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

BRIEF OF APPELLANT

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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.

a. Double Quick, Inc., Appellant;

b. Marc A. Biggers, Esq., Lonnie D. Bailey, Esq., and Charles C. Auerswald, Esq., Upshaw, Williams, Biggers & Beckham, LLP, counsel for Appellant;

c. Dorothy Moore, Appellee; and

d. Andrew M. Westerfield, Esq. and Warren B. Bell, Esq., Westerfield, Janoush & Bell, P.A., counsel for Appellee.

Dated this the 10th day of March, 2011.

Lonnie D. Bailey

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

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DOUBLE QUICK, INC. — APPELLANT

VS. — NO.: 2010-IA-01963-SCT

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BRIEF OF APPELLANT

I. INTRODUCTION

This premises liability action arises from a shooting incident which occurred at Double Quick's convenience store in Shelby, Mississippi. Mario Moore ("Moore") was shot and killed by George Ford ("Ford") after Moore interjected himself into an argument between Ford and another man, Cassius Gallion ("Gallion"), in the parking lot of the convenience store. Dorothy Moore ("Plaintiff"), Moore's mother and administratrix of his estate brought this wrongful death action in the Circuit Court of Bolivar County. Eventually, Double Quick moved for summary judgment on the basis that the undisputed facts show that Moore was, at best, a licensee, more probably a trespasser, under premises liability law and that there was no evidence that Double Quick breached its duty to refrain from willfully or wantonly injuring him. Double Quick also demonstrated in its motion for summary judgment that the undisputed facts fail to show that the shooting incident was reasonably foreseeable to Double Quick. In addition, Double Quick established that the undisputed facts show that Moore interjected himself into the altercation between Ford and Gallion thereby precluding liability of Double Quick for the criminal acts of a third party pursuant to this Court's opinion in *Titus v. Williams*, 844 So.2d 459 (Miss. 2003).

Despite pleading her case as a premises liability case, plaintiff argued at the summary

judgment hearing that premises liability law does not apply and that the case is "more akin to a basic negligence case than a premises liability case." R.E. 3-5, R. 1524-26 (page 2) [1]. Even though the trial court concluded as a matter of law that plaintiff cannot establish the foreseeability factors which must be shown by a claimant seeking to recover from a premises owner for failing to protect the claimant from the intentional acts of another[2], the trial court agreed "with the Plaintiff that this case is more similar to a basic negligence action against an employee of Double Quick and that the premises liability foreseeability factors are not applicable." R.E. 3-5, R. 1524-26 (page 2). The trial court's conclusions are contrary to a long line of appellate decisions which compel contrary conclusions.

The trial court erred when it failed to apply well-settled premises liability law in this premises liability case to Double Quick's motion for summary judgment. It should have applied Mississippi premises liability law to the undisputed facts in the record and granted summary judgment to Double Quick. This Court should reverse the Order of the trial court insofar as it denied summary judgment to Double Quick and render judgment here for Double Quick.

II. STATEMENT OF THE ISSUE

Whether the trial court erred in refusing to grant summary judgment to Double Quick when the undisputed facts showed that Double Quick was entitled to judgment as a matter of well-settled principles of premises liability law.

1

In this brief, references to the record are as follows: "R. ____" refers to the Clerk's papers; "Tr. ____" refers to the court reporter's transcript of the hearing on Double Quick's motion for summary judgment; "R.E. ____" refers to appellant's record excerpts; and "Ex. ____" refers to exhibits offered on the motion for summary judgment.

2

Double Quick would, based on the trial court's own legal conclusions, be entitled to summary judgment under a proper application of premises liability law.

III. STATEMENT OF THE CASE

A. Nature of the Case

The case below, filed by Dorothy Moore on behalf of the estate and wrongful death beneficiaries of Mario Moore, deceased, involved allegations of negligence against Double Quick, Inc., the owner and operator of a convenience store in Shelby, arising from the fatal shooting of Moore by Ford in the parking lot of the Double Quick store. R. 3-6. After discovery and motion practice, Double Quick filed its motion for summary judgment asserting that under the undisputed facts: (a) Moore was, at best, a licensee and there was no evidence of wanton or wilful conduct by Double Quick that caused Moore's injury and death; (b) the shooting of Moore by Ford was not reasonably foreseeable by Double Quick; and (c) as a matter of law, under *Titus v. Williams*, 844 So.2d 459 (Miss. 2003), Double Quick could not be held liable for the criminal acts of a third party because Moore interjected himself into an altercation between Ford and another. R. 38-805.

On consideration of Double Quick's motion for summary judgment, the trial court agreed "with the Plaintiff that this case is more similar to a basic negligence action against an employee of Double Quick and that the premises liability foreseeability factors are not applicable."[3] R.E. 3-5, R. 1524-26 (page 2). The trial court denied Double Quick's motion for summary judgment. *Id.* The issue before this Court on appeal is whether the trial court erroneously denied Double Quick's motion for summary judgment because it refused to apply premises liability law to an obvious premises liability case.

