IN THE SUPREME COURT OF MISSISSIPPI

No. 2009-CA-1750

JESSIE DEAN ELLIS **Appellant**

VS.

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

BRIEF OF APPELLANT JESSIE DEAN ELLIS

Oral Argument Requested

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Certificate of Interested Persons

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

1. Honorable Richard A. Smith, Sunflower County Circuit Court Judge
2. Jessie Dean Ellis, Plaintiff
3. Gresham Service Stations, Inc. dba Double Quick, Inc., Defendant
4. Bradley MacNealy, Defendant
5. John D. Brady, *Mitchell, McNutt & Sams*, Attorney for Defendants
6. Malissa Winfield, *Butler, Snow, O'Mara, Stevens & Cannada,* attorney for Defendants
7. Omar L. Nelson, *Morgan & Morgan,* attorney for Jessie Dean Ellis

OMAR L. NELSON
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III. Whether the Trial Court erred in granting Defendants' Motion to Reconsider concerning the exclusion of deposition testimony of Edgar Love and excluding Love from testifying at trial.

PROCEDURAL AND FACTUAL BACKGROUND

Facts

The Assault

On October 6, 2006, Jessie Dean Ellis had been helping a friend, Richard Jenkins, do work around Jenkins' auto repair shop. (Jenkins, RE 044). Ellis and Jenkins have been friends for thirty-plus years since they met in the National Guard (Jenkins, RE 044) At the end of the day, Jenkins took Ellis home (Ellis was staying in a camper on his uncle's property near the Indianola landfill - Jenkins, RE 044). They stopped at the Double Quick on BB King Drive in Indianola so Ellis could buy some cigarettes. Ellis also apparently called a friend, Terry Timmons, about possibly picking him up there(Timmons, RE 112). Ellis recalled purchasing the cigarettes in the Double Quick, and then, upon leaving the store, he encountered a group of people congregating outside the front door. One hit Ellis in the jaw and another took his cell phone. (Ellis, RE 039)

Richard Jenkins' testimony of events up to this point is much the same. Jenkins testified:

> He (Ellis) went in the store and then he came out and when he came out, it was a bunch of guys crowded around him and I seen one of them take his cell phone and then another one kind of, kind of hit him, you know, and I didn't know what was going on, you know, it was so many people around there and I had done been around that place before and got a glass knocked out of my truck, so I was kind of scared, you know, what was going to happen so I went on and left...

(Jenkins, RE 045)

Jenkins said there were approximately ten to fifteen people around the Double Quick and the liquor store next door, outside drinking (RE 045). The group surrounded Ellis, pushing him toward the liquor store at the end of the building and started hollering (RE 046). Jenkins got scared and left (RE 046), going around the block. When he returned, he did not see Ellis and concluded he had gotten away. (Jenkins, RE 046)

Unfortunately, Mr. Ellis had not gotten away, but rather he was beaten severely. He sustained head injuries and a concussion, which explains his inability to remember what happened, per the neurosurgeon who treated him, Dr. Rutkowski (RE 095). Ellis recalled going around the corner of the building, getting hit in the head, and the next thing, waking up in jail. (Ellis, RE 039). He did not know and cannot identify his assailants.

As will be discussed below, in March 2009, Plaintiff's counsel learned of another witness, Edgar Love. He was deposed and testified that he did not know Mr. Ellis prior to this incident (Love,RE 063-064), but that he was the one who had found Mr. Ellis in a ditch near the Double Quick on Double Quick property that night. Love helped Ellis up, and brought him to the side of the store (RE 067) . He testified that Mr. Ellis was in bad shape; he was bleeding from the head, and that Ellis could not even talk to him. (Love, RE 067). Love also said that when he did see Ellis again after the incident, Ellis "didn't even know who I was".[1] (Love 074)

Love alerted the Double Quick staff that there was an injured man outside and that they should call the police or an ambulance. (Love depo, RE 067, 069)[2]. After police and an ambulance arrived, Love left. Mrs. Timmons verifies that when she went to the Double Quick to pick Mr. Ellis up, she saw the ambulance and police but she could not find Mr. Ellis. (Timmons RE 112)

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[1]Love testified that he was living in Illinois from 2004 until September 2008 (Love depo, RE 55, 56) though he would visit and stay here for short periods when his mother was ill. It is understandable then that Mr. Love was not identified as a witness, because Love never gave a statement to the police, and he admitted that Mr. Ellis did not recognize him or know of his involvement until after he returned from Illinois.

[2]Double Quick claims it had not knowledge of this incident until December 2007 when the lawsuit was filed. However, this is improbable since according to the corporate representative, Scott Shafer, the employee at the cash register has a clear view of the pumps and parking lot. (RE 088). Surely, a police car and an ambulance would have caught the attention of that employee if no one else.

Mr. Ellis was taken to jail on the mistaken belief that he was drunk. When Ellis woke up, police took him to meet his sister, Jean Cummins, who took him home and eventually to the local hospital (Cummins, RE 050) He was diagnosed with a concussion, broken jaw and broken teeth. He was 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)

Evidence concerning dangerousness of the area

According to Ellis (who testified that he worked for the Police undercover), there is a drug house across the street from this Double Quick and he has witnessed drug sales at the Double Quick "almost every day" (Ellis, RE 041-042) Robert Jenkins also testified about a prior incident he had had at the Double Quick that made him frightened of the area. He said that there are always many cars there and one day, when he came out of the store, he exchanged words with someone, and "they just threw a bottle and broke the window out" of his car. Jenkins did not file an incident report with Double Quick; he just went on and left (Jenkins, RE 046). However, this incident made him fearful of the area (RE 047). Jenkins testified that he has seen a security guard inside the Double Quick Store, and sometimes even outside. Jenkins also testified that there were always a lot of people around the Double Quick and liquor store, outside, drinking. (RE 045).

