

2010-IA-01963-SCT

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOUBLE QUICK, INC.

APPELLANT

VS.

CASE NO. 2010-IA-01963-SCT

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

APPELLEE

**ON APPEAL FROM THE CIRCUIT COURT OF
BOLIVAR COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT**

HONORABLE ALBERT B. SMITH, III, CIRCUIT JUDGE

REPLY BRIEF OF APPELLANT

Of Counsel to Appellant:

Lonnie D. Bailey, Esq. (MSB # [REDACTED])
Marc A. Biggers, Esq. (MSB # [REDACTED])
UPSHAW, WILLIAMS,
BIGGERS & BECKHAM, LLP
309 Fulton Street
Post Office Drawer 8230
Greenwood, Mississippi 38935-8230
Telephone: (662) 455-1613
Fax: (662) 455-7884

ORAL ARGUMENT NOT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Appellant submits that the facts and legal arguments are adequately presented in the briefs and record such that the decisional process would not be significantly aided by oral argument. If, however, the Court determines that oral argument will be helpful, Appellant welcomes the opportunity to attend and participate.

TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. ARGUMENT	3
A. The Trial Court Erred in Failing to Apply Well-Settled Principles of Premises Liability Law	3
B. Double Quick, Inc., is Entitled to Summary Judgment Under Well-Settled Principles of Premises Liability Law	5
1. Mario Moore was a Trespasser	5
2. The Shooting of Moore by Ford was not Reasonably Foreseeable	6
III. CONCLUSION	7

TABLE OF AUTHORITIES

CASES

<i>Adams v. Fred's Dollar Store of Batesville</i> , 497 So.2d 1097 (Miss. 1986)	6
<i>Corley v. Evans</i> , 835 So.2d 30 (Miss. 2000)	2
<i>Davis v. Christian Brotherhood Homes of Jackson, Mississippi, Inc.</i> , 957 So.2d 390 (Miss. App. 2007)	2, 8
<i>Ellis v. Gresham Service Stations, Inc. d/b/a Double Quick, Inc.</i> , 55 So.3d 1123 (Miss. App. 2011)	6-7
<i>Foradori v. Captain D's LLC</i> , 2005 WL 3307102 (N.D. Miss. 2005)	4, 7
<i>Foradori v. Harris</i> , 523 F.3d 477 (5 th Cir. 2008)	4, 5, 7
<i>Hoffman v. Planters Gin Co., Inc.</i> , 358 So.2d 1008 (Miss. 1978)	7
<i>Howard v. Wilson</i> , ____ So.3d ____, 2011 WL 2041106 (Miss. 2011)	1
<i>Little v. Bell</i> , 719 So.2d 757 (Miss. 1998)	6
<i>Lyle v. Mladinich</i> , 584 So.2d 397 (Miss. 1991)	7
<i>Magnusen v. Pine Belt Investment Corp.</i> , 963 So.2d 1279 (Miss. App. 2007)	6
<i>Ottis v. Lynn</i> , 955 So.2d 934 (Miss. App. 2007)	6
<i>Titus v. Williams</i> , 844 So.2d 459 (Miss. 2003)	5

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOUBLE QUICK, INC.

APPELLANT

VS.

NO.: 2010-IA-01963-SCT

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

APPELLEE

REPLY BRIEF OF APPELLANT

I. INTRODUCTION

Appellee-Plaintiff Dorothy Moore continues to cling to her newfound theory of basic negligence in derogation of well-established Mississippi premises liability law, despite Double Quick's demonstration in the trial court and in its initial brief before this Court that it is entitled to a summary dismissal of plaintiff's claims. Appellee filed the case in the trial court as a premises liability case. A.R.E. Tab 1, R. 3-6, 810-813, ¶ VI (allegation that Moore was a "business invitee"), ¶ VII (allegations that Double Quick failed to provide adequate security on premises). Appellee prosecuted this case as a premises liability case, as evidenced by the retention of a security expert and the unsuccessful attempt to develop crime statistics demonstrating an "atmosphere of violence." Faced with a summary judgment motion that highlighted her failure of proof, Appellee concocted a new theory of liability which she erroneously concluded excuses her inability to establish foreseeability.¹ Even now, on appeal, Appellee relies on premises liability decisions from this Court

