IN THE SUPREME COURT OF MISSISSIPPI

No. 2009-CA-1750

JESSIE DEAN ELLIS **Appellant**

VS.

GRESHAM SERVICE STATIONS, INC, ETAL **Appellees**

REPLY BRIEF OF APPELLANT JESSIE DEAN ELLIS

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CLARIFICATION OF FACTS

A. The Assault did occur.

The proof submitted by Mr. Jesse Deal Ellis shows that on October 6, 2006, he was assaulted by a congregation of people at the Double Quick store on BB King Road in Indianola, Mississippi. This proof includes:

*testimony of Mr. Ellis himself

*testimony of Mr. Jenkins who drove Mr. Dean to the Double Quick and saw someone take Mr. Ellis' cell phone and another person begin hitting him and pushing him to the side of the building

*testimony of Mrs. Timmons that Mr. Ellis called her home and asked to be picked up at the Double Quick, placing him at the Double Quick

*testimony of Mr. Love that he found Mr. Ellis in the ditch behind the building.

Double Quick claims the "brutal assault" never happened. However, the only "proof" it provides to refute Mr. Ellis's proof is a single police report (R.352) that indicates, under "Bonding Information", the date/time and location where Mr. Ellis was read his rights as: "10/07/2006 08:51 300 Second Avenue" . From this, Double Quick infers that Mr. Ellis was found by the police at 300 *Second Avenue*, which its says is two blocks from the Quick Stop. However, that police report is unclear as to where Mr. Ellis was found, because above the Bonding Information, this same report lists the date/time and location of the arrest as: "10/07/2006 08:51 **First Avenue**". *First Avenue runs right behind the Double Quick!* Double Quick provides no testimony from the police to clarify this report, and at most, the report creates a question for the jury to resolve as to where this assault happened and where Mr. Ellis was

found.

The only other evidence that Double Quick puts forth to prove the incident did not happen is Double Quick's corporate representative testimony that no employee reported anything. However, Mr. Love testified that he alerted the store employees once he found Mr. Ellis and asked them to call an ambulance. (R329-330). He waited until the ambulance came and then left. Mrs. Timmons who drove up to the Double Quick to pick Mr. Ellis up confirms that there was an ambulance there, giving credence to Mr. Love's testimony. From this testimony, a jury could and should conclude that someone at the store had to have known or been informed about the assault with police and an ambulance on site. That the employees failed to report it does not mean the incident did not happen.

B. There was no proof of willfulness on Mr. Ellis' part in not remembering Mr. Love's involvement until March of 2009

After failing in its first defense that the incident never happened or did not happen on its premises, Double Quick then moves on in its brief to argue its challenge to the introduction of Mr. Edgar Love's testimony. Clearly, Mr. Love is a key witness who not only placed Mr. Ellis on the Double Quick property, but also alerted Double Quick employees to his injuries, which Love also describes as severe. Mr. Love's testimony fills in the gaps between Mr. Jenkins' leaving, and Mrs. Timmons arriving to find the ambulance at Double Quick. Thus, it was critical for Double Quick to prevent Mr. Love from testifying. Double Quick, however, would never admit this, nor could Double Quick argue that the disclosure of Love in March of 2009, when no trial date had even been set, prejudiced them in their trial preparation.[1] All Double Quick could

[1]The Trial Court inquired of Double Quick how it may be prejudiced by this late

seize upon to exclude his testimony is the argument that his late disclosure was a "wilful discovery violation".

Double Quick's entire "wilful discovery violation" is based on selective portions of Mr. Love's testimony. From it, Double Quick erroneously implies that Mr. Love was a resident of Indianola from October 2006 to March 2009 who saw Mr. Love almost every day and spoke to him just as frequently. However, a closer reading of Mr. Love's testimony reveals:

1. That he and Mr. Ellis were not friends, not even acquaintances. Mr. Love might see Mr. Ellis and his boss *when they came into an area where I was at* (R275-276); they might speak and go on about this business.

