IN THE SUPREME COURT OF MISSISSIPPI

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

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

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# BRIEF OF APPELLANT DOUBLE QUICK, INC.

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**ORAL ARGUMENT REQUESTED**

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## 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 Westbrooks, Attorney for Plaintiff-Appellee/Cross-Appellant
8) Tanisha Gates, Attorney for Plaintiff-Appellee/Cross-Appellant
9) Honorable Jim Hood, Attorney General of Mississippi

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## STATEMENT OF ISSUES

Defendant Double Quick Inc. appeals from a judgment of $1,679,717.00 entered against it and in favor of Plaintiff Ronnie Lee Lymas in the Circuit Court of Humphreys County. According to Lymas, Orlando "Red Boy" Newell shot Lymas several times without any apparent motive or any provocation whatsoever. Lymas was walking away from the Double Quick, a retail convenience store, and almost at the corner of the front parking lot. The incident happened on a busy Friday afternoon in broad daylight in front of several witnesses. Newell was not an employee or agent of Double Quick. Two experts testified for Lymas that the incident was foreseeable because (a) Double Quick knew about Newell's "violent nature" and (b) police call logs and incident reports indicated an "atmosphere of violence" on the store's premises *and* within a 1-mile radius of the store. They also testified that the failure of Double Quick to use certain security measures, viz., exterior perimeter cameras and an armed security guard, caused Lymas' injuries.

The issues on appeal are:

1. Did Lymas prove proximate cause? That is, was the evidence sufficient to show that Newell's wholly random, spontaneous violent act was caused by Double Quick's failure to have in place the security measures advocated by Lymas' experts?

2. Did Lymas prove forseeability? That is, was the evidence sufficient to establish either that (a) Newell had a "violent nature;" or that (b) the store was located in an "atmosphere of violence"?

3. Did the trial court err in failing to exclude the testimony of Lymas' two liability experts because their opinions were both conclusory and wholly speculative under the standards established by *Daubert,* thereby entitling Double Quick to a new trial?

4. Did the trial court misapprehend the law and err in instructing the jury that Newell had a "violent nature" and that Double Quick therefore had a duty to protect Lymas from Newell?

## STATEMENT OF THE CASE

### The Proceedings in the Circuit Court

The trial took a full week. At the appropriate times, Double Quick moved for a directed verdict, 19 R. 724-31 & 779-80[1], R.E. 10-20, and later for judgment as a matter of law, 22 R. 1018, arguing that the evidence was insufficient to send Lymas' claim to the jury. The trial court denied both motions. 19 R. 780, 22 R. 1020; R.E. 20, R.E. 24. The jury returned a verdict of $4,179,350.49 in favor of Lymas, 10 R. 1442, R.E. 25-26, and the trial court entered judgment, 10 R. 1443, R.E. 27-28.

Double Quick moved to alter or amend the judgment under Miss. Code § 11-1-60(b) (2009), which places a $1,000,000.00 cap on non-economic damages in non-medical services tort actions, 10 R. 1446, and for other post-trial relief, including judgment as a matter of law or a new trial, 10 R. 1459. Lymas filed a motion to declare Section 11-1-60(b) unconstitutional. 10 R. 1453. The trial court granted Double Quick's motion to alter or amend the judgment, and it entered a Final Judgment of $1,679,717.00 in favor of Lymas, 11 R. 1536, R.E. 29-30.

The trial court heard Lymas' motion related to Section 11-1-60(b) at the same time as Double Quick's post-trial motions. 24 R. 1112. Before the hearing, the State of Mississippi intervened as a non-aligned party, requesting that the trial court uphold the constitutionality of Section 11-1-60(b). 24 R. 1112. The trial court denied Double Quick's remaining post-trial motions, 12 R. 1668, R.E. 31, and it also denied Lymas' motion. 12 R. 1662. This appeal and cross-appeal followed.

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[1] The trial transcript immediately follows, and is not differentiated by the court reporter from, the court file. Thus, references to the court record and to the trial transcript are cited as "_ R. __" with the volume number followed by the page number. There are four separately numbered volumes of trial exhibits (Vols. 1-4) in the Record, and they will be referenced as "Ex. P-___" or "Ex. D-___."

**The Trial**

The Double Quick is a well kept, attractive retail convenience store and gasoline station. 21 R. 982. It is located in downtown Belzoni on the northeast corner of the intersection of Martin Luther King Jr. Drive and First Street about five blocks north of the Humphreys County Courthouse.[2] 19 R. 790. The Belzoni Police Department is "right down the street" from the Double Quick and before you reach the County Courthouse. 19 R. 748-49.

Besides the regular fare of food, snacks, beverages, gasoline, and other goods, this Double Quick had a Church's Fried Chicken outlet with a drive-through window on the left or north side of the building and a pay telephone stand at the far corner of the south side. *See* Ex. D-8.[3] Two other convenience stores – a Shell and a Quick Seven - and the Varsity, a local restaurant, were on the other three corners of the same commercial intersection as the Double Quick.[4] 15 R. 332.

The day of the incident, the last Friday of the month, the Double Quick was "very busy." 15 R. 316-17. This was not unusual. The store does 500,000 annual business transactions, *see* 20 R. 802, 840-41, and customer traffic at the store on Fridays is heavier than other week days. 19 R. 749-50.

The shooting itself happened in the late afternoon before sunset. 14 R. 278, 281. Immediately before the shooting, several people had walked up to the store, going in and/or out the front door. None of these people (or anyone else) complained to the store's employees

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[2] South of the intersection, Martin Luther King Jr. Drive is referred to as Hayden Street.

[3] The color photographs of the Double Quick found as Ex. D-8 were taken at night after the shooting which happened before sunset.

[4] The Double Quick is on the northeast corner of the intersection of Hayden-Martin Luther King Jr. Drive and First Street. 19 R. 790. The Shell is on the southeast corner. The Quick Seven is on the southwest corner. The Varsity Restaurant is on the northwest corner.

had walked so far away from the front door of the Double Quick that the employee at the Church's Fried Chicken drive-in window on the north end of the store was able to see Lymas already on the ground when she leaned out her window after hearing the gun shots. 21 R. 899-900.

Some time earlier, Lymas had walked past the Double Quick going to the Shell while he listened to music on a head set. 17 R. 485. Lymas saw Donald Lucas, a friend, who was coming from Fred's Dollar Store, which is farther south of the Shell. 17 R. 480. Lucas told Lymas to take off his head set. 17 R. 485, 17 R. 520. When he did, Lymas heard something, turned around, and saw two men out in the Double Quick parking lot arguing. 17 R. 485, 520-21. One was Allen Unger, whom Lymas had "practically raised," 17 R. 484, and the other one was Orlando "Red Boy" Newell, whom Lymas did not then know and whom as far as it appears in the record had never had any prior encounter with Lymas until that day. 17 R. 521-23.

Lymas gave Lucas some money, and he asked Lucas to buy Lymas a half pint of gin at a nearby liquor store. 14 R. 218. Lucas bought the gin and gave it to Lymas. 14 R. 218. Lucas and Lymas then went to the Shell so Lucas could buy a beer, but the Shell did not have the beer that Lucas wanted. 14 R. 218.

Lymas and Lucas left and went across the street to the Double Quick. 14 R. 218. They went inside the Double Quick, and Lucas went to the cooler to see if the Double Quick had the kind of beer he wanted, which it did. 14 R. 218. Before making a purchase, Lucas and Lymas left the Double Quick together, and they went to Fred's Dollar Store so Lucas could pick up his medicine. 14 R. 218.

Lucas and Lymas then went back to the Double Quick. 14 R. 218. Lucas entered the store first, some time before Lymas did. 14 R. 219. Lucas said no one was standing in front of the Double Quick when he entered, and that Lymas came into the store only a few seconds later.

14 R. 224-25. Lucas saw Lymas after he came inside the Double Quick this second time. Lucas said that Lymas did not appear to be upset about anything. 14 R. 219.

Lucas bought his beer and left the store before Lymas did. Lucas went out the front door, turning to the right, and walking north. 14 R. 220. Lucas did not see the shooting, which took place some time after he had left the store. Lucas was so far up the street that the shots sounded like caps or fireworks when he heard them. 14 R. 221.

When Lymas returned to the Double Quick the second time, Lymas saw Unger and Newell outside having a conversation "like they were arguing or something." 17 R. 483-84. Lymas continued on into the Double Quick. 17 R. 485. He did not say anything to anyone inside the store about the presence of the two men outside or their argument. Lymas purchased a "pop or something another" at the Church's Fried Chicken register. 17 R. 485. Lymas then exited the store listening to music on his head set. 17 R. 485.

As Lymas opened the front door, he looked left and saw the same two men he had seen when he entered. They were standing near the pay phone, and it looked like they were still arguing and that one of the men had "jumped right behind" the other. 17 R. 486. Nothing about what Lymas saw caused him either to step back into the store, to flee or run away, or to do anything else. 17 R. 487. Lymas went right on his way, with his back to Unger and Newell, having said nothing to either one of them and going north toward the street. *Id.*

According to Lymas, up to that point he had had no direct encounter, much less a conversation or a confrontation, with Newell during any of the three times that late afternoon that Lymas saw Newell. Thus, Newell had no apparent motive or reason whatsoever to do what he was about to do.

