the following words and phrases shall have the meanings ascribed herein unless the context clearly requires otherwise:

(a) "Noneconomic damages" means subjective, nonpecuniary damages arising from death, pain, suffering, inconvenience, mental anguish, worry, emotional distress, loss of society and companionship, loss of consortium, bystander injury, physical impairment, disfigurement, injury to reputation, humiliation, embarrassment, loss of the enjoyment of life, hedonic damages, other nonpecuniary damages, and any other theory of damages such as fear of loss, illness or injury. The term "noneconomic damages" shall not include punitive or exemplary damages.

(b) "Actual economic damages" means objectively verifiable pecuniary damages arising from medical expenses and medical care, rehabilitation services, custodial care, disabilities, loss of earnings and earning capacity, loss of income, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, loss of business or employment opportunities, and other objectively verifiable monetary losses.

(2)(a) In any cause of action filed on or after September 1, 2004, for injury based on malpractice or breach of standard of care against a provider of health care, including institutions for the aged or infirm, in the event the trier of fact finds the defendant liable, they shall not award the plaintiff more than Five Hundred Thousand Dollars ($500,000.00) for noneconomic damages.

(b) In any civil action filed on or after September 1, 2004, other than those actions described in paragraph (a) of this subsection, in the event the trier of fact finds the defendant liable, they shall not award the plaintiff more than One Million Dollars ($1,000,000.00) for noneconomic damages.

It is the intent of this section to limit all noneconomic damages to the above.

(c) The trier of fact shall not be advised of the limitations imposed by this subsection (2) and the judge shall appropriately reduce any award of noneconomic damages that exceeds the applicable limitation.

(3) Nothing contained in subsection (1) of this section shall be construed as creating a cause of action or as setting forth elements of or types of damages that are or are not recoverable in any type of cause of action.

CREDIT(S)

Added by Laws 2002, 3rd Ex.Sess., Ch. 2, § 7, eff. Jan. 1, 2003; Laws 2004, 1st Ex.Sess., Ch. 1, § 2, eff. September 1, 2004.

CERTIFICATE OF SERVICE

I, John C. Henegan, hereby certify that I have this day caused a true and correct copy of the foregoing Reply Brief of Appellant Double Quick, Inc. and Opposition Brief of Cross-Appellee Double Quick, Inc. to Brief on Cross-Appeal of Cross-Appellant Ronnie Lee Lymas to be delivered by United States mail, postage prepaid, to the following:

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SO CERTIFIED, this the 10th day of December, 2009.

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JOHN C. HENEGAN

CERTIFICATE OF FILING

I, John C. Henegan, certify that I have had hand-delivered the original and three copies of the Reply Brief of Appellant Double Quick, Inc. and Opposition Brief of Cross-Appellee Double Quick, Inc. to Brief on Cross-Appeal of Cross-Appellant Ronnie Lee Lymas and an electronic diskette containing same on December 10, 2009, addressed to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

John C. Henegan

JOHN C. HENEGAN