There have been numerous incidents of reported criminal activity at this Double Quick, including aggravated assault, October 30, 2003 (RE 116); burglary, January 1, 2005 (RE 119); burglary, January 2, 2005 (RE 122); disorderly conduct, September 16, 2000 (RE 129)where the police report indicates over 100 people were in the parking lot; malicious mischief, July 2005 (RE 131) involving a domestic dispute; simple assault in September 2005 (RE 133); gasoline drive off, (RE 128); disturbing the peace, July 2006 (RE 134); petty larceny, August 2006 (RE 135) and

anther assault (mace sprayed) that day before Mr. Ellis's assault (October 5, 2002 (RE 136). There were a total of twelve documented incidents before Mr. Ellis' on October 6, 2006.

Despite these incidents, and testimony of large groups of people loitering in front of the liquor store that is adjacent to the Double Quick, Defendant's vice president of operations, Scott Shafer described the neighborhood as " quiet" and " residential" (RE 086A). Shafer admitted that Double Quick has not consulted with any security company regarding security at the store prior to October 2006 – but relies on the "ongoing dialogue with the police department"(RE 086). However, Double Quick apparently is concerned enough about activity at the site to provide security from Inner City Security four nights a week from 9 p.m. to closing, Thursday through Sunday (Shafer, RE 087). Shafer said this was needed as these were "busy times" for the store, because Thursday was "club night" and because of events at the High School a block a way – not because of the criminal activity at the store (RE 087). However, there is a fundamental difference between the need for additional *employees* during peak business times and the need for *security*. Double Quick's actions in hiring part time security reflect an awareness of conditions at the store and in the area that required a deterrent presence on the premises and not just additional help during busy times. The problem is that it only schedules this security part time.

Plaintiff anticipated calling as his expert, Chief Tyrone Lewis, who is eminently qualified in the field of law enforcement and security (See resume, RE 141). He was prepared to testify, as noted in his affidavit (RE 155), that Mr. Ellis' assault was a natural and foreseeable consequence of the conditions and circumstances that existed there at the Double Quick on that day. He pointed out that there was testimony that the initial attack took place on Mr. Ellis in front of the store (which Shafer said the employee up front could readily see), but no one from the store intervened. He

further said that the crime statistics and testimony of Mr. Jenkins who was afraid of the area show that the area was dangerous. Chief Lewis was prepared to testify from *the Law Enforcement Officer's Complete Crime Prevention Manual*, and other professional articles (RE 160-173) how security risks are evaluated and how he determined that this area was in fact dangerous.

The employees at the store that day were inadequately trained and wholly failed to act when the assault on Mr. Ellis occurred Corporate representative Scott Shafer testified that of the four employees at the Indianola store, only one, the manager, has attended the company's training program, Double Quick University. This training includes actions to take to avoid robberies, rapes and abductions and one session where the employee is taught to scan the outside:

> "looking for individuals that may be loitering, looking for individuals that may be engaged in suspicious activity that may rise to the level that the employee would become suspicious or become uncomfortable and make a judgement call if they needed to call the police to come sweep the parking lot or come check on whatever the activity may be. (RE 083-084)

However, this one trained manager was not in the store at the time of the Ellis incident. (Shafer, RE 054, 081). The other employees merely had on the job training, watching videos (RE 080) and Shafer claims that they had no knowledge of this incident (RE 088). However, this is not consistent with Shafer's testimony that the employee at the cash register has a clear view of the pumps and parking lot. (RE 088). Surely, even if the employee stationed there did not see the actual assault, he or she should have seen the police car and ambulance that witnesses say came thereafter.

Double Quick's only other form of "security" were twelve video cameras, eight of which are inside the store; three others outside are pointed at the parking lot and one is positioned to see the front door (Shafer RE 082). However, Mr. Shafer did not know if they were functional on the day of Mr. Ellis' assault (RE 083 and if store employees missed the assault, the police and the

ambulance, it is doubtful that they were watching the monitors for the security cameras either.

Procedural background of the lawsuit

Plaintiff filed suit against the owner of Double Quick (Gresham Service Station Inc., and Bradley MacNealy), on September 24, 2007; the Complaint was amended on October 27, 2007 (Amended Complaint, RE 019). Defendants answered the Complaint (Answer of Gresham, RE and Answer of Bradley MacNealy, RE 023 and RE 030) and an Agreed Scheduling Order was entered setting various deadlines for the case. By the terms of the initial Scheduling Order, discovery would end on June 30, 2008; however, an Agreed Amended Scheduling Order was entered on September 8, 2008, extending discovery to October 31, 2008. (See Docket, RE 02).

Depositions of several individuals were taken as well as written discovery exchanged. Both sides designated experts; Plaintiffs designated Chief Tyrone Lewis, RE 14; and the Defendants designated Lee D. Vance, RE 174. Plaintiff's expert opined that premises were unreasonably dangerous, making Mr. Ellis's assault reasonably foreseeable and putting the Defendants on notice of the need for additional safety precautions; Defendants' expert opined the opposite. Neither party raised any *Daubert* challenge to the qualifications, methodology or opinions of the other's expert.