As Lymas walked away from the Double Quick, Lymas continued listening to music on his headset, trying to catch up to Lucas. 17 R. 487. Just as Lymas was "leav[ing] off of the

Double Quick parking lot," he was shot. 17 R. 487. Lymas did not hear any gunshots; he just felt them. Falling to the ground, Lymas was kicked by four or five people who were standing around him, and he was shot three more times while he was on the ground "close to the road." 17 R. 487, 491; 15 R. 323. Lymas later identified Newell as the shooter. 17 R. 522-23.

A couple of employees of Double Quick testified that sometime before the shooting, they had heard that Newell "was involved" in or had been charged with aggravated assault with a deadly weapon.[5] These employees were not in supervisory or management positions. They had no legal duty to tell their superiors at the store what they had heard about Newell, and they did not do so.

Over the objection of Double Quick, 16 R. 383, the trial court allowed the felony case file related to the prior indictment in which Newell had been charged with aggravated assault with a deadly weapon, based on an incident that had happened in November 2005, to be introduced into evidence. 16 R. 386. The trial court then allowed extensive testimony by the police officer who had investigated the November 2005 incident. 16 R. 417-45. According to this police officer, it was well known in the community that Newell had shot another person with a sawed off shotgun before the Friday afternoon of Lymas' shooting. 16 R. 424.

Over Double Quick's objection, the trial court also took judicial notice of the indictments of Unger and Newell for the aggravated assault on Lymas. 17 R. 557. All this evidence was admitted to "prove" Newell's "violent nature" even though Newell was then out on bail, related to the November 2005 incident, and even though Newell had not been convicted of a felony (or even a misdemeanor) when the jury heard this information. The November 2005 incident was the one and only thing that Plaintiff relied on to prove its allegation that Newell had a "violent

[5] *See* 14 R. 273 (Double Quick employee Shavon Ellis) (had heard that Newell had "shot somebody"); *Id.* at 283 (does not know who was shot, or any of the circumstances); 14 R. 261-62 (Double Quick employee Shanetta Thurman) (had heard, from working at the county courthouse, that Newell "had shot somebody before").

nature." 18 R. 589-590, 617-20 (Smith); 19 R. 749-50 (Lewis); 23 R. 1102-03 (closing argument).

No evidence shows that any employee of Double Quick had actual or constructive notice of the contents of the prior November 2005 indictment of Newell on the day Lymas was shot – only that Newell had been involved in a prior shooting. It is also undisputed that while Newell had been in the Double Quick store before January 26, 2007, no employee of Double Quick testified that Newell had been in the store earlier that same day or that they knew or had any reason to believe that Newell was out in the parking lot when the shooting took place. There is also no evidence that anyone saw Newell anywhere with a gun that day – much less on the premises – at any time before he pulled a gun and shot Lymas. Indeed, until the shooting, there is no evidence that Newell had engaged in any type of illegal activity or even any legal conduct – such as drinking alcohol – that might cause Newell to go out of control or lose his senses.

Over Double Quick's objection, 16 R. 365, the trial court admitted into evidence (Ex. P-8- ) Belzoni Police Department incident lists – call logs of alleged criminal events on the store's premises and within a one-mile radius of the store, Ex. P-8, 16 R. 376-77, R.E. 35-48. Exhibit P-12 was also admitted, consisting of three incident reports of criminal events at the Double Quick in the 3-year period before Lymas' shooting. 16 R. 391, R.E. 59-61. A comparison between the two types of documents shows that the "incident lists" are misleading and entirely unreliable.

A May 2, 2004 entry on the incident list, for example, showed a call for alarm, (viz., code # 46, (*see* Ex. P-9, R.E. 50)), placed from the Double Quick premises. The incident report, however, showed that nothing actually took place at the Double Quick. 16 R. 392 (*see* Ex. P-12 (5-2-2004 incident report). R.E. 59. Similarly, a September 27, 2006 entry on the incident list shows an "armed" robbery, (viz., code # 75 (*see* Ex. P-9)). R.E. 50. But the actual incident report contains no indication whatsoever that a weapon was involved. 16 R. 396-98, R.E. 60

(*see* Ex. P-12 (9-27-2006 incident report).

The store's employees were told to be observant about what happened on the premises, to ask people who were loitering to leave, and to call the police if they did not. 20 R. 800. There is no evidence that anyone had been loitering either inside or outside the store before the shooting. To this end, the trial court refused to give such an instruction.

Over Double Quick's *Daubert* objection, Lymas' experts were allowed to testify that the shooting was foreseeable because of Newell's violent nature and the atmosphere of violence that existed within a one-mile radius of the store. 18 R. 617, 19 R. 751. They also testified that the absence of exterior security cameras and an armed security guard and the failure of the store to issue a trespass notice to Newell were the proximate cause of the shooting and Lymas' injuries. 19 R. 755, 777, 18 R. 611-13. Double Quick's expert had testified that the presence of several people in the parking lot when the shooting occurred showed that even if there had been exterior security cameras or a security guard on duty when the shooting took place, the shooter would not have been deterred from this random act of violence. 21 R. 984.

It is undisputed that the original jury verdict of $4,179.350.49, included $679,717.00 in economic damages. The remainder was non-economic damages.

## SUMMARY OF THE ARGUMENT

Double Quick asks this Court to reverse a judgment of $1,679,717.00 entered against it in the Circuit Court of Humphreys County. The judgment is based on a 9-3 jury verdict in favor of Ronnie Lee Lymas' negligence claim arising from the criminal acts of Orlando Newell, who was not an employee or agent of Double Quick.

Newell shot Lymas while both were outside of the Double Quick's retail convenience store in front of numerous witnesses in broad daylight. According to Lymas' own testimony, Newell shot Lymas several times without any apparent motive or any provocation on the part of

Lymas as Lymas was walking away from the store, listening to music on a headset, and about to enter the sidewalk. Newell's acts were a random act of spontaneous violence that had no nexus to Double Quick's retail business. Indeed, there is no evidence that the employees at Double Quick knew or had any reason to know that Newell was even on the premises that afternoon.

Lymas called two putative experts, Professor Michael Smith and Commander Tyrone Lewis. They testified that the incident was foreseeable because Double Quick knew about Newell's "violent nature" and police call logs and incident reports indicated an "atmosphere of violence" on the store's premises *and* within a one-mile radius of the store. They also testified that the failure of the Double Quick to have exterior video cameras and an armed security guard at the time of the incident were the proximate cause of Lymas' injuries.

Retail businesses are not auxiliary law enforcement agencies or strict liability insurers. Nothing that the Double Quick did or failed to do impelled Newell's random act of spontaneous violence which could have happened virtually anywhere else as easily as it happened at the Double Quick. As unfortunate as such events are, no retail business could have prevented what happened based on Lymas' testimony about the events leading up to the shooting. Lymas has failed to prove proximate cause.

The sole proof of Newell's violent nature is a November 2005 indictment for aggravated assault with a deadly weapon. Lymas' "proof" of an existing "atmosphere of violence" at the store and in the surrounding one-mile radius was even more tenuous. The contents of the call logs, which should not have been admitted into evidence based on Double Quick's objections, do not even begin to pass muster at what our State appellate courts have relied on to establish this proof.

Finally, none of the opinion testimony of Lymas' experts which was wholly conclusory in nature and without any accepted methodology should have been admitted into evidence.

## ARGUMENT AND AUTHORITIES

**I. Did Lymas prove proximate cause? That is, was the evidence sufficient to show that Newell's wholly random, spontaneous violent act was caused by Double Quick's failure to have the security measures advocated by Lymas' experts?**

In a personal injury action, a defendant can be liable only where its conduct proximately caused the plaintiff's injury. An act is not the proximate cause of an accident or injury unless the accident would not have occurred without it. *Twin County Elec. Power Ass'n v. McKenzie*, 823 So. 2d 464, 469 (Miss. 2002), *citing Pargas, Inc. v. Craft*, 249 So. 2d 403, 407 (Miss. 1971). Viewing the evidence in the light most favorable to Lymas,[6] his case fails as a matter of law. No reasonable juror could find that Double Quick's acts or its failure to act proximately caused Lymas' injuries.

The State Supreme Court has been careful to confine this type of premises liability case to those particular and relatively-rare fact situations in which we may fairly blame the premises owner for the third party's crime. Thus, in *Grisham v. Long V.F.W. Post No. 4507, Inc.*, 519 So. 2d 413 (Miss. 1998), this Court held that the owner was entitled to judgment as a matter of law, where there was no proof that the presence of a security guard would have kept one V.F.W. patron from attacking another. *Grisham*, 519 So. 2d at 417[7]; *accord, Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So. 2d 1186, 1192 (Miss. 1994) ( "absolutely no evidence which

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[6] A *de novo* standard of review applies to a trial court's denial of a judgment notwithstanding the verdict ("JNOV"). *Johnson v. St. Dominics-Jackson Mem'l Hosp.*, 967 So. 2d 20, 22 (Miss. 2007). This Court will affirm the denial of a JNOV only if there is substantial evidence to support the verdict. *Id.. (citing Natchez Elec. & Supply Co. v. Johnson*, 968 So. 2d 358, 362 (Miss. 2007)). Although the evidence is reviewed in "the light most favorable to the non-moving party," this Court will reverse and render judgment in the movant's favor where evidence is so "overwhelmingly in favor of the party requesting the JNOV that reasonable persons could not have arrived at a contrary verdict." *Natchez Elec. & Supply Co.*, 968 So. 2d at 362 (*citing Steele v. Inn of Vicksburg*, 697 So. 2d 373, 376 (Miss. 1997)).