¹

Recently, this Court once again held that a plaintiff cannot file an apple and then call it an orange when faced with dismissal. Appellee's belated attempt to adopt a "simple" or "basic" negligence theory is analogous to the plaintiff's effort -- in *Howard v. Wilson*, ____ So.3d ____, 2011 WL 2041106 (Miss. 2011) -- to transform an intentional tort claim into a negligence claim to avoid the applicable one (1) year statute of limitations. Mississippi law does not sanction such form over substance attempts to circumvent dismissal.

and the Court of Appeals in her ill-fated attempt to justify the trial court's decision to ignore the applicable law.²

In the Court below and in its Brief of Appellant before this Court, Double Quick demonstrated that Appellee failed to offer proof of an essential element of her claim -- foreseeability. The Brief of Appellee did not demonstrate that she offered any evidence to establish foreseeability. Indeed, she has taken the untenable position that she somehow is not required to prove foreseeability. Appellee's admitted failure of proof on this issue is outcome-determinative of this appeal and is fatal to her claim.

Even if, however, this case was to be decided under basic negligence principles, the required result would be the same -- Double Quick would be entitled to a summary judgment of dismissal. This is so because, even under basic negligence principles, intervening criminal acts of a third party constitute a defense to a negligence action when the criminal acts are outside of the zone of foreseeability. So regardless of whether this case is decided under the applicable settled premises liability law or Appellee's newfound, unsupportable basic negligence theory, her claim fails because she did not offer any proof that Double Quick had cause to anticipate that Ford would shoot and kill Moore.

Appellee argues that Moore was an invitee (under premises liability principles) because of an affidavit stating that Moore intended to purchase beer at Double Quick. Appellee, however, ignores the undisputed fact that Moore interjected himself into the dispute between Ford and Gallion and struck a Double Quick employee when he threw the punch. As a matter of law, Moore lost any

2

See, for example, Appellee's citation to and quote from *Davis v. Christian Brotherhood Homes of Jackson*, 957 So.2d 390 (Miss. App. 2007), *Corley v. Evans*, 835 So.2d 30 (Miss. 2003) and other decisions at page 24 of Brief of Appellee.

potential invitee status when he threw that punch.

Finally, regardless of Moore's status under premises liability law, Appellee's claim fails because she failed to offer any evidence that Double Quick could reasonably foresee that Ford would commit a criminal act resulting in injury to Moore. Appellee has once again conceded that she has not and cannot establish the requisite foreseeability. See Brief of Appellee at page 25 ("The Appellee does not rely on the past atmosphere of violence as it is not required.") She is, however, required under Mississippi law to prove foreseeability in order to establish her negligence claim. She must prove it to establish that Double Quick owed any duty to Moore. She must also prove it to establish proximate cause. Her failure to offer evidence establishing foreseeability leaves her unable to establish two separate elements of her negligence claim.

The Brief of Appellee fails to offer any support for the trial court's erroneous failure to apply settled premises liability law to this premises liability case. Consequently, Double Quick is entitled to a summary dismissal of Appellee's claims.

II. ARGUMENT

A. The Trial Court Erred in Failing to Apply Well-Settled Principles of Premises Liability Law.

The Brief of Appellee does not directly address a significant focal point of Double Quick's appeal -- that the trial court committed reversible error when it denied Double Quick's motion for summary judgment on the basis that "this case is more akin to a basic negligence case than a premises liability case" and that premises liability law does not apply to this case. R.E. 3-5, R. 1524-26. Instead, she argues that Double Quick and its employee, Jackson, were guilty of "direct acts of negligence" and infers that under this theory of liability she is somehow excused from proving the element of foreseeability which is required both to establish the duty owed by Double Quick to

Moore and to prove proximate cause.

Yet, the record before this Court demonstrates that Appellee filed this case in the Circuit Court of Bolivar County as an inadequate security, premises liability case. A.R.E. Tab 1, R. 3-6, 810-813, ¶ VI (allegation that Moore was a “business invitee”), ¶ VII (allegations that Double Quick failed to provide adequate security on its premises). Appellee prosecuted this case as a premises liability case, as evidenced by the retention of John Harris, a so-called security expert, and her unsuccessful attempt to establish that an “atmosphere of violence” existed in the vicinity of Double Quick through the use of crime statistics from the Shelby Police Department.

