IN THE SUPREME COURT OF MISSISSIPPI

No. 2009-CA-1750

JESSIE DEAN ELLIS — APPELLANT

VS.

GRESHAM SERVICE STATIONS, INC.,
D/B/A DOUBLE QUICK, INC.,
BRADLY MACNEALEY — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF SUNFLOWER COUNTY, MISSISSIPPI
HONORABLE RICHARD A. SMITH, CIRCUIT JUDGE, PRESIDING

BRIEF OF APPELLEES GRESHAM SERVICE STATIONS, D/B/A DOUBLE QUICK, INC. AND BRADLY MacNEALY

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certified that the following listed person have an interest in the outcome of this Case. These representation are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Honorable Richard A Smith, Sunflower County Circuit Court Judge
2. Jessie Dean Ellis, Plaintiff
3. Gresham Service Stations, Inc. d/b/a/ Double Quick, Inc., Defendant/Appellee
4. Bradley MacNealy, Defendant/Appellee
5. John D. Brady, MITCHELL, MCNUTT & SAMS, Attorney for Defendants/Appellees
6. Willie E. Abston, BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, Attorney for Defendants/Appellees
7. LeAnn W. Nealey, BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, Attorney for Defendants/Appellees
8. Malissa Winfield, BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, Attorney for Defendants/Appellees
9. Omar L. Nelson, MORGAN & MORGAN, attorney for Jessie Dean Ellis/Appellant

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ONE OF THE ATTORNEYS FOR APPELLEES

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I. Whether summary judgment in Double Quick's favor should be affirmed because Mr. Ellis failed to show, with "significant, probative evidence," that an "atmosphere of violence" existed at the Double Quick so as to give Double Quick "cause to anticipate" Mr. Ellis's alleged assault.

II. Whether the trial court properly disregarded the affidavit of Mr. Ellis's liability expert, Commander Tyrone Lewis, based on the trial court's determination that the opinions expressed therein were not based on the necessary "sufficient facts and data" required under Miss. R. Evid. 702.

III. Whether the trial court properly exercised the "great latitude" afforded the trial courts in imposing discovery sanctions, when it excluded the deposition testimony of Edgar Love and excluded him from testifying at trial, based on the trial court's careful determination the Mr. Ellis had willfully circumvented discovery deadlines by failing to timely disclose Mr. Love's existence and his knowledge about the facts of this case.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in the Court Below.

This is a premises liability lawsuit brought by Plaintiff-Appellant Jessie Dean Ellis against Defendants-Appellees Gresham Service Stations, Inc., d/b/a/ Double Quick, Inc., and Bradley MacNealey (collectively, "Double Quick"). Mr. Ellis claims he was "brutally beaten" by unknown assailants "behind the [Double Quick] store." R. 8; *see* R. 353. Double Quick moved for summary judgment based on Mr. Ellis's inability to produce "significant probative evidence" supporting the duty element of his premises liability claim. R. 348-508. Namely, Mr. Ellis lacked competent proof that the alleged assault was reasonably foreseeable because an "atmosphere of violence" existed on the Double Quick premises sufficient to give Double Quick "cause to anticipate" Mr. Ellis's assault by the unknown assailants. *Id.* The Circuit Court of Sunflower County, Mississippi, the Honorable Richard A. Smith presiding, granted summary judgment in Double Quick's favor. R.E. 17; R. 708 and R.E. 8-14; R. 697-703 (opinion). Mr. Ellis timely appealed. R.E. 15; R. 706.

B. Statement of the Relevant Facts.

a. Facts Relating to Double Quick's Motion for Summary Judgment.

On October 7, 2006, law enforcement authorities arrested Mr. Ellis for public drunkenness on First Avenue – **two blocks** away from the subject Double Quick. R. 352. Nearly three months later, on December 27, 2006, Mr. Ellis filed an offense report claiming that on October 7, 2006 ". . .he went to [Double Quick] to get some cigarettes and when he exited, unknown suspect(s) hit him in the face. [Plaintiff] stated that two (2) younger guys asked to use his phone and when [Plaintiff's friend] left they gave him the phone back [and] when he turned to walk away, he was hit in the head again and knocked out." R. 353.

Over a year from his alleged assault, Mr. Ellis filed his premises liability action against Double Quick, claiming he was "brutally beaten" "behind the store." R. 8. As noted above, however, Mr. Ellis, was found unconscious **two blocks** from the Double Quick on October 7, 2006 -- and arrested for public drunkenness. R. 352.

Mr. Ellis cannot identify the alleged assailants. R. 361-62 (Ellis Dep. pp. 32-33). Although there are no eyewitnesses to the alleged "brutal beating" that occurred "behind the store," Mr. Ellis's long-time friend, Richard Jenkins, testified that a "bunch of guys" took Mr. Ellis's cell phone and "another one **kind of** hit him," at which time Mr. Jenkins **left** the Double Quick. R. 392, 395 (Jenkins Dep. pp. 17-19, 31) (emphasis added). He left the scene without calling police on his cell phone, which he testified he had in his possession at the time of the alleged assault. *Id.* In fact, Mr. Jenkins never contacted anyone to help his friend on that day.

There are no Double Quick employees who witnessed or were even aware of the subject assault prior to suit being filed on October 22, 2007. R. 418; 420 (Shafer Dep. p. 40, 47). No security personnel were on the premises on October 7, 2006, though Double Quick uses security personnel during peak traffic hours (*see* R.E. 86-87; R. 423-24 (Shafer Dep. pp. 60-63)), which is based on management's decision to provide security during the store's busiest hours. *Id.*

On September 8, 2009, Double Quick moved for summary judgment based on Mr. Ellis's lack of "significant probative evidence" of an "atmosphere of violence" on the Double Quick premises -- proof necessary for Mr. Ellis to prove the "duty" element of his premises liability claim. R. 348-508. A detailed discussion of this evidence, and the applicable law showing it is insufficient to overcome summary judgment on the duty element of Mr. Ellis's claim, is contained in the "Argument" portion of this brief. To avoid repetition, a synopsis of this evidence is set forth here.

Mr. Ellis's "atmosphere of violence" evidence consists of the following:

(i) Twelve police incident reports relating to the subject premises. R.E. 115-40; R. 455-80. These 12 incident reports span a **ten-year** period prior to Mr. Ellis's alleged October 2006 assault. None of these incidents involve a "brutal beating" by unknown assailants, as Mr. Ellis alleges occurred in this case. *Id.*

(ii) Mr. Ellis's testimony that he knew "drug deals" occurred on the Double Quick premises. R.E. 42; R. 107 (Ellis Dep. pp. 61-63). None of these "drug deals" were reported to Double Quick. R.E. 42; R. 107 (Ellis Dep. at p. 62).

(iii) Testimony by Mr. Ellis's long-time friend, Richard Jenkins, that people would congregate on the property; and that someone had thrown a beer bottle through a window in his car, which caused him to fear going on the premises. R.E. 46-47; R.143-44 (Jenkins Dep. pp. 20-21). Notably, Mr. Jenkins never reported the beer bottle incident to Double Quick, and, despite his "fear" of the premises, he visited the Double Quick "probably every day . . . at this particular time." R.E. 46; R.143 (Jenkins Dep. p. 20).

Mr. Ellis also furnished the Affidavit of his liability expert, Commander Tyrone Lewis, in response to Double Quick's motion for summary judgment. In forming his opinions in both his expert designation and in his Affidavit, Commander Lewis relied on the **same evidence listed above** as the basis for his foreseeability opinion, as follows:

> It is my opinion to a reasonable degree of professional certainty that the attack on Jessie Dean Ellis on or about October 7, 2006 . . . was a natural and foreseeable consequence of the conditions and circumstances that existed on the premises on and prior to October 7, 2006. This opinion is based on the fact that there had been sufficient crime committed on the premises of the subject convenience store to place the owner on notice that reasonable security measures were needed for the security, safety and well-being of their patrons. See Crime Stats of the subject property attached hereto as Exhibit A.

R.E. 156; R. 600 (referenced crime stats attached as Ex. A to the Affidavit at R. 604-24).[1]

Based on an assessment of the evidence before him, the parties' pleadings and briefs, and the argument of counsel, the Trial Court Judge granted summary judgment in Double Quick's favor, holding:

> Viewing the evidence in a light most favorable to Plaintiff, this Court finds as a matter of law that Plaintiff has not produced sufficient competent evidence that reasonable minds could differ as to whether an "atmosphere of violence" existed at the subject store nor could it be said the assault on Plaintiff was reasonably foreseeable.

R.E. 13, R. 702 (¶26).

The trial court also addressing the affidavit of Commander Lewis. In light of the same lack of "sufficient competent evidence" on the atmosphere of violence issue described earlier in his opinion (R.E. 13; R. 702 (¶26)), the Trial Court Judge likewise held:

> [T]his Court finds the opinions of Commander Lewis are precisely the kind of testimony our rules mean to keep out, that is, *ipse dixit* or "it is because I say it is". Lewis' expert opinions and conclusions, without sufficient facts or data upon which these opinions are based, are not reliable.

R.E. 13; R. 702 (¶29).

Plaintiff appealed the trial court's entry of final judgment in Double Quick's favor on October 26, 2009. R.E. 15: R. 706.

b. Facts Relating to the Exclusion of the Testimony of Edgar Love.

As noted above, there are no eyewitnesses to the "brutal beating" that occurred "behind the store."[2] Though the twice-extended discovery deadline had expired on February 1, 2009 (*see*

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[1] In relevant part, Commander Lewis also relied upon the "discovery responses [of Plaintiff and Defendants] . . . photographs of the subject property, [and] depositions." R.E. 155; R. 599.