[7] The *Grisham* Court wrote that there was "absolutely no showing of proximate cause" where plaintiff said that lighting was inadequate, giving assailant cloak of anonymity, but light was sufficient for plaintiff to identify assailant; "Similarly, as to her claims that the V.F.W. should have provided better lighting, hired security guards, and maintained a less violent atmosphere, Mabeline has made absolutely no showing that any of those omissions was the proximate cause of the attack." 519 So. 2d at 417.

. . . shows a causal link between the amount of lighting in the Moose Lodge parking lot and the injury sustained by Crain at the hands of his assailant"); *Newell v Southern Jitney Jungle* Co., 830 So. 2d 621, 624 (Miss. 2002) (actions of the defendant grocery store did not "impel" the aggressor's violent conduct against his former spouse).[8]

Where the criminal act of the person is spontaneous, wholly random, and without any logical nexus to the premises of the business owner, the plaintiff must show that something the defendant did or failed to do *impelled* the crime to satisfy proximate cause. *Newell, supra.* Yet the proof of proximate cause offered by Lymas consisted of eight conclusory words from his expert witness, Professor Smith:

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[8] Notably, the proximate cause opinions of Commander Lewis (one of Lymas's liability experts) were rejected in *Alqasim v. Capitol City Hotel Investors,* 989 So. 2d 488 (Miss. Ct. App. 2008), a case involving a hotel's liability to a patron who was shot and robbed in the hotel parking lot.

Similar to what he opined in the instant case, Commander Lewis had opined that the hotel "'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. . . .'" *Id.* at 493. On appeal, the court held that Commander Lewis's "general statements and broad conclusions" about the hotel's alleged negligence "are not sufficient to show that any action or inaction of [the hotel] caused Alqasim's injury. . . . Alqasim has not shown that if the security was somehow different, the incident would not have occurred." *Id.*

*Accord, Martin v. Rankin Circle Apartments*, 941 So. 2d 854, 864 (Miss. Ct. App. 2006) (upholding summary judgment for defendants, apartment owner and management company, finding that the proximate cause of decedent's shooting and death was not anything defendants did or did not do, but rather the actions of the shooter and decedent.); *Price v. Park Management, Inc.*, 831 So. 2d 550, 552-53 (Miss. Ct. App. 2002) (affirming summary judgment for defendant apartment management group finding no causal connection between its actions and plaintiff's injuries; though Park Management had left a security gate open and unattended, the court found the actions of others in admitting the assailant into Price's apartment were the proximate cause of her injury).

Q. And, Dr. Smith, have you reached an opinion as to whether the breaches you've just described, breaches or failures in reaching the standard of care, whether they proximately caused the shooting of Ronnie Lymas?

A. Yes, I have.

Q. And what is that opinion?

A. My opinion is that they did.

Q. That is -- that is, Double Quick's failure in the standard of care caused the shooting or the injuries of Ronnie Lymas. Is that your opinion?

A. Yes, sir.

18 R. 612, and another two score or so of equally conclusory, and essentially identical, words from Commander Lewis,[9] all admitted over Double Quick's objections, 19 R. 739, 19 R. 742, 19

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[9] Q And, Mr. Lewis, have you been able to reach an opinion as to whether the breaches of the standard of cares that you just testified, whether it proximately caused the assault and injuries to Ronnie Lymas?

A Yes.

Q And what is your opinion?

A That this was the cause of the injuries.

Q What was the cause?

A The attack and assault.

[objection sustained]

Q (Mr. Tatum) What was the proximate cause of the injury or the cause of the injuries of Ronnie Lymas?

[objection overruled]

A Not having training and security measures in place on that property was the proximate cause of Mr. Lymas' injuries.

R. 757, 19 R. 771.

Those objections should have been sustained, for the same reason that the same testimony by Commander Lewis was rejected in *Davis v. Christian Broth. Homes of Jackson, Mississippi, Inc.*, 957 So. 2d 390, 408-10 (Miss. Ct. App. 2007) (affidavit from Commander Lewis properly disregarded on motion for summary judgment, where there was no empirical evidence to support his conclusions). Put simply, "[w]ithout more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible." *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422 (5th Cir. 1987).

The sober fact is that nothing that Lymas' experts opined that Double Quick could have done, or failed to do, would have prevented this incident. They contended that Double Quick

> * should have "conduct[ed] a security risk study or survey to asses the true level of crime" in and around the store;
>
> * should not have relied "on employees calling the Belzoni Police Department after an altercation had already beg[un]," but instead should have trained its employees "to identify and take action to remove violent persons if any from the Double Quick store premises";
>
> * should have "require[d] its employees to be aware and observant," and to supplement this with "a security camera" to "monitor the parking lot; and, finally,
>
> * should have had "a visible security guard. . . ."

*See* 10 R. 1368 (Jury Instruction No. 8).[10] None of these measures, separately or in combination,

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> 13 Q (Mr. Tatum) And did, what about the
> 14 security cameras? The lack of security cameras in
> 15 the parking lot?
>
> 16 A That would also be added to that.

19 R. 756-57.

[10] The Double Quick side has two registers at the check-out counter, the closest being approximately 6 feet from the front entrance. Four video surveillance or security cameras are inside the store, 20 R. 842-43. They are directed at the front door, the two registers at the counter, the first and

would have kept Lymas from being shot.

It should go without saying that merely "conduct[ing] a security risk study or survey," without more, as opined to by Professor Smith, would not have prevented the incident.

As for Double Quick not relying on its "employees calling the Belzoni Police Department after an altercation had already begun," but instead training its employees "to identify and take action to remove violent persons if any from the Double Quick store premises": the record establishes that there *was* in fact no "altercation" between anyone, much less between Newell and Lymas. Whatever Newell and Unger may have been doing as Lymas left the store, it provoked no response from Lymas. There was, in short, nothing to call the police about.

It may be that Lymas meant that Orlando Newell was a "violent person" (who should have been "removed") not because of anything he was doing but because of what Newell had done more than 20 months before Lymas was shot, that is, the November 2005 incident in which Newell shot Jefferson. This theory is entirely untenable. It simply cannot be the law that everyone with a history like Newell's, who at the time of Lymas' shooting had never been convicted of any crime, must be barred from every commercial premise in the State. Convicted child molesters, once released, receive better treatment. There are, after all, literally millions of

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second aisles, and the cooler. *Id.* No cameras were directed at the Church's Fried Chicken register.

Windows across the front of the store allow Double Quick personnel to see outside where the gas pumps are. 20 R. 822. A well constructed wooden fence prevents access to the parking and drive through area in back of the store. The shooting took place before sunset. In any event, the exterior lighting of the store at night was described as being "brilliant" with the store being described as extremely well kept and clean. 21 R. 982.

No security cameras were located outside the store. 20 R. 843. When the shooting took place, no security guard was then on duty. Double Quick used an armed security guard at the store on some Thursdays and every Friday through Sunday from 10:00 p.m. to 3:00 a.m. Double Quick's management choose these particular days and hours based on its analysis of customer flow, special events, and the store's transaction data, which showed that the store had had 500,000 annual transactions in the prior two years. 15 R. 291; 20 R. 802, 840-41.

ex-convicts on American streets; over half a million are released each year.[11] Many, of course, were convicted of non-violent offenses, but there are, perhaps, an equal number of persons like Orlando Newell, who have been involved in violence but have never been convicted for any number of reasons, including that their conduct was in self-defense.

If Double Quick is obliged to watch for and "remove" Newell under such circumstances, it is obliged to watch for and "remove" a countless host. And if Double Quick is so obliged, every other premises owner is too.

Under the rule for which Lymas contends, millions of citizens endeavoring to re-integrate into society (to say nothing of thousands of entirely innocent citizens who had the misfortunate of finding it necessary to use force to defend themselves or others) would be driven from every premise they approached – in the words of the State Supreme Court, "every residential curtilage, every shop, every store, every manufacturing plant." *Kelly v. Retzer & Retzer, Inc.*, 417 So. 2d 556, 561 (Miss. 1982), and, of course, every potential employer.[12]

And even if the Court were to ignore the foregoing, what about the premises owners and their employees? *Every* encounter with a criminal is dangerous -- *see* below.[13] Will the law

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[11] "Reentry Trends in the U.S., Releases from State prison," U.S. Bureau of Justice Statistics, http://www.ojp.usdoj.gov/bjs/reentry/releases.htm ; "Prison nation turns its back on released convicts," USA Today (May 30, 2001), http://www.usatoday.com/news/opinion/shapiro/543.htm.

[12] The Mississippi Court of Appeals made a similar point in *Dawson v. Townsend & Sons, Inc.*, 735 So. 2d 1131 (Miss. Ct. App. 1999), wherein a grocery store customer was stabbed, for no apparent reason, by another customer, who was latter committed to Whitfield. Urged to rule in a way that would have forced the store owner to bar the mentally ill man, or at least have someone follow him around, the *Dawson* Court declined, observing that such a rule would impinge upon the rights of the mentally ill to enter groceries and other establishments, and might even expose the owners to discrimination suits. *Id.* at 1145.

[13] Dangerous or deadly. Which is why law enforcement officers, who have the best training, the best equipment, and the whole force of the law behind them say, truly, that even a traffic stop is never "routine." *See* http://www.fbi.gov/ucr/killed/leoka03.pdf (Table 17) (101 law enforcement officers feloniously killed in traffic pursuits/stops, 1994-2003).

truly require them to confront people like Newell who are, *ex hypothosis,* so unpredictably violent that they would shoot someone for no reason? The law does not lightly demand that the ordinary private citizen who is engaged in a routine commercial enterprise "risk his own life or employ others to risk theirs" in crime fighting; "[t]hat is a function which he should be able to leave to government police." *Kelly,* 417 So. 2d at 562; *accord, Crain,* 641 So. 2d at 1192 ("[M]erchants are not required to carry out the duties of the police force").

