# 2010-1A-01963-SCT

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**DOUBLE QUICK, INC.** — **APPELLANT**

**VS.** — **CASE NO. 2010-1A-01963-SCT**

**DOROTHY MOORE, AS ADMINISTRATOR AND ON BEHALF OF ALL THE WRONGFUL DEATH BENEFICIARIES OF MARIO MOORE, DECEASED** — **APPELLEE**

***ON APPEAL FROM THE CIRCUIT COURT OF BOLIVAR COUNTY, MISSISSIPPI SECOND JUDICIAL DISTRICT CIRCUIT COURT NO. 2008-0072 HONORABLE ALBERT B. SMITH, III, CIRCUIT JUDGE***

## BRIEF OF APPELLEE

**ORAL ARGUMENT REQUESTED**

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned Counsel of Record certifies that the 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. The Honorable Albert B. Smith, III, Circuit Court Judge, Bolivar County, Mississippi;
2. Double Quick, Inc., Appellant;
3. Mark A. Biggers, Esq., Lonnie D. Bailey, Esq., and Charles C. Auerswald, Esq., Upshaw, Williams, Biggers & Beckham, LLP, counsel for Appellant;
4. Dorothy Moore, Appellee; and
5. Andrew M. W. Westerfield, Esq. and Warren B. Bell, Esq., Westerfield, Janoush & Bell, P.A., counsel for Appellee.

CERTIFIED this 9th day of May, 2011.

Andrew M. W. Westerfield, MS Bar No. [redacted]
Attorney for Appellee

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DOROTHY MOORE, AS ADMINISTRATOR AND ON BEHALF OF ALL OF THE WRONGFUL DEATH BENEFICIARIES OF MARIO MOORE, DECEASED — APPELLEE

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# BRIEF OF APPELLEE

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## I. STATEMENT OF THE ISSUES

The Trial Court properly overruled Double Quick, Inc.'s Motion for Summary Judgment. There are trial issues as to acts of negligence of Appellant. The status of Mario Moore, deceased, has not been determined although proof shows he was an invitee.

## II. STATEMENT OF THE CASE

Appellant appeals the denial of its Summary Motion by the Trial Court and Interlocutory Appeal has been granted.

This all began with George Ford and his young son going to the Double Quick in Shelby to get gas on May 17, 2008. On his way into the store, Ford encountered Cassius Gallion. They apparently had some bad history. A dispute began, and Gallion followed Ford into the store where the dispute escalated. Words were exchanged inside the store, along with it being plain that if Ford and Gallion met outside, it would continue and result in violence. Gallion went outside the store. There were three Double Quick employees there on the scene. One was the store manager who,

knowing there would be a fight outside, did not call the police nor keep the combatants separate, but led Ford outside where this escalated to the shooting of Mario Moore as he tried to break up the argument.

## III. STATEMENT OF THE FACTS

Wytisha Jackson, the store manager on duty at the Appellant's Double Quick Store, and Jonathan Johns, another employee, were inside when this started in front of them. Wytisha Jackson says there was a confrontation in the store between Gallion and Ford, and she knew that there would be trouble outside when Ford went back to his car by the gas pumps.(T.823-826,831; R.E.6). Despite knowing that, several things did *not* occur which should have, and one thing did occur that should *not* have. First, the police/authorities were not contacted immediately by the Double Quick employees there in the store as should have been if their training had been followed.(T.828, R.E.6; T.900, R.E.8). Next, common sense tells us that if you know something bad is going to happen outside between two people, why didn't Ms. Jackson ask Ford to stay inside the store until the police in Shelby could get there? It only took the police in Shelby one minute to respond to the Double Quick after contact was made with them.(T.900; R.E. 8). If necessary, the door of the Double Quick could have been locked since Gallion was outside, and if he tried to enter the store he could have been told to leave and that the police were in route. This was what should have been done and was the reasonable thing to do but was not done.(T.900; R.E. 8). What Ms. Jackson did was to escort Ford and his son outside the store to the gas pumps where Gallion was waiting in close proximity.(T. 823-826,83; R.E. 6). In essence, when the confrontation inside was interrupted by Gallion leaving, and if reasonable precautions or actions had been taken, it would have ended at that time with police soon to arrive. The parties were separated. The police could have been contacted. They would

have arrived in one minute.(T. 899; R.E. 8). If a Security Guard had been there, he could have assisted in the common sense approach of keeping the two parties separate. A security guard could have told Gallion and others to leave and that the police were on the way.(T. 900; R.E. 8). That did not happen. What did happen was Ms. Jackson took Ford, the shooter, out to where the confrontation could continue, and in fact it did. Ms. Jackson testified at Ford's criminal trial she knew there would be a fight outside with Gallion and could have involved the "other guys" with Gallion.(T. 1248-1249; R.E. 9). Mario Moore, among others, tried to get Gallion away from Ford.(T. 823-826,831; R.E. 6). Mario and Ford then exchanged words which led to Mario, maybe rightly, taking action to protect himself by swinging at Ford, but hit Jackson who was between them. Ford went to the trunk of his car and got a pistol. He shot Mario Moore in the back as Mario tried to leave the scene. In other words, Ford had Mario on the run and shot him. How could this have happened if Ford had been told to stay inside the store by Double Quick personnel and allowed the police to arrive in one minute? He would have been separated from the ensuing fight and would not have had the ability to get to his gun in his trunk. The police would have arrived in 60 seconds. This would not have escalated into the shooting death of Mario Moore. It is that simple. Mario had come to the Appellant's Double Quick for a purchase at their store.(T.1248,1249;R.E. 9). He was an invitee there.