In March 2009, Plaintiff's counsel learned of the new witness, Edgar Love, and on April 1, 2009, counsel filed a Motion to take Love's deposition, setting the matter for hearing on May, 4, 2009 (RE 181). At this point, no trial date had been set.[3] On April 8, 2009, the Defendants' objected to taking Love's deposition, saying that the discovery deadline had passed and that the

[3]The Defendants did not seek a trial date until early April (See correspondence to the Trial Court from Malissa Winfield, dated April 1, 2009 (RE).

Plaintiff had failed to identify Love prior to that time. While Plaintiff's Motion to take Love's deposition was set for hearing, on May 11, 2009, the parties submitted an Agreed Amended Scheduling order that extended discovery to June 15, 2009 and set a September 21, 2009 trial date (RE 183). On June 5, 2009, Edgar Love was deposed.

On July 8, 2009, the Defendants filed a Motion to Dismiss, or in the Alternative, Motion to Strike Deposition testimony and exclude trial testimony of Edgar Love (RE 184). The Defendants claim that Ellis' failure to disclose Love as a potential witness earlier in the discovery process was a wilful misrepresentation, because Love testified that he had told the Plaintiff (not Plaintiff's counsel) in 2007 of his involvement. Defendants sought dismissal of this case as a sanction for abusing the discovery process under Rule 37(e).

The Plaintiff responded to the Motion (RE 195) raising that the fact that Mr. Ellis and Mr. Love are not friends and did not even know each other prior to the incident. Moreover, even after the incident, Mr. Love testified that Mr. Ellis did not recognize him as his Good Samaritan, nor did Ellis remember him. It was not until March of 2009 that Plaintiff's counsel learned of Mr Love's existence and immediately alerted defense counsel. Moreover, while Mr. Love may have run into Mr. Ellis several times, Mr. Love also testified that prior to September 2008, he had been living in Illinois for four years, with occasional visits to Indianola to see his mother who was ill.[4] Therefore his interaction with Mr. Ellis was sporadic and minimal. This coupled with Mr. Ellis' difficulty in remembering anything after being hit, explains why Mr. Love's

[4]Love also testified on June 5, 2009, that he had been back in Indianola for about a year (RE 059). He moved back in September 2008 from Illinois, where he had been living for fours years prior (a year in Springfield and three years in Peoria) (RE 058-060). Therefore, Love lived in Illinois from 2004 to 2008. He clarified that he would come home for visits and that he was here again in December 2007 when his mom got sick (RE 057)

involvement was not discovered by his counsel earlier.

At a hearing on the Motion on August 10, 2009, the Trial Court specifically asked the Defendants how they would be prejudiced (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) but kept pressing that sanctions had to be imposed because in their opinion, the late disclosure was wilful.

On September 10, 2009, the Trial Court denied Defendants' Motion to Dismiss (RE 203), offering the Defendants the opportunity to request a continuance and conduct further discovery or to submit further testimony on the issue of Mr. Ellis's late disclosure of Mr. Love (RE 205).

Instead of seeking a continuance, on September 15, 2009, the Defendants filed a Motion for Reconsideration, asking the Court to reconsider its ruling concerning Mr. Love's deposition (RE 206) and to dismiss the case. The Plaintiff responded (RE 214), pointing out the relevant case law concerning premises liability and the forseeability of criminal acts.

The parties argued the matter as second time before the Court on September 15, 2009 (RE 241). During the argument, the Court *sua sponte* raised concerns about Plaintiff's expert witness, Chief Lewis (RE 258). Plaintiff's counsel offered to bring Chief Lewis to the Court for a Daubert hearing so the Court could see how the Chief came to his opinions, using, *inter alia* methodology from the National Crime Prevention Institute to determine when criminal activity is foreseeable (RE 258).

Instead of conducting a *Daubert* hearing, on October 5, 2009, the Court granted the Defendants' Motion for Summary Judgment (RE 008), this time addressing the merits of

Plaintiff's claim. The Trial Court found that the Defendants had conceded that Mr. Ellis was an invitee at the Double Quick store, but that the Plaintiff "had 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." The Court in essence struck Plaintiff's expert, even though the Defendants had not challenged him at all. The Court said that Chief Lewis' opinions were "without sufficient facts or data" but merely subjective and "unsupported speculation".

The Trial Court then revisited the issue of Edgar Love's testimony and struck it as well, saying that the medical opinions of Dr. Rutkowski had established that Mr. Ellis had no long term memory problems. Without any further evidence, the Court concluded that Ellis' forgetfulness was not the result of a medical condition but an intentional act to circumvent the discovery deadlines. As a sanction, the Court struck the deposition testimony of Edgar Love.

Plaintiff timely appealed this adverse ruling (RE 015) on or about October 26, 2009.

Summary of Argument

Plaintiff was undisputably an invitee at Gresham's Double Quick on the night of the incident. It is well established law that a business owes a duty of reasonable care to protect its patrons from assaults by third parties while they are on the premises and to protect the invitee from reasonably foreseeable injury at the hands of others. *Gatewood v. Sampson*, 812, So.2d 212 (Miss. 2002). To prove "reasonable foreseeability" that would require a business owner to anticipate such attacks, Plaintiff must show (1) actual or constructive knowledge of the assailant's violent nature or (2) actual or constructive knowledge that an atmosphere of violence exists on the premises. *Lyle v. Mladinich*, 584 So.2d 597 (Miss. 1991). In the case at hand,

Plaintiff Ellis provided sufficient proof of the atmosphere of violence surrounding Gresham's Double Quick prior to the time of Mr. Ellis' assault, thus creating a question of fact for the jury to decide. There being a material fact in dispute, summary judgment for the Defendant should have been denied.

