IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO. 2008-CA-01713

DOUBLE QUICK, INC. — DEFENDANT-APPELLANT-CROSS-APPELLEE

VS.

RONNIE LEE LYMAS — PLAINTIFF-APPELLEE-CROSS APPELLANT

BRIEF OF APPELLEE-CROSS APPELLANT RONNIE LYMAS

(ORAL ARGUMENT REQUESTED)

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VS.

RONNIE LEE LYMAS PLAINTIFF-APPELLEE-CROSS APPELLANT

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. Honorable Jannie Lewis, Humphreys County Circuit Court Judge
2. Ronnie Lymas, Plaintiff-Appellee/Cross-Appellant
3. Double Quick, Inc, Defendant-Appellant/Cross-Appellee
4. Joe N. Tatum, Esquire, Tatum & Wade, Attorney for Ronnie Lymas
5. Latrice Westbrook, Attorney for Ronnie Lymas
6. Tanisha Gates, Attorney for Ronnie Lymas
7. John Brady, Esq., Mitchell, McNutt & Sams, P.A., Attorney for Double Quick, Inc.
8. Honorable Jim Hood, Attorney General of Mississippi
9. Willie Abston, Esq., Butler Snow Law Firm, Attorney for Double Quick, Inc.
10. John C. Henegan, Butler Snow Law Firm, Attorney for Double Quick, Inc.

11. State of Mississippi, Non-aligned Intervenor

12. W. Wayne Drinkwater, Bradley Arant Boult Cummings, LLP

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES . . . . i-ii

TABLE OF CONTENTS . . . . iii-iv

TABLE OF CASES AND AUTHORITIES . . . . v-viii

STATEMENT REGARDING ORAL ARGUMENT ix

STATEMENT OF THE ISSUES 1-2

STATEMENT OF THE CASE 3-10

A. Nature of the Case 3

B. Course of Proceedings Below 3

C. Disposition in the Court Below 4

B. Statement of the Facts 4-10

SUMMARY OF THE ARGUMENT 10-15

STANDARD OF REVIEW 15-17

ARGUMENT 17-50

A. **Could reasonable minds differ based upon the evidence presented at trial as to whether Double Quick's employee's actions of Ignoring a brewing altercation at its front door and allowing known violent persons to regularly loiter on its premises was the proximate cause of the unprovoked attack upon Ronnie Lymas by Orlando Newell making the proximate cause question ripe for jury determination in this case** 17-31

B. **Could reasonable minds differ based upon the evidence presented at trial as to whether the attack upon Ronnie Lymas was foreseeable in light of the fact that two Double Quick employees had actual knowledge of the violent nature of Ronnie Lymas' assailants and in light of the prior criminal acts which occurred on and around Double Quick's premises, making the foreseeability question ripe for jury determination in this case?** 31-42

C. **Was the Court's decision to allow Ronnie Lymas' two security experts to testify at trial within its discretion and should Double Quick be estopped from arguing that Plaintiff's security experts should have been excluded when both Plaintiff and Defense security experts used the same data and procedures in reaching opposing opinions, making the matter a question of "weight of the evidence" and not admissibility?** . . . 43-46

D. **Whether ample evidence was placed before the jury regarding Ronnie Lymas' theory of the case that Orlando Newell had a violent nature which Double Quick had actual or constructive knowledge of, thereby justifying the Court's jury instruction on Ronnie Lymas' "violent nature" theory of the case?** 46-50

CONCLUSION 50

RONNIE LYMAS CROSS APPEAL 50-65

CONCLUSION 65-66

APPENDIX A 67-72

CERTIFICATE OF SERVICE 73

CERTIFICATE OF FILING 74

TABLE OF CASES AND AUTHORITIES

CASES **PAGE**

Alley v. Praschak Mach. Co., 366 So.2d 661 (Miss. 1979) 16

American National Insurance Co. v. Hogue, 749 So.2d 1254, 1259 (Miss. Ct. App. 2000) 4,45

Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974) 60

Barry v. Edmunds, 116 U.S. 550, 565 (1886) 54

Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 161 (Miss. 1988) 37

Best v. Taylor Machine Works, 689 N.E.2d 1057, 1080 (I11. 1997) 64,68

Burton v. Barnett, 615 So.2d 580, 583 (Miss. 1993) 16

Cecil Newell v. State of Mississippi, 308 So. 2d 71 (Miss. 1975) 62

Chantey Music Publ'g, Inc. v. Malaco, Inc., 915 So. 2d 1052, 1060 (Miss. 2005) 40

Church v. Massey, 697 So.2d 407, 410 (Miss. 1997) 16

*City of Savannah v. Cullens, 38 Ga. 334, 1868 WL 1510, *6 (1868)* 52

Clark v. Clabaugh, 20 F.3d 1290, 1294 (3rd Cir 1994) 37

Combs v. Wikinson, 315 F.3d 548, 555 (6th Cir. 2002) 37

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437 (2001) 53

Davis v. Christian Brotherhood Homes of Jackson, Mississippi, Inc., 957 So.2d 390, 401 (Miss. Ct. App. 2007 45,46

Dimick v. Schiedt, 293 U.S. 474, 486 (1935) 54

Donald v. Amoco Production Company, 735 So.2d 161, 174 (Miss. 1999) . . . 17

*Drysdale, 51 Ga. 644, 1874 WL 2824 at *2* 53

Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998) 54,55,61

Flight Line, Inc. v. Tanksley, 608 So.2d 1149 (Miss. 1992) 46

Franklin Corp. v. Tedford, 2009 WL 1015170 (Miss. 2009) 59

Gamble ex rel Gamble v. Dollar General Corp., 852 So.2d 5, 14 (Miss. 2003) 26

Gatewood v. Sampson, 812 So. 2d 212 (Miss. 2002) 23,24,27,30,31, 36,37,40,41,46,47

Glorioso v. YMCA, 556 So. 2d 193, 195 (Miss. 1989) 16

Glover v. Jackson State University, 968 So.2d 1267, 1276 (Miss. 2007) 33,34,48

Grand Casino Tunica v. Shindler, 772 So.2d 1036 (Miss. 2000) 44

Helzel v. Prince William County, 523 U.S. 208, 211 (1998) 55

Illinois Cent. R. Co, v. Barron, 72 U.S. 90, 108 (1866) 53,61

In re Adoption of Minor Child, 931 So.2d 566, 578-79 (Miss. 2007) 41

Kennon v. Gilmer, 131 U.S. 22, 26 (1889) 55,56

Lakin v. Senco Products, Inc., 987 P.2d 463, 473, *op. clarified*,

987 P.2d 476 (Or. 1999) 56,67

Lewis v. Garrett's Adm'rs, 5 Howard 434, 1841 WL 1846 (Miss. Err. App. 1841) 51,60,62