### A. CRIMINAL TRIAL TESTIMONY OF MANAGER, WYTISHA JACKSON - CONDENSED

(T. 275; R.E. 6)

Q. Okay. Now, did anything unusual occur in the store involving George when he came in the store:

A. He came in and he was paying for the items that he had bought and it was like an

argument between him and I think they called him Cash while he was in the store.

Q. Do you know how that argument started?

A. No.

Q. Were you there when the argument took place?

A. I was at the register when the argument was going on. Yes.

Q. Okay. Now, did anything physical occur between the two of them while you were there? (T.275; R.E. 6)

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(T. 824; R.E. 6)

A. No. They just argued. That's all.

Q. How long would you say they were arguing?

A. Maybe five minutes, something like seven to eight minutes. They wasn't in the store long.

Q. Okay. Now, when George left, did you do anything out of the ordinary?

A. Yes, I took his son out to the car and, and put him in his car seat, told him to go on and leave so things wouldn't happen.

Q. Okay. Now tell me why you did that?

A. *Because I had a feeling something was going to happen.* He was there by himself with his son and I didn't want nothing to happen in front of his son or, or nothing like that. (Emphasis added).

Q. Okay. So you took his son to the car?

A. Uh, huh.

Q. Was George with you when you took his son out?

A. *He was walking behind me.* (Emphasis added).

Q. Okay. Now tell me, what you did when you got to the car.

A. Put his son in the car, then I went around, around to him and was trying to get him to get in the car and just leave it alone, go on, go home, leave it alone and go home.

Q. Okay. Did you see Cash at the car?

A. He wasn't at first, but he came around arguing and stuff like at the car and he was. (T. 824, R.E. 6)

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(T. 826, R.E. 6)

Q. Did you tell me, what made you take him to his car and ask him to get in the car and leave?

A. Because he was by hisself if something would have happened. *I just thought that they try to fight.* (Emphasis added).

Q. Okay. And what gave you, what made you think that?

A. *Because they, they were arguing and they were mad with each other, stuff like that, and I thought they'd try to fight.* (Emphasis added).

Q. Did anything get your attention after you got returned to the store, to the cash register?

A. I went into the store and got the phone and asked John to call the police to come running because I heard shots. (T. 826; R.E. 6)

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(T. 828; R.E. 6)

Q. What was your purpose when you went into the store?

A. To call the police. He hit me. To call the police.

Q. Had you advised anybody to call the police before you actually walked out of the store?

A. When I walked out of the store, I told Jonathan to call the police.

Q. That was when you were checking on Mario, I mean, you were checking on George Ford getting to the car?

A. Uh-huh.

Q. You told Jonathan to call the police?

A. Yes, sir.

Q. All right. To your knowledge, did he make that call?

A. *No. He told me he didn't make the call at all.* (Emphasis added).

Q. Now, how long did it, it take the police to get there after you called?

A. It didn't take them long at all. (T.828; R.E. 6)

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(T. 831; R.E. 6)

Q. Well, how did you know there was going to be a fight?

A. *Because they were arguing when he came in.* It was my conclusion and that, nobody else's, just mine.

Q. I understand that. All I'm asking is about your, you said they were in the store arguing, right?

A. Uh-huh.

Q. *You took the little boy out to the car because –*

A. Yes. (Emphasis added).

Q. *– - because you felt that they might be in a fight and the other guys was going to help him?*

A. *Yes.* (T. 831; R.E. 6)(Emphasis added).

**B. <u>PORTIONS OF STATEMENT OF WYTISHA JACKSON TO SHELBY POLICE DEPARTMENT THE DAY FOLLOWING THE INCIDENT AT DOUBLE QUICK</u>:**

(T. 841; R.E. 6)

Investigator
Washington: Can you tell me in your own words, what occurred at your store?

Jackson: Ok, Cash, a young man name Cash .... (T.841; R.E. 6)

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(T. 842; R.E. 6)

Washington: Cash, what?

Jackson: I don't know his last name.

Washington: Ok, continue please.

Jackson: And a young man name George Ford.

Jackson: They in the store, had a lil dispute in the store.

Washington: Why type of dispute?

Jackson: I don't even know what they was arguing about, but they were just going back and forward at each other saying that I'm gonna be outside, I'm a be waiting on you, it was words.

Washington: Who, who was making the statement? Mr. Gallion and Mr. Ford?

Jackson: Un huh.

Washington: At each other?

Jackson: Yes.

Jackson: He (Ford) was with his son, he was with his, I think his son's like five or six and he was with, that's who he was with and so when I finish ringing him out and stuff like that I took his son, *I seen it was gonna be something going on*, so I took his son to the car. ..... he was pumping his gas and they was still into arguments and stuff like that, him Cash and George they was still into an argument.(T.842; R.E. 6) (Emphasis added).

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(T. 843; R.E. 6)

Washington: All right, what type of relationship do you have with Mr. Ford?

Jackson: He's my God Brother.

Washington: But the altercation actually started inside the store?

Jackson: Un-huh.

Washington: With, with Mr. Gallion, Cash and Mr. Ford?