The only workable procedure is the one that Double Quick in fact uses: the store trains its employees to make their decisions about who should be asked to leave the premises *based on their actions while on the premises* – not based on their profiles, which is inherently bigoted and potentially discriminatory conduct.

No evidence shows that any employee of Double Quick had actual notice of Newell's prior November 2005 indictment on the day Lymas was shot – only that Newell had been involved in a prior shooting. It is also undisputed that while Newell had been in the Double Quick store before January 26, 2007, no employee of Double Quick testified that Newell had been in the store earlier that same day or that they knew or had any reason to believe that Newell was out in the parking lot when the shooting took place. The record just as clearly shows that no one, including Newell, had done anything outside the store to draw any complaints from the numerous customers who were going in and out of the store that busy Friday afternoon.

It was, of course, open to Lymas to prove how long it would take a reasonable retailer to detect the presence of a "violent" person who was engaged in an act that an employee reasonably understood to be physically threatening in nature and then to take reasonable measures to remove the violent person, and then to compare this to how long Orlando Newell had been present before

the shooting. Lymas made, however, no such effort and presented no such evidence.[14]

Turning now to the suggestion that Double Quick should have "require[d] its employees to be aware and observant," and then supplemented this effort with "a security camera" to "monitor the parking lot" if we credit Lymas' testimony – as we must, in this procedural posture – Orlando Newell, who was "shooting the breeze" with someone as people were walking up to and out of the Double Quick, suddenly shot Lymas, who did not even know Newell, for no reason at all, in broad daylight, at an open and busy intersection, during the busiest time of the week, in the immediate presence of numerous witnesses. No one can believe (more importantly, no jury will be permitted to find) that such a man would have been deterred by the presence of a camera, or the consciousness that a few more employee-witnesses were paying better attention.

This leaves Lymas' expert testimony about the presence of an armed security guard as Lymas' last, best hope. Suppose there *had* been a guard on duty. It is common knowledge that while guards may deter some crimes, they certainly do not deter all of them. Otherwise the act of robbing a bank in broad daylight with guards posted on the premises would have gone the way of the horse and buggy. *Glenn v. State*, 996 So. 2d 148, 151-52 (Miss. Ct. App. 2008) (defendants rob bank despite presence of armed guard, whose presence they were aware of, from previously casing the bank); *May v. V.F.W. Post No. 2539*, 577 So. 2d 372, 376 (Miss. 1991)

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[14] Professor Smith also suggested that Double Quick should have "trespass" Newell. 18 R. 606. Presumably he meant that Double Quick should have issued what is sometimes called a "trespass bar notice." *See* Miss. Code. § 97-17-97 (2009) (misdemeanor to enter or remain on premises "after having been forbidden to do so, either orally or in writing"). This type of notice is sometimes used by retail stores against suspected shoplifters. The jury was not instructed on this theory, and thus any judgment for Lymas based on this testimony would be invalid. The contention has the same fatal problems we have just discussed. The law does not require that every premises owner "trespass" every individual with a history or "record" such as Newell's. Nor would a trespass bar notice have made any difference. No one can reasonably suggest that Newell would have been deterred by the threat of a misdemeanor conviction. And while Double Quick would have had the right to have had Newell arrested once he began shooting at Lymas, there is no proof that this could have been done in time to prevent Lymas' injuries.

(two security guards, one in uniform, were not sufficient to deter bar fight); *Davis,* 957 So. 2d at 395, 407-08 (apartment complex shooting undeterred by presence of police investigating burglary). For this reason a plaintiff can not carry his causation burden simply by asserting that, had there been a guard on duty, he would not have been attacked. *See May,* 577 So. 2d at 376 ("Furthermore, although May has insisted that the VFW was negligent in failing to provide adequate security, he failed to make a showing that an increased number of security guards would have prevented the attack") (citing *Grisham*[15]). He must offer proof.

The record here furnishes a fine example of the soundness of this rule: during the May 2004 "[fight]" relied upon by Lymas to show "atmosphere of violence," the presence of a guard at the scene did nothing to deter the fisticuffs. 16 R. 395 & Ex. P-12, R.E. 59-61, 18 R. 629-30. When asked about the incident, Lymas' security expert, Professor Smith, cut himself with his own thrust: he repeatedly stated that the criminal in the May 2004 incident may not have known that a guard was present. 18 R. 630-31. Unless the criminal was aware of it, Professor Smith emphasized, the guard's presence would have "no deterrent effect." *Id.* at 630. "The guard may have been inside." *Id.* Professor Smith continued:

> A. -- it wouldn't have deterred him unless he knew it was there. I mean, deterrents work only when they are known, and there's nothing here that indicates necessarily that he was known. He might have been coming around the corner and been around the corner when it was happening. He could have been inside and not -- perpetrator not seen him.

18 R. 631.

This is one hundred percent correct. And it is correct, not only as to the May 2004 incident to which Professor Smith referred, but also and equally as to the instant case. Nothing

[15] *See also Grisham,* 519 So. 2d at 417 ("Similarly, as to her claims that the V.F.W. should have provided better lighting, hired security guards, and maintained a less violent atmosphere, Mabeline has made absolutely no showing that any of those omissions was the proximate cause of the attack").

in the record would support a finding that had Double Quick had a guard on duty when this shooting happened, the guard would have been where Newell could have and would have seen him. Even if we speculate that Newell would have seen the guard, there is no proof that seeing the guard would have caused Newell to refrain from shooting. In fact, the record establishes precisely the opposite: Newell was happy to shoot in the immediate presence of numerous witnesses; there are no grounds to conclude that one more, even one in uniform, would have made a difference.

This leaves only intervention. Let us, therefore, imagine a guard in the right place, at the right time, staring straight at Newell as Newell stands with several others in front of the pay phone. And the guard does . . . nothing at all, because he, like Mr. Gowdy and his daughter-in-law, has no reason to suspect that Newell is about to draw a pistol, much less start firing. By the time the guard has cause to be concerned, Lymas is down on the ground, bleeding.

Professor Smith opined that Double Quick should have had an armed security guard. 18 R. 640-41 (guard would have been the best "single step" that could have been done for security); *id.* at 639-41 (repeating this on cross). He never did, however, say with any specificity what the guard should or could have done. Although he suggested that Double Quick should have "removed" loiterers (or at least "known troublemakers") by "trespassing" them, 18 R. 605-606, Professor Smith did not say that this would have required a guard, or even that a guard would have undertaken this task.

Commander Lewis, likewise, opined that Double Quick should have had a guard, but the Commander never did say how a guard would or could have made a difference. 19 R. 751-52 (Double Quick should have had "a security guard keep their premises clear from incidents like this happening"). The only thing he managed to say on this point is that in general guards are a deterrent. *Id.* at 752 ("In my 25 years as being in law enforcement and experience, a uniformed

officer or person plays a big deterrent in decreasing. Any time an incidence or crime that take place on the premises, people would be, would think twice before they commit or try to commit or think about committing an offense or an incident in front of a person in uniform"). This was totally unsupported. More fundamentally, Commander Lewis made no attempt to connect his experience with the facts of this case. To say that, *in general*, a guard would make a criminal "think twice" is to say nothing at all about whether a guard would have deterred *Newell.*

Even when speculating freely, it is extraordinarily difficult to see how an armed guard could have made any conceivable difference. Under an objective review of the record, it is impossible to do so. This is not to say that guards never make a difference. It is entirely possible for a plaintiff to prove that a guard could have deterred a particular assailant as the plaintiffs did in *Whitehead v. Food Max of Mississippi, 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").

It is entirely possible, too, for a plaintiff to prove that there was a disturbance that would have caused a reasonable person to intervene, and intervention would have been effective. *Cf. Foradori v. Harris,* 523 F. 3d 477, 491 (5th Cir. 2008) (affirming jury verdict where store manager saw fight between employee and patron and failed to take reasonable action to stop it). But no such proof was offered in the trial court, and no such proof could have been offered. There was nothing for a guard to intervene in. One moment Newell's conduct was so ordinary that when Lymas saw Newell, Lymas turned his back to Newell and *walked* away listening to music on his head set, going in the opposite direction; the very next moment Lymas was lying on the ground near the road.

This is another reason why Lymas' proof is insufficient: Where the attack is "sudden and

spontaneous," such that the business owner is not "placed on notice of [an] impending danger" to one of its patrons, there is, as a matter of law, no proximate cause. *May v. V.F.W. Post No. 2539*, 577 So. 2d 372, 376-377 (Miss. 1991)[16]; *accord, Davis v. Christian Broth. Homes of Jackson, Miss., Inc.*, 957 So. 2d 390, 408 (Miss. Ct. App. 2007) (notwithstanding expert testimony by Commander Lewis, apartment complex was not cause in fact, where shooting was "sudden [and] unexpected," and "appear[ed] to have occurred in the heat of the moment. * * * While perhaps exaggerated to a certain extent, we find some truth in the following statement made by the trial court in ruling on this issue: 'you could have had a policeman or security guard at every corner in the complex, and it wouldn't have prevented what happened.'"); *Corley v. Evans*, 855 So. 2d 30, 38 (Miss. 2003) (premises owner not liable for shooting at crawfish boil where, inter alia, she did not have "adequate warning" that shooting might occur); *Davis v. Christian Broth. Homes of Jackson Mississippi, Inc.*, 957 So. 2d 390, 408 (Miss. Ct. App. 2007) (no cause in fact where "record describes a sudden, unexpected shooting that appears to have occurred in the heat of the moment").[17] On the facts as testified to by Lymas, an armed guard

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[16] The plaintiff in *May* was at the local V.F.W. when he felt a tap on the shoulder, heard a word or two, leaned and turned to see who it was, and was hit. The *May* Court, citing numerous cases to the same effect (including *Kelly*), held that "[b]ecause of the spontaneity of the event in question, it is inconceivable that the VFW reasonably could have protected May from Triplett's attack." *May*, 577 So. 2d at 377.