[2] The only person identified by Mr. Ellis who witnessed any part of Mr. Ellis's confrontation with the "unknown assailants" was Mr. Ellis's long-time friend, Mr. Jenkins, who testified that a "bunch of guys" took Mr. Ellis's cell phone and "another one **kind of** hit him." R. 392, 395 (Jenkins Dep. pp. 17-19, 31) (emphasis added).

R. 302), on April 1, 2009 Mr. Ellis served a motion to take the deposition of Edgar Love, who allegedly found Mr. Ellis in a ditch behind the Double Quick and offered assistance. R. 255.[3] In his motion to take Mr. Love's deposition, Mr. Ellis described Mr. Love as a "key witness in this case" and represented to the Court that ". . .his whereabouts have been unknown to Plaintiff since the incident of October 2006. Mr. Love saw and approached Mr. Ellis on or about March 20, 2009, and wanted to know how he was doing." *See* R. 61-62.

Double Quick objected to this motion on the grounds that the discovery deadline had passed and Mr. Ellis had failed to identify anyone during the course of discovery who purportedly assisted him on the night in question. R. 63-175.[4]

At the hearing on Plaintiff's Motion to Take Deposition, Mr. Ellis, through his counsel,[5] represented as follows:

> We are asking the Court and requesting the Court to allow us to take a deposition of a gentleman by the name of Edgar Love, Your Honor. We were just made aware, at least my office was made aware of the existence of this person by my client when he was approached by Mr. Love to inquire as to his health condition. We didn't have any idea prior to Mr. Love coming forward that, of what type information, facts, and circumstances that he could shed on this incident that occurred in October 2006.
>
> My client was knocked unconscious after receiving a severe blow from one of the assailants on October 2006. There were rumors that there was someone or

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[3] Mr. Ellis describes Mr. Love as "the one who had found [him] in a ditch near the Double Quick on Double Quick property [the] night [of his attack]." Appellant's Brief at 3. Double Quick disputes that Mr. Ellis was found "on Double Quick property" because the ditch is **not** on Double Quick property.

[4] Neither the Indianola Police Department's offense and arrest reports, Mr. Ellis's deposition testimony, taken April 11, 2008, Mr. Ellis's responses and supplemental responses to written discovery, nor the deposition testimony of the three fact witnesses previously identified by Mr. Ellis, had any mention of Mr. Love or any description of any person "who aided Mr. Ellis following the assault at Double Quick" but whose whereabouts were unknown to Mr. Ellis. *See* R. 68-171.

[5] Double Quick does not claim, nor has it ever claimed, that Plaintiff's counsel had actual knowledge that his client, in fact, knew about Mr. Love's role in the alleged incident since 2007.

multiple individuals[6] who may have aided or assisted Mr. Ellis, the plaintiff in this case, following this incident. So there was no way for us to absolutely know who this person was, whether or not he existed. All we knew was there were other individuals who were out there who may have seen this incident occur, who may have assisted Mr. Ellis in this. And it wasn't until, again, that we received a phone call from our client indicating that he had just come in contact with Mr. Love, and I immediately sent a letter to counsel opposite indicating that we were just made aware of the existence of this person. What this person is going to tell us in [his] deposition, I have no idea but I do want to go ahead and move forward with the deposition.

R. 303-06. Subsequently, by Agreed Amended Scheduling Order, the discovery deadline was again extended, this time until June 15, 2009. R. 178. Mr. Love's deposition was taken on June 5, 2009.

In direct contrast to Mr. Ellis's representations that he did not learn about Mr. Love until March of 2009, Mr. Love readily admitted to seeing and speaking to Mr. Ellis "countless" times since the incident. More particularly, Mr. Love testified that he informed Mr. Ellis as early as 2007 about the role he played on the night in question:

Q: Let me ask it this way -- this might be a better question -- since the incident, how many times have you seen Mr. Ellis?
A: Every day. Every day. Do I have to accurately count and tell you how many time I seen him a day? I -- I can't do that. I see him every day --

R. 275.

Q: So you saw Mr. Ellis every day after the incident?
A: If he come through where I'm at, yeah.
Q: And do you understand what you're saying, though?
A: If he's coming through the area that I'm in, I see him every day. Even in the morning, I see him every morning when I'm getting up -- get up, getting ready to go to work. I go get me some coffee. I see him and the guy he works with. I speak to him. I go on about my business. They go on about theirs.

Id.

[6] Curiously absent in Plaintiff's answers and supplemental answers to interrogatories, and the deposition testimony of Plaintiff and three facts witnesses, is reference to any "rumors" of "someone or multiple individuals" helping Plaintiff following the alleged incident.

Q: Let me ask it another way. Can you count how many times you've seen Mr. Ellis since the incident?
A: I just told you I can't count.
Q: So, it's been countless times you've --
A: Yes.
Q: -- seen him? And you've spoken to him, correct?
A: Yeah. I spoke to him.

R. 276.

Q: So just that I'm -- the record is clear, let me just kind of recap your testimony here. It's your testimony that you've seen Mr. Ellis since the incident countless times?
A: Yes.
Q: And you have spoken to Mr. Ellis since the incident countless times?
A: Yes.

R. 278.

Q: At any point did you tell him about the incident and your helping him that night?
A: Yes.

R. 279.

Q: Would you say you had that conversation sometime in '07? I'm just trying to get a timeframe when you had that --
A: I -- I --
Q: -- conversation.
A: -- don't know. I don't know. I -- yes, I guess, it would have been in '07.
Q: So sometime in '07 --
A: Yes.
Q: -- you did have a conversation with Mr. Ellis about the night that you assisted him?
A: Yes.

R. 280.

Mr. Love described that conversation, explaining that Mr. Ellis told him what happened that night:

Q: So [Plaintiff] thanked you for [helping him]?
A: Yeah.
Q: When you had that conversation with –

A: Yeah.

Q: -- him about the incident --
A: Yeah.
Q: -- the first conversation in '07?
A: Yeah.
Q: And at that conversation, did he tell you what happened to him? Did he go into details?
A: He said something about he was letting somebody use his telephone. Somebody had asked him -- a -- a -- a guy had asked him to use his telephone, and he let the guy use his telephone. And the guy went to talk around the corner with his phone because he was talking to somebody else, and he told the person that he was talking to that he was about to go get his phone. And when he went around the corner to ask the guy about his phone, say some guys jumped him. Other than that, I don't know.

R. 281.

In light of Mr. Love's testimony, Double Quick moved to dismiss, or alternatively, to strike Mr. Love's testimony pursuant to Miss. R. Civ. P. 37(e) (R. 185-306): The deposition testimony of Mr. Love revealed that Mr. Ellis has known about the role Mr. Love played on the date of the alleged incident since 2007 and that Mr. Love and Mr. Ellis talked "countless" times since Mr. Ellis's alleged assault. Double Quick showed, through Mr. Love's testimony, that Mr. Ellis misrepresented to the trial court that he was unaware of Mr. Love's existence until March 2009 - nearly three years after the alleged assault that is the subject of Plaintiff's premises liability action; two years after he filed suit; and two months after the twice-extended discovery deadline had expired. R. 185.

Mr. Ellis's response to Double Quick's motion was basically "I forgot" and the allegations that he suffered memory loss from his head injuries -- without any medical reports or expert opinions to support his allegations. *See* R.E. 204-05; R. 510-11.

Though he expressed "concern" that Mr. Ellis failed to come forward with any medical proof of his purported memory loss, the Trial Court Judge conditionally denied Double Quick's motion, finding there was insufficient proof to determine whether Mr. Ellis's "inability to comply" was willful or not. R.E. 203-05; R. 509-11. The trial court left the door open for the

parties to revisit, with appropriate expert and medical testimony, the issue of Mr. Ellis's "inability to comply." R.E. 205; R. 511.

Double Quick moved for reconsideration on this issue (R. 514-54), submitting the testimony of Plaintiff's treating neurosurgeon, Dr. Lenard Rutkowski. Dr. Rutkowski's testimony shows that it is reasonable to believe that Mr. Ellis's purported inability to comply with the discovery deadline was indeed willful. Dr. Rutkowski explained that Mr. Ellis's concussion typically results in **short-term amnesia**, not any long-term intermittent memory loss:

> Q: With respect to his amnesia, is amnesia a common, I guess, side effect of someone who has suffered a concussion?
> A: Yes.
> Q: And is it long term or is it short term or does it depend? Can you just give us some more information about amnesia as it relates to a person suffering a concussion?
> A: There's two statements I have to make in regards to amnesia. Typically, short-term is what was affected. In other words, you forget what you did a couple of hours ago. It is not long term. You tend to remember what happened weeks, months, years ago. Now, that's one aspect of the type of amnesia. It's usually short term. Now, how long [the short term] amnesia lasts is another issue in regards to how much is bothersome as a result of a concussive or traumatic head injury and that, again, is dependent upon somebody evaluating the patient at some time down the way. But, typically the initial amnesia that you see is short term, in other words, what happened within the first 24 [hours]. . . ."