Jackson: Yes.

Washington: And they was Jawjanking each other and Mr. Gallion advised him that he'll be outside?

Jackson: Yes.

Washington: And Mr. Ford advised he would be outside?

Jackson: Yes. (T. 843; R.E. 6)

### C. CRIMINAL TRIAL TESTIMONY OF JONATHAN JOHNS - CONDENSED

Jonathan Johns was another employee at the Appellant's Double Quick at the time of this incident. Johns was able to observe the start and escalation of the argument between Ford and Gallion and that Gallion left first with Ford following after exchanging words that they would meet each other outside. Johns did not call the police because he was too scared after hearing the shots and Wytisha Jackson called the police.(T. 873, 874; R.E. 7).

(T. 873, 874; R.E. 7)

Q. And then later on, didn't you tell the officer that, isn't, isn't it a fact you told the law officer that Cash walked out of the store?

A. Yes, sir.

Q. Before he walked out of the store, he said we'll be, be outside. We'll be outside?

A. He said I'll be outside. Well, I'll be outside.

Q. Well, I'll be outside?

A. Yes, sir.

Q. Isn't it true that he said, you told the officer that he said, well, I'll be outside?

A. That was Mr. Ford's words, like, well, I'll be outside when Cash walked out.

Q. Cash walked outside?

A. Yes, sir.

Q. Well, I'll be outside?

A. Yes, sir. (T.873; R.E. 7)

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(T. 874; R.E. 7)

Q. And when George Ford went out of the building, didn't Cash approach him, approach George Ford?

A. Yes, sir. I could say that.

Q. And didn't he get, continue the argument?

A. Yes, sir, they argued. (T.874; R.E. 7)

**D. <u>PORTIONS OF STATEMENT OF JONATHAN JOHNS TO SHELBY POLICE DEPARTMENT THE DAY FOLLOWING THE INCIDENT AT DOUBLE QUICK:</u>**

(T. 892; R.E. 7)

Johns: During this time, during between 7 or bout 6:30 or 7 a gentleman by the name of George Ford walked in the door, him and his lil son. He was coming in to purchase some items and Cash walked in,

Investigator Washington: Cash, when you, when you say Cash,

Johns: Cash Gallion. (T.892; R.E. 7)

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(T. 893, 894; R.E. 7)

Washington: Just Cash, ok, continue sir.

Johns: He was coming in and I guess Ford said what's up to him, and he was like don't speak to me, I ain't got no words for you and then Ford was like well then, - - *a argument escalated between that two right there, between them two*.(Emphasis added).

Washington: Ok.

Johns: And Cash walked out the store and Ford, before he walked out Ford say well I'll be outside, and Cash walked out, cause he was coming in to get a cigarette from Ms. Shannon.

Washington: Cash was?

Johns: Yes sir, he was looking for Ms. Shannon - - so he came back in and they were steady arguing, he was like, that was just, that was some foul stuff you did, he was like, then Ford was like you don't want to see me, Cash told him you don't want to see me and I went back there to the back to get Ms. Shannon purse to get ah, Cash. *Ford told him I'll be outside, Cash said I'll be outside, the argument between them two, so when they went outside*, Ford had paid for his gas all that, when they went outside Ford was pumping his gas, him and Cash was still talking words to each other, by this time, while them two was arguing, James he had separated them.(T. 893,894; R.E. 7). (Emphasis added).

Johns saw the "argument escalated between the two right there, between them" in the store. He heard them tell each other they would be outside. Johns was so scared that he was "trembling" after the shooting he couldn't dial the police. He corroborated what Ms. Jackson had said about going to the car with Ford because of the argument between Ford and Gallion in the store. He also confirmed the argument continued outside. (T. 892-894; R.E. 7)

## E. AFFIDAVIT OF CALVIN DAVIS - STATUS OF MARIO MOORE AT DOUBLE QUICK AS INVITEE

IN THE CIRCUIT COURT OF BOLIVAR COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

DOROTHY MOORE, AS ADMINISTRATOR
AND ON BEHALF OF ALL OF THE
WRONGFUL DEATH BENEFICIARIES
OF MARIO MOORE, DECEASED — PLAINTIFF

VS. — CAUSE NO. 2008-0072

DOUBLE QUICK, INC. — DEFENDANT

### AFFIDAVIT OF CALVIN DAVIS

I am Calvin Davis and would state under oath that I have personal knowledge of the following and am competent to testify to the matters stated herein as follows:

1. I am over the age of twenty-one years and I live in Shelby, Mississippi.
2. I am making this affidavit on my personal knowledge and am competent to testify to this.
3. I was with Mario Moore on May 17, 2008 prior to us going to the Double Quick store in Shelby, Mississippi on the late afternoon. Mario Moore had gotten some money from Terry Williams and we were going to the Double Quick store so Mario could purchase some beer. Once we got to the store property, Mario began talking to some other people there at the front door and before he could enter the store to purchase anything, there was an argument between Cassious Gallion and George Ford. Mario Moore and other people tried to break up the argument.

George Ford pulled a gun out of his trunk and started shooting and shot Mario Moore. I was an observer to all of this.

Calvin Davis
CALVIN DAVIS

STATE OF MISSISSIPPI
COUNTY OF Bolivar

Subscribed and sworn to before me this 16th day of October, 2010.