2. That Mr. Ellis never recognized him from that night (R.279) and Love definitely did not tell Mr. Ellis in 2006 about his involvement [they did not "go off into all that" (i.e. talk about the incident)(R277-278)].

3. Most importantly, Mr. Love could not really remember when they first spoke about it, and only agreed to the 2007 date when suggested by counsel for Double Quick. (R.279). However, if they did speak in 2007, it is highly likely that Mr. Ellis saw him with any regularity since Mr. Love was living in Springfield, Illinois at that time (R.319) and did not move back to Indianola until September of 2008. Thus it is more likely that Love revealed his involvement sometime after then, making the March 2009 disclosure reasonable.

When Mr. Ellis' counsel learned of Mr. Love's existence, he immediately supplemented his discovery to reveal this witness. It is critical, *and agreed by all parties*, that as of March

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disclosure(RE 231) in light of the fact that discovery had been extended, and Mr. Love's deposition was taken in June (nearly four months before trial). The Defendants could not articulate specific prejudice to themselves, (RE 232).

2009, no trial date had been set. It is also agreed by all parties that discovery was extended through June, 2009, so as to give Double Quick adequate time to depose Mr. Love, and a September 2009 trial date also agreed to by the parties. Double Quick had adequate time to develop any rebuttal testimony.

Seizing upon the leading questions its counsel put to Mr. Love, Double Quick argued to the Trial Court that Mr. Ellis had known about Mr. Love's involvement since 2007 and deliberately and wilfully failed to reveal him. There is no proof in the record, however, that would contradict the representation made by Ellis' counsel that Mr. Ellis simply did not remember this and only when he encountered Love again in March 2009, was Ellis reminded by Love of his involvement.[2] Had Mr. Ellis known or remembered of this critical, favorable witness, there is no reason for him not to have identified him earlier.

Argument

A motion for summary judgment should be overruled unless the trial court finds, beyond a reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim." *Palmer v. Anderson Infirmary Benevolent Ass'n,* 656 So.2d 790, 796 (Miss.1995). The trial court is prohibited from trying the issues; it may only determine whether there are issues to be tried. *Id.* In the case at hand, Mr. Ellis has provided sufficient proof on each element of his claim to defeat the Motion for Summary Judgment.

I. There was sufficient proof of the reasonable forseeability of the attack on Mr. Ellis to

[2]It should be remembered that Mr. Ellis was diagnosed with a concussion, broken jaw and broken teeth from this incident. He had to be transferred by ambulance to the hospital in Greenville where he stayed for two weeks and had to go through rehabilitation (Cummins, RE 051; Dr. Rutkowski, RE 095)

create a question for the jury, thus precluding summary judgment.

The parties have both cited to the Court the relevant premises liability case law, namely that criminal acts of third parties are actionable if they are reasonably foreseeable to the premises owner whether because of his actual knowledge of an assailants violent nature, or because of the atmosphere of violence that existed on the premises. In premises liability cases, the contested issues of forseeability and breach of duty are issues to be decided by the finder of fact once sufficient evidence is presented. *American National Ins. Co. v. Hogue,* 749 So.2d 1254 (Miss. App. 2000); *Hankins Lumber v. Moore,* 774 So.2d 459 (Miss. Ct.App. 2000)(when reasonable minds might differ on the matter, questions of negligence are generally for determination by a jury, including forseeability and breach of duty).