[17] The "violent nature" cases have an analog in *Williamson v. Daniels*, 748 So. 2d 754 (Miss. 1999), in which this Court held that, as a matter of law, the mother of a fifteen-year-old son was not liable in negligence when the boy shot a neighbor, even though the boy's prior misconduct had put her "on notice that her child had a tendency for violence towards others." *Id.* at 760. The reason? At the time of the shooting the Mother was on the telephone, and did not even know that her son had gone outside, much less that he was armed. *Id.* at 761. Nor did she know "that he had any reason or desire confront [Plaintiff] and shoot him." *Id.* In short, the plaintiff had no proof that the mother had reason to know, specifically, "of a present opportunity" for violence, and an opportunity to prevent it. *Id.* at 761. Any other rule "would pose the risk of transforming parents from care givers and disciplinarians into the jailors and insurers of their minor children." *Id.* at 762. It goes without saying that mothers and retailers are worlds apart, but there is a fair parallel at this one point: It is one thing to insist that they intervene when (a) they see a specific situation that reason and experience tell them may soon turn ugly, and (b) they have a reasonable opportunity, and means, to intervene. It is quite another to insist that they constantly patrol and supervise under the circumstances presented by the record in the instant appeal.

would not have made a bit of difference.

The reason that Lymas offered only conclusory, inadmissible "proof" of proximate cause, which was no proof at all, is because no real proof was possible. There was absolutely no reasonable security measure that Double Quick could have undertaken to prevent this random senseless shooting. Still less did Double Quick do anything in any way to "impel" the shooting. *See Newell v Southern Jitney Jungle* Co., 830 So. 2d 621, 624 (Miss. 2002) (no proximate cause where defendant's actions "did not impel the assault"). As a matter of law, Double Quick is entitled to have the judgment reversed and rendered based on the absence of any evidence that a reasonable juror could conclude that the failure of the security measures used by Double Quick was the proximate cause of Lymas' injuries.

**II. Did Lymas prove forseeability? That is, was the evidence sufficient to establish either that (a) Newell had a "violent nature;" or that (b) the store was located in an atmosphere of violence?**

**A. The evidence is insufficient as a matter of law to show that Newell had a "violent nature."**

For proof of Orlando Newell's "violent nature," Lymas relied *exclusively* on the November 2005 incident in which Orlando Newell shot Calvin Jefferson. This was, as a matter of law, insufficient.

It was insufficient, first, because it was only a single incident. "Violent nature" law applies only to extraordinarily dangerous persons.[18]

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[18] We see this in a case indirectly cited by *Grisham* and *Crain* -- *McFarlin v. Hall*, 619 P.2d 729 (Ariz. App. 1980). In *McFarlin* the defendants admitted that shooter was a "troublemaker" and "crazy"; that he had previously "caused trouble and gotten into fights" at the defendants' bar; that he "would argue with other customers"; that he "had spent the prior two to three years in jail or in an institution for the mentally ill"; that he "had been arrested for drunk and disorderly conduct numerous times"; that "**of all the people that have come into their place over the years, there were only two she was really afraid of and Dominquez was one of them**"; and that they "knew they shouldn't have let him back into the place." 619 P. 2d at 731-32 (Emphasis supplied.). *Hall* was cited in *Sucanick v. Clayton*, 730 P.2d 867, 869 (Ariz. App. 1986), which in turn was cited by *Grisham* and *Crain*.

It was insufficient, too, because Newell stood *accused,* not convicted, and according to Newell, he had acted in self defense. It should go without saying that when the cases speak of "violent nature," they speak of individuals with a history of *criminal violence,* not acts of self-defense.[19] Miss. Code § 97-3-15(1)(e)-(f), (4) (2009). If it is legally impermissible to infer that a person has a violent history from the simple fact that he has been previously incarcerated, *Davis*, 957 So. 2d at 401, it should be equally impermissible to do so from the simple fact of a single pending indictment.[20]

Remember that when he shot Lymas, Newell was free and on the street, not pacing a jail cell. Newell was out in broad daylight on a Friday afternoon because the State of Mississippi, which had arrested and jailed him, later released him. This tells us something very significant. It tells us that the State could not prove (or perhaps did not even believe) that Newell, if released, "would constitute a special danger to any other person or to the community. . . ." *See* Miss. Const. art. 3, § 29(3) (1890) (authorizing denial of bail in these circumstances, when defendant facing at least twenty years); 16 R. 386, Ex. P-10 (Newell indicted under Miss. Code § 97-3-

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[19] The law recognizes that some violence is innocent, even commendable. FBI statistics show that each year hundreds of police officers, and hundreds of private citizens, commit justifiable homicide. http://www.fbi.gov/ucr/cius_04/offenses_reported/violent_crime/murder.html#table2_15, Tables 2.15 and 2.16. Millions more display or discharge firearms defensively. Gary Kleck & Marc Gertz, "Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun," 86 J. Crim. L. & Criminology 150 (1995) at Table 2, on line at http://www.guncite.com/gcdgklec.html (last accessed May 18, 2009). The "violent nature" cases have no reference to these people.

[20] That Newell was not convicted, only indicted, also shows the insufficiency of notice to Double Quick. It is one thing to charge Double Quick with notice of a public record of an official determination, quite another to charge Double Quick with knowledge acquired by rumor. Yet this was literally what plaintiff argued, 18 R. 618-20 (cross of Professor Smith)(Q. Should she [the Double Quick employee who heard "rumors" of the 2005 shooting] have based her actions on gossip and rumor that she heard in the community? A. Well, sure, if it's relating to – I mean, we all do, relating to safety issues and things."). That the employee's knowledge was mere rumor of an accusation makes it even more absurd to impute it to Double Quick.

7(2)(b) (2009) (penalty up to "not more than twenty (20) years").[21]

Aware that Orlando Newell claimed self-defense in the 2005 incident, 16 R. 444, and that if Newell had in fact acted in self-defense, the prior incident could not establish Newell's putative "violent nature," the trial court allowed Lymas to prove that Newell was the aggressor in the 2005 incident. Rather than calling any witness with personal knowledge of the incident, such as Calvin Jefferson, Lymas offered hearsay, and only hearsay: a copy of the Belzoni Police Department's file on the incident. Double Quick objected, 16 R. 382 & 383, but Plaintiff argued that it fell within the "business records" exception to the hearsay rule, Miss. R. Ev. 803(6), 16 R. 384. The trial court agreed, 16 R. 385, and the file was admitted into evidence. 16 R. 386 & Ex. P-10A.

Lymas also argued, in the alternative, that the file was not being offered for the truth of the matters asserted therein, but only for "notice." This was plainly and fundamentally wrong. There was no showing that the Belzoni Police Department had ever shared the contents of its investigative police file with Double Quick before Newell shot Lymas. Indeed, police investigative files are exempt from disclosure under the Mississippi Public Records Act. *Compare* Miss. Code § 25-61-3(b), (e)-(g) (2009), *with Id.* § 25-61-12(2). Notably, the purpose and effect of introducing the investigative file was to show that Newell *in fact* had a violent nature, not that he had a *reputation* for having a violent nature.

That this is legal error has been settled for the better part of a century, at least since "the leading case of" *Johnson v. Lutz,* 253 N.Y. 124, 170 N.E. 517 (1930). *Lutz* "held that a police

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[21] Another way of looking at the same point: To affirm the verdict against Double Quick would be for the State to say that the November 2005 shooting was proof that Mr. Newell had a "violent nature." But under the State Constitution,, the November 2005 shooting was not, itself, any proof of "violent nature." Had the State wished to hold Newell without bail the State would have had to prove not only the shooting ("proof is evident or the presumption great") but also, separately and independently, that his release would pose a danger to the community. *See Edmonds v. State,* 955 So. 2d 787 (Miss. 2007).

report which contained information obtained from a bystander was inadmissible. . . . ." *Official Comment,* Miss. R. Evid. 803(6). The reasoning is this: true "business records" are reliable because, and only because, each person in the chain is under a business duty to perceive the events and to relate them accurately. Thus, for a record to be a true "business record," each person, including the original source of the information, must "be . . . acting *in the course of* the regularly conducted activity." *Official Comment,* Miss. R. Evid. 803(6) (emphasis supplied). It follows, as the Official Comment to Rule 803(6) explains, that police reports are inadmissible. "[T]he officer qualified as one acting in the regular course of a business, but the informant did not." *Id.*[22] Indeed, it is difficult to imagine any information more unreliable than the report made to a police officer about an alleged violent crime, whether the information comes from the victim or the victim's friends.