Notary Public

My Commission Expires:

STATE OF MISSISSIPPI NOTARY PUBLIC ID # 81664 WARREN B. BELL Commission Expires June 25, 2014 BOLIVAR COUNTY

(T.1248-1249; R.E. 8)

## F. AFFIDAVIT OF JOHN A. HARRIS - EXPERT FOR APPELLEE

IN THE CIRCUIT COURT OF BOLIVAR COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

DOROTHY MOORE, AS ADMINISTRATOR
AND ON BEHALF OF ALL OF THE
WRONGFUL DEATH BENEFICIARIES
OF MARIO MOORE, DECEASED — PLAINTIFF

VS. — CAUSE NO. 2008-0072

DOUBLE QUICK, INC. — DEFENDANT

### AFFIDAVIT OF JOHN A. HARRIS

I am John A. Harris and would state under oath that I have personal knowledge of the following and am competent to testify to the matters stated herein as follows:

1. I am the principal consultant for the Harris Group Atlanta, Georgia. I hold Board Certifications and Security Management (CPP) and Physical Security (PSP). My training experience in Physical Security began over 40 years ago when I was commissioned an Officer in the United States Marine Corps. I have hands-on experience developing, implementing, managing and maintaining Physical Security programs with personally owned properties as well as fiduciary responsibility as a general partner in real estate investments and as consultant to developers, owners, managers and insurers of property. I have conducted over 1,000 security risk assessments of premises located in 41 States in the Continental United States as well as Hawaii, Puerto Rico, Virgin Islands and Columbia, South America. I am a court qualified forensic security expert and have served as Forensic Security Consultant and testifying expert for both plaintiffs and defense counsel in civil dispute resolution regarding premises security related to third party criminal acts such as assault, homicide, kidnaping, rape and robbery. My C.V. is attached to my deposition which is made a part hereof, together with all reports submitted herein together with the materials that I have reviewed in conjunction to providing my opinions and expert disclosures, all of which have been provided to the Defendant through counsel.

2. It is my opinion that Double Quick employees knew or should have known by the exercise of reasonable care that the incident which began between Cassious Gallion and George Ford inside the Double Quick store on Saturday evening, May 17, 2008, could foreseeably lead to some type of violence involving them and/or others.

3. It is my opinion that Double Quick employees should have, by the exercise of reasonable care, contacted law enforcement authorities by calling 9-1-1 immediately and persistently, if they were initially unsuccessful — not waiting until after gunshots had been fired to notify law enforcement authorities so that law enforcement officers could respond promptly to the incident. It took the Shelby Police Department officer only one (1) minute to respond to the Double Quick location after they received a call for service from Double Quick employees.

4. It is my opinion that the employees of Double Quick failed to follow Double Quick policies and procedures, even though it is my opinion that those policies and procedures were inadequate.

5. It is my opinion that the employees of Double Quick should have immediately utilized the installed panic button when the incident between Cassious Gallion and George Ford began inside the Double Quick store.

6. It is my opinion Double Quick employees should have taken the reasonable precaution and steps to keep the parties, Gallion and Ford, separated after Gallion left the store until law enforcement officers arrived. This could have been simply accomplished by locking the front door, if necessary, and asking Ford to stay inside until the police arrived.

7. It is my opinion that the presence and use of a security guard at the Double Quick at the time of this incident would have, more likely than not, reasonably led to diffusing and/or ending the incident by keeping separated all parties engaged in the incident and keeping down further escalation of the incident by clearing the area of any persons involved in the incident.

8. It is my opinion that the Double Quick employees acted unreasonably by escorting Ford out to an area where Cassias Gallion was on store property after knowledge of the incident inside the store and those employees could have reasonably concluded would lead to further confrontation and violence if Ford and Gallion again came in contact with each other.

9. It is my opinion that the Defendant should have provided adequate training to its employees to observe and recognize incidences that had the reasonable expectation of leading to violence and then to take reasonable steps such as making sure employees had made contact with law enforcement authorities and to take the reasonable steps to keep separated the potential participants or those with them from each other until law enforcement officers arrived.

10. It is my opinion that actions of the Double Quick employees whether active or by omissions on their part, as noted above, contributed to and was a proximate cause of the shooting death of Mario Moore.

JOHN A. HARRIS

STATE OF GEORGIA

COUNTY OF FULTON

Subscribed and sworn to before me this 15th day of October, 2010.

Notary Public

My Commission Expires:

Faye C Pennyman
Notary Public
DeKalb County, Georgia
Commission Expires 02/10/2011

(T. 899-901; R.E. 9)

## G. SEQUENCE OF EVENTS ON DOUBLE QUICK CAMERAS

**CAMERA 2:**

| | |
|---|---|
| 8:37:40 | Cassius Gallion, together with Mario Moore, came onto the premises. They walked to an area past the entrance of the front door and visited with Beverly Shannon, a Double Quick employee, who was having a smoke break. |
| 8:38:54 | Cassius Gallion can be seen entering the store. |
| 8:39:43 | Gallion can be seen exiting the store. |
| 8:39:35 | George Ford comes in the Store with his son. At the same time Cassius Gallion is leaving the store and they have a discussion starting the incident. Ford goes to the Cash register. |
| 8:39:56 | Ford leaves the register and goes to the door of the store and opens it and says |

something out the door and goes back to the counter.