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[3] It is ironic that the trial court concluded as a matter of law that plaintiff could not establish the foreseeability factors which must be shown by a claimant seeking to recover from a premises owner for failing to protect the claimant from the intentional acts of another, and yet failed to grant Double Quick's summary judgment motion. R.E. 3-5, R. 1524-26 (page 2). ("This Court agrees with the Defendant that neither of the 2 prongs of the *Corley* test is met in this case."). Double Quick is, based on the trial court's own legal conclusions, entitled to summary judgment under a proper application of premises liability law.

B. The Course of the Proceedings and Disposition in the Court Below.

Dorothy Moore, etc. v. Double Quick, Inc., Civil Action No. 2008-0072, was filed in the Circuit Court of Bolivar County, Mississippi, Second Judicial District, on September 5, 2008. R. 3-6. Ms. Moore charged that Double Quick, Inc. was guilty of neglecting to protect Moore, purportedly a business invitee, from injury and death as a result of his being shot by Ford while on the premises of a Double Quick convenience store in Shelby. *Id.* On October 2, 2008, Double Quick, Inc., answered the complaint. R. 7-10. Double Quick, Inc., denied the essential allegations of the complaint, including liability to plaintiff. *Id.* After extensive discovery by both parties, on October 7, 2010, Double Quick, Inc., filed its motion for summary judgment and supporting memorandum brief. R. 34-805. Plaintiff filed a response to Double Quick's motion for summary judgment and a cross-motion for partial summary judgment on October 19, 2010. R. 806-1467. On October 25, 2010 the trial court heard oral argument on the motions. Tr. 1-71. On November 23, 2010, the trial court entered its Order denying both motions for summary judgment, finding as a matter of law that principles of premises liability were not applicable to this case. R.E. 3-5, R. 1524-26. It is from that portion of the Order denying it a summary judgment that the defendant Double Quick, Inc. appeals.[4]

C. Statement of Relevant Facts.

The facts concerning the shooting incident are largely undisputed[5]. On May 17, 2008

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[4] This Court granted Double Quick's Petition for Permission to Appeal an Interlocutory Order on December 8, 2010. R. 1530-31.

[5] The record contains digital video from both inside and outside the store which captured the events. The video images on DVD are attached as Exhibit 1 to the Affidavit of Scott Shaffer which was, in turn, attached as Exhibit 5 to Double Quick's motion for summary judgment. The DVD is contained in a separate envelope provided with the record by the Bolivar County Circuit Clerk. In addition, still photos printed from (continued...)

Wytisha Jackson ("Jackson") was an assistant store manager of a Double Quick convenience store in Shelby, Mississippi. R. 840. Shortly after 7:30 p.m.[6], George Ford ("Ford") and his young son entered the Double Quick to make a purchase. R. 822. Cassius Gallion (Gallion") came in the store after them whereupon Ford and Gallion exchanged words. R. 823-24, 850-51. James Townsend intervened and Gallion exited the store. R. 722. Ford left the store to pump gas in his car, accompanied by Ford's son and Jackson. Jackson left the store to assist putting Ford's child in the car. R. 824. Outside at the gas pumps, Ford and Gallion again exchanged words and again James Townsend intervened and separated them. R. 874. Then, Moore, plaintiff's decedent[7], approached Ford's car and threw a punch at Ford that struck Jackson. R. 826, 845. Jackson returned to the store and immediately called the police. R. 826, 845. Ford then retrieved a pistol from the trunk of his car and shot Moore. R. 855-56.

IV. SUMMARY OF THE ARGUMENT

Double Quick brought a motion for summary judgment demonstrating that the undisputed facts establish that Moore was at best a licensee on Double Quick's premises and that there was no evidence in the record that Double Quick acted willfully or wantonly to injure Moore. Double Quick also demonstrated that, even if Moore was an invitee, as a matter of law, plaintiff could not establish that the shooting incident was reasonably foreseeable as required by this Court's opinion in *Corley*

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[5](...continued)
the video images are attached as Exhibits 2 through 69 of Mr. Shaffer's affidavit. R. 726-793. Double Quick strongly urges the Court to review the video images in conjunction with the affidavit of Mr. Shaffer to obtain a clear picture of the undisputed events on the evening of May 17, 2008.

[6] The Affidavit of Scott Shaffer explains that the time stamp on the digital video is off by one hour because the clock on the recording system had not been changed to account for Daylight Savings Time. R. 724.