R. 550-51.

If short-term memory loss is a typical and usual side effect of a concussion, then long-term memory loss would be atypical and unusual. That Mr. Ellis suffered no long-term memory loss is shown by his own testimony; he can clearly remember pre- and post-incident conversations and events,[7] with the exception of the events immediately after the alleged assault

[7] For example, Mr. Ellis recalled: Telling the police officer while he was in jail that he needed to go to the hospital. "He said, well, we'll drop you off. I said no. Just carry me back to [Richard Jenkins' house]." R. 364 (Ellis Dep. p. 44); telling a police "sergeant" the day following the subject incident that he had been assaulted. "I don't remember [who]. I just knew he was a sergeant. . . He had three stripes . . . He was probably six two, 220." R.359 (Ellis Dep. p. 24); calling his sister from Richard Jenkins' house. "She went to work the next day and come home, took my blood pressure and took me to the emergency room in Cleveland and they took me to Greenville." R. 364 (Ellis Dep. p. 44); and calling

(which can be explained as short-term memory loss) and, of course, his 2007 conversation with Mr. Love. Dr. Rutkowksi's assessment that Mr. Ellis suffered short-term memory loss is further supported by the fact that of the voluminous medical records from multiple doctors that Mr. Ellis produced in this case, Mr. Ellis did not refer to **any** medical record or other proof that contradicts Dr. Rutkowski's of short-term memory loss description.

Based on the circumstances surrounding Mr. Love's disclosure; the testimony of Mr. Love, himself; the testimony of Dr. Lenard Rutkowski, Mr. Ellis's treating neurosurgeon; and the lack of any contrary medical evidence, the trial court, "as a sanction against Plaintiff, and not Plaintiff's counsel, . . . [struck] the deposition testimony of Edgar Love and exclude[d] Love from testifying at the trial of this matter." R.E. 14; R. 703. In so doing, the trial court specifically found that Mr. Ellis's claimed "forgetfulness" regarding Mr. Love's existence and his knowledge about the facts of this case "was not the result of any medical condition but an intentional act to circumvent discovery deadlines so that [Mr. Love] could provide testimony favorable to the Plaintiff in this matter." *Id.*

Plaintiff appealed this decision on October 26, 2009. R.E. 15; R. 706.

Detective Gilson "to see what had been done, if they heard anything, found out who hit me. . . ." R. 365 (Ellis Dep. p. 45).

SUMMARY OF THE ARGUMENT

Summary judgment in Double Quick's favor should be affirmed because Mr. Ellis failed to show, with "significant, probative evidence," that an "atmosphere of violence" existed at the Double Quick so as to give Double Quick "cause to anticipate" Mr. Ellis's alleged assault. As proof supporting the "atmosphere of violence" factor, Mr. Ellis relies upon twelve police incident reports spanning a **ten-year** time period prior to his alleged attack (R.E. 115-40; R. 455-80); his own testimony and that of his long-time friend, Richard Jenkins, regarding the Double Quick premises;[8] and the Affidavit of his liability expert Commander Tyrone Lewis, in which Commander Lewis bases his foreseeability opinions on this same evidence. In other "atmosphere of violence" cases, the Mississippi appellate courts have found that similar proof does not, as a matter of law, establish an "atmosphere of violence" sufficient to overcome summary judgment on the essential duty element of Mr. Ellis's premises liability claim.

Moreover, because Commander Lewis based his foreseeability opinions on this same evidence, the trial court was well within its discretion to disregard his Affidavit, finding his opinions were not based on the necessary "sufficient facts and data" required under Miss. R. Evid. 702. The trial court did not error in disregarding Commander Lewis's Affidavit in granting summary judgment in Double Quick's favor. In fact, the Mississippi appellate courts have affirmed such decisions under very similar circumstances -- **including two cases in which Commander Lewis's affidavits were found lacking**. *Alqasim v. Capitol City Hotel Investors*,

[8] Mr. Ellis testified that he knew "drug deals" occurred on the Double Quick premises (R.E. 42; R. 107 (Ellis Dep. pp. 61-63)), but he never reported these "drug deals" to Double Quick. *Id.* Mr. Jenkins testified that people would congregate on the property; and that someone had thrown a beer bottle through a window in his car, which caused him to fear going on the premises. R.E. 46-47; R.143-44 (Jenkins Dep. pp. 20-21). Notably, Mr. Jenkins never reported the beer bottle incident to Double Quick, and, despite his "fear" of the premises, he visited the Double Quick "probably every day . . . at this particular time." R.E. 46; R.143 (Jenkins Dep. p. 20).

989 So. 2d 488, 493 (Miss. Ct. App. 2008); *Davis v. Christian Brotherhood Homes of Jackson, Miss., Inc.*, 957 So. 2d 390, 408-10 (Miss. Ct. App. 2007).

Alternatively only, should the Court reverse and remand this case for a trial on the merits, then the trial court's decision to exclude any deposition or live testimony of Edgar Love should be affirmed. The trial court properly exercised the "great latitude" afforded the trial courts in imposing discovery sanctions, when it excluded the deposition testimony of Edgar Love and excluded him from testifying at trial. Though Mr. Love's testimony goes to the very merits of Mr. Ellis's premises liability claim,[9] Mr. Ellis did not identify Mr. Love until March 2009 -- outside the twice-extended discovery deadline and nearly three years after his alleged October 7, 2006 assault. Mr. Ellis represented to the trial court that he did not learn about Mr. Love until March of 2009, but Mr. Love, when deposed, said he saw and spoke to Mr. Ellis "countless" times since the incident (R. 275-81); and specifically testified that **as early as 2007** (i) he told Mr. Ellis about the role he played on the night in question; (ii) **Mr. Ellis** thanked him for his help at that time; and (iii) **Mr. Ellis** told Mr. Love what had happened to him on that night. *Id.*

Mr. Ellis's claimed "forgetfulness" as to Mr. Love's existence and knowledge about his alleged assault is refuted by (i) the testimony of Dr. Lenard Rutkowski, Mr. Ellis's treating neurosurgeon, that Mr. Ellis's concussion typically results in short-term, not long-term amnesia; (ii) the lack of any contrary medical evidence that would show Mr. Ellis suffered from long-term amnesia; and (iii) Mr. Ellis's own testimony in which he remember numerous other pre- and post-assault facts. This evidence shows that Mr. Ellis's untimely March 2009 disclosure of Mr. Love was indeed intentional. The trial court was well within its discretion in finding that Mr.

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[9] As noted above, Mr. Ellis describes Mr. Love as "the one who had found [him] in a ditch near the Double Quick on Double Quick property that night [of his attack]." Appellant's Brief at 3. Though Double Quick disputes that Mr. Ellis was found "on Double Quick property" because the ditch is **not** on Double Quick property, the point here is that Plaintiff relies on Mr. Love's testimony for this crucial fact -- yet failed to reveal his existence until nearly three years after his alleged assault.

Ellis's claimed "forgetfulness" regarding Mr. Love "was not the result of any medical condition but an intentional act to circumvent discovery deadlines so that [Mr. Love] could provide testimony favorable to the Plaintiff in this matter." R.E. 14, R. 703. Based on the evidence before it, the trial court had ample grounds to exclude Mr. Love's testimony pursuant to Miss. R. Civ. P. 37 and the applicable case law.

ARGUMENT

A. Standard of Review.

This Court "employ[s] the *de novo* standard in reviewing a trial court's grant of summary judgment." *Brown ex rel. Ford v. J.J. Ferguson Sand & Gravel Co.*, 858 So. 2d 129, 130 (Miss. 2003), citing *O'Neal Steel, Inc. v. Millette*, 797 So. 2d 869, 872 (Miss. 2001). In conducting a *de novo* review, the Court looks "at all evidentiary matters before [it], including admissions in pleadings, answers to interrogatories, depositions, and affidavits." *Brown*, 858 So. 2d at 130 (citations omitted); *see Newell v. Hinton*, 556 So. 2d 1037, 1041 (Miss. 1990). The nonmoving party must diligently oppose summary judgment. *Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc.*, 519 So. 2d 413, 415 (Miss. 1988).

Thus the trial court -- and this Court upon *de novo* review -- must assess the evidence presented to determine whether Mr. Ellis may proceed with his lawsuit. In particular, the Court must determine whether Mr. Ellis, in rebutting Double Quick's summary judgment motion, has furnished "**significant probative evidence** showing that there are indeed genuine issues for trial." *Borne v. Dunlop Tire Corp.*, 12 So. 3d 565, 570 (Miss. Ct. App. 2009) (citing *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 485 (Miss. 2006)) (emphasis added). The evidence necessary to meet this burden must be evidence upon which "a fair-minded jury could return a favorable verdict." *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1214 (Miss. 1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In short, Miss. R. Civ. P. 56 mandates the entry of summary judgment where the non-moving party fails to make a showing sufficient to establish the existence of an element essential to his case on which he bears the burden of proof at trial. *Grisham*, 519 So. 2d at 416; *see Evan Johnson & Sons Const., Inc. v. State*, 877 So. 2d 360, 365 (Miss. 2004); *Borne*, 12 So. 3d at 570.

B. Summary Judgment in Double Quick's Favor Should be Affirmed Because Mr. Ellis Cannot Show His Attack Was Reasonably Foreseeable to Double Quick.

To establish a prima facie premises liability case, Mr. Ellis must prove the familiar elements of duty, breach of duty, proximate cause, and damages. *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So. 2d 1186, 1189 (Miss. 1994). In this case, Mr. Ellis does not have sufficient, competent evidence to overcome summary judgment on the duty element of his premises liability claim.

In a premises liability action, the duty owed by the property owner is established by first identifying the injured party's status. *Little by Little v. Bell*, 719 So. 2d 757, 760 (Miss. 1998). For purposes of its summary judgment motion only, Double Quick conceded that Mr. Ellis was an invitee.

As to the duty owed an invitee, "**[t]he landowner is not an insurer of the invitee's safety**, but does owe to an invitee the duty to keep the premises reasonably safe. . . ." *Corley v. Evans*, 835 So. 2d 30, 37 (Miss. 2003) (emphasis added). The premises owner must employ reasonable care to protect an invitee from "reasonably foreseeable injuries at the hands of another." *Newell v. S. Jitney Jungle Co.*, 830 So. 2d 621, 623 (Miss. 2002).