8:40:29 Cassius Gallion comes back inside the store where the incident continues.

8:41:06 James Townsend pushes Cassius to the door and told him to leave it alone.

8:41:19 Cassius Gallion leaves the inside of the store.

8:41:34 George Ford leaves the inside of the store and the incident continues outside.

**CAMERA 7:**

8:41:46 Cassius Gallion is seen on camera outside as well as George Ford, his son and Wytisha Jackson. All are approaching Ford's Car. Incident from the inside continues outside

8:42:00 Mario Moore seen on camera in Yellow shirt. Mario seen along with others trying to break the argument up.

8:44:00 Mario Moore seen running as well as others and Ford shooting.

8:44:53 Ford goes back to his car and leaves the scene.

## IV. ARGUMENT AND LAW:

### A. MARIO MOORE STATUS

The Appellant makes the leap without any supporting proof that Mario Moore was at best a licensee since he did not enter the store to their knowledge. The undisputed proof is that Moore came to and was on the Double Quick property to make a purchase from them.(T.1248,1249;R.E.9). He did not get to make that purchase due to the negligence of Double Quick and its employees.

In *Magnusen v. Pine Belt Investment Corp.*, 963 So.2d., 1228 (Miss. Ct. App. 2007), the Defendant claimed she was attacked at a Burger King franchise owned by the Defendant. She *had intended to use* the drive-through line at the Burger King in Poplarville, Mississippi but felt that the line was too long and never ordered. As she approached the parking lot exit to leave, a truck blocked

her way and another truck blocked her from behind. According to the Plaintiff, she was then attacked when she got out of her truck. It was found that she was an invitee. Where the facts are not in dispute, the question of status becomes a question of law *and if in dispute a jury issue*. Here, Appellee submits the only proof and it makes Mario Moore an invitee. The Trial Court did not pass on this issue in its Order.

The recent case of *Doe v. Jameson, Inc.*, 2011WL103543 (Miss. Decided January 13, 2011), dealt with Ann Doe's status which the Trial Court determined to be a licensee. Ann claimed that she was an invitee at the time that she entered the premises of the Jameson Inn and was raped. The Court, in this case, reaffirmed the position that where facts of a case are not largely in dispute, the classification of a Plaintiff becomes a question of law for the Trial Judge. *Leffler v. Sharp,* 891 So.2d 152, 156 (Miss. 2004) (citing *Adams v. Fred's Dollar Store of Batesville,* 497 So.2d 1097, 1100 (Miss. 1986)); *Little v. Bell,* 719 So.2d 757, 761 (Miss. 1998); *Graves v. Massey,* 87 So.2d 270, 271 (Miss. 1956).

The Appellant here contends that Mario Moore was a licensee. The Appellant presents no proof of that other than he was involved in the altercation which resulted in him being shot and killed. The Appellant does not comment on the fact that the Appellee has produced proof of his status as invitee since he entered the property of the Appellant to make purchases of goods at their store. At best for the Appellant, this is a jury question and at worst a jury instruction that he was an invitee.

**B. <u>DIRECT ACTS OF NEGLIGENCE</u>**

The present case has a lot of similarities with the case of *Foradori v. Captain D's, LLC, et al.,* 2005 WL 3307102 (N.D. Miss.), where the following was found:

> Vicarious liability is a form of liability without fault, and this Court's ruling absolving Captain D's vicarious liability for Garious Harris' intentional assault upon Foradori **merely placed the burden upon Plaintiff to demonstrate that at least one Captain D's employee, acting in the scope of his or her employment, acted negligently in this case and that negligence was a proximate cause of Plaintiff's injuries.** ***Id.*** **at 1.**

The facts in *Captain D's* revolved around a customer and an off-duty employee getting into an argument inside the establishment. There was enough of a confrontation inside that the parties talked about going outside where things would be settled. The restaurant manager heard the commotion inside the restaurant but testified she thought it was just horseplay and did not **investigate, intervene or exercise her authority to protect anyone from harm.** Instead, she told them to take the disturbance outside. They did and serious injuries occurred thereafter. The Court said the following:

> In light of the foregoing, there were clearly triable fact issues in this case as to whether King (the manager) was **negligent** and whether that **negligence** was the proximate cause of Plaintiff's injuries...Captain D's arguments that Harris' intentional assault was a superceding cause as a matter of law likewise lacks merit. **In the Court's view, it is clearly foreseeable that a customer might receive injuries from engaging in a fight with an employee, and Shell's testimony could have led a reasonable juror to conclude that King (the manager) knew or should have known that her actions in ordering her employees outside (as well as her actions in not stopping the confrontation from brewing in the first place) would have resulted in a fight and possible injuries to Foradori. The mere fact that the Plaintiff's injuries were more serious than would generally be expected, and the fact that it was another employee who actually inflicted those injuries, make no difference as to the issue of foreseeability.** *Id.* at 2.(Emphasis added).

Further, in *Foradori v. Captain D's, LLC, et al.,* 523 F.3rd 477 (5th Cir.2008):

> After reviewing the record, we conclude that the district court correctly analyzed the evidence and applied Rule 50, not simply for

> the district court's stated reasons, **but also because of additional legally sufficient evidence in the record from which the jury reasonably could have found that Captain D's failed to take reasonable steps to train and discipline its employees to take reasonable precautions to control and defuse customer-related altercations on its premises.** *Id* at 494. (Emphasis added)

There was no proof of any past atmosphere of violence in this case. It is not required to be there as Appellant insists is necessary. It was reasonable to believe that Captain D's employee was negligent.