Lyle v. Mladinich, 584 So.2d 397 (Miss. 1991) 24,30,40,41,47

Matthews v. Thompson, 95 So.2d 438 (Miss. 1957) 18

Meena v. Wilburn, 603 So.2d 866, 869 (Miss. 1992) 17

Melridge, Inc. v. Heublein, 125 B.R. 825, 829 (D. Oregon 1991) 38

Minor Child Jane Doe v. Miss. State Federation of Colored Women's Club Housing for Elderly In Clinton, 941 So. 2d 820, 826-27 (Miss. 2002) . . 46

New Orleans, Jackson, and Great Northern Railroad Co. v. Hurst,

7 George 660, 36 Miss. 660 (Miss. Err. App. 1859) 52,63

Pipitone v. Biomatrix, Inc. 288 F.3d 239, 249 (5th Cir. 2002) 45

Pruett v. City of Rosedale, 421 So.2d 1046 (Miss. 1982) 60

Richardson v. Norfolk S. Ry. Co., 923 So.2d 1002, 1010 (Miss. 2006) 16,50

Seaboard Air Line Ry. v. Bishop, 132 Ga. 71, 63 S.E. 1103, 1105 (1909) 53

Sofie v. Fibreboard Corp., 771 P.2d 711, 721
(Wash. 1989), amended 780 P.2d 260 (1989) 7,61

Southern Railroad Co. v. Kendrick, 10 Miss. 374, 1866 WL 1887
(Miss. Err. App. 1866) 52,63

St. Louis, I.M. & S.R. Co. v. Craft, 237 U.S. 648. 661 (1915) 54

Stump v. Indiana Equipment Co., Inc., 601 N.E.2d 398
(Ind. App. 2nd Dist. 1992) 34,48

Thomas v. Columbia Group, LLC, 969 So. 2d 849, 854 (Miss. 2007) . . 30,40,46

Tunica County v. Matthews, 926 So.2d 209 (Miss. 2006) 16

Walters v. Blackledge, 71 So.2d 433 (Miss. 1954)
(Workers' Compensation Act) 58,59,60

Wells by Wells v. Panola County Bd. Of Educ.,
645 So.2d 883 (Miss. 1994) 58,60,61

Whitehead v. Food Max of Mississippi, 163 F.3d 365 (5th Cir. 1998) 49

Wimley v. Reid, 991 So.2d 135 (Miss. 2008) 63

STATUTES AND RULES

Mississippi Code § 11-1-60(2)(b) 4,10,50,56,57,58,59,60,62,63,64

Miss. R. Of Evid. 803(8)(B) &(C) 14, 37

Miss. R. Of Evid. 201 15

CONSTITUTIONAL PROVISIONS

Miss. Const. art. 3 § 31 (1890) 51

Miss. Const. art. 3 § 24 (1890) 65

Miss. Const. art. 1§ 1 (1890) 62

OTHER AUTHORITIES

Premises Security, William F. Blake (1999) 13, 43

Black's Law Dictionary, 7th Ed. (1999) 36

STATEMENT REGARDING ORAL ARGUMENT

Appellee/Cross-Appellant Ronnie Lymas requests oral argument as he believes that it could be helpful to this Court in fully understanding the issues before it. Particularly the issue regarding the constitutionality of the caps on non-economic damages imposed by M.C.A. § 11-1-60(2)(b) is a novel issue before this Court, and the Court's decision in this case may potentially affect the rights of each and every Mississippi citizen. Therefore, oral argument is requested.

STATEMENT OF THE ISSUES

Plaintiff-Appellee-Cross-Appellant, Ronnie Lymas cross appealed the reduction of a his $4,179,350.49 judgment entered against Double Quick in the Circuit Court of Humphreys County. The trial court judge purportedly abiding by the dictates of Section 11-1-60(2)(b), reduced the jury verdict from $4,179,350.49 to $1, 679,717.00 to conform with the caps on non-economic damages imposed by Section 11-1-60(2)(b). (12 R.1665). Ronnie Lymas was brutally attacked by a group of men who were allowed to loiter on the premises of the subject Double Quick before and after he went into the Double Quick store to purchase a beverage.

One of the store employees, Savon Ellis, walked right by the commotion being created by Ronnie Lymas' assailants, simply got into her vehicle and drove away, only to have Ronnie Lymas attacked and shot by these same assailants six minutes later. Additionally, a second Double Quick employee, Shanetta Thurman, had actual knowledge that the two feuding loiters both had pending aggravated assault charges for shooting other persons. Despite having this actual knowledge and and despite the shooter Orlando Newell coming into the store several minutes before he shot Ronnie Lymas, Shanetta Thurman took no action.

Two security experts testified on behalf of Ronnie Lymas that the assault upon Mr. Lymas was foreseeable and that Double Quick's actions and inactions were the proximate cause of the injuries to Ronnie Lymas. Double Quick's security expert, Warren Woodfork, testified that the shooting of Ronne Lymas was not foreseeable and that no action or inaction on the part of Double Quick or employees was the proximate cause of the assault. Interestingly enough, Double Quick's expert

used the exact same data and methods which Mr. Lymas' expert used in reaching their opinions, albeit he reached opposite opinions on foreseeability and causation. Double Quick's security expert did not testify that he could not reach an opinion or that his opinions were conclusory or speculative. Instead, Double Quick's security expert testified to totally opposite opinions from Ronnie Lymas' security experts, making this case a classic "battle of the experts."