Criminal actions of third parties, like the unknown assailants here, are considered "reasonably foreseeable if the premises owner had cause to anticipate such acts." *Davis v. Christian Brotherhood Homes of Jackson, Miss., Inc.*, 957 So. 2d 390, 401 (Miss. Ct. App. 2007). The "cause to anticipate" element is satisfied if the premises owner had "(1) actual or constructive knowledge of the third party's violent nature, or (2) actual or constructive knowledge that an atmosphere of violence existed on the premises." *Id.* "'[T]he overall pattern of criminal activity prior to the event in question that occurred in the general vicinity of the defendant's business premises, as well as the frequency of criminal activity on the premises, are

both relevant factors in determining whether an 'atmosphere of violence' exists on the premises." *Davis*, 957 So. 2d at 401, quoting *Crain,* 641 So. 2d at 1189-90.

As detailed below, Mr. Ellis lacks sufficient proof of either foreseeability factor necessary to show that Double Quick had a duty to protect him from his unknown assailants. He has no evidence regarding Double Quick's knowledge of the "violent nature" of his assailants because they are unknown; and he lacks the requisite "significant probative evidence" as to the existence of an "atmosphere of violence" at the Double Quick that he needs in order to overcome summary judgment in Double Quick's favor.

a. Mr. Ellis Cannot Prove Actual or Constructive Knowledge by Double Quick of His Alleged Assailants' Violent Nature.

Because Mr. Ellis cannot identify his alleged assailants (R. 361-62 (Ellis Dep. pp. 32-33)), Double Quick did not – could not – have any actual or constructive knowledge of these unknown assailants' violent nature. R.E. 263, Tr. at 44. Mr. Ellis does not contest this. The "violent nature" factor of the foreseeability test is not met.

b. Mr. Ellis Cannot Prove an "Atmosphere Of Violence" Existed at the Double Quick.

Thus, in order to establish that Double Quick owed him a duty to protect him from his unknown assailants, Mr. Ellis must present "significant probative evidence" that Double Quick had "cause to anticipate" his "brutal beating" due to an "atmosphere of violence" existing on the premises. Mr. Ellis's proof of an "atmosphere of violence" at the Double Quick is insufficient as a matter of law. Double Quick is entitled to summary judgment in this case.

Mr. Ellis's "atmosphere of violence" evidence consists of the following:

- Twelve police incident reports relating to the subject premises (R.E. 115-40; R. 455-80).

  These 12 incident reports span the ten-year period prior to Mr. Ellis's alleged October 2006 assault and none of them involve a "brutal beating" by unknown assailants, as Mr. Ellis alleges occurred in this case.

- Mr. Ellis's testimony that he knew "drug deals" occurred on the Double Quick premises (R.E. 42; R. 107 (Ellis Dep. pp. 61-63)).

  None of these "drug deals" were reported to Double Quick (R.E. 42; R. 107 (Ellis Dep. at p. 62)).

- Testimony by Mr. Ellis's long-time friend, Richard Jenkins, that people would congregate on the property; and that someone had thrown a beer bottle through a window in his car, which caused him to fear going on the premises (R.E. 46-47; R.143-44 (Jenkins Dep. pp. 20-21)).

  Mr. Jenkins never reported the beer bottle incident to Double Quick, and, despite his "fear" of the premises, he visited the Double Quick "probably every day . . . at this particular time." (R.E. 46; R.143 (Jenkins Dep. p. 20)).

The twelve incidents Mr. Ellis relies upon (R.E. 115-40; R. 455-80) are summarized below:

Date of Incident	Description of Incident
March 14, 1996	Larceny – theft of $6's worth of gasoline. R.E. 128; R. 468.
July 4, 1996	Burglary – theft of beer. R.E. 139-40; R.479-80.
September 16, 2000	Disorderly Conduct – Fight. R.E. 129-30; R. 469-70.
October 30, 2003	Aggravated Assault - Dispute involving two teenagers girls over a boy. R.E. 115-17; R. 455-57.
January 1, 2005	Burglary – theft of cigarettes and beer. R.E. 118-20; R. 458-60.
January 2, 2005	Burglary – theft of safe. R.E. 121-23; R. 461-63.
July 24, 2005	Malicious Mischief/Vandalism – Dispute between boyfriend and girlfriend where boyfriend pounded on girlfriend's car window. R.E. 131-32; R. 471-72.
August 19, 2005	Vandalism – Boys playing in store and hit glass breaking it. R.E. 126-27; R. 466-67.
September 6, 2005	Simple Assault – Domestic dispute. R.E. 133; R. 473.
July 2, 2006	Disturbing the peace/Disorderly conduct – two males creating disturbance by fighting. R.E. 134; R. 474.
August 30, 2006	Petit Larceny – customer left gas pump without paying for $10's worth of gasoline. R.E. 135; R. 475.
October 5, 2006	Simple Assault – one woman, known to the other, sprayed other woman with mace. R.E. 136; R. 476.

These twelve incidents, taken together with the testimony described above,[10] are not the type of incidents, nor are they of the frequency, that the Court has found establishes an "atmosphere of violence" sufficient to overcome summary judgment on the essential duty element of Mr. Ellis's premises liability claim.

First, the twelve incidents Mr. Ellis relies upon span **ten years** prior to his attack -- a far greater time span than has been examined in other Mississippi "atmosphere of violence" cases. In fact, the **ten year** time span of the crime incidents Mr. Ellis relies upon is two times, or more, the time span used in other premises cases (*see Gatewood v. Sampson*, 812 So. 2d 212, 220 (Miss. 2002) (3 years); *Crain*, 641 So. 2d at 1192 (5 years); *Kelly v. Retzer & Retzer, Inc.*, 417 So. 2d 556, 559 (Miss. 1982) (3 years); *Davis*, 957 So. 2d at 402 (4 years); *Magnusen v. Pine Belt Inv. Corp.*, 963 So. 2d 1279, 1282-83 (Miss. Ct. App. 2007) (5 years)) -- with the Court in some cases reviewing a time span of a year or less. *Glover ex rel. Glover v. Jackson State University*, 968 So. 2d 1267, 1279 (Miss. 2007) (10 months); *American Nat. Ins. Co. v. Hogue*, 749 So. 2d 1254, 1258-59 (Miss. Ct. App. 2000) (1 year).[11]

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[10] Mr. Ellis also claims that the fact that Double Quick used security guards during peak traffic hours should be used against it to show his assault was reasonably foreseeable. Appellant's Brief at 17. The Court's analysis in *Simpson v. Boyd*, 880 So. 2d 1047 (Miss. 2004) shows this is not so. The Court held that defendant "Boyd's decision to install a panic button and security system in the building" was not evidence of the existence of an atmosphere of violence. Rather, it merely established that "Boyd was willing to take precautionary measures for any number of security reasons" -- not that he was on notice that the subject attack would occur in his office. *Id.* at 1052. Similarly, that Double Quick uses security personnel during peak traffic hours is not evidence of an atmosphere of violence, but rather simply reflects management's decision to provide security during the store's busiest hours. *See* R.E. 86-87; R. 423-24 (Shafer Dep. pp. 60-63).

[11] Mr. Ellis also suggests that because Indianola's population is only 10% that of Jackson, Mississippi, he needs only 6 crime incidents to show foreseability, that being 10% of the 60 crime incidents occurring in Jackson that were reviewed by the Court in *Glover* and *Gatewood*. *See* Appellant's Brief at 15-16. Even if this comparison were valid, Mr. Ellis's failure to consider **the relevant time spans** likewise negates this "theory." The time span in *Gatewood* was three years, and in *Glover* it was 10 months. Properly applying Mr. Ellis's calculations, he would need 20 incidents in 10 years under *Gatewood*; and 72 incidents in 10 years under *Glover* -- not the six incidents he claims would be sufficient.

Moreover, though Mr. Ellis suggests this Court should mechanically count the number of incidents without regard to the nature of each incident (Appellant's Brief at 17-18), his argument defies common sense. Logic dictates that minor thefts of cigarettes, beer and gasoline,[12] or boys playing in the store resulting in broken glass,[13] are of little, if any, significance in assessing an "atmosphere of violence" at the Double Quick. Additionally, of the twelve incidents, all the reported assaults against persons were fights or spats between persons known to each other, engaged in ongoing relationships. These are a far cry from the unprovoked "brutal beating" (*see, e.g.* R. 8); by unknown assailants (R. 361-62 (Ellis Dep. pp. 32-33)) that Mr. Ellis alleges occurred in this case. Though the *Hogue*[14] court suggests incidents need not be "offense-specific," this does not mean that the trial court, or this Court on *de novo* review, must abandon all logic and give each and every incident equal significance in assessing the "atmosphere of violence" factor for summary judgment purposes.[15] Comparable premises liability cases show this is true.

In *Magnusen*, for example, the Court examined 13 police reports[16] covering the Burger King premises in the **five year** period preceding plaintiff's attack in the Burger King parking lot. 963 So. 2d at 1282-84. These incidents included several purse thefts, three thefts from the Burger King, a bomb threat, threatening comments made to a store employee, and, just two months earlier, an attack on a woman in her car while waiting in the drive-thru line. *Id.* at 1283.

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[12] *See* R.E. 128, 139-40, 118-20, 135; R. 468, 479-80, 458-60, 475.

[13] See R.E. 126-27; R. 466-67.