The Trial Court basically found that there was insufficient proof of the forseeability of Mr. Ellis' attack to create a question for the jury and the crux of this case is "sufficient proof" at the Summary Judgment stage.[3]

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[3]The Trial Court may have also used the wrong standard. The Court said:

> "...If you've got anything, you have any cards, now is the time to show me your cards. I am asking you—*I am treating this just like a motion for directed verdict.* This is the same posture as after you get through, if she stands up and make a motion for directed verdict at trial" (RE 0281-0282)

The standard for the review of a directed verdict is whether the facts presented, together with any reasonable inferences, considered in the light most favorable to the non moving party, **point so overwhelmingly in favor of the movant that reasonable jurors could not have returned a verdict for the plaintiff."** *Robley v. Blue Cross/Blue Shield of Miss.*,935 So.2d 990, 996 (Miss. 2006) (citation omitted). However, on summary judgment the Court looks only to see if there are disputed issues of fact. If, in this view, there is no genuine issue of material fact and, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied. Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant should be given the

Double Quick misconstrues the record when it argues that the *only* evidence presented by Mr. Ellis of the atmosphere of violence was his own testimony of drug deals, the testimony of Mr. Jenkins about his windshield being broken there, and twelve police incident reports over ten years. First, what Double Quick cites is more substantive than it seems. Mr. Ellis testified that he saw drug deals at the Double Quick daily; that he worked undercover for the Police; and that he **has reported** this drug activity to the Police. (R.107). Double Quick brought no evidence to rebut this. Second, Mr. Jenkins talked about not only the incident where his windshield was broke, he also talked about being afraid to stop there (Jenkins Deposition, p. 23 (R, 144), there being large crowds outside, drinking (Jenkins, p 15, R 142).

Third, there is testimony that Double Quick employs security on Thursdays through Saturdays from 9 p.m. to closing.(Shafer, RE 087). While Double Quick says the security is needed because these are "busier" times, if it were busy due to an increased number of customers, one would expect Double Quick to add cashiers or stock boys, not security. Security is clearly there because Double Quick knew of potential criminal activity in the area. Double Quick argues that *Simpson v. Boyd* , 880 So3d 1047 (Miss. 2004) to discount this testimony. However, *Simpson* dealt with an employee who was assaulted at the law office where she worked and the only other evidence she had was a few instances of irate clients coming into the office and her boss's comments that it was a high crime area. Here, the proof is more substantial (direct testimony of incidents and police reports). We are dealing with a Defendant that runs a public convenience store which recognized the need for security though only at certain times. However,

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benefit of the doubt.*Heigle v. Heigle*,771 So.2d 341, 345 (Miss. 2000) (quoting *McCullough v. Cook*, 679 So.2d 627, 630 (Miss.1996)).

though Double Quick had some concern about crime in the area to post security, it never consulted with any security company to determine what extent of security was actually needed.

Fourth, Mr. Ellis presented the twelve incidents of criminal activity on Double Quick's property. Double Quick argues that going back ten years is too long a time. If so, then the Court can go back just **one** year, to 2005, and there are 7 incidents with a disturbance involving men fighting in the parking lot occurring **just three months before**. Double Quick discounts the nature of some of these incidents, but they are criminal activity nonetheless. There was further testimony of large numbers of people, loitering and drinking publically in front of the area (criminal offenses as well). Double Quick itself found the need for security, though only at certain times and apparently for the protection of its employees only.

But, again, Mr. Ellis reiterates that this Court does not always look at numbers of incidents alone. For example in *Minor Child ex rel John Doe v. Mississippi State Federation of Colored Women's Club Housing for Elderly in Clinton, Inc.* 941 So.2d 820 (Miss. App. 2006), a rape case at an apartment complex that occurred in 2002 . In that case, there were **no** incidents reported from 1997 to 2002 at the complex, the five years prior to the rape. Despite the lack of incidents at the complex and the testimony from the two managers of the apartment complex that there was not an atmosphere of violence at the complex, this Court found that there was a genuine issue of material fact in dispute for the jury to decide, namely whether there was an atmosphere of violence on or around the property so as to put the landlord on notice to warn and protect invitees. So the Court looks not only to statistics but to witness testimony as well in determining the atmosphere of an area.