[7] Moore had not been in the store prior to the incident in question.

v. Evans, 835 So.2d 30, 38-39 (Miss. 2000) and other opinions.[8] Finally, Double Quick also established that the undisputed facts showed that Moore interjected himself into an altercation between Ford and Gallion on Double Quick's premises, so that this case is controlled by this Court's opinion in *Titus v. Williams*, 844 So.2d 459 (Miss. 2003) precluding liability of Double Quick, as a matter of law, for the criminal acts of a third party.

Rather than granting Double Quick the summary judgment it was entitled to under well-settled principles of Mississippi premises liability law, the trial court accepted plaintiff's argument at the summary judgment hearing that "this case is more akin to a basic negligence case than a premises liability case" and that premises liability law does not apply. R.E. 3-5, R. 1524-26. In essence, the trial court embraced plaintiff's attempted end-run around Mississippi's well-settled premises liability law regarding determination of duty owed by a business owner and denied Double Quick's summary judgment motion. This was error. This Court and the Court of Appeals have repeatedly rejected plaintiffs' attempts to apply "basic" or "simple" negligence rules in premises liability cases rather than premises liability rules that have been "'developed over many years and are grounded in reality'." *Titus v. Williams*, 844 So.2d 459, 465 (Miss. 2003), quoting *Pinnell v. Bates*, 838 So.2d 198, 199 (Miss. 2002).

The trial court should have decided Double Quick's motion under the premises liability rules this Court has developed over decades of jurisprudence. If it had done so, it would have had no choice but to find that Double Quick was entitled to judgment as a matter of law. This Court should reverse the Order denying summary judgment to Double Quick and render judgment here in Double Quick's favor.

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[8] In its Order denying summary judgment, the trial court concluded as a matter of law that the plaintiff had failed to establish either of the *Corley* tests to prove foreseeability.

V. ARGUMENT

A. Standard of Review.

The standard of review applied by Mississippi appellate courts when reviewing the grant or denial of a motion for summary judgment by a trial court is *de novo*.

> This Court conducts de novo review of orders granting or deny summary judgment and examines all the evidentiary matters before it - admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor.

Titus v. Williams, 844 So.2d 459, 464 (Miss. 2003). When this Court conducts a *de novo* review of the record in this case the conclusion will be inescapable that when the appropriate premises liability law is applied to the undisputed facts in the record, Double Quick, Inc., is entitled to summary judgment.

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

At plaintiff's urging, the trial court below abandoned "'the careful work of generations for an amorphus 'reasonable care under the circumstances' standard...'" of basic negligence. *Doe v. Jameson Inn, Inc.*, _____ So.3d _____, 2011 WL 103543, ¶ 22, (Miss., decided January 13, 2011) quoting *Little v. Bell*, 719 So.2d 757, 763 (Miss. 1998); R.E. 3-5, R. 1524-26. This was error.

This Court has not waivered in its adherence to "[t]he tripartite system of invitee, licensee and trespasser [which] evolved to delineate very fine distinctions as to when a duty was owed to an entrant on land, in part to protect the landowner from the unfettered discretion of juries." (explanatory material added.) *Little v. Bell*, 719 So.2d 757, 763-64 (Miss. 1998). *See also, Jameson Inn*, 2011 WL 103543 at ¶ 22; *Titus*, 844 So.2d at 465. Over the decades the Court has created a

single exception to the invitee/licensee/trespasser trichotomy and the premises owner's duties attached to each. In *Hoffman v. Planters Gin Co., Inc.*, 358 So.2d 1008 (Miss. 1978) the Court engrafted a "carefully limited" exception to the duty owed to a licensee where the premises owner is (a) aware of the presence of the licensee on the premises; (b) the premises owner is engaged in active negligence in the operation or control of the business; (c) the active negligence of the landowner must subject the plaintiff to unusual danger or increase the hazard to him; and (d) the active negligence must be the proximate cause of plaintiff's injury.[9] *Little v. Bell*, 719 So.2d at 761-62, quoting *Hughes v. Star Homes, Inc.*, 379 So.2d 301, 304 (Miss. 1980).

The trial court did not cite *Hoffman* in its Order or discuss the factors underpinning the Court's decision in *Hoffman*. Initially, plaintiff attempted to argue that one of the *Hoffman* factors, the active negligence factor, is controlling without showing satisfaction of the remaining elements for invocation of the exception. R. 1534-68. At the hearing, however, the trial court repeatedly expressed its view that this was an ordinary negligence case. Tr. 36, 38, 49-51 and 56. When the light bulb went on, plaintiff's counsel embraced the trial court's view. Tr. 59 ("Negligent. Just -- just good-old negligence case here.").