Second, the Trial Court further erred in excluding the opinions of Plaintiff's security expert, Chief Tyrone Lewis, without a *Daubert* hearing to determine the reliability of his opinions and methodology. The Trial Court's *sua sponte* determination despite Plaintiff's request for such a hearing was an abuse of the Court's discretion and constitutes reversible error.

Finally, the Trial Court erroneously excluded the testimony of Edgar Love, a witness disclosed by the Plaintiff in March 2009, at a time when no trial date had been set. Discovery was thereafter extended and the Defendant was able to depose Mr. Love well in advance of the trial date. There is no basis in the facts or the law for the Trial Court to have found Mr. Ellis to have wilfully and intentionally circumvented discovery deadlines when there was no showing of a pattern of falsehood on his part. *Wood v. Biloxi Public School District*, 757 So.2d 190 (Miss. 2000). The sanction of excluding Mr. Love as a witness was an abuse of the Court's discretion.

Argument

I. The Trial Court erred in granting Defendants' Motion for Summary Judgment on Plaintiff's premises liability/negligence claims.

In reviewing the grant or denial of a motion for summary judgment, the standard of review is *de novo*. *Knight v. Terrell,* 961 So.2d 30, 31 (Miss.2007); *Jamison v. Barnes,*8 So.3d 238, 242(¶ 7) (Miss.Ct.App.2008) (citing *Treasure Bay Corp. v. Ricard*, 967 So.2d 1235, 1238(¶ 10) (Miss.2007)). "For a summary judgment motion to be granted[,] there must exist no genuine

issues of material fact and the moving party must be entitled to judgment as a matter of law." *Bryant v. Bd. of Supervisors of Rankin County,* 10 So.3d 919, 921(¶ 4) Miss.Ct.App.2008) (citing M.R.C.P. 56(c)); *Arceo v. Tolliver,* 949 So.2d 691 (Miss. 2006).

A fact is material if it 'tends to resolve any of the issues properly raised by the parties.' *Gorman-Rupp Co. v. Hall,* 908 So.2d 749, 753(¶ 13) (Miss.2005) (quoting *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So.2d 790, 794 (Miss.1995)). All evidence must be viewed in a light most favorable to the non-movant. *Williams v. Jackson,* 989 So.2d 991, 993(¶ 4) (Miss.Ct.App.2008) (citation omitted). A Motion for Summary Judgment should only be granted when it is shown, beyond a reasonable doubt, that the non-movant would be unable to prove any facts to support his claim, *Downs v. Choo*, 656 So.2d 85,85 (Misss1995). In the case at hand, Plaintiffs presented substantial credible facts and testimony to support his claim which Defendant disputed. There being a genuine dispute of material facts in this case, summary judgment should not have been granted.

A. *There were genuine issues of material fact in this case precluding summary judgment on the issue of the reasonable forseeability of Mr. Ellis' assault, creating a question for the jury.*

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).

In this case there is no dispute that Mr. Ellis was an invitee of the Defendants and as such they owed Mr. Ellis the duty of keeping the premises reasonably safe and when not reasonably

safe, to warn where there is hidden danger. This duty includes protection of patrons from wrongful actions of third parties on the premises. *Whitehead v. Food Max of Mississippi,* 163 F.3d 265 (5th Cir. 1996); *Gatewood v. Sampson,* 812 So.2d 212 (Miss. 2002); *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).

The criminal acts of a third party may be deemed reasonably foreseeable if the premises owner had cause to anticipate such acts. *Davis v. Christian Brotherhood Homes of Jackson,* 957 So.2d 390, ¶22 (Miss.Ct. App. 2007). A business proprietor is required to anticipate the assault of a patron: (1) if he has actual or constructive knowledge of the assailant's violent nature, or (2) if he has actual or constructive knowledge that an "atmosphere of violence" exists on the premises, which may include the overall pattern of criminal activity prior to the event in question that occurred in the general vicinity of the business premises, as well as the frequency of criminal activity on the premises. *Id, Lyle v. Mladinich,* 584 So.2d 397 (Miss. 1991)

To prove constructive knowledge by the Defendant in such cases, Plaintiffs present testimony from witnesses about criminal or dangerous activities in the area along with reports of police calls or police incident reports of crime in the area or on the premises. This Court has not limited criminal incidence testimony simply to incidents on the premises in question, but also allows evidence of criminal activity in the general vicinity of the Defendant's business. *Davis v. Christian Brotherhood Homes of Jackson,* 957 So.2d 390 ¶22 (Miss. App. 2007); *Crain v. Cleveland Lodge 1532, Order of the Moose, Inc.,* 641 So.2d 1186, 1189 (Miss. 1994.

The Courts have also 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). The issue presented in this case is when the testimony and data is sufficient so that "forseeability" becomes a question for the jury.

The Trial Court pointed out three cases where this Court has found there to be insufficient proof of forseeability to create a jury question, all three are distinguishable from the case at hand. *Corley v. Evans,* supra (Miss. 2003) dealt with an accidental shooting at a Crawfish Boil festival that the Defendant held on her pasture property in Bolivar County annually. This was the fourth such event, and there had been only one incident at a prior festival where the Sheriff had to be called to remove some one from the property. The owner provided security and prohibited alcoholic beverages. In *Stevens v. Triplett*, 933 So.2d 983 (Miss. App. 2005), a prospective home buyer was assaulted by third parties when she was looking at a home in a residential area of Vicksburg. The police crime statistics for the area showed only a "handful of burglaries and assaults, a single rape and kidnaping, most of which happened in the middle of the night." In *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.* 641 So.2d 1186 (Miss. 1994), where a member of a band was assaulted in a parking lot, there were only two reports of crimes on the premises in year prior to the assault (both petty larcenies) and of the other fifty-five criminal incidents, only 20% (11) were crimes of violence or assaults.