The issues on appeal are:

1. *Could reasonable minds differ based upon the evidence presented at trial as to whether Double Quick's employee's actions of ignoring a brewing altercation at its front door and allowing known violent persons to regularly loiter on its premises was the proximate cause of the unprovoked attack upon Ronnie Lymas by Orlando Newell making the proximate cause question ripe for jury determination in this case?*

2. *Could reasonable minds differ based upon the evidence presented at trial as to whether the attack upon Ronnie Lymas was foreseeable in light of the fact that two Double Quick employees had actual knowledge of the violent nature of Ronnie Lymas' assailants and in light of the prior criminal acts which occurred on and around Double Quick's premises, making the foreseeability question ripe for jury determination in this case?*

3. *Was the Court's decision to allow Ronnie Lymas' two security experts to testify at trial within its discretion and should Double Quick be estopped from arguing that Plaintiff's security experts should have been excluded when both Plaintiff and Defense security experts used the same data and procedures in reaching opposing opinions, making the matter a question of "weight of the evidence" and not admissibility?*

4. *Whether ample evidence was placed before the jury regarding Ronnie Lymas' theory of the case that Orlando Newell had a violent nature which Double Quick had actual or constructive knowledge of, thereby justifying the Court's jury instruction on Ronnie Lymas' "violent nature" theory of the case?*

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff originally filed a Complaint for negligence and inadequate security against Defendant Double Quick, Inc. on June 13, 2007 (1 R. 4)[1]*, due to an unprovoked aggravated assault committed upon him at the Double Quick Convenience store on January 26, 2007. The subject Double Quick store is located at 602 Martin Luther King Drive in Belzoni, Mississippi (1 R. 5). The case arose from Ronnie Lymas being shot and beaten in the parking lot of the subject Double Quick store after he had purchased a beverage item from the Double Quick and exited the store. Plaintiff also originally sued Gresham Service Stations, Inc. However after extensive discovery was taken by all the parties in this case, Gresham Service Stations, Inc. was dismissed from the case prior to trial. (2 R.213).*

B. Course of Proceedings Below

As noted above, extensive discovery occurred in this case by all of the parties, culminating with both parties filing motions for summary judgment as to the issue of whether Ronnie Lymas was an in fact an invitee of Double Quick at the time of the subject shooting and whether Ronnie Lymas' security experts opinions were reliable and admissible. (4 R. 537 & 5 R. 710). Both parties motions on these issues were eventually denied by the trial court.

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[1] For ease of reference, Appellee Ronnie Lymas will use the same cite notations as did the Appellant Double Quick in its brief. That is, the court record and the trial transcript are cited as "_R.__" with the volume number followed by the page number. The trial exhibits will be referenced as "Ex. P-__" or "Ex. D-__."

C. Disposition in the Court Below

The trial of this case took a five days, with trial starting on Monday, June 23, 2008 and the jury reaching it decision on Friday, June 27, 2008. The jury returned a verdict in favor of Ronnie Lymas in the amount of $4,179,350.49, for which the trial court entered final judgment. (10 R. 1443).

After the trial, Double Quick moved to alter or amend the judgment under Miss. Code § 11-1-60(2)(b), which purports to place a $1,000,000.00 cap on non-economic damages in non-medical services tort actions, (10 R. 1446), and for other post-trial relief, including judgment notwithstanding the verdict, alternatively, for a new trial. (10 R. 1459).

After the trial, Ronnie Lymas filed a motion to declare section 11-1-60(2)(b) of the Mississippi Code unconstitutional on grounds that the same violates several provisions of the Mississippi and United States Constitutions. (10 R. 1453). The trial court granted Double Quick's motion to alter or amend the judgment, and it entered an Amended Final Judgment of $1,679,717.00 in favor of Lymas, (11 R. 1536). The trial court denied Lymas' motion to declare the caps imposed by section 11-1-60(b) unconstitutional. (12 R. 1662). The trial court denied Double Quick's remaining post-trial motions. (12 R. 1668. Double Quick's appeal and Ronnie Lymas' cross-appeal then ensued. (12 R. 1671 & 12 R. 1675).

D. Statement of the Facts

On January 26, 2007 Ronnie Lymas went to work at McMillian Catfish Farm around 6:30 a.m where he had worked for more than fifteen years. (17 R. 476-477). He got off from work and went home around 3:30 p.m. After getting home, Mr. Lymas took a bath and later left walking to visit his friend Robert James who lives

on Church Street in Belzoni. Mr. Lymas visited with Robert James for five to ten minutes and left walking to the Shell gas station store which is directly across the street from the Double Quick on Martin Luther King Dive in Belzoni, Mississippi. (17 R. 479-480). While walking Mr. Lymas met his friend Donald Lucas who had just purchased some medicine for his niece. Donald Lucas then joined Mr. Lymas and they walked over to the Shell gas station. Mr. Lymas after determining that prices were little higher at Shell, walked across the street to the Double Quick to make his purchase. (17. R. 481-482).

Donald Lucas went into the Double Quick store, followed by Ronne Lymas five minutes later. (14 R. 234, lines 10-14). When Mr. Lymas walked onto the Double Quick parking lot he noticed two males loitering on the Double Quick parking lot arguing. (17 R. 484 & Ex. P-1). The two individuals arguing were Orlando Newell and Allen Unger. According to Double Quick argument at trial, Orlando Newell was inside the Double Quick store shortly before he shot Mr. Lymas. (23 R. 1092, lines 11-18). Mr. Lymas walked past the argument and went into the Double Quick where he purchased a beverage item. (17 R. 485). Donald Lucas saw Mr. Lymas enter the Double Quick store. (14 R. 219, lines 3-20).

The two people whom Ronnie Lymas saw arguing in the Double Quick parking lot, Orlando Newell and Allen Unger, were both under pending aggravated assault indictments in the Humphreys County Circuit Court for shooting other people prior to shooting Ronnie Lymas. (Ex. P-10, Ex. P-11 & 4 R. 421-24). At the time of the shooting of Ronnie Lymas, Orlando Newell had been indicted for shooting Calvin Johnson in the stomach with a sawed off shotgun on November 28, 2005. (Ex P-10). Allen Unger was under indictment for shooting Willie Earl Moore on March 11, 2006 in Belzoni, Mississippi. (Ex. P-11). In fact, at the time of the deposition of Allen

Unger in this case, he had already pled guilty to the charge of aggravated assault on Willie Earl Moore, and was serving a prison term for that prior shooting.

The similarities between Orlando Newell's shooting of Ronnie Lymas and Calvin Jefferson are striking. In each case, both victims were unarmed, both shootings involved Orlando Newell arguing with someone, but shooting another individual not involved in the argument, in both shootings Orlando Newell disposed of his weapon in a local lake and both victims were taken to the University Medical Center in Jackson for treatment. (16 R. 422-425 & 21 R. 969, lines 8-11). Belzoni being a very small rural town, Orlando Newell's shooting of victim Calvin Jefferson was well known in the Belzoni, Mississippi community. (16 R. 424, lines 22-28).

About the same time that Ronnie Lymas was going into the Double Quick store, Double Quick employee Shavon Ellis was walking out the front door and observed the same arguing loiters which Mr. Lymas noticed as he walked onto the Double Quick parking lot. (14 R. 271, lines 20-21). Instead of notifying management or calling the police, Shavon Ellis simply got into her car and drove away. (14 R. 272). About six minutes later after she drove away from the Double Quick, Shavon Ellis heard gunfire, which was Ronnie Lymas being shot in the Double Quick parking lot by Orlando Newell. (14 R. 281, lines 18-22).