Both the trial court and plaintiff's counsel are wrong. This Court recently considered the issue of applying "basic" or "simple" negligence rules to premises liability cases in *Doe v. Jameson Inn, Inc.*, _____ So. 3d _____, 2011 WL 103543 (Miss., decided Jan. 13, 2011). *Doe* involved

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The Court (and Court of Appeals) have consistently construed the *Hoffman* exception to only be applicable when the landowner has been involved in some active operation on the premises involving the operation of a dangerous device. *Presswood v. Cook*, 658 So.2d 859, 862 (Miss. 1995) ("'[A]ction or inaction by the possessor (of the land) with knowledge of an individual's presence' in an operation of some device is a question of negligence), quoting *Hoffman*; *Keith v. Peterson*, 922 So.2d 4, 10 (Miss. App. 2005) ("Furthermore, Brandon was not operating a device. Instead he was playing with his friends. Thus, we find that the case before this Court is a classic premises liability case.") Of course, *Hoffman* involved the operation of a dangerous cottonseed auger which injured a minor.

allegations of the rape of a thirteen year old girl in a hotel room where she went with others to smoke marijuana. Plaintiffs argued on appeal that the trial court committed error when it applied premises liability law rather than "simple negligence". 2011 WL 103543, ¶ 9. In rejecting that argument the Court noted

> 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 that the trial court properly treated the Does' claim as one of pure premises liability. As such, we cannot hold the trial court in error on this point.

2011 WL 103543, ¶ 11, quoting *Black's Law Dictionary* 961 (7th ed. 2000). The Court also rejected plaintiff's request to "abandon the common-law distinctions of trespasser, licensee, and invitee, and opt for a reasonable care standard." *Id.* at ¶¶ 21-22.

Even if the trial court was attempting to apply the *Hoffman* exception, the record before the Court does not support denial of Double Quick's motion for summary judgment. First, there is no evidence in the record that Double Quick was aware of Moore's presence on Double Quick's premises before Moore interjected himself into the altercation between Ford and Cassion. Indeed, the evidence is undisputed that Moore "appeared out of nowhere" and involved himself in the argument. R. 845.

Next, there is no evidence in the record that Double Quick was actively negligent as contemplated by *Hoffman*. In *Titus v. Williams*, 844 So.2d 459, 466-67 (Miss. 2003) this Court discussed the meaning of active and passive negligence in some detail. The Court explained that when plaintiff complains that the defendant failed to do something to protect plaintiff, any negligence by the defendant is passive and does not bring the case within the *Hoffman* exception. As in *Titus*, all of the actions characterized as negligence by plaintiff in the instant case would be passive negligence (if negligent at all). In the trial court below, plaintiff claimed that Double Quick

was negligent because its employees failed to call the police quickly enough -- passive negligence as defined in *Titus*. Plaintiff also complained that Double Quick's employees failed to lock Ford in the store after the initial argument between Ford and Gallion -- again, passive negligence. Moreover, plaintiff complained that Double Quick employees failed to utilize a "panic" button that had been installed at the store -- failure to act, i.e. passive negligence. Plaintiff further complained that Double Quick failed to have a security guard present at the time of the incident -- passive negligence. In addition, plaintiff complained that Double Quick failed to provide sufficient training to its employees to take the actions described above -- passive negligence.[10]

Finally, plaintiff argued below that Double Quick's employee Jackson was actively negligent because she accompanied Ford to his car to assist getting his young son in the car while Ford pumped the gas he had just purchased. Plaintiff failed to demonstrate below (a) how this conduct by Jackson was negligence (i.e. what duty she breached); (b) if negligent, how this conduct was active negligence[11]; and (c) if active negligence, how this conduct was the proximate cause of Moore's death.[12]

10

These descriptions of plaintiff's allegations of negligence are taken from Plaintiff's Memorandum in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment on the Issue of Active Negligence of Defendant Double Quick, Inc., at ppg. 14-15, R. 1547-48 and from the arguments of plaintiff's counsel at the hearing on Double Quick's Motion for Summary Judgment. Tr. 23-35.

11

It logically seems that Jackson's conduct in accompanying Ford to his vehicle could, at best, be seen as an extension of the allegation that Double Quick's employees were negligent for failing to detain Ford inside the store until Cassion had left the premises or the police had responded. If negligence, this would be characterized as passive negligence under the *Titus* definition.

12

In *Davis v. Christian Brotherhood Homes of Jackson, Mississippi, Inc.*, 957 So.2d 390, 404 (Miss. App. 2007), the Court of Appeals explained that proximate cause is comprised of two distinct concepts: "(1) cause in fact; and (2) foreseeability." The Court described cause in fact as an "act or omission [which] was a substantial factor in bringing about the injury, and without it the harm would not have occurred." *Id.*
(continued...)

Assuming *arguendo* that Jackson's conduct could somehow be found to constitute negligence, as a matter of law the undisputed facts surrounding Jackson's conduct demonstrate that her conduct does not invoke the *Hoffman* exception. In *Titus*, the Court noted that "[u]nder the *Hoffman* test, the negligence of the defendant must have been the proximate cause of the plaintiff's injury." 844 So.2d at 466. Quoting *Newell v. Southern Jitney Jungle Co.*, 830 So.2d 621, 623 (Miss. 2002) the *Titus* court pointed out that

> 'Negligence which merely furnishes the condition or occasion upon which injuries are received, but does not put in motion the agency by or through which the injuries are inflicted, is not the proximate cause thereof.'