The case at hand is distinguishable from these cases. Here the assault took place in the evening, while the Double Quick was open and there were employees in the store who could have and should have observed the initial assault. Unlike *Corley v. Evans,* where the Defendant had held an annual event in a pasture with only one previous incident, in this case, Gresham operated a business, in the town of Indianola, with at least twelve reported criminal incidents in

the past ten years on its very premises. Unlike *Stevens*, where there had been no prior crime on the property and where the "handful" of incidents in the neighborhood were night time burglaries with a single incident of violent crime, in this case, there were twelve incidents of crime actually on the premises, several for fighting and for assaults during business hours. And unlike *Crain*, where the only crimes on the premises were petty larceny crimes (the assaults and other incidents being in the vicinity, not on the premises), in this case, all incidents of criminal activity were on the Double Quick premises. One concerning a fight on the premises (RE 129), echoes the testimony of Mr. Jenkins concerning the crowds of people that congregate at this location (RE 129). This case being so factually different from *Stevens, Corley* nor *Crain*[5] , those holdings would not be applicable here and would not require the grant of summary judgment in this case.

The Trial Court also noted several cases where the proof of forseeability has been found sufficient to create a question for the jury, pointing out in each the large number of reported crimes in each. Obviously, in cases such as *Gateood v. Sampson*, 812 So.2d 212 (Miss. 2002), *Glover v. Jackson State*, 968 So.2d 1267 (Miss. 2007)[6], *Davis v. Christian Brotherhood Homes of Jackson, Inc.* 957 So.2d 390 (Miss. Ct. App. 2007) and *Minor Child ex rel John Doe v. Mississippi State Federation of Colored Women's Club Housing for Elderly in Clinton, Inc.*, 941

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[5]As was noted by this Court in *Gatewood v. Sampson,* 812 so.2d 212 (Miss. 2002), the *Crain* Court really said that it would be *difficult* to say the assault on Crain was foreseeable in light of the statistical evidence, and the case turned on the issue of proximate cause. "Assuming, without decided that Crain made a showing sufficient to establish the foreseeability of the assault...he must still make a showing proximate cause".*Gatewood, ¶16.*

[6]*Glover* is really inapplicable because in that case, there was also a showing that the Jackson State University knew of the violent tendencies of the two boys that rapes young Ms. Glover. This, the Court said, coupled with sixty-three crimes which were reported to have occurred on the JSU could lead a finder of fact to conclude that JSU failed to provide adequate security on its premises, *Glover*, ibid, ¶14

So.2d 820 (Miss. App. 2006), the numbers of criminal incidents would be high because these assaults occurred in Jackson, Mississippi, the capital and most populous city in Mississippi. Indianola's population is less than 10% of Jackson's[7]. So if approximately 60 crimes in an area of Jackson was sufficient (*Gatewood* and *Glover*) to show an atmosphere of violence, then 6 should be sufficient in a case in Indianola. Here there was a showing of 12.

But this Court does not always look at numbers 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), Plaintiff brought suit over a rape at an apartment complex that occurred in 2002 . Plaintiff presented the report of law enforcement and security expert, John Tisdale, and numerous documented incidents at the complex from 1996 and 1997. Though there were reports of 676 crimes against persons reported in the vicinity, 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

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[7]2000 Census figures show Indianola with a population of 12,866 and Jackson with a population of 184,256. Therefore Indianola's population is 7.6% of Jackson's

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. Gatewood claimed that the evidence of quantity of crimes in the area was insufficient as a matter of law to send the question to the jury. This Court disagreed and 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.

In the case at hand, Plaintiff Ellis who was attacked at a crowded service station which some people feared, which was located across from a drug house in a vicinity where there have been documented incidents of criminal activity, and where crowds of people loitered outside an adjacent liquor store, drinking, presented sufficient proof to the issue of forseeability of his possible assault to go to the jury. In addition to the reported crimes, there was testimony evidence from Mr. Jenkins that his windshield was broken out at the Double Quick – an incident he did not report either to Double Quick or the police. Even the actions of Double Quick in having part-time security on the premises showed that it was aware of the atmosphere of violence surrounding the store. Therefore, when considering all the evidence, not just the statistical evidence, the Court should have denied summary judgment because Plaintiff's proof was sufficient to present a question for the jury to decide.

B. The Trial Court erroneously required the proof of criminal activity to be the same as the attack on Plaintiff Ellis.

In paragraph 25 of the opinion, the Trial Court said:

> There were only twelve incidents of crime on the premises of Double Quick within the preceding ten years prior to the alleged assault on Plaintiff. None of these incidents were

unprovoked assaults upon an invitee of Double Quick, by an unknown assailant. (RE 013)

In other words, the Trial Court was requiring Plaintiff Ellis to show that there had been incidents similar to his, (i.e. an unprovoked assault upon an invitee, by an unknown assailant) before it consider it an incident of criminal activity. However, prior acts and the act complained of are NOT required to be the same. *American Nat. Ins. Co. v. Hogue,* 749 So.2d 1254, 1260 (Miss. Ct. App. 2000). There, this Court, in a car-theft, kidnaping case that occurred at the Edgewater Mall parking lot, said that all that was needed was crimes against a person, pointing out "the rule of reason is not offense-specific..." *Id* at ¶22. That some of the assaults at the Double Quick arose from domestic disputes, they were still assaults and should not have been discounted by the Trial Court.