Linda Davis, who was Shavon Ellis' manager at the time of the subject shooting, Dale Taylor who was the Double Quick's area manger at the time of the shooting, and Double Quick's security expert, Warren Woodfork, all testified at trial that Double Quick employee Shavon Ellis' actions were improper in ignoring a brewing altercation between two known shooters on the Double Quick parking lot and driving away. (14 R. 290, line 29 and 15 R. 291 (Linda Davis), 20 R. 810, lines 2-25 (Dale Taylor) & 21 R. 999-1000 (Warren Woodfork)).

A second employee of Double Quick , Shanetta Thurman, testified that she had actual knowledge that Orlando Newell and Allen Unger, both had pending aggravated assault charges against them at the time Ronnie Lymas was shot at the Double Quick. Double Quick employee Shanetta Thurman further testified that she obtained this actual knowledge of the pending aggravated assault charges because she also worked full time at the Humphreys County courthouse and she would see Orlando Newell and Allen Unger at the courthouse during their criminal proceedings. (14 R. 261-262). Shanetta Thurman also saw Orlando Newell and Allen Unger on the Double Quick property a few days before they shot Ronnie Lymas. (2 R. 261, lines 15-18).

Double Quick did not have a security camera outside the store which would enable its employees to monitor the area of the parking lot where Orlando Newell and Allen Unger were arguing on the day of the shooting. (21 R. 897, lines 3-6 & 15 R. 293, lines 18-23) Double Quick did not have a security guard on its premises at the time of the subject shooting of Ronnie Lymas. (20 R. 840).

Shortly after the shooting, several Belzoni Police Department officers arrived and began its investigation of the shooting by attempting to locate eyewitnesses. As part of the investigation, Double Quick shift manager Latrease Ward gave the following written statement to a Belzoni police department investigator:

> *Red Boy Newell did the shooting and Red Boy gave the gun to his cousin. Can't call his name, comes in store and buy chicken sandwich all the time. The guy that got shot name was Ronnie Lymas. Red Boy cousins stay on Price Avenue in a Blue house. He's about 5' 8", weighs 176 lbs, wears braids. When Ronnie Lymas got shot 4 or 5 boys ran behind the blue house on the corner. All 4 or 5 of the boys are Newells. All of them had black on. After Ronnie got shot the boys kicked him and then ran off.* ***When Ronnie came in the store and bought***

Faygo and went out the boys was waiting on him to come out.

(5 R. 726, emphasis added).

Despite this clearly worded statement, Latrease Ward denied its content at trial. (2 R. 238, lines 8-12 & Lymas' R.E.). Double Quick's Vice President of Operations, Scott Shafer, also testified similarly under oath as follows:

> *Q. Before being shot, what did Ronne Lymas purchase from the Double Quick?*
> *A. I believe he purchased a strawberry Faygo.*

(5 R. 722 & Lymas' R.E.). However, despite this overwhelming evidence, Double Quick argued throughout trial that Ronnie Lymas did not enter into the Double Quick store and make a purchase.

Nearly every Double Quick employee who testified at the trial of this case, testified that he or she was given no training or procedures to follow if a known violent person such as Orlando Newell or Allen Unger came on to the store premises. (14 R. 275, lines 21-26 (Shavon Ellis), 14 R. 263-264 (Shanetta Thurman) & 14 R. 249, lines 22-29 (Latrease Ward)). When asked at trial whether Double Quick employees were properly trained to deal with known violent persons, Double Quick's area manager, Dale Taylor, answered "no." (20 R. 807, lines 7-12).

In the four month period preceding the date of the attack on Ronnie Lymas, the neighborhood in the immediate vicinity of the Double Quick had five armed robberies, seventeen fights, five drug cases and one rape reported to the Belzoni Police Department. (Ex. P-8). The Double Quick itself, had two armed robberies and 14 fights reported to the Belzoni Police Department. (Ex P-8).[2]

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[2] According to the 2000 census, Belzoni, Mississippi has a population of about 2,600 people.

As a result of the shooting at the Double Quick, Ronnie Lymas was hospitalized for nearly two months, underwent several surgeries and had to where a colostomy bag for nearly one year after the shooting. (Ex. P-3, Vols. 1-5). As a result of the subject shooting, Ronnie Lymas incurred the following medical bills:

	Provider	Date	Amount
1.	Humphreys County Hospital	3/6/07	$ 2,676.90
		3/3/07	$ 882.10
2.	ER Physician	3/6/07;3/3/07	$ 746.00
3.	Radiology	3/6/07-3/3/07	$ 2,783.00
4.	University Medical Center	36/07-3/1/07	$258,278.40
		36/07 (helicopter)	$ 9,099.00
		3/6/07-ER (UTI infection)	$ 908.39
		3/7/07	$ 509.00
		3/9/07	$ 129.00
		3/14/07-Urology	$ 431.00
		3/16/07	$ 105.00
		3/21/07	$ 440.00
		4/9/07-Medical Mall	$ 1,024.00
	Nerve Conduction Study	4/16/07	$ 2,465.00
	Vascular Surgery	4/20/07	$ 105.00
	Hand & Trauma Clinics	5/9/07	$ 298.00
		8/1/07-Hand Clinic	$ 105.00
		8/31/07	$ 114.00
		9/4/07	$ 704.00
		9/5/07	$ 407.00
		9/11/07	$ 4,955.00
		9/25/07	$ 881.00
		9/28/07	$ 1,150.00
		10/15/07-10/23/07	$43,651.13
		11/6/07	$ 152.00
		12/4/07	$ 124.00
		1/16/08	$ 313.00
		2/1/08	$ 951.00
5.	UMC-ER Physicians	3/6/07;3/6/07	$ 746.00
6.	UMC Radiology Assc.	3/6/07-3/21/07	$ 2,783.00
7.	UMC Anaesthesia Services	3/6/07-2/26/07	$ 12,675.00
8.	UMC Internal Medicine	2/9/07	$ 730.00
9.	UMC Pathology Assc.	6/07;2/20/07	$ 602.50
10.	UMC Neurology Group	2/9/07	$ 200.00
11.	UPA PLLC Neurology	4/16/07	$ 2,030.00
12.	UMC Surgical Assoc.	2/5/07-5/21/07	$ 87,672.00
13.	Gorton Clinic	5/15/07	$ 54.00

Total Medical Bills to Date *$381,050.29*

(Ex. P-3 & P-4).

Without objection, Ronnie Lymas' economic expert, David Channell testified that Mr. Lymas' past, present and future loss wages totaled $241,667.00 as a result injuries he sustained during the attack. (18 R. 660, lines 3-7).