Moreover, in *Gatewood v. Sampson,* 812 So.2d 212 (Miss. 2002), where Plaintiff was shot while on the pay phone at an Ellis Isle Exxon gas station, the proof showed that there had been no violent crimes on the premises prior to Sampson's attack, and no proof that crimes reported to the police actually occurred. This Court, however, noted that there had been two incidents in close proximity to the gas station, and one fight in the parking lot. This Court found there to be enough evidence to create a factual question for the jury as to whether an atmosphere of violence existed around the Ellis Isle Exxon about which differing opinions could be formed.

Finally, as additional proof of the atmosphere of violence, Mr. Ellis was prepared to present the testimony of Chief Tyrone Lewis, a security expert. (See further argument below).

Taken individually, this proof may not be sufficient to create a jury question on the issue, but collectively, the proof is, and it was error to grant summary judgment on the negligence issue.

II. The Court erred in striking Chief Lewis as an expert.

Courts have routinely allowed security experts to present this evidence to the jury and draw conclusions from it concerning the forseeability of any danger to patrons. *Corley v. Evans,* 835 So.2d 30 ¶14 (Miss. 2003); *Stevens v. Triplett*, 933 So.2d 983 (Miss. App. 2005). Accordingly, Plaintiff designated Chief Tyrone Lewis as his security expert whose credentials and qualifications no one disputed and who has testified as a security expert in over seventy cases. He provided an affidavit concerning his opinions in this case (RE 155), which Mr. Ellis is certain this Court will read in full, because Double Quick's edit of his conclusions and the basis for them on P. 24 of the Reply Brief is deliberately misleading. All Double Quick cites to the Court are *portions* of paragraph 3 of Chief Lewis' Affidavit. The full paragraph include the facts Chief Lewis relies on to form his opinion (sufficient crime on the premises; that the attack

took place in front of the store but there was no security; that the absence of security contributes to violent crimes; the testimony of Jenkins' incident and fear, and that Double Quick provided an opportunity to commit a crime. All this is in paragraph 3. But there are several other paragraphs of facts that Chief Lewis relied upon that Double Quick (and the Court) ignored. Most important to this appeal though, is paragraph 8 which states:

> In support and as a basis for my opinions in this case, **I examined and reviewed accepted methods in the industry** to determine the nature and use of the property, crime demographics, the existing crime deterrent and security in effect on the property, what prior knowledge of crime on the property was known by the owner, what crime deterrence were in effect on the day of the incident and what was the victim's status. **These methods and the facts along with research and literature as identified in paragraph 9[4] below were used to determine if the crime that occurred against Mr. Ellis was predictable and foreseeable. It is my opinion that it was predictable and foreseeable.**

R.585

What Chief Lewis is saying here, is that in the field of security there are accepted methods of determining whether a risk is foreseeable, i.e. whether there is an such an atmosphere of violence as to create a foreseeable risk of harm.

This is not an instance, as the Trial Court stated, that Chief Lewis was going to testify that "it is because I say it is". Chief Lewis anticipated testifying to the methodology he used to come to his conclusion but he was never given an opportunity to do so. Double Quick argues that the Trial Court merely applied Rule 702 and *Daubert*; however, the Trial Court clearly did not, when the Court never examined whether the testimony was the product of reliable principles and methods and that Chief Lewis had applied the principles and methods reliably to the facts of the

[4]In paragraph 9, the Chief identified and attached the Crime Prevention Manual from the American Crime Prevention Institute.

case.

Double Quick argues that the Trial Court had the authority to discount Chief Lewis' affidavit as did the Court in *Alqasim v. Capitol City Hotel Investors*, 989 So.2d 488 (Miss. Ct. App. 2008). However, in that case, the Chief's affidavit did not cite the principles and methodology he used to support his opinions. In this case, the Chief's affidavit correctly included what had been found lacking in *Alqasim.* Double Quick then cites *Davis v. Christian Brothers Homes of Jackson*, 957 So.2d 390 (Miss. App. 2007) as another instance where Chief Lewis' affidavit was stricken. However, in that case, Chief Lewis' affidavit dealt simply with causation – not forseeability and establishing the atmosphere of violence (the Court having already found an atmosphere of violence).[5] These are the only two times in over seventy trial appearances where challenges to Chief Lewis' opinions were successful.