Titus, 830 So.2d at 466.

If Jackson was negligent, the most that can be said is that her negligence "merely furnishe[d] the condition or occasion" which allowed Moore to be shot by Ford. *Id.* The agency through which Moore's injury was inflicted was Ford's conduct in pulling a gun and shooting Moore. There is no evidence that Jackson furnished the gun to Ford. There is no evidence that Jackson encouraged Ford to pull his gun and shoot Moore. There is no evidence that Jackson even knew that Ford had a gun. Thus, there is no evidence to support a finding that Jackson's negligence (if any) put in motion the agency which inflicted fatal wounds in Moore.[13] Moreover, there is no evidence that Jackson could have foreseen that Moore would interject himself into the argument between Ford and Gallion which

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[12](...continued)
(explanatory material added.) The record is devoid of any evidence, as contrasted with mere speculation, that Moore would not have been shot if Jackson had remained in the store. Accordingly, plaintiff cannot establish that Jackson's purported negligence was the "cause in fact" of Moore's injury and death.

[13]
Even plaintiff's expert, John Harris, agreed that if Moore had declined to interject himself into the argument between Ford and Gallion and had refrained from throwing a punch at Ford, the shooting would not have occurred. R. 948-49.

resulted in Ford pulling his gun and shooting Moore.[14] Consequently, Jackson's conduct was not the proximate cause of Moore's injury and death, and cannot fall within the *Hoffman* exception.

It is, thus, clear that the trial court improperly characterized this case as a "basic negligence case and not a premises liability case." R.E. 3-5, R. 1524-26 (page 3). Premise liability rules, and only premise liability rules, apply. Under a proper application of the appropriate premises liability rules of law, Double Quick cannot be held liable for Ford's shooting of Moore and was, and is, entitled to summary judgment.

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

Under the applicable principles of premises liability law Double Quick is entitled to summary judgment. If the appropriate legal principles are applied to the undisputed facts, plaintiff's claims against Double Quick must be dismissed as a matter of law.

1. Mario Moore Was a Trespasser.

Premises liability cases are subject to a three-step analysis. *Titus v. Williams*, 844 So.2d 459, 467 (Miss. 2003). First there must be a determination of the status of the injured party; i.e., is he an invitee, licensee or trespasser[15]. *Id.* Once status is determined the Court assesses, based on status, what duty the landowner owes to the injured party. *Id.* Finally, the Court must decide whether the landowner breached any duty owed to the injured party. *Id.*

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14 In *Davis*, 957 So.2d at 404, the Court of Appeals described foreseeability to mean "that a person of ordinary intelligence should have anticipated the dangers that his negligent act created for others." The record lacks any evidence that Jackson was even aware that Moore was on the premises, much less that he would interject himself into the fray.

15 When the facts regarding status are undisputed, as here, status is a question of law for the Court. *Otts v. Lynn*, 955 So.2d 934, 939 (Miss. App. 2007).

At one point, Moore may have been a licensee while he was present on Double Quick's premises. The proof, including video tape, shows that he never entered the store or made a purchase. He was on the premises for his own reasons, not providing any benefit to Double Quick. Once he interjected himself into the argument between Ford and Gallion and then struck Jackson with his fist, he became a trespasser.[16] *Titus*, 844 So.2d at 467 (Supreme Court agreed with trial court's reasoning that plaintiff became a trespasser when he returned to convenience store intent on fighting with other patrons.)

"A landowner owes a licensee and a trespasser the same 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 willfully or wantonly injure Moore. Accordingly, summary judgment is appropriate for Double Quick.

2. <u>The Shooting of Moore by Ford was not Reasonably Foreseeable.</u>

Even if Moore was an invitee who was owed a higher duty than a licensee or trespasser, Double Quick would still be entitled to a judgment of dismissal as a matter of law. In premises liability cases involving alleged failure to protect an invitee from the intentional acts of another, the claimant must prove foreseeability by establishing 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. *Corley v. Evans*, 835 So.2d 30, 38-39 (Miss. 2000)

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16 Accordingly, plaintiff's offer of the bare bones affidavit of Calvin Davis (R. 1248-49) in an effort to create an issue of fact on Moore's status fails. Even if Moore was planning to enter the store to purchase beer he never did so. When he struck the store manager with his fist after interjecting himself into the altercation between Gallion and Ford whatever invitation Double Quick had extended to Moore was withdrawn and he became a trespasser. *Titus*, 844 So.2d at 467.