Here, Ms. Jackson, the manager, knew an argument had taken place which would lead to fighting outside. She did not contact the police pursuant to what she was supposed to do by Double Quick training. She had a chance to keep the parties separated, i.e., keep the shooter away from anyone else, but failed to do so. Ms. Jackson escorted George Ford and his son outside to the location where the confrontation could continue, ending in the shooting of Mario Moore. (T.823-826, 831, 841-843; R.E.6)

The question is, did the Appellant Double Quick exercise reasonable care to protect people coming on their property in Shelby to shop from reasonable foreseeable injury at the hands of other patrons? To prevail, a Plaintiff must demonstrate (1) a duty owed by Double Quick; (2) a breach of that duty; (3) damages; (4) a cause or connection between the breach and the damages such as that the breach is the proximate cause of the damages. *Grisham v. John Q. Long VFW Post No. 4057, Inc.*, 519 So.2d 413 (Miss. 1988). Although not an insurer of an invitee's safety such as Mario Moore, deceased, a premises owner owes a duty to exercise reasonable care to protect the invitee from reasonably foreseeable injuries at the hands of another. *Simpson v. Boyd*, 880 So.2d 1047 (Miss. 2004). Generally, criminal acts can be intervening causes which break the causal of

connection with the Defendant's negligent act, if the criminal act is not within the realm of reasonable foreseeability. *O'Cain v. Harvey Freeman & Sons, Inc.*, 603 So.2d 824 (Miss. 1991). In premises liability cases, foreseeability *may* be established by proving that the Defendant had (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. Maldrinich*, 584 So.2d 397 (Miss. 1991); *Corley v. Evans* 835 So.2d 30 (Miss. 2003). **Direct acts of negligence, as here, are a different aspect of liability.** *Foradori v. Captain D's, LLC, et al.* 523 F.3RD 477 (5th Cir. 2008).

Whether a duty is owed is a question of law. *Rein v. Benchmark Constr. Co.*, 865 So.2d 1134 (Miss. 2004). **The general duty is to act as a reasonable prudent person would under the circumstances**. *Donald v. AMPCO Prod. Co.*, 735 So.2d. 161 (Miss. 1999)(Emphasis added). The important component of "the existence of duty" is that the injury is reasonably foreseeable. *Rein v. Benchmark Constr. Co.*, 865 So.2d 1143 (Miss. 2004). When the conduct of the actor is a substantial factor in bringing about the harm to another, then "the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." *Rein,* 1144-45. (quoting Restatement (Second) of Torts §435 (1965)), Defendants "cannot escape liability because a particular injury could not be foreseen, if *some* injury ought to have been reasonably anticipated." *Rein,* 1145; *Delta Electric Power Assn. v. Burton,* 126 So.2d, 258, 261 (Miss. 1961).

The Plaintiff's expert witness, John Harris, is expected to testify to the following:

a. Double Quick employees should have by the exercise of reasonable care, contacted law enforcement authorities by calling 9-1-1 immediately and persistently. If they were initially unsuccessful – not waiting until after shots had been fired to notify law enforcement so they could respond promptly to the incident. It only took the Shelby

Police Department one (1) minute to respond to the Double Quick location after they received a call for service.

b. The employees of Double Quick failed to follow Double Quick policies and procedures, even though those policies and procedures were inadequate.

c. The employees of Double Quick should have immediately utilized the installed panic button when the incident between Cassius Gallion and George Ford began inside the Double Quick store.

d. Double Quick employees should have taken the reasonable precaution and steps to keep the parties, Gallion and Ford, separated after Gallion left the store until the police arrived. This could have been simply accomplished by locking the front door, if necessary, and asking Ford to stay inside until the police arrived.

e. The presence and use of a security guard at the Double Quick at the time of this incident could have reasonably led to diffusing and/or ending the incident by keeping all parties separated and keeping down further escalation of the incident by clearing the area of any persons involved in the incident.

f. Double Quick personnel acted unreasonably by escorting Ford out to an area where Cassius Gallion was on store property after knowledge of the incident inside the store which could reasonably have been concluded would lead to further confrontation and violence if they came in contact with each other again.

g. Double Quick should have provided training to the employees to observe and recognize incidences that had the reasonable expectation of leading to violence and then to take the reasonable steps such as making sure personnel had made contact with the police/authorities and to take the reasonable steps to keep the potential participates or those with them separated from each other until the police arrived.

h. The actions of the Double Quick personnel whether active or by omissions on their part as noted above contributed to and was a proximate cause of the shooting death of Mario Moore. (T. 899-901; R.E. 8)

This testimony is specific as to causation, not general nor speculative as in the recent case

of *Double Quick Inc. v. Lymas,* 2008-CA-01713-SCT (decided September 27, 2010). Also in *Lymas,* there were no Double Quick personnel involved in the immediate events of the shooting that contributed to the shooting there or helped set it in motion as in the case at bar before this Court.