II. The Trial Court erred in striking the expert testimony opinions of Chief Tyrone Lewis.

The Plaintiffs designated Chief Tyrone Lewis as their security expert. According to his resume (RE 146), Chief Lewis graduated from the Jackson Police Training Academy in 1983 and has over twenty five years of law enforcement experience. He has been a patrol officer, an instructor at the Academy and eventually Commander/Director of the Training Academy. He has also worked in Neighborhood Enforcement. He is still a certified policeman, but he also testified as a security expert in over seventy cases. He provided an affidavit concerning his opinions in this case (RE 155), as well as materials such as *The Law Enforcement Officer's Complete Crime Prevention Manual*, and other professional articles (RE 160-174)[8] that he would use to show how

[8]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.

risk is evaluated, how he determined that this area owned by the Defendants was in fact dangerous enough to place Gresham on notice that the assault on Mr. Ellis was predictable.

The Defendants did not challenge Chief Lewis' credentials, nor his opinions and even the Trial Court notes that the Defendants had not raised the issue of the legitimacy of such testimony (RE 013). The Defendants, in fact, designated their own expert, Commander Lee Vance, a Jackson Mississippi assistant Police Chief, who would give opinions similar in nature to those of Plaintiff's Expert, Chief Lewis (RE 174). The Defendants did not question the methodology or sufficiency of Chief Lewis' opinions in their oral argument to the Court either. Therefore, Plaintiff had no notice of any challenge to Chief Lewis's opinions and thus had no notice or opportunity to address the issue until blind sided by the Court during argument. (RE 258).

At that time, when the Court questioned the validity and methodology of Chief Lewis's opinions, counsel for Plaintiff offered to bring Chief Lewis to the Court for a *Daubert* hearing. Plaintiff's counsel explained that Chief Lewis would bring a video and use the materials provided to show the Court how risks are assessed and how they should be addressed (RE 259). The Court never afforded Plaintiff the opportunity for such a presentation, and the Court simply found, without any basis, that Chief Lewis' "expert opinion and conclusions, without sufficient facts or data upon which these opinions are based, are not reliable." The Court went on to fault Plaintiff for providing no evidence to show that Chief Lewis' opinions were not merely based on his own subjective beliefs (RE 13) . However, the Court did not give the Plaintiff adequate notice or an opportunity to provide such proof, though Plaintiff offered to do so. The entire approach of the Trial Court to the issues surrounding Chief Lewis's opinions and its findings concerning his opinions constitute rank error and an abuse of discretion.

The admissibility of expert testimony is within the sound discretion of the Trial Court, *Denham v. Holmes ex.rel Holmes,* —So.3d—, 2010 WL 1037494 (Miss. App. March 23, 2010). The standard for review on appeal then is whether the Trial Court abused its discretion in admitting or excluding expert evidence. *Mississippi Transportation Comm's v. McLemore,* 863, So.2d 31, 38 (Miss. 2003). In other words, was the discretion the Trial Court used arbitrary and this Court's review is *de novo. White v. Stewman,* 932 So.2d 27, 32 (Miss. 2006)

For expert testimony to be admissible, it must be both relevant and reliable, *Mississippi Transportation Commission v. McLemore,* 863 So.2d 31 (Miss.2003). *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) provides an illustrative list of factors that trial courts may use in assessing the reliability of expert testimony where such testimony relies on scientific knowledge. However, "depending on the circumstances of the particular case, many factors may be relevant in determining reliability, and the *Daubert* analysis is a flexible one." *McLemore,* 863 So.2d 31, 38 (Miss. 2003).

If an expert's opinions have been challenged as unreliable or there is question about the acceptance of his methods within the scientific community, that expert must respond with some evidence that the opinions are, in fact, accepted within the scientific community. Thus, for example, in *Smith v. Clement,* 983 So.2d 285 (Miss.2008), the plaintiff's highly qualified engineer expert opined that certain copper tubing which caused a school bus fire was the same copper tubing that had been installed by the defendant fourteen years earlier. This opinion was challenged by the defendant's expert who testified under oath that there are no reliable, or valid, scientific principles or methods that could be utilized by any engineer, or any other specialist, that would enable that person to give such an opinion. Plaintiff's expert never contradicted the

evidence of unreliabilty nor offered any evidence of reliability or acceptance within scientific communities of his opinion. The trial court excluded the expert's opinion and this Court affirmed, stating that the plaintiff was on notice of the defendant's challenge to the reliability of her expert, and she had a fair opportunity to respond. Because she did not, this Court held the trial court did not abuse its discretion in finding, from the evidence in the record, that the plaintiff's expert's opinions should be stricken. However, in doing so, this Court reiterated the need for a hearing on any such challenge:

> Perhaps before *Daubert* such a determination could be made without a hearing, but the continual evolution of science and the growing intricacies of litigation mandate that we take the trial court's role as "gatekeeper" seriously, because our trial "courts have an important role as gatekeepers in determining whether to admit expert testimony." *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 355 (5th Cir.2007). Therefore the trial "courts must *carefully analyze* the studies on which experts rely for their opinions before admitting their testimony." *Id.* (emphasis added). A hearing is simply the best method of guarding the admission of expert testimony.