(quoting *Lyle v. Mladinich*, 584 So.2d 397, 399 (Miss. 1991).[17]

At this point it might be helpful to review the development of this Court's jurisprudence in cases where a plaintiff seeks to hold a premises holder liable for injuries or death received as a result of the intentional criminal acts of a third party. Historically, the general rule in this state was that the criminal acts of a third party constituted an independent intervening cause which broke the causal connection between a defendant's negligence and the plaintiff's injury. *Robinson v. Howard Brothers of Jackson, Inc.*, 372 So.2d 1074 (Miss. 1979) (Howard Brothers held not liable for murder committed by minor who purchased gun and ammunition used in murder from Howard Brothers in violation of state and federal law; murder of plaintiff's decedent was not within "circle of reasonable foreseeability.")

In 1982, this Court considered the first of what has now come to be known in the common parlance of judges and lawyers as "negligent security" cases involving business establishments. In *Kelly v. Retzer & Retzer, Inc.*, 417 So.2d 556 (Miss. 1982), a case of first impression, the Court was called upon to decide whether the owner of a McDonald's restaurant could be held liable for the shooting death of a patron by another patron in the restaurant parking lot. The Court affirmed the trial court's peremptory instruction for the defendant holding that "Kelly's [plaintiff's decedent] voluntary interference into an already hostile situation was an independent intervening cause which could not have been reasonably foreseen or prevented by McDonald's." *Id.* at 562.

In 1988, for the first time the Court described with detail the duty and standard for determining a breach of that duty in the so-called negligent security cases. In *Grisham v. John Q.*

17

In the Order, the trial court, as a matter of law, "agrees with Defendant that neither of the 2 prongs of the *Corley* test is met in this case." R.E. 3-5, R. 1524-26 (page 2). The trial court is correct on that point and, as a result, Double Quick is entitled to summary judgment.

Long VFW Post, No. 4057, Inc., 519 So.2d 413, 416 (Miss. 1988) the Court described the duty as follows: "the keeper of a bar or tavern[18], though not an insurer of his guests' safety, has a duty to exercise reasonable care to protect them from reasonably foreseeable injury at the hands of other patrons." The Court further explained that

> Authorities indicate, however, that the **owner can be liable only where he had cause to anticipate the wrongful or negligent act of the unruly patron**. (citations omitted). The requisite 'cause to anticipate' the assault may arise from 1) actual or constructive knowledge of the assailant's violent nature, or 2) actual or constructive knowledge that an atmosphere of violence exists in the tavern. (emphasis added).

Id. at 416-17. Thus, because of the nature of negligent security premises liability cases, the Court described a very narrow refinement to the *Howard Brothers* intervening cause rule providing non-liability for criminal acts of third parties.[19] In *Grisham*, the Court affirmed summary judgment for the defendant on the basis of a lack of proof of proximate cause. *See also, May v. V.F.W. Post # 2539*, 577 So.2d 372 (Miss. 1991) (summary judgment affirmed for V.F.W. Post based on lack of proof of foreseeability.)

In *Lyle v. Mladinich*, 584 So.2d 397 (Miss. 1991), the Court described the proof necessary

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18 The Court has, of course, applied these rules in cases involving other business establishments such as convenience stores, apartment complexes and fast food restaurants.

19 The logic which supports this refinement to the general rule of non-liability for criminal acts of others is based on fairness. If a business owner has cause to anticipate that a patron that he has invited to his premises might be injured by the wrongful or criminal act of another, it would be unfair to allow the business owner to escape responsibility based on the intervening cause doctrine. Fairness, however, works both ways. If an injured plaintiff is allowed to rely on ordinary negligence principles, in derogation of the foreseeability rules as they have developed in negligent security cases, then the defendant should be entitled to rely on the ordinary negligence defense of intervening cause, regardless of its knowledge of the violent nature of the wrongful actor or the atmosphere of violence surrounding its premises. In other words, where, as here, there is no evidence that Double Quick should have anticipated Ford's criminal conduct, it would be unfair to hold Double Quick responsible for wrongful acts that it could not have anticipated.

to establish the second prong of the foreseeability test; i.e. the "atmosphere of violence". "Courts have relied on such factors as the overall pattern of criminal activity prior to the event in question that occurred in the general vicinity of the defendant's business premises, as well as the frequency of criminal activity on the premises." *Id.* at 399.

More recently, the Court has acknowledged that "negligent security" premises liability cases are a special type of premises case with a unique set of standards. In *Double Quick, Inc. v. Lymas*, 50 So.3d 592 (Miss. 2010) this Court noted that:

> Generally, 'criminal acts can be intervening causes which break the causal connection with the defendant's negligent act, if the criminal act is not within the realm of reasonable foreseeability'. (citations omitted).
>
> 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.' *Corley v. Evans*, 835 So.2d 30, 38-39 (Miss. 2003) (quoting *Lyle v. Mladinich*, 584 So.2d 397, 399 (Miss. 1991)).