Every Double Quick employee who testified at the trial of this case expressly stated that he or she knew of nothing Ronnie Lymas did to cause the shooting or instigate the violence, and no one saw Ronnie Lymas with a weapon or a weapon near Mr. Lymas as he lie gravely injured in the Double Quick parking lot . (14 R. 276, lines 17-19 and 15 R. 292, lines 5-8). Double Quick seems to admits this in its appellate brief on page 15 which states "the record establishes that there was in fact no "altercation" between anyone, much less between Newell and Lymas.[3]

SUMMARY OF THE ARGUMENT

Whether alleged conduct of an actor is the proximate cause of harm or damages, has traditionally been a jury question under Mississippi law. Ronnie Lymas' two security experts both testified in detail that the following actions or inactions by Double Quick or its employees caused the shooting of Ronnie Lymas on the Double Quick premises:

1. Double Quick employee Shavon Ellis walking pass two arguing individuals she knew were presently charged with prior shootings of other individuals, ignoring the argument and driving away, only to have at least one of them attack Mr. Lymas

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[3] However, Double Quick is wrong about some altercation occurring. Clearly its own employee Shavon Ellis saw two men arguing in the parking lot whom Ronnie Lymas definitively testified was Allen Unger and Orlando Newell. (5 R. 484, lines 3-8).

5 to 6 minutes later after she drove away. This 5 to 6 minute time lapse while Ronnie Lymas was still in the store making his purchase, was more than enough time for Shavon Ellis to inform her supervisor or call the police to have Orlando Newell and Allen Unger removed from the property. Double Quick's own security expert, Warren Woodfork, and its two management employees, Dale Taylor and Frances Byest, all testified that Shavon Ellis' actions were improper and that she should have reported the argument to her supervisor or that otherwise she should have acted to get Orlando Newell and Allen Unger off of the property.

The jury was well within its right to decide had Shavon Ellis acted, given the 5 to 6 minute delay in the shooting after she drove away, that the shooting of Ronnie Lymas more likely than not would have been prevented had she alerted her supervisor and/or called the police in light of her knowledge that Orlando Newell and Allen Unger had previously shot other individuals.

2. Double Quick's complete failure to train or give instructions its employees on how to deal with a known violent person on its property.

3. Double Quick's failure to have a security camera on the outside of the store to monitor persons loitering outside the store. Orlando Newell and Allen Unger loitered and argued on the parking lot long enough for Ronnie Lymas to go into the store, make a purchase, and for Shavon Ellis to drive 5 to 6 minutes away before hearing gun fire. A security camera on the outside of the store would have allowed the store employees to view this brewing violent altercation from inside the store and take action to have them removed from the property. A video monitor was available for viewing immediately behind the cash register where manager Frances Byest was standing during the time Newell and Unger were arguing in the parking lot.

4. Failing to have an armed security guard on the premises at the time of the shooting on the single busiest day of the week for the Double Quick store, a Friday, January 26, 2007.

Combined, this testimony and evidence constitutes more than substantial, overwhelming and credible evidence to support the jury's verdict in this case.

With respect to its foreseeability argument, Double Quick appears not to argue foreseeability much at all, but whether Ronnie Lymas' shooter, Orlando Newell, had a violent nature in the first place. Double Quick's suggestion that only conduct adjudged to be criminal can qualify as "violent" for foreseeability purposes is not supported by Mississippi case law. Furthermore, at the time of trial, Allen Unger had pled guilty to his pending aggravated assault charge. In this case, two persons with pending aggravated assault indictments were allowed to loiter on Double Quick's parking lot arguing for several minutes while one employee walked right by them and drove away, only to have a customer, Ronnie Lymas, shot by them 5 to 6 minutes later. There could not have possibly been a more dangerous situation brewing on the Double Quick property than two known feuding shooters.

The shooting was also foreseeable in light of the fact that Double Quick employee Shavon Ellis testified that, "people are arguing and almost fighting at the Double Quick everyday." (14 R. 272, lines 11-14). Yet no action was taken to quell these altercations. Ronnie Lymas' security expert Tyrone Lewis testified that in his 25 year law enforcement career and experience as a police officer, ongoing altercations and fights on a premises are a good predictor that an escalation in

violence will occur, as arguing and fights tend to grow and fester if not addressed, and eventually escalate to much more serious violent crime.

As to the admissibility and reliability of the Ex. P-8, the Belzoni police department crime incident lists, The Mississippi Court of Appeals has specifically held that where a plaintiff presents crime statistics of calls made to the police department, "but not necessarily crimes committed, this evidence created a jury question of whether [defendant] was on notice that assaults were occurring.

Double Quick's argument that Ronnie Lymas' security experts testimony was unreliable and conclusory is disingenuous and plain wrong. The methods used to reach their opinions in this case and the facts and data they relied upon to reach their opinions are universally accepted in the premises security field to reach opinions about foreseeability and proximate cause of criminal attacks on commercial property. See Premises Security, William F. Blake and Walter F. Bradley (1999).

Furthermore, Double Quick's security expert, Warren Woodfork, used the exact same methods and data as did Ronnie Lymas' security experts, in reaching his opposing opinions in this case. Double Quick cannot point to one single method or piece of data that its security expert, Warren Woodfork, used in reaching his opinions in this case, which was different or in addition to Ronnie Lymas' security experts. Despite using the same methods and data as did opposing experts, Double Quick's security expert opined at trial that the shooting of Ronnie Lymas was not foreseeable and no action by Double Quick was the proximate cause of the shooting of Ronnie Lymas.

Double Quick's security expert Warren Woodfork did not testify that he could not reach an opinion in this case based on the crime statistics available from the Belzoni Police Department in Ex. P-8. Instead, Mr. Woodfork gave full and substantive opinions opposite of those given by Ronnie Lymas' security expert. This case presented a classic "battle of the experts", which Double Quick is attempting to manufacture into a Daubert issue. Double Quick's Daubert challenge to Ronnie Lymas' security expert is no real Daubert challenge at all, but instead is an invitation to this Court to impermissibly weigh in on the "credibility and weight" of opposing expert opinions. Double Quick is estopped from making this inconsistent argument on appeal.

Double Quick's argument that the introduction of Plaintiff's Exhibit P-10-A, the Belzoni Police Department's investigation findings for the prior aggravated assault by Orlando Newell on Calvin Johnson was reversible error is simply wrong. The police investigation findings were clearly admissible under Miss. R. Evid. 803(8)(C), as a public record of factual findings in a civil action resulting from an investigation made pursuant to authority granted by law.