Smith v. Clement, ¶31

In the case at hand, Plaintiff Ellis had no notice of any challenge to his expert, Chief Lewis' opinions. In his Affidavit submitted to the Court in response to the Motion for Summary Judgment, Chief Lewis provided a litany of facts (not speculations, but facts from the record) that he based his opinions upon, including the criminal incidents reports, and facts from deposition testimony of Ellis, Jenkins and Shafer. The sufficiency of this affidavit was not challenged by Double Quick. Only at the oral argument, did the *Trial Court* raise concerns about Chief Lewis' testimony. There, when the Trial Court said he had serious concerns, Plaintiff's counsel offered (nearly begged) to bring Chief Lewis to the Court for a Daubert hearing:

> By Mr. Nelson: We can have a Daubert hearing. I will bring him here on Monday,

and I will put him on the stand, and I will ask him his methodology so the judge —so Your Honor will be satisfied that the methodology he has employed is proper...

By the Court: The concern that I have is that there is a Latin phrase for it but what it means is it is because I say it is. That's what it means.

By Mr. Nelson: Conclusion without basis.

By the Court: I say it is without no data, no methodology, no nothing, except I just say it is.

By Mr. Nelson: That's not what we have here. We have actually —I have actually attached to his affidavit, there is a video, a DVR video that we have where he actually employs methodology from the National Crime Prevention Institution for which he is a certified member that he is going to employ to support or to support his opinions. He's not up here just saying that it was foreseeable and therefore, they have reason to anticipate this particular action. He is actually going to outline the basis that he used to support that conclusion. And that's what I am saying, Your Honor, if the Court—if I was aware before now that the Court had concerns about his methodology, I would have brought him here to go through the methodology that he employed so that the Court can make the decision of whether or not his methodology was both reliable and relevant so that the jury—to present before the jury

(RE258-259)

Despite the offers of Plaintiff's counsel, the Trial Court held no hearing concerning the reliability or basis of Chief Lewis' opinions but merely concluded that Chief Lewis opinions were without sufficient facts or data and not reliable. To deny Plaintiff the opportunity for a *Daubert* hearing, when Plaintiff had no prior notice of any challenges to the basis of his expert's testimony constitutes an arbitrary exclusion of expert witness testimony by the Trial court and a clear instance of abuse of discretion.

III. The Trial Court erred in granting Defendants' Motion to Reconsider concerning the exclusion of deposition testimony of Edgar Love and excluding Love from testifying at trial.

The Trial Court erred in its ruling excluding the testimony of Edgar Love, the witness

who found Mr. Ellis after the beating. As noted above, after two discovery extensions, Plaintiff's counsel learned of Mr. Love and his involvement in the case in March of 2009. At this time, no trial date had even been set, but Plaintiff disclosed him as required under the Rules and sought to depose him. Thereafter, the parties entered into an Agreed Scheduling Order, extending discovery through June 15, 2009 and trial was set for September 21, 2009 (RE 183) . Mr. Love was then deposed on June 5, 2009 and a month later, the Defendants sought to have his testimony stricken. (RE184).

The Defendants did not challenge Mr. Love's testimony because he was disclosed after the deadline of discovery (because indeed, he was disclosed prior to that last Agreed Scheduling Order). Nor did Defendants claim to be prejudiced by the late disclosure. In fact, when asked by the Court what prejudice they suffered, Defendants' counsel, who had the opportunity to depose him long before trial, admitted they were not adversely affected in their trial preparation (RE 231, 232). The only "disadvantage" to the Defendants was that the Plaintiffs now had a witness who would testify about what happened after Mr. Jenkins left and how Mr. Ellis was found and Double Quick personnel alerted of his presence (RE 232). In other words, Defendants might lose.

Having no valid trial-preparation-prejudice argument, the Defendants vindictively pressed for dismissal of the case or Mr. Love's exclusion , as a punishment to the Plaintiff for not wilfully failing to disclose him earlier. The Trial Court initially declined to impose such a severe sanction as dismissal; however, it required Plaintiffs to provide medical proof of Mr. Ellis' inability to remember Love before March of2009. On reconsideration, the Trial Court struck Mr. Love's testimony altogether when he found the medical proof Ellis submitted was inadequate.

The Trial Court's exclusion of Love was a sanction against Mr. Ellis for what it found was "an intentional act to circumvent discovery deadlines so that his witness, Edgar Love, could provide testimony favorable to the Plaintiff in this matter" (¶ 30, RE 014). There being no basis in fact or in the law for such a ruling, the Trial Court abused its discretion and committed reversible error.

A. There was no discovery abuse in this case

A Trial Court does have the authority to impose sanctions for discovery violations under its own inherent power to protect the integrity of the legal process and under Rule 37 of the Mississippi Rules of Civil Procedure. *Irby v. Estate of Irby ex rel Marshall,* 7 So.3d 223 (Miss 2009). The goal of both is to insure that trials are won or lost on their merits, not by ambush. *Harris v. Gen. Host Corp.*, 503 So.2d 795, 796 (Miss. 1986) Accordingly, discovery must be timely supplemented and the parties must respect Court deadlines. On appeal, however, the Appellate Court reviews a trial judge's decision to impose sanction for discovery abuses under an abuse-of-discretion standard. *Ladner v. Ladner*, 436 so.2d 1366 (Miss. 1983). In such a review, this Court determines whether a Trial Court committed a clear error of judgment, weighing all relevant factors, and if so, the sanction should be reversed. *Irby, ibid,* ¶11.

Even if a discovery abuse is shown, the Court should decide on sanctions, taking into account the interest of justice and fair play, [i.e. "the court may impose upon any party or counsel *such sanctions as are just...*" Rule 37(e).] *Id.* Thus, in the *Irby* case, the Supreme Court affirmed a Trial Court's exclusion of an investigator witness whose investigative reports were not disclosed until nine days before trial and whose trial testimony was not disclosed until three days before trial. Moreover, the Supreme Court also affirmed the Trial Court's Court's exclusion of 1700 pages of documents that were produced two days before trial. In both instances, the party

failed to give the Court a reasonable explanation for not disclosing the documents and witness's name in a timely manner.