Where a defendant has personal knowledge of the assailant's prior violent behavior, there need be no connection – a defendant has seen it with his own eyes. Here two employees of Double Quick had heard rumors elsewhere that Newell had been involved in a prior shooting, but they had no duty to report these rumors to their employer. *See, e.g., Ohio Millers' Mut. Ins. Co. v. Artesia State Bank,* 39 F.2d 400, 402 (5th Cir. 1930) (applying Mississippi law - when the knowledge of the agent is not acquired while acting in the course of his employment for his principal, it does not bind the principal); *United States v. Currency Totalling $48,318.08,* 609 F.2d 210, 215 (5th Cir. 1980) (applying Texas law - "a principal is affected by an agent's knowledge of a matter where it is the agent's duty to give such information to the principal. See generally [Restatement (Second) of Agency] §§ 272, 275 [(1958)]. However, '(t)he agent must

[22] To put it another way, the investigating officer's testimony about what witnesses told him is hearsay, *Harrison v. State,* 722 So. 2d 681, 682-84 (Miss. 1998) (testimony from investigating police officer, as to what witnesses told him, was hearsay). The twin acts of putting what the officer is told on paper, and putting the paper as a report in a file, does not change the outcome. In both instances, the source of the information has no legal duty to convey the information in a reliable manner.

have a duty to reveal the information which he has. It is not enough that the agent has a duty in relation to the subject matter.' Id. § 275, Comment c, at 599. DeMassa failed to prove that Agent Best had a duty to reveal his knowledge of the assignment."); *Lamb v. Household Credit Services,* 956 F. Supp. 1511, 1516-17 (N.D. Cal. 1997) (courts will not attribute every employee's knowledge to employer, even when employee is a "manager" or "supervisor"). Thus, Double Quick itself never had knowledge of Newell's "violent nature."

Because there was nothing to support a finding that Newell had a "violent nature" -- based on an act of violence that had been conclusively adjudged to be *criminal conduct* – and there was no proof that Double Quick had knowledge of Newell's violent nature, Lymas' "violent nature" theory, a theory that permeated his entire case,[23] never should have gone to the jury. Double Quick's objections, 22 R. 1030-32, should have been sustained as a matter of law. This alone requires reversal, and, at a minimum, a new trial:

> [W]hen a case is submitted to the jury on a general verdict, the failure of evidence or a legal mistake under one theory of the case generally requires reversal for a new trial because the reviewing court cannot determine whether the jury based its verdict on a sound or unsound theory. . . . "[I]f any one of the district court's list of claims were not supported by evidence or in some other way unsound, we would be bound to remand this cause for a new trial, absent evidence that the jury did not base its verdict on that unsound claim.

*Rutherford v. Harris County*, 197 F.3d 173, 185 (5th Cir. 1999) (internal quotation marks and citations omitted) ("We cannot be reasonably certain the jury did not base its verdict on an unsound theory because the district court asked the jury generally whether Harris County had intentionally discriminated . . . . We therefore reverse th[at] part of the judgment . . .and remand

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[23] *See, e.g.*, 14 R. 207 (opening); 18 R. 589-91 (Dr. Smith); 19 R. 749-51 (Commander Lewis) ; 23 R. 1082-84 (closing). Even if the "failure to train" jobs at Double Quick were tied in. *See* 16 R. 451 (Shafer) ("Q. Now, Mr. Shafer, what type of training does Double Quick provide for its employees when it comes to dealing with someone that they know has a violent past who comes upon their premises? A. Double Quick has no specific training in relation to an individual coming on the parking lot that has a violent past"); 16 R. 457 (same); 18 R. 593 (Dr. Smith) (same).

for a new trial of that cause of action"). *Accord, Greenbelt Co-op. Pub. Assn., Inc. v. Bresler,* 398 U.S. 6, 11 (1970) ("when it is impossible to know, in view of the general verdict returned whether the jury imposed liability on a permissible or an impermissible ground, the judgment must be reversed and the case remanded").

This evidence was more than sufficient to have a prejudicial impact upon Double Quick. Being hearsay, the proof of Newell's "violent nature" was not subject to cross-examination. Especially when we reflect that the officer who summarized the contents of the police file had also led the investigation that resulted in Newell's being indicted, 16 R. 420-25, and that this officer plainly conveyed his belief that Newell was guilty and that Plaintiff, in closing, pointed to the officer's testimony as proof of Newell's guilt, 23 R. 1103, the likelihood is high that by its verdict against Double Quick, the jury had "convicted" Newell who was never in the courtroom for his part in the 2005 incident. Ironically, none of the legal defenses and other evidentiary protections (including a far higher burden of proof) to be afforded to Newell in his own criminal trial were afforded to Double Quick as the result of the trial court's ruling. This Court should adopt definitive standards that make it clear that the premises owner is not burdened with defending the reputation or actions of a third party through the device permitted here. *Cf. State Farm Mutual Automobile Ins. Co. v. Campbell,* 538 U.S. 408, 123 S. Ct. 1513, 1520 (2003) (since defendants in civil proceedings are not accorded same protections applicable in criminal proceedings, due care must be taken in administering civil proceedings).

### B. The evidence is insufficient as a matter of law to show that the Double Quick store was located within an "atmosphere of violence."

Plaintiff's liability experts, Professor Michael Clay Smith and Commander Tyrone Lewis, opined at trial that crime on and around the Double Quick premises put Double Quick on notice of an "atmosphere of violence" not merely on the premises but in the surrounding one-mile radius of the store. Over Double Quick's objection, motion for mistrial, standing objection

and motion for continuance, 16 R. 365-76, Lymas' liability experts were allowed to give their "atmosphere of violence" opinions based on data contained in incident lists received from the Belzoni Police Department. *See* Ex. P-8, R.E. 35-48; 18 R. 581-82; 19 R. 745-46. "[I]ncident lists" are simply "a log of calls that come to the police department." *See, e.g.,* 18 R. 582. In comparison, "incident reports" are prepared by the police officer at the scene of the reported crime. *See* 18 R. 625; *Tillman v. Wendy's Int'l, Inc.,* 252 F.3d 434 (5th Cir. 2001) ("incident reports . . . are produced when the police have confirmed that a criminal offense has actually occurred.").

Thus, Double Quick was charged with being responsible for knowing and having actual knowledge of what happened on its own premises and for being responsible for knowing and having constructive knowledge of the entire surrounding one-mile radius. The selection of this one-mile radius by Lymas' experts went unexplained. Their affidavits did not disclose that they had done any survey subject to any verifiable methodology that supported or justified their inclusion of this surrounding area. They failed to explain, for example, how this area was any different than any other section of town or for that matter the entire county or even if the rate of crime was any higher in the area they selected than elsewhere in Belzoni.[24]

Other than just three narrative "incident reports" of crimes occurring on the Double Quick premises that "turned up in discovery," (18 R. 586 (Smith)), the remaining "crimes" upon which these experts based their atmosphere of violence opinions were the calls listed on the incident lists. Neither expert verified their accuracy by pulling the actual incident reports for the

[24] Thus, the term "atmosphere of violence" spawned in the context of those cases involving bars and taverns that are engaged in serving liquor to the adult public under circumstances that can predictably become highly volatile has been transformed to apply to any retail business that is be open to all ages of the public, even those located in the virtual center of a small town's commercial business district. That is a troubling development about which most retail businesses have not a clue about its impact on their operations.

purported crimes that appeared on the lists. 18 R. 586 (Smith); 19 R. 769 (Lewis).

The misleading, prejudicial effect of allowing Smith and Lewis to opine based on these incident lists far outweighed the probative value. This evidence should have been excluded pursuant to Miss. R. Evid. 403. *See* 16 R. 365-66. The lists are merely calls: there is no indication on these lists whether a call was a false alarm or related to an event that happened at the Double Quick or even within the chosen one-mile radius. Nor do these lists necessarily give the correct date or time or location or description of the reported crime.[25] Indeed, in at least one instance, the incident list entry relied upon by Plaintiff's expert showed an "armed robbery," (see Ex. P-12, R.E. 59-61; (code # 75 (*see* Ex. P-9, R.E. 49-58)), but the narrative in the incident report contained no information whatsoever suggesting that a weapon had in fact been involved. *See* Ex. P-12 (9-27-2006 incident report) R.E. 59-61.

In hearing the testimony of Lymas' experts about these lists, the jury could have easily been misled into believing an "atmosphere of violence" existed when, in fact, these call descriptions did not describe the actual circumstances or outcome of the listed incident. Indeed, this Court has 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." *American Nat. Ins. Co. v. Hogue*, 749 So. 2d 1254, 1261 (Miss. Ct. App. 2000). This prejudicial effect was made all the worse by Lymas' liability

[25] The unreliability of these incident lists is shown by the testimony of Dorothy Elders, the officer with the Belzoni Police Department responsible for maintaining these records. 16 R. 360-61. Officer Elders was questioned about the particular incident lists relied upon by Lymas' experts (Ex. P-8, R.E. 35-48), and she admitted that the dates and times given in the incident lists were not necessarily when the crimes occurred, but rather when the crimes were reported. 16 R. 400-02. Notably, Officer Elders explained that even the "location" listed on the incident list was not necessarily where the crime occurred. For a call placed from a cell phone, the address given is to the location of the cell tower; not the location of the caller – and not the location of the crime. *Id.* 403-04. Other location discrepancies would result, for example, if a call were placed from the Double Quick pay phone. Even if the reported crime had occurred elsewhere, the address shown on the incident list would be the address of the Double Quick, not the location of the crime. *Id.* 404-05.

experts adopting and relying upon these lists, given the undeniable tendency of jurors to give even more credence to their opinions given their "expert" status. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993); *Edmonds v. State*, 955 So. 2d 787, 792 (Miss. 2007).