Also, the Ex. P-10-A was admissible to show notice to Double Quick of Orlando Newell's violent nature because Double Quick argued throughout trial that it heavily relied upon the Belzoni Police Department for security, giving the jury the impression that it had a close relationship with the department. Finally, without objection, Belzoni Police Officer Truron Grayson testified at trial in great detail about the pending aggravated assault indictment against Orlando Newell , including its

similarities with the Ronnie Lymas shooting.[4] *Thus even assuming the Court was incorrect in admitting Ex. P-10-A, such was harmless error in light of Officer Grayson's unobjected to testimony about the aggravated assault charge.*

The indictments of Orlando Newell and Allen Unger in their prior aggravated assault charge were admissible under Miss. R. of Evid. 201, as the indictments were pending in the Humphreys County Circuit Court, the same court which tried this case. It is paramount, that a trial judge may take judicial notice of court documents in its own court file.

The jury instructions of which Double Quick now complains of comport with the Mississippi Model Jury Instructions and are supported by specific Mississippi premises liability case law. Taken as a whole, the jury instructions given in this case fairly announced the primary rules of law applicable to this case. Also, Double Quick failed to make an objection at trial to the jury instructions it now complains of and/or it waived any such objections.

STANDARD OF REVIEW

The standard of review for the denial of a motion for directed verdict and a motion for judgment notwithstanding the verdict are identical. Miss. Power and Light Co. v. Cook, 832 So.2d 474, 478 (Miss. 2002). The Mississippi Supreme Court has described the standard as follows:

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[4] Officer Grayson testified that both shootings appeared to be unprovoked shootings of unarmed victims, i.e. Calvin Johnson and Ronnie Lymas.
Both shootings involve Orlando Newell arguing with one person, but shooting an innocent person. Also, after both shootings, Orlando Newell disposed of his weapon in a local river.

> *This Court will consider the evidence in the light most favorable to the appellee, giving the appellee the benefit of all favorable inferences that may be reasonably drawn from the evidence. If the facts are so overwhelmingly in favor of the appellant that reasonable jurors could not have arrived at contrary verdict, this Court must reverse and render. On the other hand, if there is substantial evidence in support of the verdict, that is evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, this Court must affirm.*

Id.

The standard of review for the trial court's admission or exclusion of evidence, including expert testimony, is abuse of discretion. "The appellate court gives great deference to the discretion of the trial judge regarding the admission or exclusion of evidence, and unless the appellate court concludes that the exercise of that discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion, that decision will stand." Tunica County v. Matthews, 926 So.2d 209 (Miss. 2006).

Finally, when reviewing a challenge to a jury instruction, Mississippi appellate courts asks whether the instruction at issue contains a correct statement of the law and whether the instruction is warranted by the evidence. Church v. Massey, 697 So.2d 407, 410 (Miss. 1997). "A party has a right to have jury instructions on all material issues presented in the pleadings or evidence." Glorioso v. YMCA, 556 So. 2d 193, 195 (Miss. 1989) and Alley v. Praschak Mach. Co., 366 So.2d 661 (Miss. 1979). When the Mississippi appellate court reviews a claim of trial court error in granting or denying jury instructions, all of the jury instructions are reviewed as a whole, and no instruction is read in isolation. Richardson v. Norfolk

S. Ry. Co., 923 So.2d 1002, 1010 (Miss. 2006) and Burton v. Barnett, 615 So.2d 580, 583 (Miss. 1993). "Defects in specific instructions do not require reversal where all instructions taken as a whole fairly, although not perfectly, announce the applicable primary rules of law." Burton, 615 So. 2d at 583.

ARGUMENT AND AUTHORITIES

A.

Substantial and Credible Evidence Supports the Jury's Verdict that Double Quick's Actions and Inactions Were the Proximate Cause Of the Shooting Attack Upon Ronnie Lymas.

It is well settled law in Mississippi that in order for a plaintiff to prevail on any claim for negligence, he must prove the following four elements: (1) the existence of a duty owed to him, (2) breach of such duty or standard of care, (3) a causal relationship between the breach and alleged injury, that is, the defendant's conduct must be the proximate cause of plaintiff's damages and (4) the plaintiff must prove damages. Donald v. Amoco Production Company, 735 So.2d 161, 174 (Miss. 1999) and Meena v. Wilburn, 603 So.2d 866, 869 (Miss. 1992). On its direct appeal herein, Appellant Double Quick apparently does not challenge Appellee Ronnie Lymas' proof on the first two elements of his negligence claim, that is, Mr. Lymas invitee status and attendant duties owed to him as an invitee, and whether Double Quick breached the standard care owed him. Double Quick does not even attempt to challenge or brief these two elements Ronnie Lymas' negligence claims. Whether alleged conduct of an actor is the proximate cause of harm, has traditionally been a jury question under Mississippi law. Donald v. Amoco Production Company,

735 So.2d 161, 174 (Miss. 1999) and Matthews v. Thompson, 95 So.2d 438 (Miss. 1957). At the trial of this case, Ronnie Lymas called two security experts to testify on his behalf. Michael C. Smith, a former professor of criminal justice at the University of Mississippi and Tyrone Lewis, the current Chief of Police of Jackson, Mississippi. Double Quick does not challenge either expert's qualifications regarding inadequate security cases. Ronnie Lymas' two security experts both testified in detail that following actions or inactions by Double Quick or its employees caused the shooting of Ronnie Lymas on the Double Quick premises on January 26, 2007:

A(1)

Employee Shavon Ellis' Actions Were A Proximate Cause of Ronnie Lymas' Shooting

Double Quick employee Shavon Ellis' actions of walking pass and ignoring Orlando Newell and Allen Unger arguing on the Double Quick parking lot when she knew both men were presently charged with aggravated assault for the prior shootings of individuals other than Ronnie Lymas contributed to the attack on Ronnie Lymas. (14 R. 271-272 & 14 R. 274, lines 18-29). Instead of calling the police or notifying her manager as Double Quick alleges she was trained to do, Shavon Ellis simply ignored the argument and drove away, only to have Mr. Lymas be attacked 5 to 6 minutes later after she drove away. (14 R. 281, lines 18-22).