In the *Irby* case, exclusion of proof and testimony was warranted because the disclosures did violate the discovery rules and the Defendant was clearly prejudiced by the late disclosures. But that is not the case here. Here, there was no discovery abuse and the Defendant was not prejudiced by the March disclosure of Love as a witness. In the case at hand, the record clearly shows that discovery deadlines were extended on several occasions, with the last extension going through June 15, 2009. Plaintiff disclosed the identity of Mr. Love in March 2009, at a time when no trial date had been set. Thus, Plaintiff did not violate any other Court Order or discovery deadline in this case. To impose any sanction on Plaintiff at all when there had been no violation is an abuse of discretion.

B. Trial Court's finding of a "wilful" discovery violation was unfounded in the facts and the law.

When Defendant sought to have Plaintiff's case dismissed altogether because Mr. Love was not disclosed until March of 2009, Plaintiff's counsel argued that Mr. Ellis had apparently forgotten any earlier conversation Mr. Love may have said they had. Plaintiff's counsel pointed out the severe beating Mr. Ellis had, and said, "To the extent that Ellis's memory of when he first learned fo Love's involvement may not coincide with Love's, this may be explained by Ellis' head injury." Counsel further stated that Ellis was reminded by Love of his involvement when they encountered each other in March 2009 but Ellis did not remember being give this same information earlier (RE 199).

The Trial Court then required Mr. Ellis to produce appropriate expert or medical

testimony on Mr. Ellis's memory loss (RE 205) which was submitted by way of excerpts of his treating physician's deposition (RE 091). The Court ultimately dismissed the case on other grounds, but went further to exclude Mr. Love's testimony because it found that Mr. Ellis's forgetfulness was not the result of any medical condition, "but an intentional act to circumvent discovery deadlines so that the witness, Edgar Love, could provide testimony favorable to the Plaintiff in this matter" (RE014).

This finding of a wilful 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 the Court's discretion in the first instance. However, to find a Plaintiff in **wilful** violation of discovery from the lack of Court-required medical proof of long term amnesia, and that alone, exhibits a further abuse of its discretion by the Trial Court. This appears to be a case of first impression as to the level of proof that a Trial Court may impose upon a party to avoid a finding of wilful discovery violations. However, an examination of cases where wilful violations have been found is instructive. These include:

**Pierce v. Heritage Properties, Inc.* 688 So.2d 1385 (Miss. 1997) where Plaintiff deliberately lied about the presence of a witness when a ceiling fell on her because she did not want her parents to know she had male company with her at the time. The Court found that Plaintiff had been repeatedly untruthful in her sworn testimony.

**Scoggins v. Ellzey Beverages,* 743 So.2d 990 (Miss. 1999) where the Court held an evidentiary hearing and the Plaintiff's testimony concerning her prior back problems was directly contradicted by her medical records, saying: "Most persuasive is Scoggins's contention that she could not remember a lumbar omnipaque myelogram performed in 1991. This is an invasive and

painful procedure and it is difficult to believe Scoggins either forgot or did not consider this procedure important."

**Allen v. National RR Passenger Corp.* 934 So.2d 1006 (Miss. 2006) where Mr. Allen excluded documentation of injuries he suffered in a 1993 incident, and denied under oath ever filing a workers comp claim or being involved in a car accident.

**Salts v. Gulf National Insurance Co.*, 872 So. 2, 667 (Miss. 2004) where plaintiffs refused to submit to depositions.

However, in *Wood v. Biloxi Public School District* 757 So.2d 190 (Miss. 2000) the Court found no wilful violation when the Plaintiff answered in interrogatories that his injury affected his ability to do manual labor even though the Defendant had a video tape showing the Plaintiff playing basketball, squatting, twisting and bending. The Court found no wilful violation because the answer to the interrogatory was subject to different interpretations and because it found no pattern of giving falsehoods. The *Wood* Court noted that the *Pierce* Court had said:

> The focus must be on the intentional nature, as well as the pattern of the plaintiff's conduct, which included deliberately providing false responses in three discovery mechanisms: the answers to interrogatories, the request for production of documents, and the depositions testimony

Wood, ibid, ¶15

In the case at hand, Mr. Ellis has given no sworn testimony that contradicts any medical finding. Unlike the plaintiff in *Pierce*, there has been no showing that Mr. Ellis knew of Mr. Love's identity but wilfully refused to reveal it. The testimony of Mr. Love showed that Mr. Ellis was incoherent and unable to speak that night; that Mr. Ellis and he were not friends prior to this incident or later; and that Mr. Love was actually out of the state until he returned in 2008, only visiting intermittently here between 2004 and 2008. The proof also showed that Mr. Ellis

did suffer a severe head injury, from which he could suffer post concussion symptoms for week, months or a longer period of time, his doctor said (RE 101). The case at hand shows no pattern by Mr. Ellis' of deliberately providing false information. Even his disclosure of Mr. Love was still timely under that last Agreed Order extending discovery and did not prejudice the Defendants in their preparation for trial. There is no basis for concluding that the March 2009 disclosure of Mr. Love was a **wilful** discovery violation. Further, for the Court to have required Mr. Ellis to prove he suffered amnesia until the time of his disclosure of Love, or be found to have committed a wilful violation, was arbitrary and an abuse of discretion as well.

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 13th day of April, 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 **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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This 13th day of April, 2010.

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