50 So.3d at 598.

Returning to this case, there is no evidence that Double Quick knew or had reason to know that George Ford had a violent nature. Indeed, the undisputed proof reflects only that Ford was a customer who sought to buy gas and buy his 5-year-old son a snack. There is simply not one scintilla of evidence that Double Quick knew or had reason to know that George Ford was a violent person who should not have been on Double Quick property. Therefore, there can be no doubt that foreseeability cannot be predicated on any prior knowledge by Double Quick of Ford's violent nature.

The alternative criteria to establish foreseeability requires actual or constructive knowledge that an atmosphere of violence exists on the premises. In assessing whether there is an "atmosphere

of violence", relevant factors include "the overall pattern of criminal activity prior to the event in question that occurred in the general vicinity of the defendant's business premises", and "the frequency of criminal activity on the premises." *Corley*, 835 So.2d at 38-39 (quoting *Gatewood v. Sampson*, 812 So.2d 212, 220 (Miss. 2002).

Plaintiff's proof of prior criminal activity on the Double Quick premises fails completely both from a qualitative as well as quantitative viewpoint.[20] John Harris, Plaintiff's expert, relied on radio or "calls for service" logs and a very small number of incident reports from the Shelby Police Department.[21] R. 911-12, 917-18. These records of prior criminal activity reflect no serious crimes on the premises.[22] R. 933-34. The Shelby Chief of Police testified in deposition that he was not aware of any violent crime, including shootings or assaults with any kind of weapon, that happened

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Plaintiff has, essentially, conceded that she cannot prove the requisite foreseeability by establishing an "atmosphere of violence" on or around the Double Quick premises. For example, in her brief opposing summary judgment in the court below, she argued that "activity of violence or criminal activity" is not important because of her ill-conceived theory that she can recover because of Jackson's purported active negligence. R. 1555. At the hearing on Double Quick's motion, she repeated this concession several times to the trial court: "You don't need all of the... proof [of] the propensity of violence for a person or through the violence... in that particular store when there is active negligence going on right there by the employees. You don't have to have that." Tr. 34-35; see also Tr. 37.

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It is clear from Mr. Harris' testimony that the "calls for service" records are not reliable, as compared to incident reports which are prepared after an investigation of the complaint. For example, he testified that he eliminated from consideration all "shots fired" calls for service because he thought the description was not reliable enough to make a determination of whether there were shots fired (a serious crime) or fireworks going off. Tr. 919-20; see also, Tr. 935 (unable to determine whether calls for service described as "fight" involved personal injury or "just one woman screaming at another."); Tr. 936 (no way to know, without access to incident reports, whether "fight" on a call for service involves a domestic dispute.)

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Plaintiff's expert, John Harris, conceded that in the five years prior to the shooting incident involving Moore no one was shot on the Double Quick property. Tr. 933. He conceded further that in the crime data he reviewed there were no incidents of murder, shooting, stabbing or rape. Tr. 934. In fact, the only crime data that Harris found significant were twelve calls for service, described as "fight" over a 3 ½ year period. Tr. 934. As noted, because he was unable to review incident reports for these calls for service, Harris had to concede that there was no way to determine whether these "fights" involved serious assaults, domestic disturbances or simply people arguing. Tr. 933-37.

on the Double Quick property prior to May 2008. R. 413-14.

In *Magnuson v. Pine Belt Investment Corp.*, 963 So.2d 1279 (Miss. App. 2007), the Court of Appeals affirmed summary judgment based on the conclusion that sixteen police reports concerning a Burger King store failed, upon analysis, to create an issue of fact as to the existence of an atmosphere of violence. The Court of Appeals, after analyzing reports involving mostly break-ins or thefts, and disregarding reports fabricated by a former employee, noted that only one crime report involved a violent crime, i.e. assault on a woman in the drive-thru line, and held that summary judgment was proper. The Court of Appeals relied on *Stevens v. Triplett*, 933 So.2d 983 (Miss. App. 2005), wherein that court noted that "only a handful of violent crimes in the five years preceding the incident in question" was not sufficient to establish foreseeability. In *Triplett*, the court stated: "A handful of burglaries and assaults, a rape and a kidnapping, most of which occurred in the middle of the night, are not enough to show that Triplett breached the duty he owed to Stevens when he invited her to see the property." 933 So.2d at p. 986.

Very recently in *Ellis v. Gresham Service Stations, Inc. d/b/a Double Quick, Inc.*, ____ So.3d ____, 2011 WL 294414 (Miss. App., decided Feb. 1, 2011), the Court of Appeals was called upon to consider the quality and quantity of evidence necessary to prove an "atmosphere of violence" to establish foreseeability of a third party assault at a convenience store. In *Ellis*, the plaintiff was assaulted by a group of unknown assailants[23] in the parking lot of a Double Quick store in Indianola. Plaintiff's proof of foreseeability consisted of twelve police reports over a ten-year period, his own

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23 The Court noted that because the assailants were unknown "Ellis was required to produce evidence that an atmosphere of violence existed on Double Quick's premises" in order to establish the requisite foreseeability. 2011 WL 294414, ¶ 15.

testimony about drug deals on the premises[24], the testimony of his associate that someone threw a bottle at the associate's truck and the "conclusory" opinions of Ellis' expert. *Id.* at ¶ 17.