This 5 to 6 minute time lapse while Ronnie Lymas was still in the store making his purchase, was more than enough time for employee Shavon Ellis to inform her supervisor and/or call the police to have Orlando Newell and Allen Unger removed from the property. Double Quick's own security expert, Warren Woodfork, and its

two Double Quick management employees, Dale Taylor and Linda Davis, all testified that Shavon Ellis' actions of ignoring Orlando Newell and Allen Unger were improper and that she should have reported the argument to her supervisor or otherwise she should have acted to get Newell and Unger off of the Double Quick property. More specifically, Double Quick manager Linda Davis testified at trial as follows:

> *Q. Now Shavon Ellis, she was your employee, correct*
> *A. Yes, she was.*
> *Q. You had direct supervisory authority over her, correct?*
> *A. Yes.*
> *Q. Okay. Now, she would have been wrong just walking past an argument that's going on and just leave, getting in the car and leaving, would it? That was not proper, was it?*
> *A. No.*

(14 R. 290, line 29 & 15 R. 291, lines 1-10).

Also, Double Quick 's area manager, Dale Taylor, testified at trial as follows:

> *Q. You were in the courtroom when [Double Quick manager Linda Davis][5] testified that when Shavon Ellis walked past the argument or some altercation out in the parking lot shortly before Ronnie Lymas had gotten shot, [Lynda Davis] testified to the question of was that proper, she said no, it was not proper." Do you disagree with that?*
> *A. No, I don't disagree, ...*
> *Q. Okay, But now you don't disagree that her actions were improper? You don't disagree that they were improper?*

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[5] During the examination of Dale Taylor, counsel for Ronnie Lymas inadvertently said the name Frances Byest which is in the transcript. The earlier testimony of Double Quick's employee Lynda Davis was actually being referred to. However, the testimony of Lynda Davis was precisely as transcribed above.

> *A. No.*

(20 R. 810, lines 2-25).

Further, with respect to Shavon Ellis admission that "arguments and almost fights go on at the Double Quick everyday", (14 R. 272, lines 11-14), Double Quick's area manager Dale Taylor further testified as follows:

> *Q. And how could you possibly disagree with her if she say that they happen -- let me finish -- every day, and you're only there two days a week? How can you disagree with her?*
> *A. I don't disagree with her, because if something was happening out there every day, I do feel like she should have said something about it, But, you know, every day, that's like an expression to some people.*
> *Q. Well, we can only go by what she said, mam, and your testimony is if she, in fact, witnessed arguments every day, something should have been done about it. That's what you said; correct?*
> *A. If she said it happened every day, then,* ***yes, something should have been done about it.***
> *Q. Well being that something should have been done about it, what was done about it?*
> *A.* ***At that particular time, nothing.***

(20 R. 812, lines 2-24)(emphasis added).

Finally, with respect to Shavon Ellis admission that "arguments and almost fights" go on at the Double Quick everyday, Double Quick's own security expert, Warren Woodfork, testified as follows:

> *Q. Your heard [Lynda Davis][6] and you heard Dale Taylor say that it was improper for Shavonne Ellis to just simply walk past whatever commotion it was and drive away. You heard that, didn't you?*

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[6] See footnote 3 above. Ronnie Lymas' counsel was actually referring to testimony by Double Quick manager Linda Davis.

A. I heard that?
Q. You heard them both say that?
A. Yes
Q. Well, you don't disagree surely with them. I mean, you don't disagree with management, do you?
A. ***No****. What I disagree with is somebody constructing argument - - arguing isn't a violation of the law.*

(21 R. 999-1000).

Shavon Ellis' description of daily arguments and almost fights occurring at the Double Quick was also confirmed by witness Sheila Taylor who worked directly across the street from the Double Quick. Sheila Taylor testified at trial that she personally and often witnessed "arguing, fighting and drug activity " on the Double Quick property." (15 R. 326, lines 4-18), and that no Double Quick employee ever acted to stop loitering, fights and arguing at the Double Quick. (15 R. 329, lines 18-22).

There could not have been a more dangerous situation for Double Quick customers, including Ronnie Lymas, than two feuding known gun shooters. Yet Double Quick employee Shavon Ellis simply ignored this condition, which then escalated into gunfire and the shooting of Ronnie Lymas. Even Double Quick's own management and security expert testified that such actions were improper. See supra.

As to Shavon Ellis's testimony that "arguments and almost fights go on every day at the Double Quick", (14 R. 272, lines 11-14), Ronnie Lymas' security expert Tyrone Lewis connected this condition to Lymas' shooting in the following testimony:

Q. Well, let's start with the fights, Mr. Lewis. In your experience as a police officer, what's the significance of

> *fights occurring routinely particularly at a convenience store such as Double Quick ....*
>
> *A. Well fights, as well as any other crimes that continue to occur on premises such as the Double Quick, if they go unaddressed, and it's just like a broken window theory. If you have a broken window in the neighborhood of a house that's vacant, and if you don't fix it, it's going to continue to grow, and somebody is going to throw another rock and break it again. These things continue to escalate if they're not addressed, and continually lead to incidents such as what happened on January 26, 2007, to Mr. Lymas.*[7]

(19 R. 748, lines 6-27).

Ronnie Lymas' second security expert, Michael Smith, also connected Shavon Ellis' testimony that "arguments and almost fights go on every day at the Double Quick," to Lymas' shooting in the following testimony:

> *A. ... And Shavon Ellis, the employee we've talked about before, said in her deposition that, quote, usually - - people, quote, usually stand outside that store and argue every day, close quote.*
> *Q. And what is the significance of that, Dr. Smith?*
> *A. Well, you know, arguments lead to trouble. I mean, arguments are trouble, but arguments lead to worse trouble too an it - - part of that is environment that is problematic and is going to lead to serious injury just as it did.*

(18 R. 609, lines 8-18).

With the above referenced testimony, the jury was well within its province to

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[7] Tyrone Lewis was referencing the "Broken Windows" theory of adequate security which is a well known principle used in law enforcement and the security expert field. This theory was also referenced by Double Quick's security expert, Warren Woodfork. (9 R. 1000, lines 13-24). "Broken Windows" was first published by social scientists James Q. Wilson and George L. Kelling in the March 1982 edition of the *The Atlantic Monthly.*

decide had Shavon Ellis acted, given the 5 to 6 minute delay in the shooting after she left the store's parking lot, that the shooting of Ronnie Lymas could have been prevented had she altered her supervisor and/or called the police in light of her knowledge that Orlando Newell and Allen Unger had previously shot other individuals.