The other cases cited by Double Quick involve expert affidavits that were found insufficient because they were merely broad summarizations of the elements of a claim, failing to set forth "specific facts", *Luvene v. Waldrup*, 903 So.2d 745, 748 (Miss. 2005), not the case here where Chief Lewis' affidavit cites facts and further explains that he utilized an accepted method in the industry to determine risk. The case of *Rogers v. Barlow Eddy Jenkins PA*, 22 So.3d 1219 (Miss. Ct. App. 2009), where the deceased fell from a wall mounted ladder that did not meet OSHA standards, is irrelevant to the case at hand. The experts there could readily discuss the violation of the OSHA standards, but there was no proof to establish why the deceased fell.

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[5]In *Davis*, the deceased had been sitting in the car with his friend, while police were on site investigating a burglary. They argued and his friend shot him. The Court agreed with the lower court when it said " you could have had a policeman or a security guard at every corner in the complex, and it wouldn't have prevented what happened." However adequate security in this case clearly would have prevented Mr. Ellis' assault.

Any "opinion" as to the cause of the fall was mere speculation. In the case at hand, it is clear how Mr. Ellis was injured and it was not a matter of speculation that adequate security could have avoided it.

Double Quick then argues that the Court properly exercised its "gate keeping responsibilities" by striking Chief Lewis' Affidavit despite the fact that Double Quick had filed no Motion to Strike Chief Lewis and in fact had its own security expert who would give similar, though opposite, opinions. Prior to the Motion, then, Mr. Ellis had no notice that the sufficiency of the Chief's affidavit was in question, until the Court raised it during argument. Immediately, Mr. Ellis' counsel pointed out the paragraph 8 material and methodology that Chief Lewis would testify about to show why there was a foreseeable risk of injury in this case. Mr. Nelson, in effect, requested a *Daubert* hearing on the matter, which the Court, in effect, denied. This Court has said:

> 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. 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.

Smith v. Clement, 983 So.2d 285, 290 (Miss, 2008).

Clearly, in this case, Mr. Ellis was blind-sided and not given a fair opportunity to respond to the Court's concerns. The Trial Court never allowed Chief Lewis to testify about the materials such as *The Law Enforcement Officer's Complete Crime Prevention Manual*, and other professional articles (RE 160-174)[6] that he and other security experts use to show how risk is evaluated, and

[6]These are just selected pages of the reference material that Chief Lewis would use. The materials appear in full in the record at Pages 625-683.

how he determined that this area owned by Double Quick was in fact dangerous enough to place it on notice that the assault on Mr. Ellis was predictable. To raise concerns for the first time, *sua sponte,* during argument on a Motion and then refuse a party the opportunity to prepare and present a response was a clear abuse of the Court's discretion.

III. The Trial Court erred in excluding Edgar Love from testifying at trial.

As noted above, it is undisputed that Mr. Ellis suffered head and face injuries as a result of his assault. Edgar Love, his rescuer, testified that Mr. Ellis did not recognize him from that night. It was only when Love told Ellis of his involvement later that Mr. Ellis would have known who it was that helped him. Double Quick argues that Love did this in 2007 (even through Love said he really wasn't sure) ; however, at that time, Love was living in Springfield, Illinois. So Love's disclosure to Mr. Ellis could only have been sometime after September of 2008.