[14] *American Nat. Ins. Co. v. Hogue*, 749 So. 2d 1254, 1260 (Miss. Ct. App. 2000).

[15] As noted above, on summary judgment it is the Court's role to assess the sufficiency of any evidence before in determining whether the non-movant (Mr. Ellis here) has brought forward "**significant probative evidence** demonstrating the existence of a triable issue of fact." *Newell*, 556 So. 2d at 1042 (emphasis added).

[16] The Court actually examined 16 reports, but noted 3 reports were later learned to have been fabricated.

Despite the attack occurring just months before, the Court noted that this was the only violent incident in the five year period before plaintiff's attack, and held that this evidence was insufficient to find an "atmosphere of violence" on the Burger King premises. *Id.* at 1284.

The *Crain* court likewise affirmed summary judgment in favor of the Moose Lodge based on lack of proof of an "atmosphere of violence". 641 So. 2d at 1187. Crain was assaulted by an unknown assailant in the Lodge parking lot. Addressing the "atmosphere of violence" foreseeability factor, the Court held it was "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. *Id.* at 1187.

The trial court in *Kelly* granted a peremptory instruction for the defendant where plaintiffs brought a premises liability claim against McDonalds for the victim's fatal shooting occurring in the McDonald's parking lot. 417 So. 2d at 559. 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" (*id.*), plus testimony by several witnesses concerning various incidents in which they were involved on McDonald's premises, the Court affirmed the trial court's decision.

In relevant part, the *Kelly* Court held that plaintiffs failed to show the fatal shooting in the McDonald's parking lot was reasonably foreseeable. *Id.* at 559-60. *See also Scott v. City of Goodman,* 997 So. 2d 270, 275 (Miss. Ct. App. 2008) (evidence that premises "was frequently robbed" held insufficient to show "atmosphere of violence"); *Stevens v. Triplett*, 933 So. 2d 983, 986 (Miss. Ct. App. 2005) (though not indicating a time span in which the incidents were

examined, the court held that "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.").

A comparison to cases in which the Court has held that the evidence **does** create a question of fact on the "atmosphere of violence" issue also shows that the evidence Mr. Ellis relies upon here does **not** do so in this case. *See, e.g., Glover*, 968 So. 2d at 1279 ("sixty-three crimes . . .reported to have occurred **on the JSU campus** [the subject premises] **during the ten 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); *Gatewood,* 812 So. 2d at 220 (60 violent crimes reported in the **neighborhood surrounding** the Exxon where the incident occurred in the prior **3 years,** 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); *Davis,* 957 So. 2d at 402 (question of fact existed on "atmosphere of violence" issue based on the testimony of five witnesses about fights and shootings on the premises (one witness testifying that they occurred "everyday"), and a police activity log for the **four years** prior to the subject shooting with "multiple entries reflecting the following: shots fired, fights, arson, man with gun, possession of narcotics, malicious mischief, disturbance, stabbing, simple assault, aggravated assault, rape, auto theft, shooting w/intent, disturbing the peace, burglary, armed robbery, trespassing, among others."); *Hogue*, 749 So. 2d at 1259 (question of fact created as to foreseeability on "atmosphere of violence" prong based on crime compilations "**limited to crimes against persons and certain property crimes, . . . [not including] such offenses as shoplifting**. . . [which] indicated that there were between **seventy-one and seventy-nine calls**

made from the [subject premises (Edgewater Mall)] to the Biloxi Police Department **annually**.") (emphasis added).[17]

Mr. Ellis failed to produce "significant, probative evidence" to prove the essential duty element of his premises liability claim. Summary judgment in Double Quick's favor should be affirmed on this basis.

C. The Trial Court Did Not Error In Disregarding the Affidavit of Commander Lewis and Granting Summary Judgment in Double Quick's Favor.

Mr. Ellis also challenges the trial court's disregard of the Affidavit of his liability expert, Commander Tyrone Lewis. This challenge is meritless, as shown when the trial court's determination is placed in its proper context.

First, based on Mr. Ellis's lack of sufficient proof of an "atmosphere fo violence," the trial court held:

> Viewing the evidence in a light most favorable to Plaintiff, this Court finds as a matter of law that Plaintiff has not produced sufficient competent evidence that reasonable minds could differ as to whether an "atmosphere of violence" existed at the subject store nor could it be said the assault on Plaintiff was reasonably foreseeable.

R.E. 13, R. 702 (¶26).

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[17] Mr. Ellis points out in his brief that incidents considered in some cases were not all on the premises, as compared to the 12 incidents he relies upon which occurred at the Double Quick. Appellant's Brief at 15, 17. As an initial matter, in most cases cited above the courts **did** limit their analysis to incidents and testimony relating to the subject premises. But even as to those cases in which the courts looked to incidents outside the premises, the geographic scope was limited. *See, e.g., Crain,* 641 So. 2d at 1187 (2 block radius); *Gatewood,* 812 So. 2d at 220 (review limited to surrounding neighborhood, with over half the crimes occurring in the adjacent Ellis Isle mall); *Stevens,* 933 So. 2d at 986 (neighborhood). Indeed, premises liability law allows for consideration of crime incidents "in the general vicinity" of the business premises, as well as occurrences on the premises (*see Crain,* 641 So. 2d at 1187) -- a principle Mr. Ellis acknowledges in his own brief. *See* Appellant's Brief at 13. That Mr. Ellis chose to rely solely on incidents occurring on the premises was his decision -- but Plaintiff's case strategy in no way should serve to limit this Court's assessment of the sufficiency of his "atmosphere of violence" proof.

The trial court next considered and addressed the Affidavit of Commander Lewis. Commander Lewis relied on the same evidence examined by the trial court on the "atmosphere of violence" issue as the basis for his foreseeability opinion, as follows:

> It is my opinion to a reasonable degree of professional certainty that the attack on Jessie Dean Ellis on or about October 7, 2006 . . . was a natural and foreseeable consequence of the conditions and circumstances that existed on the premises on and prior to October 7, 2006. This opinion is based on the fact that there had been sufficient crime committed on the premises of the subject convenience store to place the owner on notice that reasonable security measures were needed for the security, safety and well-being of their patrons. See Crime Stats of the subject property attached hereto as Exhibit A.

R.E. 156; R. 600 (referenced crime stats attached as Ex. A to the Affidavit at R. 604-24).[18]

In light of the same lack of "sufficient competent evidence" on the atmosphere of violence issue described earlier in his opinion (R.E. 13; R. 702 (¶26)), the Trial Court Judge likewise held:

> [T]his Court finds the opinions of Commander Lewis are precisely the kind of testimony our rules mean to keep out, that is, *ipse dixit* or "it is because I say it is". Lewis' expert opinions and conclusions, without sufficient facts or data upon which these opinions are based, are not reliable.

R.E. 13; R. 702 (¶29).

In short, the trial court applied Rule 702[19] and *Daubert*[20]/*McLemore*[21] standards, and found Commander Lewis's Affidavit was not "based upon [the] sufficient facts and data" (Miss. R. Evid. 702) necessary to take his opinions out of the realm of "unsupported speculation." R.E.

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[18] In relevant part, Commander Lewis also relied upon the "discovery responses [of Plaintiff and Defendants] . . . photographs of the subject property, [and] depositions." R.E. 155; R. 599.

[19] Miss. R. Evid. 702 provides that "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

[20] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

[21] *Mississippi Transp. Com'n v. McLemore*, 863 So. 2d 31 (Miss. 2003).

13; R. 702 (¶29). Mr. Ellis argues, however, that the trial court abused its discretion by excluding his expert's Affidavit -- despite the fact that the trial court rejected Commander Lewis's Affidavit based on the insufficiency of the very same facts and data that formed the crux of Double Quick's summary judgment motion[22] -- thoroughly briefed by the parties and addressed at the hearing on Double Quick's motion for summary judgment. Nevertheless, Mr. Ellis claims the trial court acted arbitrarily in denying "Plaintiff the opportunity for a *Daubert* hearing, when Plaintiff had no prior notice of any challenges to the basis of his expert's testimony." Appellant's Brief at 22.

Plaintiff's argument is meritless -- as discussed in further detail below, the trial court did not error in disregarding Commander Lewis's Affidavit in granting summary judgment in Double Quick's favor. *See Alqasim*, 989 So. 2d at 493; *Davis,* 957 So. 2d at 408-10; *see also Luvene v. Waldrup*, 903 So. 2d 745, 746-49 (Miss. 2005); *Rogers v. Barlow Eddy Jenkins P.A.,* 22 So. 3d 1219, 1225-26 (Miss. Ct. App. 2009). Mr. Ellis portrays the trial court's decision out of context; and ignores the essential point explained above: The trial court rejected Commander Lewis's Affidavit because it lacked a sufficient factual basis -- the same lack of sufficient "atmosphere of violence" proof challenged by Double Quick on summary judgment.

There is no "lack of notice" on this issue: Mr. Ellis had notice that the sufficiency of his "atmosphere of violence" proof was at issue from the filing of Double Quick's motion for summary judgment -- including the sufficiency of the police incident reports attached to Double Quick's Motion (R.E. 115-40; R. 455-80) **and** the sufficiency of Commander Lewis's opinions

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[22] *See, e.g.,* R.E. 243, Tr. 24 (At the hearing on Double Quick's summary judgment motion, Double Quick's counsel summarized the basis for its motion: "The crux of the matter is that the record is void of any evidence to support a finding that the alleged assault was reasonably foreseeable because an atmosphere of violence existed on the subject premises for [Double Quick] to have cause to anticipate the assault against the plaintiff.").

based on these reports and other deposition testimony, likewise attached to Double Quick's Motion (R. 495-508) (Plaintiff's Expert Designation).