In Mississippi premises law, passive negligence is negligence where the Double Quick here would merely *fail* to act in fulfillment of a duty of care. This duty is to exercise reasonably safe care to protect patrons from reasonably foreseeable injuries at the hands of others. The proof **may be** where the actual or constructive knowledge of an atmosphere of violence proof enters the picture, but that is not the sole and only way the proof has to go. Appellee is saying there is negligence where Appellant had actual knowledge of the potential for violence at a particular time and **participated** in some manner **in conduct or omission** which caused the injury.

Appellant relies heavily on *Titus v. Williams, et al.*, 844 So.2d 459 (Miss.2003). This case is easily distinguished factually from the present case. In *Titus*, the Plaintiff alleged that the Defendant, The Flash Store, in knowing of the shooter's "potential dangerousness" failed to take sufficient precautions for Titus resulting in his death. Earlier in the evening of the occurrence at The Flash Store, Titus and the shooter had gotten into an argument, then later the shooter had actually shot at the car Titus was in striking it. Later, Titus saw the shooter and his brother in The Flash Store. Titus entered the store and immediately got into a fight with the shooter and his brother which ended with Titus running outside, where he was shot. The case revolved around the duty to a licensee of the business to refrain from willfully or wantonly injuring him. The Plaintiff argued that the store's actual and/or constructive knowledge of an atmosphere of violence existed on the premises constituted active or affirmative negligence citing *Hoffman v. Planters Gin Company,* 358 So.2nd 1008 (Miss. 1978).

In *Hoffman*, the Court found that a licensee/invitee distinction did not apply in cases of **active or affirmative negligence.** *Hoffman* applied the standard of ordinary and reasonable care, rather than the standard of intentional and wanton negligence to a licensee. The Court in *Titus* in affirming the Trial Court's granting a summary motion to the store and others, found that the store had not engaged in any **active or affirmative negligence** that caused Titus' shooting death. The Court found that the store contributed no active negligence to Titus running into the store and actually getting into a fight with someone he knew was armed and dangerous.

This is totally different from the present case where the Appellant's Double Quick employees had an opportunity to end the confrontation between Gallion and Ford but failed to do so by not keeping Ford in the store after Gallion left. The employees failed to contact the police promptly when they *knew that something bad was going to happen outside*, and then inexplicably escorted Ford outside to where Gallion was waiting. This allowed the confrontation to continue, and Moore was shot by Ford when he became embroiled in trying to separate Gallion and Ford.

In *Titus*, the Court found the following in distinguishing active and passive negligence:

> **One is only passively negligent *if he merely fails to act in fulfillment of duty of care which law imposes upon him, while one is actively negligent if he participates in some manner in conduct or omission which caused injury.*** *Id.* at 467. (Emphasis added)

Appellant cites for support the recent case of *Ellis v. Gresham Service Station d/b/a Double Quick*, 2011 WL 294414 (Miss. App. Decided February 1, 2011). Again, this case involved a different theory of liability than the present case. There was no evidence that involved negligence on the part of the Double Quick employees at the time the Plaintiff was injured by a group of unknown assailants.

In *Davis v. Christian Brotherhood Homes of Jackson,* 957 So.2d 390 (Miss. Ct. App. 2007), the Court directly address the active/passive negligence issue before this Court now. It also gives insight into the "foreseeability" issue also.

> Rather, we read *Titus* as further explaining the affirmative/passive negligence dichotomy as these concepts relate to the duty owed to invitees, licensees, and trespassers. **To be sure, the duty to protect invitees from third party criminal activity would be rendered meaningless if the very danger for which protection is required could be considered the superceding cause of injury.** In the instant case, Lucius was an invitee to whom Christian Brotherhood owed a duty to provide protection from the foreseeable criminal acts of others, notwithstanding the fact that Christian Brotherhood did "not put in motion the agency by or through which [Lucius's] injuries [were] inflicted." This is so because the "agency by or through which [Lucius's] injuries [were] inflicted" is the very danger for which Christian Brotherhood had a duty to provide protection, and hence, the criminal act of Troy Younger was not the superceding cause of Lucius's injuries. However, to establish proximate cause, it must also be shown that the failure to implement reasonable security measures was the cause in fact of the injury. *Id.* at 401.

In the cases cited by Appellant Double Quick to the Trial Court as here, the Defendant in every instance did not actively participate in some manner in conduct or omission which caused the injury. In every case cited, it was alleged that they failed to act in fulfillment of the duty to exercise reasonable care. There, the proof turned on whether the Defendant had actual or constructive knowledge if an atmosphere of violence existed on their property. Again, this is not the case here. See *Mangrum v. Pine Belt Investment Corp.*, 963 So.2d 1279 (Miss. App. Ct. 2003); *Williams v. Walmart,* 989 So.2d 991 (Miss. Ct. App. 2008); *Corley v. Evans,* 835 So.2d 30 (Miss. 2003); *Martin v. Rankin Circle Apartments,* 941 So.2d 854 (Miss. Ct. App. 2006).

In every one of these cases the Plaintiff had relied on the "atmosphere of violence" **not** negligent acts by the Defendant through employees which led to the injury.

> What we have at most in the present case is that the Defendants "*furnished the condition*" in which the shooting occurred but did not "*put in motion*" the shooting itself. Citing *Titus* 844 So.2d, 466, *Newell v. Southern Jitney Jungle Co.*, 830 So.2d, 621, 623 (Miss. 2002), *Martin.* (Emphasis added)

The Appellant now also relies on *Nunez v. Spino* 14 So.2d 82 (Miss. Ct. App. 2008) and *Kendrick v. Quin* WL 4456904, ¶ 8 (Miss. App. 2010). These cases are not relevant. In *Quin*, it is found:

> Quin was not engaged in **affirmative or active negligence** while in the operation or control of a business as held by the *Little* court's interpretation of *Hoffman.* Accordingly, this claim is without merit.