Appellee cites no authority that would support the trial court’s failure to apply the applicable premises liability law and support its denial of Double Quick’s properly supported motion for summary judgment based on Appellee’s basic negligence theory. Citing snippets out of context, Appellee relies heavily on the decision of the U.S. District Court for the Northern District of Mississippi in *Foradori v. Captain D’s LLC*, 2005 WL 3307102 (N.D. Miss. 2005) and its affirmance by the Fifth Circuit in *Foradori v. Harris*, 523 F.3d 477 (5th Cir. 2008) as somehow supportive of its basic negligence legal theory in derogation of premises liability principles. The decisions in *Foradori* are, however, completely inapposite. The facts of *Foradori* are not at all analogous to the facts of the instant case. In *Foradori* the plaintiff was accosted and, eventually injured, **by employees** of the Captain D’s restaurant where he was a customer. The legal principles discussed and decided in *Foradori* involved the vicarious liability of Captain D’s for its manager’s negligent failure to control her employees and prevent them from assaulting a customer of the

restaurant. It was **not** a premises liability case.³

B. Double Quick, Inc., is Entitled to Summary Judgment Under Well-Settled Principles of Premises Liability Law.

1. Mario Moore was a Trespasser.

Appellee contends that there is a jury question about Moore's status at the time of the incident because of an affidavit submitted by Calvin Davis indicating that Moore intended to purchase some beer at Double Quick. A.R.E. Tab 9, R. 1248-1249. Even if the affidavit could be considered as evidence of a fact rather than Davis' hearsay speculation about Moore's intent, it still does not create a triable issue of fact regarding Moore's status at the time of the incident. It is undisputed that Moore took it upon himself to get involved in the dispute between Ford and Gallion⁴ in the gas bay of Double Quick and on doing so threw a punch at Ford that struck Double Quick's employee Jackson. A.R.E. Tab 6, R. 826; Brief of Appellee at 3 (conceding that Moore threw a punch at Ford and hit Jackson).

Once Moore abandoned his quest to purchase beer and initiated a physical altercation with Ford, which resulted in Jackson being struck, he lost whatever heightened status he might have enjoyed and became a trespasser. *Titus v. Williams*, 844 So.2d 459, 467 (Miss. 2003) (Supreme Court agreed, as a matter of law, with trial court's reasoning that plaintiff's status changed to that of a trespasser when he returned to convenience store intent on fighting with other patrons.)

When the facts regarding a plaintiff's status are undisputed, as they are here, status is a

³

Indeed, the Fifth Circuit noted that the District Court had granted summary judgment dismissing plaintiff's premises liability claims. 523 F.3d at 483.

⁴

Until Moore's intrusion, the dispute had remained verbal -- there was no physical altercation or contact until Moore swung at Ford, striking Jackson.

question of law for the Court. *Little v. Bell*, 719 So.2d 757, 760 (Miss. 1998); *Ottis v. Lynn*, 955 So.2d 934, 939 (Miss. App. 2007); *Magnusen v. Pine Belt Investment Corp.*, 963 So.2d 1279, 1282 (Miss. App. 2007). The undisputed facts of the instant case establish, as a matter of law, that Moore was a trespasser at the time of the shooting incident. As a trespasser, Double Quick owed Moore the duty “to refrain from willfully or wantonly injuring him”. *Titus*, 844 So.2d at 467, citing *Adams v. Fred’s Dollar Store of Batesville*, 497 So.2d 1097, 1100 (Miss. 1986). There is no evidence in the record that Double Quick took any action to wilfully or wantonly injure Moore. Accordingly, Double Quick is entitled to summary judgment.

It is clear from the Brief of Appellee that she chose to ignore Double Quick’s argument on Moore’s status. Double Quick does not contend that Moore attained a lesser status because he never entered the store or made a purchase. Rather, Double Quick contends that, as a matter of law, whatever Moore’s initial status when he entered upon Double Quick’s premises, it changed to that of a trespasser when he punched Jackson while intending to initiate a physical altercation with Ford. Appellee did not respond to that argument, despite that it was raised both in the trial court and Double Quick’s initial appellate brief.

2. The Shooting of Moore by Ford was not Reasonably Foreseeable.

Even assuming *arguendo* that Moore was an invitee, rather than a trespasser, at the time of the shooting incident, Double Quick is still entitled to a summary dismissal as a matter of law. Appellee has failed to demonstrate that there is a triable issue of fact regarding whether the criminal conduct of Ford was reasonably foreseeable to Double Quick and, thus, has failed to establish the duty element of her negligence claim.