In any event, even if the information on the incident lists is accepted at face value, it does not constitute the requisite "sufficient facts and data" upon which the testimony of these experts as is called for by Miss. R. Evid. 702 and *Daubert/McLemore* standards. Because the "atmosphere of violence" opinions of Lymas' liability experts were based solely upon such evidence, their testimony, like the incident reports themselves, should have been excluded. *See* Part III, *infra.*

In particular, based on the incident lists, both Professor Smith and Commander Lewis opined that in the two-year period preceding the subject incident, there were four fights, (18 R. 633 (Smith); 19 R. 766 (Lewis)), and one armed robbery on the Double Quick premises. 18 R. 623-24 (Smith); 19 R . 766 (Lewis). Yet, when they were shown the actual incident report on the "armed" robbery, each one acknowledged that nowhere in the **report** was there mention of a weapon. 18 R. 623-24 (Smith); 19 R. 767-68 (Lewis). Lewis fully admitted his reference to the "armed" robbery was wrong. 19 R . 767-68.

Smith testified, based on the incident lists, that within a **one mile** radius of the Double Quick in the four months prior to the attack on Mr. Lymas, there were 17 fights, five armed robberies cases, and one rape or attempted rape. 18 R. 587. Still, this does not satisfy either the proximity, or the frequency, of reported crime that the Mississippi courts have looked to as establishing an atmosphere of violence in other such cases. ***Compare*** *Gatewood v. Sampson*, 812 So. 2d 212, 220 (Miss. 2002) (60 violent crimes reported in the **neighborhood surrounding** the Exxon where the incident occurred, including a bullet fired into the Exxon, with 32 of the 60

violent crimes occurring in the **adjacent** shopping center, held sufficient to allow jury to find an atmosphere of violence); *Glover ex rel. Glover v. Jackson State University,* 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), ***with*** *Kelly,* 417 So. 2d at 559, 561-62 (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); **and** *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 indecent exposure); **and** *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.").

Public policy requires that this Court carefully limit imposing a duty on business owner based on an "atmosphere of violence" in or around the premises. As this Court has unequivocally stated, it will not impose what amounts to a strict liability standard under the very circumstances that occurred here: "We refuse to place upon a business a burden approaching strict liability for all injuries occurring on its premises as a result of criminal acts by third

parties." *Crain*, 641 So. 2d at 1191-92.

In explaining, this Court relied on Michigan law noting that although the Michigan appeals court had "found that . . . the risk of an unknown assailant might be more foreseeable in a high-crime area, it would not impose a higher standard of duty in those areas." *Crain*, 641 So. 2d at 1190, citing *Papadimas v. Mykonos Lounge,* 439 N.W.2d 280, 283 (Mich. Ct. App. 1989) (stating that "[a]lthough crime occurs more frequently in certain areas of our cities and particular portions of the state, we again decline to apply a higher standard of duty in such so-called high crime areas."). To this end, in cases applying Mississippi law, the Fifth Circuit has refused to apply the atmosphere of violence criteria in a manner that would create a strict liability standard for those retail businesses that operated in neighborhoods with relatively high crimes rates. *See Tillman v. Wendy's Int'l, Inc.*, 252 F.3d 434 (5th Cir. 2001) (citing *Crain,* 641 So. 2d at 1189, 1191-92 and *Kelly*, 417 So. 2d at 561, 563). The irony of applying the amorphous, ill-defined "atmosphere of violence" criteria as was done in the trial court - and the resulting material prejudice that flowed from its application - is that there was absolutely no proof that the one-mile radius where the Double Quick was located had a crime rate that was higher than any other area of this small rural Mississippi town.

Notably, the Mississippi Supreme Court has emphasized on more than one occasion that it would not impose police-force duties on business owners: "[M]erchants are not required to carry out the duties of the police force. Crime has become so prevalent in recent years that even without taking the financial burden into consideration it would be impossible for a business to guarantee the safety of everyone coming onto its premises." *Crain,* 641 So. 2d at 1192. "[E]ven where previously violence has swept in from the streets, we do not think that it should be the duty of a businessman . . . to risk his own life or employ others to risk theirs in order to protect bystanders who happen to be [on the premises] rather than on the street. That is a function which

he should be able to leave to government police." *Kelly,* 417 So. 2d at 562-63.

The sound rationale for not holding business owners responsible for criminal acts on their premises is plain: Business owners "cannot control the incidence of crime in the community." *Williams v. Cunningham Drug Stores, Inc.,* 418 N.W.2d 381, 384 (Mich. 1988).[26] [27] Yet extending and applying the "atmosphere of violence" criteria beyond the business owner's own premise to an unpredictable, ill-defined geographic area over which the business owner has no control, and at best constructive knowledge of its character, involves numerous policy-making decisions that are beyond the ken of the common law and is best left to the State Legislature if it chooses to enter such a quagmire.

As another State Supreme Court has explained, to require business owners "to provide armed, visible security guards to protect invitees from criminal acts in a place of business open to the general public would require [a] defendant to provide a safer environment on his premises

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[26] The *Williams* decision was heavily relied upon by the Michigan Court of Appeals in *Papadimas*, the case this Court favorably quoted in *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So. 2d 1186, 1191-92 (Miss. 1994).

[27] Elaborating, the *Williams* court distinguished the landlord/tenant relationship, noting that "a landlord has more control in his relationship with his tenants than does a merchant in his relationship with his invitees." *Williams,* 418 N.W.2d at 384 n. 17. "[T]enants can voice their complaints to the landlord" regarding a dangerous condition on the premises, thus the courts will uphold "a landlord's duty to investigate and take available preventive measures when informed by his tenants that a possible dangerous condition exists in the common areas of the building." *Id.*

Security measures available to an apartment complex owner are simply not feasible for other business owners to implement. For example, in *Thomas v. Columbia Group, LLC,* 969 So. 2d 849, 852 (Miss. 2007), this Court noted the past security measures of the defendant apartment complex owner, including installing "an iron fence around the entire property . . . [with] only one entrance to the property. . . controlled by a guard stationed in a booth to monitor who entered and exited the property." Discontinuation of this practice and the complex manager's admitted failure to "ban and evict" the person that had previously shot at a tenant on the premises, was held to constitute sufficient facts to create a jury issue on proximate causation. *Id.* at 855. A merchant, in contrast, "does not have the same degree of control", *Williams*, 418 N.W.2d at 384 n. 17, -- nor is it even realistic to require a retail business that is open to the general public like the Double Quick to install an iron fence around the entire property with but one, guarded entrance. *Cf. Thomas,* 969 So. 2d at 852. As the *Williams* court bluntly acknowledged: "When the dangerous condition to be guarded against is crime in the surrounding neighborhood, as it is in the present case, the merchant may be the target as often as his invitees. Therefore, there is little the merchant can do to remedy the situation, short of closing his business." *Williams*, 418 N.W.2d at 384 n. 17.

than his invitees would encounter in the community at large." *Williams,* 418 N.W. 2d at 384. Yet this is the practical effect if not the clear import of the trial court's rulings related to the "atmosphere of violence" criteria.

If this is in fact the law of Mississippi, no retail business could rationally elect to locate and operate in any such area since the costs of doing business will always be demonstrably higher than for any similar business that is located in a geographic area outside a designated "atmosphere of violence." That is not an attractive, much less desirable, outcome for the people who live or work or do both in any such so-called area. It is not a burden lightly welcomed by the business owner that decides to operate in such an area. The State Supreme Court should jettison this criteria altogether or adopt clearly defined standards that enable business owners such as Double Quick to be able to determine what the law rightly demands.

**III. Did the trial court err in failing to exclude the testimony of Lymas' two liability experts because their opinions were both conclusory and wholly speculative under the standards established by *Daubert,* thereby entitling Double Quick to a new trial?**

The Mississippi Supreme Court reviews a trial court's decision to admit expert testimony on an abuse-of-discretion standard. *Roberts v. Grafe Auto Co.,* 701 So. 2d 1093, 1098 (Miss. 1997). "When determining whether a trial court erred in refusing a new trial, this Court reviews for abuse of discretion." *Mississippi Transp. Com'n v. Ronald Adams Contractor, Inc.,* 753 So. 2d 1077, 1083 (Miss. 2000).

Based upon insufficient facts and unreliable grounds, Plaintiff's liability experts, Professor Smith and Commander Lewis, testified at trial that the Lymas shooting was foreseeable and that it could have been prevented if Double Quick would have had certain security measures in place. As shown above, their testimony should have been excluded. It was not "based upon sufficient facts or data" within the meaning of Miss. R. Evid. 702; nor was their

testimony "the product of reliable principles and methods" within the meaning of Rule 702.[28] Because it had no basis in fact, their testimony was irrelevant. Thus, their testimony failed to meet Rule 702's basic requirement that it "assist the trier of fact to understand the evidence or to determine a fact in issue."

As to the "reliability" requirement, neither Smith nor Lewis performed or published any objectively verifiable, peer-reviewed study that supports any correlation between their conclusions on foreseeability or causation in this case. Nor did either expert talk with any other business owner to see what security measures they employed or talk with any police officer with respect to the Double Quick premises. Though they mention some publications upon which they rely, nothing in these publications show that additional or different security measures at the Double Quick would have prevented Lymas from being shot.