In *Nunez*, the Court simply found that in applying the question of whether Nunez was an invitee versus licensee, there was no issue of material fact that Nunez was a licensee and Spino did nothing willful or wanton to injure her.

The Appellee does not rely on the past atmosphere of violence as it is not required. The Appellee relies on the uncontested facts that Appellant Double Quick, through its employees, were negligent. The Double Quick employees knew a confrontation had occurred and that it was going to escalate leading to violence outside, but they still fail to call the police. They should have according to company policy. They failed to keep the parties in the confrontation (one of which killed Mario Moore) separated while they had a chance. By doing this, the confrontation outside would not have occurred. The police could have come and intervened. However, the manager escorted the shooter outside so the violence could continue and escalate where Mario Moore, as well as others, would have to try to break up the argument. This shooting would not have occurred if proper measures were taken.

Let's take a look at the very recent case of *Doe v. Jameson, Inc.*, 2011 WL 103543 (Miss., decided January 13, 2011). Here, Ann Doe, a thirteen (13) year old entered the Jameson Inn to smoke marijuana. Based on this, the Trial Court found that there was no genuine issue as to material facts as to Ann's status as a licensee at the Jameson Inn. The Supreme Court agreed and affirmed the Trial Court's decision on this.

The Does contended that the case was not only one of premises liability but also a case of simple negligence based on cases that followed the *Hoffman v. Planters Gin Co.*, 358 So.2d 1008 (1978). The Court found the following in Paragraph 10 of its decision.

> The *Hoffman* exception has no place in determining whether a cause of action falls within the realm of premises liability versus that of simple negligence. Rather, the *Hoffman* exception is applicable only in premises liability cases where, by a finding of certain factors, the duty of care owed to a licensee should be elevated from "willful and wanton injury" to a "reasonable standard of care". Thus, whether Ann's cause of action falls under the general theory of negligence or a specific type of negligence warrants a review of the facts that gave rise to Ann's claim. (WL Page 3 of Opinion)

The Court went on to say in Paragraph 11 the following:

> Since premises liability is a theory of negligence that establishes the duty owed to someone injured on a landowner's premises as a result of "conditions or activities" on the land, we find the Trial Court properly treated the Does' claim as one of pure premises liability. (WL Page 3 of Opinion)

Importantly, the Court found the record lacked any evidence that the Defendants had engaged in any "active negligence" that somehow caused injury to Ann, and there was no evidence presented of any "unusual danger" or "increase in hazard" to Ann. That is not the case with this case before the Court.

## V. THE TRIAL COURT IS CORRECT:

The Trial Court is correct when it says:

> There is a question of fact for a jury to decide whether it was foreseeable to Jackson, as an employee, that a fight may continue outside the store and whether her actions or inactions subjected the Plaintiff to an unusual danger or increased hazard. Further, the jury must decide whether Jackson's acts were the proximate cause of the Plaintiff's death or whether his acts constituted an efficient intervening cause which would limit his ability to recover from the Defendant.
>
> In *Foradori v. Captain D's, LLC,* 2005 WL 3307102 (N.D. Miss.), the Court determined that the severity of the injuries to the Plaintiff did not have to be foreseeable in order for the premises owner to be liable for the Plaintiff's injuries. It would be for a jury to determine whether Jackson knew or should have known that her actions would have resulted in injuries to Moore.
>
> Mario Moore was not involved in the initial altercation between Ford and Gallion. However, he put himself into the altercation by punching Jackson. Reasonable minds could differ on whether the acts of Moore were an efficient intervening cause of his own injuries or whether Jackson's actions were the proximate cause of Moore's injuries. The jury must determine which actor's actions put in motion the agency through which the injuries to Moore were inflicted." (T.1524-1526; R.E. 5)

## VI. CONCLUSION:

It is submitted that the Trial Court correctly overruled the Appellant's Motion for Summary Judgment.

**RESPECTFULLY SUBMITTED** this the 9th day of May, 2011.

**DOROTHY MOORE, AS ADMINISTRATOR AND ON BEHALF OF ALL THE WRONGFUL DEATH BENEFICIARIES OF MARIO MOORE, DECEASED**

By: _____

Andrew M. W. Westerfield, MS Bar No. [redacted]

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**CERTIFICATE OF SERVICE**

I, Andrew M. W. Westerfield, attorney for the Respondent, do hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

Honorable Albert B. Smith, III
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THIS, the 4th day of May, 2011.

Andrew M. W. Westerfield

## CERTIFICATE OF FILING

I, Andrew M. W. Westerfield, one of the counsel for the Appellee, do hereby certify that, pursuant to rule 25(a), M.R.A.P., I have filed the original and three copies of Brief of Appellee by depositing them in the United States Mail, first class, postage prepaid, on this the 9th day of May, 2011, addressed as follows:

Ms. Kathy Gillis, Clerk
Supreme Court of Mississippi
Post Office Box 249
Jackson, MS 39205-0249

This the 9th day of May, 2011.

Andrew M. W. Westerfield