Indeed, Plaintiff thoroughly briefed his opposition to Double Quick's motion (R. 555-98), attaching Commander Lewis's Affidavit (R. 562-66), and the "Crime Stats" (R. 567-87) which Double Quick had already attached to and challenged in its summary judgment motion. Double Quick filed no *Daubert* challenge or motion to strike Commander Lewis's Affidavit because, again, Commander Lewis's Affidavit was based on the very data Double Quick challenged (and attached to) its own summary judgment motion.

Nor is there any validity to Plaintiff's claim that he was entitled to a separate *Daubert* challenge as to the sufficiency of Commander Lewis's Affidavit: The entire summary judgment hearing was devoted to an assessment of the sufficiency of the "atmosphere of violence" evidence under the applicable law. In fact, in assessing the reliability of Commander Lewis's Affidavit based on this evidence, the Trial Court Judge asked Plaintiff's counsel several times whether he had any other evidence on the "atmosphere of violence" issue -- wanting to make absolutely certain this was the only evidence Plaintiff intended to rely upon to prove this element of his premises liability claim. *See* R.E. 250, 281-82; Tr. 31, 63-64.

Finding Plaintiff's "atmosphere of violence" evidence insufficient upon reviewing the thorough briefing and the argument of counsel, the Trial Court Judge then properly exercised his gate-keeping responsibilities by likewise excluding Commander Lewis's Affidavit. Plaintiff claims that the trial court abused its discretion in making this determination -- but the opposite is true. The Mississippi appellate courts have **affirmed** such decisions under very similar circumstances -- **including two cases in which Commander Lewis's affidavits were found lacking**. *See Alqasim*, 989 So. 2d at 493; *Davis*, 957 So. 2d at 408-10.

In *Davis* the victim was shot on the apartment complex's premises and his survivors brought a premises liability action against the apartment complex owner (Christian Brotherhood). 957 So. 2d at 394-97. Plaintiffs' relied on Commander Lewis's affidavit to support their claim in response to Christian Brotherhood's motion for summary judgment. *Id.* at 408-10. Granting Christian Brotherhood's summary judgment motion,[23] the trial court referred to Commander Lewis's affidavit, finding that "'it's nothing more than just a compilation of conclusory statements [and] provides no factual basis.' The [trial] court further opined that the majority of the testimony contained in the affidavit 'would be objectionable, and what would survive would not provide material relevant evidence that would defeat a motion for a directed verdict.'" *Id.* at 408, quoting the trial court opinion.

After undergoing a thorough Rule 702 analysis, the Court of Appeals affirmed the trial court's decision, stating, "we agree with the trial judge that there is no 'factual basis' for Commander Lewis's conclusions, and therefore the trial court properly disregarded the affidavit's conclusions on causation because Commander Lewis's opinions lacked reliability." *Id.* at 409. Summarizing its holding, the Court stated: "Consequently, the trial judge did not abuse his discretion as gatekeeper in ruling that the opinions contained in Commander Lewis's affidavit were merely 'conclusory' and had no 'factual basis.' The trial judge properly disregarded this evidence in rendering summary judgment for Christian Brotherhood." *Id.* at 410.

Similarly, in *Alqasim,* Alqasim, a hotel guest, brought a premises liability action against Hampton Inn and others for injuries he suffered when he was robbed in hotel's parking lot. 989 So. 2d at 490. Alqasim relied upon an affidavit by Commander Lewis in support of his claim

[23] Christian Brotherhood did not separately file a motion to strike or *Daubert* motion with respect to Commander Lewis's affidavit.

against Hampton Inn and in rebutting Hampton Inn's summary judgment motion.[24] Affirming summary judgment in Hampton Inn's favor, the Mississippi Court of Appeals upheld the trial court's rejection of the "general statements and broad conclusions" in Commander Lewis's affidavit. *Id.* at 493. *See Luvene,* 903 So. 2d at 746-49 (en banc) (reversing Court of Appeals on writ of certiorari and reinstating trial court's grant of summary judgment in defendant Cooke's favor based on the trial court's determination that the affidavit of plaintiff's expert was "fatally defective and deficient regarding the issue of causation" and thus plaintiff failed to meet an essential element of his legal malpractice claim); *Rogers,* 22 So. 3d at 1225-26 (The trial court rejected the testimonies of plaintiffs' liability experts on proximate cause at the hearing on defendants' motion for summary judgment and granted defendants' motion based on plaintiffs' inability to prove causation. Relying on *Davis*, the Court of Appeals affirmed, holding that "[s]ummary judgment may not be defeated through expert opinions that are not based on facts but instead are based on a guess, speculation, or conjecture.").[25]

In comparison to this sound and substantial case law supporting the trial court's decision, Plaintiff relies on *Smith ex rel. Smith v. Clement,* 983 So. 2d 285 (Miss. 2008) to support his notice and separate hearing argument. But the trial court in the case at hand excluded Commander Lewis's Affidavit based purely on the lack of "sufficient facts and data" supporting his opinions. This is not case where Double Quick or the trial court challenged the technical or scientific reliability of his opinions, as in *Smith v. Clement.* Though this distinguishes *Smith v. Clement*, it is also relevant that the overriding concern expressed in that case -- that the

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[24] As in *Davis*, there was no pending motion to strike or *Daubert* challenge.

[25] *See also Borne v. Dunlop Tire Corp., Inc.,* 12 So. 3d 565, 569-70 (Miss. Ct. App. 2009) (affirming trial court's determination that summary judgment affidavit was insufficient, though no motion to strike had been filed); *Briscoe's Foodland, Inc. v. Capital Associates, Inc.,* 502 So. 2d 619, 622 (Miss. 1986) (assessing sufficiency of summary judgment affidavits filed by both movant (Briscoe's) and non-movant (Capital) and finding both deficient, though only Briscoe's filed a motion to strike).

proponent of expert testimony be given a "fair opportunity to respond" to any challenge to that testimony -- was amply met here.

As the *Smith* Court explained: "We have never held that a trial court is required to hold a formal *Daubert* hearing when an expert's opinions are challenged. We only require that, when an expert's opinion is challenged, the party sponsoring the expert's challenged opinion be given a fair opportunity to respond to the challenge." 983 So. 2d at 290. Continuing, the Court addressed the trial court's role: "The provision of a fair opportunity to respond is part of the trial court's gate-keeping responsibility, and we will reverse only where the trial court abused its discretion by clearly failing to provide a fair opportunity to respond." *Id.*

A "fair opportunity to respond" is precisely what occurred here. This is a case of a straightforward lack of evidence on the "atmosphere of violence" factor necessary to prove that Double Quick owed a duty to Plaintiff to protect him from his unknown assailants. As detailed above, Mr. Ellis had notice of this issue; thoroughly briefed this issue; and thoroughly addressed this issue at the summary judgment hearing. The trial court's exclusion of Commander Lewis's Affidavit, in turn, was based on the court's determination that Mr. Ellis's "atmosphere of violence" evidence was likewise insufficient to support Commander Lewis's opinions expressed in his Affidavit. In short, Commander Lewis's Affidavit lacked the requisite "factual basis" necessary for it to constitute probative competent proof in support of Mr. Ellis's premises liability case. The trial court did not error in disregarding his Affidavit and granting summary judgment in Double Quick's favor.

D. The Trial Court Properly Invoked its Authority to Impose Discovery Sanctions by Excluding the Deposition Testimony of Edgar Love and Excluding Edgar Love from Testifying at Trial.

Nowhere in Appellant's Brief does he rely upon Edgar Love's testimony in support of the "atmosphere of violence" issue addressed above. As such, if this Court determines that Mr. Ellis

has failed to meet his burden of proof on the essential duty element of his premises liability claim, and affirms the trial court's decision dismissing this case on the merits, then there is no need to address the Edgar Love issue.

Alternatively only, should the Court reverse and remand this case for a trial on the merits, then the trial court's decision to exclude any deposition or live testimony of Edgar Love should be affirmed.[26] Mr. Ellis did not identify Mr. Love until March 2009 -- outside the twice-extended discovery deadline and nearly three years after the subject incident. The circumstances surrounding Mr. Love's disclosure; the testimony of Mr. Love, himself; the testimony of Dr. Lenard Rutkowski, Mr. Ellis's treating neurosurgeon; and the lack of any contrary medical evidence, all show that Mr. Ellis's untimely March 2009 disclosure of Mr. Love was indeed intentional. The trial court was well within its discretion in finding that Mr. Ellis's claimed "forgetfulness" regarding Mr. Love's existence and his knowledge about the facts of this case "was not the result of any medical condition but an intentional act to circumvent discovery deadlines so that [Mr. Love] could provide testimony favorable to the Plaintiff in this matter." R.E. 14, R. 703. Based on the evidence before it, the trial court had ample grounds to exclude Mr. Love's testimony pursuant to Miss. R. Civ. P. 37 and the applicable case law.

To briefly reiterate the underlying facts of this case, Mr. Ellis's alleged assault took place on October 7, 2006; though Mr. Ellis did not file a police report about this incident until three months later. R. 353. Over a year later, Mr. Ellis filed his premises liability action against Double Quick, claiming he was "brutally beaten" "behind the store." R. 8. Mr. Ellis, however, was found unconscious **two blocks** from the Double Quick on October 7, 2006 -- and arrested for public drunkenness. R. 352. No witness saw the alleged "brutal beating" or can testify that it took place on the Double Quick premises. The only properly identified witness on these issues,

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[26] Mr. Ellis did not appeal the award for attorney's fees that Double Quick incurred relating to this issue.