The Court of Appeals analyzed the police reports proffered by plaintiff and found that only five of the twelve reports involved "crimes against the person" and that none of them involved assaults by unknown attackers of the type at issue in that case. Indeed, the Court noted that "each offense was precipitated by some sort of pre-existing dispute between individuals who knew each other and who brought their conflicts on to Double Quick's grounds with no forewarning to Double Quick." *Id.* While conceding that under prior precedent it is not necessary to prove identical "assaultive acts" to establish a jury issue on foreseeability, the Court held that "Double Quick could not have reasonably foreseen an assault of this nature based on the type of incidents the store had experienced in the past." *Id.* at 24. The Court affirmed summary judgment for Double Quick based on plaintiff's failure to demonstrate the required pattern and frequency of criminal activity necessary to establish an "atmosphere of violence". *Id.* at 25.

Here the evidence before the Court does not show a single verified violent crime against a person at Double Quick. Police Chief Bedford testified he was aware of none. The crime data presented to the trial court is not as probative of an atmosphere of violence as the data which the Court of Appeals found to be insufficient as a matter of law in either *Magnuson* or *Ellis*. Therefore, Plaintiff's claim fails as a matter of law because of plaintiff's inability to prove that the shooting of Moore by Ford was foreseeable.

3. Plaintiff's Claim Fails as a Matter of Law Under *Titus v. Williams*.

In *Titus v. Williams*, 844 So.2d 459 (Miss. 2003), this Court considered the appeal of a

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24 Plaintiff testified only that he, not Double Quick, was aware of the drug deals. *Id.* at ¶ 18.

summary judgment granted to the defendants in a case involving a shooting which occurred at a convenience store in Sardis, Mississippi. In that case, the heirs of Milton Titus sought recovery against a convenience store for his death in a shooting incident on the store property. Titus had an argument with the Butcher brothers on the property around 9:00 p.m. About an hour later Titus observed the Butcher brothers inside the store and went inside the store and confronted both in a fist fight. One of the Butchers went to his car, retrieved a gun, chased Titus behind the store and shot him to death.

The Court noted that, while in that case the proof justified the conclusion that an atmosphere of violence existed at the store, the fact remained that it was Titus not the defendants who created and caused the event. The Court stated: "While we must not shield property owners from their own negligence, we must not subject them to liability for the criminal acts of their patrons when these criminal actors, so acting, cause harm to themselves." 844 So.2d at 466. *See also, Williams v. Jackson*, 989 So.2d 991, 994 (Miss. App. 2008) ("whether Williams is considered an invitee or merely a trespasser, this Court agrees with the circuit court that the proximate cause of Williams' injuries was the interjection of himself into the argument between Jackson and Williams' family in front of Wal-Mart."); *Martin v. Rankin Circle Apartments*, 941 So.2d 854, 864 (Miss. App. 2006) (Court of Appeals, citing *Titus* found that shooting was intervening cause for which defendants "furnished the condition" but did not "put in motion".)

Here, Mario Moore, just like Titus, decided he would assault George Ford by throwing a punch which actually also struck Jackson. This criminal act by Moore resulted in his being shot by George Ford less than 30 seconds later. These facts are undisputed. It is important to note that in *Titus* this Court held that the status of Titus was irrelevant to the decision, stating that even if Titus were considered an invitee, the Flash Store owed him no duty to warn of a situation which he created

himself. 844 So.2d at 467. That is exactly what Mario Moore did in this case. He elected to interject himself into a verbal altercation between Ford and Gallion, and chose to turn it into a physical assault. These facts are undisputed. It was Moore, not Double Quick, who created the dangerous situation which caused his death. Double Quick is entitled to judgment of dismissal as a matter of law.

VI. CONCLUSION

The trial court committed an error of law when it determined that this case should be decided under principles of law other than premises liability law. When this Court conducts its *de novo* review of the record in this case the conclusion is inescapable that the undisputed outcome-determinative facts show that Double Quick, Inc. is entitled to a judgment of dismissal as a matter of law.

For all of the foregoing reasons, 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 10th day of March, 2011.

DOUBLE QUICK, INC.

By: 

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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.
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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 10th day of March, 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 Brief of Appellant by depositing them in the United States Mail, first class, postage prepaid, on this the 10th day of March, 2011, addressed as follows:

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

This the 10th day of March, 2011.

Lisa Roberts

Lisa Roberts

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