When Mr. Ellis was deposed on April 13, 2008, he was asked about what he remembered of that day. He recalled going in to get cigarettes, coming out, being hit, someone asking for his cell phone, him giving it up, then going around the corner to get it back, and being hit again. That is all. (Ellis, depo, p. 27, 37-38, R. 098, 101). It was clear at that time, he did not recall anyone coming to his aid, and obviously did not know about Mr. Love at that time, or Mr. Ellis would have been able to give more details of events after his assault.

Thus, the only basis for Double Quick's argument for wilful discovery violation is the equivocating testimony of Mr. Love as to when he disclosed his identity to Mr. Love. (See pages 3-4 above).

The date of Mr. Love's disclosure to Mr. Ellis is really irrelevant because when Mr. Ellis' attorney learned of Love's involvement, he promptly supplemented discovery to disclose him, as

is required by the Rules, and noticed his deposition. Double Quick then **agreed** to the extension of the discovery deadline. (See Docket entry, 5/12/09, R003). If the discovery did not end until June 15, 2009, and a witness was disclosed in March 2009, how is there any discovery violation? When there is no discovery violation, there can be no *wilful* violation either.

Moreover, when Mr. Love was disclosed, no trial date had been set yet. Even at argument on the Motion to Strike, counsel admitted its trial preparation was not prejudiced. Double Quick argues that no prejudice need be shown, if the violation is wilful, citing *Pierce v. Heritage Properties, Inc.*, 688 so.2d 1385 (Miss. 1997). Setting aside the fact that there was no discovery violation here, *Pierce* is distinguishable in that the Plaintiff there *admitted* she lied under oath concerning the presence of a witness. There is no such admission in this case; in fact, under oath, in April 2008, Mr. Ellis said he could not remember anything else of that night.

Double Quick argues that *Scroggins v. Ellzey Beverages,* 743 So. 2d 990 (Miss. 1999) and *Allen v. National RR Passenger Corp.,* 934 So.2d 1006 (Miss. 2006) support its position of wilfulness, but they do not. In both cases, the Plaintiffs themselves testified contradictory to documentation in medical records (*Scroggins)* or a filed workers comp claim (*Allen).* Again, in these cases, there had been non-disclosure of the information or testimony directly contradicted by well-established documents. This is not the case here. Here Mr. Ellis did eventually disclose the identity of his witness while discovery was still ongoing.

Whether Mr. Ellis was told earlier and perhaps forgot until later reminded is irrelevant, because the witness was ultimately disclosed with no prejudice to Double Quick. Here the Court presumed wilful non-disclosure, even when there had been disclosure, and required a medical diagnosis of amnesia to overcome a finding of "wilfulness". Even Double Quick can cite no

precedent for this. This Court has said that exclusion of evidence for a discovery violation is an extreme measure, and lower courts should exercise caution before doing so, because our courts are " courts of justice [and] not of form." *Estate of Bolden v. Williams,* 17 So.3d 1069, 1072 (Miss, 2009), *Caracci v. Int'l Paper Co.*, 699 So.2d 546, 556 (Miss.1997) (quoting *Clark v. Miss. Power Co.,* 372 So.2d 1077, 1078 (Miss.1979)); *Miss. Power & Light Co. v. Lumpkin,*725 So.2d 721, 734 (Miss.1998) (citing *McCollum v. Franklin,* 608 So.2d 692 (Miss.1992) (overruled on other grounds). In this instance, the Trial Court abused its discretion in excluding the testimony of Edgar Love.

Conclusion

For the above and foregoing reasons, Plaintiff Jessie Dean Ellis requests the Court to reverse the Trial Court's grant of summary judgment in this matter, and further reverse the Trial Court's exclusion of the testimony of Edgar Love and remand this case for trial on the merits.

RESPECTFULLY SUBMITTED, this the 2 day of Aug, 2010.

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CERTIFICATE OF SERVICE

I, **Omar L. Nelson,** attorney for the Appellant, hereby certify that I have this day filed this **Reply Brief of Appellant** with the Clerk of this Court and have served a copy by United States mail with postage prepaid on the following persons at these addresses:

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