“A business owner owes an invitee a duty to exercise reasonable care to protect the invitee from reasonably foreseeable injury at the hands of another.” *Ellis v. Gresham Service Stations, Inc.*

d/b/a Double Quick, Inc., 55 So.3d 1123, 1127 (Miss. App. 2011) (citing *Lyle v. Mladinich*, 584 So.2d 397, 399 (Miss. 1991)). Despite Appellee's disingenuous argument to the contrary, in a negligent security premises liability case, the way a plaintiff proves reasonable foreseeability of the intentional conduct of a third party is to prove that the owner had cause to anticipate the conduct. Cause to anticipate is proven "by either: '(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]...'” *Id.*

There is no evidence that Double Quick had actual or constructive knowledge of any violent nature of Ford. Appellee concedes that she has not offered evidence in opposition to Double Quick's motion for summary judgment sufficient to create a triable issue of fact that an atmosphere of violence existed on or around Double Quick's premises.

Rather, Appellee contends that she is not required to prove that Double Quick knew or should have known that there was an atmosphere of violence on or around its premises, because of Jackson's purported "direct acts of negligence". The problem with Appellee's argument, from a legal standpoint, is that she has offered no applicable authority to support this novel theory. Double Quick has already demonstrated that the *Foradori* decisions are not applicable to the factual circumstances of this case. Appellee offers no other authority that she can ignore the foreseeability requirements of premises liability law and still recover, which is the essence of her argument.

Moreover, in premises liability cases, the active/passive dichotomy is relevant only to the issue of status, in that the so-called *Hoffman* active negligence exception concerns only whether the duty owed to a licensee will be elevated to the ordinary care duty owed to an invitee. It does not eliminate the requirement to prove foreseeability -- a requirement to establish both duty and

proximate cause.⁵ Appellee's failure of proof applies to two elements of her negligence claim. Consequently, Double Quick is entitled to summary judgment.

III. CONCLUSION

The trial court erred when it excused Appellee's obligation to establish foreseeability and denied Double Quick's Motion for Summary Judgment. The Brief of Appellee presents nothing -- either legally or factually -- to dispel that conclusion. For all of the foregoing reasons and those set out in the Brief of Appellant, the Court should reverse the order of the Circuit Court of Bolivar County and render a judgment of dismissal in favor of Double Quick, Inc.

Respectfully submitted, this the 2nd day of June, 2011.

DOUBLE QUICK, INC.

By: Lonnie D. Bailey
LONNIE D. BAILEY, (MSB # [REDACTED])
MARC A. BIGGERS, (MSB # [REDACTED])

OF COUNSEL:

UPSHAW, WILLIAMS,
BIGGERS & BECKHAM, LLP
309 Fulton Street
Post Office Drawer 8230
Greenwood, Mississippi 38935-8230
Telephone: (662) 455-1613
Fax: (662) 455-7884

⁵

Proximate cause is comprised of two distinct concepts: "(1) cause in fact; and (2) foreseeability." *Davis v. Christian Brotherhood Homes of Jackson, Mississippi, Inc.*, 957 So.2d 390, 404 (Miss. App. 2007).

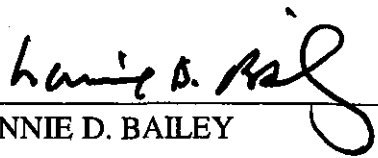
CERTIFICATE OF SERVICE

I, Lonnie D. Bailey, of counsel to Appellant, hereby certify that I have this day mailed, with postage prepaid, a true and correct copy of the above and foregoing document unto:

Andrew M. Westerfield, Esq.
Warren B. Bell, Esq.
Westerfield, Janoush & Bell, P.A.
P.O. Box 1448
Cleveland, MS 38732

Honorable Albert B. Smith, III
Circuit Judge, District 11
P.O. Drawer 478
Cleveland, MS 38732

CERTIFIED this the 2nd day of June, 2011.



LONNIE D. BAILEY

CERTIFICATE OF FILING

I, Lisa Roberts, legal secretary to Lonnie D. Bailey, one of the counsel for the Appellant, do hereby certify that, pursuant to Rule 25(a), M.R.A.P., I have filed the original and three copies of Reply Brief of Appellant by depositing them in the United States Mail, first class, postage prepaid, on this the 2nd day of June, 2011, addressed as follows:

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

This the 2nd day of June, 2011.



Lisa Roberts

K:\USER2\MAB\Double Quick ads Moore\Reply Brief of Appellant.wpd