Mr. Ellis's long-time friend, Mr. Jenkins, testified that he **left** the Double Quick as soon as he saw Mr. Ellis exit the Double Quick and become surrounded by a "bunch of guys" that took Mr. Ellis's cell phone and "another one **kind of** hit him." R.E. 45; R. 142 (emphasis added). Mr. Jenkins had his cell phone, but never called the police. R. 392, 395.

In March 2009 -- nearly three years after his alleged assault; two years after filing suit; and two months after the twice-extended discovery deadline expired (R. 67, 172, 173)[27] -- Mr. Ellis, for the first time, identified Edgar Love, a witness who allegedly found Mr. Ellis in a ditch a block behind the Double Quick and offered assistance. R. 255.

In his motion to take Mr. Love's deposition out of time, Mr. Ellis described Mr. Love as a "key witness in this case" and represented to the trial court that ". . .his whereabouts have been unknown to Plaintiff since the incident of October 2006. Mr. Love saw and approached Mr. Ellis on or about March 20, 2009, and wanted to know how he was doing." *See* R. 61-62. But neither the Indianola Police Department's offense and arrest reports, Mr. Ellis's deposition testimony, taken April 11, 2008, Mr. Ellis's responses and supplemental responses to written discovery, nor the deposition testimony of the three fact witnesses previously identified by Mr. Ellis, had any mention of Mr. Love or any description of any person "who aided Mr. Ellis following the assault at Double Quick" but whose whereabouts were unknown to Mr. Ellis. *See* R. 68-171.

[27] In his brief, Mr. Ellis mentions several times that no trial date had been set at the time Mr. Ellis identified Mr. Love as a fact witness. What Mr. Ellis fails to mention is the reason why a trial date had not been set. The Trial Court Judge would not set a trial date so long as the parties were conducting discovery. It is standard procedure for the Trial Court Judge to set a trial date after the parties conclude discovery. On April 1, 2009, following the close of discovery and before the hearing on Mr. Ellis's motion to depose Mr. Ellis, Double Quick submitted a proposed order setting trial.

Double Quick objected to Plaintiff's motion, and at the May 4, 2009 hearing on that motion, Mr. Ellis, through counsel,[28] represented that in March 2009 Mr. Ellis had just been made aware of Mr. Love. R. 303-06. Mr. Ellis's counsel described Mr. Ellis's head injury in explaining to the trial court the reason for Mr. Ellis's untimely disclosure:

> My client was knocked unconscious after receiving a severe blow from one of the assailants on October 2006. There were rumors that there was someone or multiple individuals[29] who may have aided or assisted Mr. Ellis, the plaintiff in this case, following this incident. So there was no way for us to absolutely know who this person was, whether or not he existed.

Id.

Mr. Love's deposition was taken on June 5, 2009.

In direct contrast to Mr. Ellis's representations that he did not learn about Mr. Love until March of 2009, Mr. Love in his deposition readily admitted to seeing and speaking to Mr. Ellis "countless" times since the incident. R. 275-81.[30] More particularly, Mr. Love testified that **as**

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[28] As noted in the "Summary of the Case" section above, Double Quick does not claim, nor has it ever claimed that Plaintiff's counsel had actual knowledge that his client, in fact, knew about Mr. Love's role in the alleged incident since 2007.

[29] Curiously absent in Plaintiff's answers and supplemental answers to interrogatories, Mr. Ellis's deposition testimony, and the deposition of three facts witnesses, is reference to any "rumors" of "someone or multiple individuals" helping Plaintiff following the alleged incident.

[30] Mr. Love testified:

> [By counsel for Double Quick] Q: Let me ask it this way -- this might be a better question -- since the incident, how many times have you seen Mr. Ellis?
> [By Mr. Love] A: Every day. Every day. Do I have to accurately count and tell you how many time I seen him a day? I -- I can't do that. I see him every day --
> * * *
> Q: So you saw Mr. Ellis every day after the incident?
> A: If he come through where I'm at, yeah.
> Q: And do you understand what you're saying, though?
> A: If he's coming through the area that I'm in, I see him every day. Even in the morning, I see him every morning when I'm getting up -- get up, getting ready to go to work. I go get me some coffee. I see him and the guy he works with. I speak to him. I go on about my business. They go on about theirs.
>
> R. 275.

early as 2007 (i) he told Mr. Ellis about the role he played on the night in question; (ii) **Mr. Ellis** thanked him for his help at that time; and (iii) **Mr. Ellis** told Mr. Love what had happened to him on that night:

> [By Counsel for Double Quick] Q: And you have spoken to Mr. Ellis since the incident countless times?
> A: Yes.
>
> * * *
>
> Q: At any point did you tell him about the incident and your helping him that night?
> A: Yes.
>
> * * *
>
> Q: Would you say you had that conversation sometime in '07? I'm just trying to get a timeframe when you had that [conversation]--
>
> * * *
>
> A: [I] don't know. I don't know. I -- yes, I guess, it would have been in '07.
> Q: So sometime in '07 --
> A: Yes.
> Q: -- you did have a conversation with Mr. Ellis about the night that you assisted him?
> A: Yes.
>
> * * *
>
> Q: So [Plaintiff] thanked you for [helping him]?
> A: Yeah.
> Q: When you had that conversation with . . . him about the incident . . . the first conversation in '07?. . . did he tell you what happened to him? Did he go into details?
> A: He said something about he was letting somebody use his telephone. Somebody had asked him -- a -- a -- a guy had asked him to use his telephone, and he let the guy use his telephone. And the guy went to talk around the corner with his phone because he was talking to somebody else, and he told the person that he was talking to that he was about to go get his phone. And when he went around the corner to ask the guy about his phone, say some guys jumped him. Other than that, I don't know.

R. 275-81.

In light of Mr. Love's testimony, Double Quick moved to dismiss, or alternatively, to strike Mr. Love's testimony pursuant to Miss. R. Civ. P. 37(e) (R. 185-306): The deposition testimony of Mr. Love revealed that Mr. Ellis has known about the role Mr. Love played on the date of the alleged incident since 2007; that Mr. Love and Mr. Ellis have talked "countless" times since Mr. Ellis's alleged assault; and that Mr. Ellis, himself, thanked Mr. Love for his help and described to him what happened to him on the night of October 7, 2006. In short, in his motion to take Mr. Love's deposition out of time, and at that hearing, Mr. Ellis had misrepresented to the trial court that he was unaware of Mr. Love's existence until March 2009. R. 185.

Mr. Ellis's response to Double Quick's motion was basically "I forgot". He also alleged that he suffered memory loss from his head injuries -- but offered **no** medical reports or expert opinions to support his allegations. *See* R.E. 204-05; R. 510-11.

Demonstrating the care the trial court took in assessing whether to impose sanctions, the trial court did not grant Double Quick's initial motion to dismiss, or alternatively, strike Mr. Love's testimony. R.E. 203-05; R. 509-11. The trial court, however, expressed "concern" that Mr. Ellis failed to come forward with any medical proof of his purported memory loss, and thus **conditionally** denied Double Quick's motion, finding there was insufficient proof to determine whether Mr. Ellis's "inability to comply" was willful or not. *Id.* The trial court left the door open for the parties to revisit, with appropriate expert and medical testimony, the issue of Mr. Ellis's "inability to comply." R.E. 205; R. 511.

Double Quick moved for reconsideration on this issue (R. 514-54), submitting the testimony of Plaintiff's treating neurosurgeon, Dr. Lenard Rutkowski, which shows that Mr. Ellis's purported inability to comply with the discovery deadline was indeed willful. Dr.

Rutkowski's testimony shows that Mr. Ellis's concussive state resulted in **short-term amnesia**, not any long-term intermittent memory loss:

> Q: With respect to his amnesia, is amnesia a common, I guess, side effect of someone who has suffered a concussion?
> A: Yes.
> Q: And is it long term or is it short term or does it depend? Can you just give us some more information about amnesia as it relates to a person suffering a concussion?
> A: There's two statements I have to make in regards to amnesia. Typically, short-term is what was affected. In other words, you forget what you did a couple of hours ago. It is not long term. You tend to remember what happened weeks, months, years ago. Now, that's one aspect of the type of amnesia. It's usually short term. Now, how long [the short term] amnesia lasts is another issue in regards to how much is bothersome as a result of a concussive or traumatic head injury and that, again, is dependent upon somebody evaluating the patient at some time down the way. But, typically the initial amnesia that you see is short term, in other words, what happened within the first 24 [hours]. . . ."

R. 550-51.

Dr. Rutkowski's testimony is additional support for the trial court's ultimate ruling that Mr. Ellis's "'forgetfulness' was not the result of any medical condition but an intentional act to circumvent discovery deadlines so that [Mr. Love] could provide testimony favorable to the Plaintiff in this matter." R.E. 14, R. 703. If short-term memory loss is a typical and usual side effect of a concussion, then long-term memory loss would be atypical and unusual. Mr. Ellis can clearly remember pre- and post-incident conversations and events,[31] with the exception of the events immediately after the alleged assault (which can be explained away as short-term memory loss) and, of course, his 2007 conversation with Mr. Love. As such, it is unlikely that Mr. Ellis's

[31] For example, Mr. Ellis recalled: Telling the police officer while he was in jail that he needed to go to the hospital. "He said, well, we'll drop you off. I said no. Just carry me back to [Richard Jenkins' house]." R. 364 (Ellis Dep. p. 44); telling a police "sergeant" the day following the subject incident that he had been assaulted. "I don't remember [who]. I just knew he was a sergeant. . . He had three stripes . . . He was probably six two, 220." R.359 (Ellis Dep. p. 24); calling his sister from Richard Jenkins' house. "She went to work the next day and come home, took my blood pressure and took me to the emergency room in Cleveland and they took me to Greenville." R. 364 (Ellis Dep. p. 44); and calling Detective Gilson "to see what had been done, if they heard anything, found out who hit me. . . ." R. 365 (Ellis Dep. p. 45).

memory loss falls into the unusual and atypical category of long-term amnesia. Moreover, out of the voluminous medical records from multiple doctors that have been produced by Mr. Ellis during the course of this litigation, Mr. Ellis does not refer to **any** medical record or other proof that contradicts Dr. Rutkowski's assessment that short-term memory loss is the typical response in Mr. Ellis's case.