This case is very similar to the *Davis* case in which the Mississippi Court of Appeals ruled as a matter of law that Commander Lewis' opinions on causation had no factual basis. *Davis*, 957 So. 2d at 409. In *Davis*, Lewis also relied upon some crime data but had insufficient factual basis for his causation opinions. The Court explained that "[w]hile Commander Lewis's expertise in law enforcement and general security may be sufficient to support his conclusion 'that inadequate lighting increases the chance of criminal activity,' we find that neither this correlation between lighting and criminal activity, nor any other record evidence, is sufficient to

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[28] The trial court's gatekeeping responsibility under Rule 702 and *Daubert/McLemore* is to determine whether the evidence both "rests on a reliable foundation and is relevant in a particular case," (*Mississippi Transp. Comm'n v. McLemore*, 863 So. 2d 31, 36 (Miss. 2003), a responsibility not met by the trial court in this case. Specifically addressing reliability, the Mississippi Supreme Court instructs that the trial court is to examine the facts relied upon by the expert. As explained in *McLemore*, "the facts upon which the expert bases his opinion or conclusion must permit reasonably accurate conclusions as distinguished from mere guess or conjecture." 863 So. 2d at 35. "The proponent of the expert's testimony must demonstrate that such testimony is not based 'merely [on] his subjective beliefs or unsupported speculation.'" *Davis v. Christian Brotherhood Homes of Jackson, Miss., Inc.*, 957 So. 2d 390, 409 (Miss. Ct. App. 2007) (*quoting McLemore*, 863 So. 2d at 36)).

support Commander Lewis's conclusion that the lighting at CBA was inadequate and that this inadequacy contributed to Lucius's death." *Davis*, 957 So. 2d at 409-10. Continuing, the Court held, "[f]rom our review of the record, we cannot discern the 'good grounds' upon which Commander Lewis based his opinions, and his opinions do not appear to be 'based upon sufficient facts or data.'" *Davis*, 957 So. 2d at 410 (*quoting* Miss. R. Evid. 702).

Similarly, Lewis and Smith in this case do not have "good grounds" on which to base their opinions regarding foreseeability and causation. They claim that Lymas' shooting was foreseeable and that had Double Quick employed an armed security guard or outside security cameras this shooting would not have occurred. But their testimony bears none of the indicia of reliability identified in and required by *Daubert* in order to deem such testimony admissible. Their opinions have not been tested and cannot be tested -- that is, their testimony cannot "be challenged in some objective sense," but "is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability. . . ." *See* Advisory Committee Note on Fed. R. Evid. 702 (identical to Miss. R. Evid. 702). Because their expert testimony lack the "good grounds" required by Rule 702 and *Daubert/McLemore* standards, their testimony should be stricken and should have never been heard by the jury.

The trial court should have been especially vigilant in excluding the testimony of these experts given the potential that a jury may give added weight to their opinions based on their "expert" status. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993) (acknowledging that "powerful" nature of expert evidence requires judge to exercise thorough analysis of admissibility under Rule 403), quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991). "Juries are often in awe of expert witnesses, because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience." *Edmonds v. State*, 955 So. 2d 787,

792 (Miss. 2007). No wonder "juries usually place greater weight on the testimony of an expert witness than that of a lay witness." *Id.*

This is particularly true here – everyone wants to believe that crime, particularly violent crime, can be prevented. Professor Smith and Commander Lewis told the jury precisely that. Incredibly, Professor Smith promised that had Double Quick only followed his suggested security measures, the crime would not have happened (18 R. 609-12). Commander Lewis assured the jury that had Double Quick just had more "security measures" in place the crime would have been deterred. 19 R. 756-57.

Neither expert had evidence to support his conclusions, nor is there any evidence that could. The shooting was a sudden, unexpected and wholly random act: it could have happened virtually any where else, and nothing could have prevented it. The assurances of these experts, while comforting, were not "evidence" and should never have been admitted at trial.

## IV. Did the trial court misapprehend the law and err in instructing the jury that Newell had a "violent nature" and that Double Quick therefore had a duty to protect Lymas from Newell?

The instructions contained numerous defects, which, taken together, made the instructions as a whole materially misleading and certain to produce an unjust verdict.

* The first sentence of Instruction Number 7, 10 R. 1423, R.E. 32, told the Jury that Double Quick had a duty to "guard against the foreseeable risk of criminal assault on its business invitees. . . ." Double Quick pointed out that without the words "if any" after "risk," the instruction was peremptory as to the existence of such a risk. That the same instruction went on to define forseeability did not cure the problem, but simply created confusion. Double Quick's objection to this instruction (22 R. 1029) should have been sustained.

* Instruction Number 7 defined forseeability as "a 'cause to anticipate' the subject criminal assault." Double Quick objected, pointing out that only "reasonable cause" to anticipate

amounts to forseeability, but the Court erroneously overruled this objection. 22 R. 1030.

* Instruction Number 7, after defining forseeability, went on to say that

> "[f]orseeability may be established by: (1) actual or constructive knowledge of the criminal attacker's violent nature or (2) actual constructive knowledge that an atmosphere of violence existed on the Double Quick Store Premises including the parking lot of the Double Quick Store. You may consider the overall pattern of criminal activity prior to the event in question in this case that occurred in the general vicinity of the defendant's business premises, as well as the frequency of criminal activity on the premise"

As Double Quick pointed out in its objection (22 R. 1030), this amounted to a comment on the evidence, taking from the Jury its discretion and prerogative to decide just what a reasonable man should and should not foresee. So, for example, even if Lymas had proven that Mr. Newell had a "violent nature," it was certainly within the Jury's power to find that a reasonable man would not have anticipated violence from him under the circumstances. There are, perhaps, a few people so depraved that the reasonable man should anticipate violence from them at any time, under any circumstances: such individuals are kept behind bars, and, on those rare occasions when we must bring them out, are kept shackled. As to the rest, including the vast majority of those people who may truly be said to have "violent natures," the reasonable man will anticipate violence in some circumstances – alone in a dark alley with a vulnerable innocent, for example. But he will not, and need not, anticipate violence in other circumstances – in broad daylight, in front of numerous witnesses, for example. The Jury should have been left free to find that Newell, whatever his past, was unlikely to risk criminal sanctions by shooting, in broad daylight, in front of numerous witnesses, a man that he could just as easily shoot in secret on any dark night. Instruction Number 7 impermissibly curtailed and cabined this discretion. Double Quick's objection to this instruction (22 R. 1029) should have been sustained.

* Instruction Number 7 told the Jury that Double Quick, "[a]s a matter of law," knew whatever its employees knew. Thus, if a Double Quick employee had heard rumors about Mr.

## CONCLUSION

Courts have long recognized that their tort-law decisions change citizens' behavior. One of the goals of modern products liability law was to induce manufacturers to design and build safer products. It is appropriate, indeed necessary, for this Court to identify the behavior goal behind this type of premises liability case.

The goal can not to be move crime from one premise to another, or to the street. That would help no one. Nor can it be to reduce crime. Everyone is for less crime, but as the *Kelly* Court observed, quite correctly, crime fighting "is a function which he [the premises owner] should be able to leave to government police." *Kelly,* 417 So. 2d at 563.

Double Quick respectfully suggests that the only legitimate behavior goal that can lie behind this area of tort law is to see that the premises owner does not *increase* crime. A fair analogy may be found in the law of public nuisance. The law (civil and criminal) recognizes that a certain amount of drunkenness, gambling, and prostitution will always take place, but it recognizes, too, that even *more* will take place if the owner of a premise encourages, or suffers, his premises to serve as a sanctuary for these activities. It is this *extra* misconduct, *caused* by the owner of the nuisance that the law curbs. *See State v. Marshall,* 56 So. 792, 795 (Miss. 1911) (civil and criminal law actions, "distinctly traced back to the reign of Queen Elizabeth," to prevent, as public nuisances, "bawdyhouse[s]," gambling houses, premises where intoxicating liquors are illegally distributed, etc.).

By all means hold premises owners to an honest negligence-proximate cause standard. Subject them to liability when their failure to use ordinary care *impels and causes* a crime, that is, when the exercise of due care would have *prevented it.* But to go beyond this is unwise and, more importantly, unjust.

"Fire is a useful servant, but a fearsome master." So too the premise liability tort

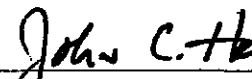
advanced by Lymas, who, based on his own testimony, was the victim of a wholly unprovoked, spontaneous violent act that was without any apparent motive and without any nexus to the Double Quick's premises, that is, this random act simply happened to take place at the Double Quick as opposed to some other commercial business. The tort has a proper application, but it is essential that the State Supreme Court cabin and limit this tort to its proper setting and not make every retail business an auxiliary law enforcement agency or a strict liability insurer.

For the reasons explained above, Double Quick respectfully requests that the judgment of the circuit court be reversed and rendered or, in the alternative, reversed and remanded for a new trial.

THIS, the 5th day of June, 2009.

Respectfully submitted,

DOUBLE QUICK, INC.



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## CERTIFICATE OF SERVICE

I, John C. Henegan, hereby certify that I have this day caused a true and correct copy of the foregoing Brief of Appellant Double Quick, Inc. to be delivered by United States mail, postage prepaid, to the following:

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## CERTIFICATE OF FILING

I, John C. Henegan, certify that I have had hand-delivered the original and three copies of the Brief of Appellant Double Quick, Inc. and an electronic diskette containing same on June 5, 2009, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

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