This case is analogous to the Gatewood v. Sampson, 812 So. 2d 212 (Miss. 2002) case with respect to the proximate cause question raised by Double Quick. In Gatewood, a store patron went onto the property to use a pay phone and was assaulted. The defendants in Gatewood also argued a lack of proximate cause. In rejecting the defense and affirming liability on the part of the property owner, the Mississippi Supreme Court stated, "evidence establishing proximate cause and foreseeability was presented to the jury." Id. at 221. Likewise, as shown above, both of Ronnie Lymas' security experts testified that Shavon Ellis' actions of ignoring the argument between Newell and Unger, as well as unabated "arguing and fights going on daily at the Double Quick created the environment which led to Ronnie Lymas being shot. Using a well accepted security principle, "Broken Windows", both of Mr. Lymas' security experts expressly testified that these actions and conditions proximately caused the shooting of Ronnie Lymas. (18 R. 612, lines 4-11 and 19 R. 756-757).[8]

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[8] Contrary to Double Quick's assertion that these were conclusory proximate cause opinions, Mr. Lymas' security experts' testimony clearly was referencing all of their prior testimony concerning breaches of standard of care such as a lack of training, not having a security camera outside of the store and not having a security guard present, etc. These ending proximate cause opinions cannot be read in a vacuum as Double Quick urges this Court to do. They must be read in view of all of the experts' prior testimony.

This case's proximate cause question is also analogous to the Lyle v. Mladinich, 584 So.2d 397 (Miss. 1991) parking lot assault case. In Lyle, the Mississippi Supreme Court reversed a grant of summary judgment and returned the case to the lower court for trial, holding that a genuine issue of fact existed as to whether the breaches of the standard of care caused the assault upon the patron. Id. at 399-400. Just like Double Quick in this case, the property owner in Lyle made calling the police after an assault had been committed, its principal method of security. Id. 399-400. (14 R. 263, lines 1-8).

Based on Gatewood and Lyle, this Court should affirm the trial court's verdict.

A(2)

Double Quick's Failure to Train Its Employees Was A Proximate Cause of the Shooting of Ronnie Lymas

Ronnie Lymas' security expert Michael Smith testified that Double Quick failed to train its employees on how to deal with persons with known violent past who may come onto the Double Quick property, and that said failure to train was also a proximate cause of the shooting of Ronnie Lymas. (18 R. 592-596 & 18 R. 612, lines 4-15). Nearly every Double Quick employee who testified at trial stated that he or she was not trained to deal with persons with a known violent past who came onto the Double Quick property. (14 R. 275, lines 21-26 (Shavon Ellis), 14 R. 263-264 (Shanetta Thurman) & 14 R. 249, lines 22-29 (Latrease Ward)). When asked at trial whether Double Quick employees were properly trained to deal with known violent persons, Double Quick's area manager, Dale Taylor, answered "no." (20 R. 807, lines 7-12). This failure to train led directly to Shanetta Thurman's and Shavon Ellis'

failure to act prudently with the information each possessed about the assailants Orlando Newell and Allen Unger as admitted to by Double Quick's own security expert, Warren Woodfork who testified as follows:

> *Q. - - Of Orlando Newell's violent nature. You also heard her [Shanetta Thurman] say that even after she had known that, she saw him come to the Double Quick before and that he was even on the Double Quick the week of the shooting of Ronnie Lymas. You heard that too?*
> *A. Yes*
> *Q. Now as security expert, what should she have done with that information?*
> *A. Relayed it to her superiors.*

(20 R. 996, lines 17-27).

> *Q. But seeing Orlando Newell there [at the Double Quick] in the week of the shooting, though, it's your opinion that she [Shanetta Thurman] should have relayed that information to her supervisor, correct?*
> *A. Yes. It would have been a prudent thing to do.*

(20 R. 997, lines 13-18). Thus, Double Quick's own security expert testified that the information about Newell and Unger was mishandled. This testimony coupled with Lymas' experts testimony that Double Quick's employees were not trained to properly convey this type of information to management, and such failure to train was the proximate cause of the shooting of Lymas, the jury verdict is well supported by the evidence.

Double Quick should not be able to shield itself from liability because it failed to train its employees on how and when to inform management of the presence of persons with known violent pasts who come onto the Double Quick property or how to otherwise have such persons removed from the store property.

That is why Double Quick's employee knowledge is imputed to Double Quick. See discussion on imputed knowledge infra.

An employer's negligent training or failure to train employees on matters related to customer safety and security gives rise to viable claims under Mississippi law. See Gamble ex rel Gamble v. Dollar General Corp., 852 So.2d 5, 14 (Miss. 2003). In Gamble, the Mississippi Supreme Court held that no expert was needed to prove a failure to train claim versus an inadequate training claim. Id. at 14. In Gamble, a customer of Dollar General was assaulted by a store employee after being accused of shoplifting. The plaintiff, Gamble, sued Dollar General alleging that it failed to train its employee, and as a result she was assaulted by an employee of Dollar General. The Court affirmed a jury verdict in favor of the plaintiff. Id. Just like in Gamble, Ronnie Lymas' claims against Double Quick for failure to train its employees on how to deal with persons with known violent pasts or inform management of such person's presence on the property, are just as viable as was in Gamble.

In Gamble, it is noteworthy that the subject employee did receive some training from Dollar General, as well as an employee handbook. Id. at 14. However, the training and handbook did not address the proper way to confront a customer suspected of shoplifting. Id. This is analogous to Double Quick's alleged training in this case. Although Double Quick claims that it gave some training to its employees, as can be seen by its employees testimony at trial as shown above, the training did not include training on how to deal with persons with known violent pasts

or inform management of such persons presence on the property. This failure to train was a complete and utter failure by Double Quick in light of the fact that under Mississippi law, a premises owner can be found civilly liable to a customer if it has actual or constructive knowledge of an assailant's violent nature and such assailant injures one of its customers. Gatewood v. Sampson, 812 So. 2d 212 (Miss.2002).

Ronnie Lymas' security expert Michael Smith gave substantial and credible testimony regarding Double Quick's failure to train its employees. This testimony made a jury question as to whether Double Quick's failure to train its employees on how to deal with persons with known violent pasts or inform management of such persons presence on the property, was a proximate cause of Ronnie Lymas' shooting. (18 R. 592-596 and 18 R. 612, lines 4-15). Id.

A(3)

Double Quick's Failure to Have A Camera Outside Was A Proximate Cause of Ronnie Lymas' Shooting

Both of Ronnie Lymas experts testified that Double Quick's failure to have a security camera on the outside of the store to monitor persons loitering outside the store was also a proximate cause of the shooting of Ronnie Lymas. (18 R. 599-602 & 19 R. 754-757). Ronnie Lymas' expert Michael Smith testified that a camera was needed outside the Double Quick store because criminology statistics show that "fully half of the retail store crime - - serious crime problems happen in a parking lot." (6 R. 600, lines 17-26).

Orlando Newell and Allen Unger loitered and argued on the Double Quick parking lot long enough for Ronnie Lymas to go into the Double store, make a