The evidence described above, including the testimony of Mr. Love; the testimony of Dr. Lenard Rutkowski, Mr. Ellis's treating neurosurgeon; the testimony of Mr. Ellis himself; and the complete lack of any contrary medical records or expert testimony showing Mr. Ellis had long-term (rather than short-term) memory loss, all show that Mr. Ellis's untimely March 2009 disclosure of Mr. Love was indeed intentional. Based on this evidence, the trial court had ample grounds to exclude Mr. Love's testimony pursuant to Miss. R. Civ. P. 37 and the applicable case law.

In particular, Mr. Ellis showed a complete disregard for the rules governing his actions before the trial court – the greatest of these rules being candor to the Court. The very purpose of Miss. R. Civ. P. 37(e) is to vest the courts with great latitude in deciding when and what sanctions will be imposed for a discovery violation, including the authority to strike pleadings and exclude evidence: "[T]he court may impose upon any party . . . such sanctions as may be just . . . if any party . . . abuses the discovery process in seeking, making or resisting discovery." *See White v. White*, 509 So. 2d 205, 207 (Miss. 1987) ("Rule 37(e) provides the court where the action is pending with a residuary grant of authority to impose "such sanctions as may be just. . . These provisions are intended to give the court great latitude in fashioning appropriate sanctions and this Court has given great deference to the exercise of this discretion."); *Palmer v. Biloxi Reg'l Med. Ctr.*, 564 So. 2d 1346, 1367 (Miss. 1990) (holding imposition of sanctions is necessitated to protect the integrity of the judicial process). Indeed, subparagraph (b)(2)(C) of

Rule 37 specifically allows the court to "[strike] out pleadings or parts thereof" as sanctions to a "disobedient party."

Mr. Ellis argues that the trial court's finding "of a willful discovery violation to disclose the identity of a witness when no trial date had been set and there was no trial preparation prejudice to the Defendant is an abuse of discretion." Appellant's Brief at 26. Mr. Ellis cites no legal authority for this proposition -- understandably so, because the Court has specifically held that in imposing sanctions for **willful** discovery violations, "there is no requirement that the defendant be substantially prejudiced by the absence of [the] evidence." *Pierce v. Heritage Properties, Inc.*, 688 So. 2d 1385, 1391 (Miss. 1997).

A willful violation is what we have here, and thus, under *Pierce*, no prejudice need be shown. This is particularly true in this case, where the trial court gave Mr. Ellis another chance to come forward with medical proof of any long-term memory loss (which Mr. Ellis failed to do), and also opted for the lesser sanction of excluding Mr. Love's testimony, rather than the "death knell" dismissal of Mr. Ellis's case altogether.

Nor can Mr. Ellis adequately distinguish comparable cases affirming sanctions for willful discovery violations. *Pierce* is analogous here, though the trial court in that case imposed the even harsher sanction of dismissal under Rule 37 based on the finding that the plaintiff had willfully concealed that another person was present when she was injured. The Mississippi Supreme Court affirmed. *Id.* at 1392. Pierce, an apartment tenant, was injured when a ceiling fan fell and struck her. She sued the owner of the apartment and manufacturer of the fan. Throughout the proceedings, the plaintiff maintained that she was in the apartment alone. After the trial, however, the defendants discovered that her boyfriend had spent the night – a fact which the plaintiff did not want her parents to know. *Id.* at 1388.

The Mississippi Supreme Court held that the trial court did not abuse its discretion in dismissing the action based on the tenant's willful misstatements in response to discovery requests, in which she falsely stated that no one else was present in her apartment when the fan fell. *Id.* at 1388. The Court called this the "paradigm situation," in which the plaintiff knowingly refused to be forthcoming and actively withheld the truth from the court. *Id.*

In the case at hand, though Mr. Ellis's counsel at the hearing on Plaintiff's motion to take Mr. Love's deposition alluded to "rumors" of "someone or multiple individuals" helping Plaintiff following the alleged incident (R. 303-06), Mr. Ellis's discovery responses in this case never referenced these "rumors" or the possible existence of any such person or persons. And of course, Mr. Ellis never named Mr. Love as a witness or person with knowledge -- though Mr. Love's testimony shows Mr. Ellis knew since 2007 of his existence and that he had helped him the night his assault occurred. Indeed, Mr. Love's testimony shows that Mr. Ellis, in fact, had a conversation with Mr. Love about the incident at the time, and thanked Mr. Love for his help. R. 275-81.

Another analogous case is *Scoggins v. Ellzey Beverages, Inc.*, 743 So. 2d 990 (Miss. 1999), in which the Mississippi Supreme Court affirmed the trial court's dismissal of Ms. Scoggins's lawsuit against a beverage company because she had no credible explanation for the vast discrepancies between her discovery responses relating to past medical conditions and her actual medical records. *Id.* at 995. The trial court did not find Ms. Scoggins's excuse of "forgetfulness" to be credible. *Id.* at 992.

The Court found no abuse of discretion in the trial court's dismissal of Ms. Scoggins's case, finding her misrepresentations went to the heart of her case, and her testimony "was in direct contradiction" to the history described in her medical records. *Id.* at 995. Much like Mr. Ellis in this case, Ms. Scoggins appeared to have selective forgetfulness: "As the trial court

pointed out, [Ms.] Scoggins could recall the details of other aspects of her life as far back as 1958 and as recent as a few months before the hearing." *Id. See also Allen v. National R.R. Passenger Corp.*, 934 So. 2d 1006 (Miss. 2006) (holding that the plaintiff's failure to disclose prior injuries in a workers' compensation claim warranted dismissal for failure to comply with discovery).

Mr. Ellis's "forgetfulness" is likewise not credible here, in the face of Mr. Love's testimony, Dr. Rutkowski's testimony, Mr. Ellis's ability to remember other events after the incident,[32] and the lack of any proof showing Mr. Ellis had long-term, rather than the typical short-term, memory loss. And, like the plaintiffs in *Pierce* and *Scoggins*, the information "forgotten" by Mr. Ellis went to the merits of his premises liability case.[33] This is not situation where a plaintiff omitted or failed to disclose information not relevant to his claim. Exclusion of Mr. Love's testimony was appropriate and well within the trial court's discretion here.

The judicial system is premised upon the truth. Misrepresentation of any kind only serves to taint the system. The trial court correctly adhered to Miss. R. Civ. P. 37(e) and existing case law in excluding the live or deposition testimony of Mr. Love because of Mr. Ellis's willful failure to cooperate in discovery. The Trial Court's decision should be affirmed.

CONCLUSION

Summary judgment in Double Quick's favor should be affirmed. Mr. Ellis did not prove the requisite duty element of his premises liability claim: He failed to show, with "significant, probative evidence," that an "atmosphere of violence" existed at the Double Quick so as to give

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[32] *See* footnote 31.

[33] Mr. Ellis's initial motion to take Mr. Love's deposition described him as a "key witness" (R.61-62); and in his brief Mr. Ellis describes Mr. Love as "the one who had found [him] in a ditch near the Double Quick on Double Quick property that night [of his attack]." Appellant's Brief at 3. Though Double Quick disputes that Mr. Ellis was found "on Double Quick property" because the ditch is **not** on Double Quick property, the point here is that Plaintiff relies on Mr. Love's testimony for this crucial fact -- yet failed to reveal his existence until three years after his alleged assault.

Double Quick "cause to anticipate" his alleged assault. Moreover, because the opinions expressed in Commander Lewis's Affidavit were based on this same insufficient evidence, the trial court properly disregarded his Affidavit under Miss. R. Evid. 702 and properly granted summary judgment in Double Quick's favor.

Alternatively only, should the Court reverse and remand this case for a trial on the merits, then the trial court's decision to exclude any deposition or live testimony of Edgar Love should be affirmed. The trial court properly exercised the "great latitude" afforded the trial courts in imposing discovery sanctions, based on its careful determination that Mr. Ellis's claimed "forgetfulness" regarding Mr. Love was "an intentional act to circumvent discovery deadlines" (R.E. 14, R. 703), providing ample grounds to exclude Mr. Love's testimony pursuant to Miss. R. Civ. P. 37 and the applicable case law.

Accordingly, for the reasons explained above, Double Quick respectfully requests that the judgment of the Circuit Court of Sunflower County, the Honorable Richard A. Smith presiding, be affirmed.

Respectfully submitted,

GRESHAM SERVICE STATIONS, INC. AND
BRADLY MACNEALY

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CERTIFICATE OF SERVICE

I, LEANN W. NEALEY, one of the attorneys for the Defendants-Appellees, do hereby certify that I have this day served a true and correct copy of the above and foregoing Brief Of Appellees by United States Mail to:

Honorable Richard A. Smith
Sunflower County Circuit Judge
Post Office Box 1953
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CIRCUIT COURT JUDGE

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ATTORNEY FOR PLAINTIFF

SO CERTIFIED, this the 16th day of July, 2010.

LeAnn W. Nealey
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