

**IN THE SUPREME COURT OF MISSISSIPPI**

**DOUBLE QUICK, INC.,**

**Defendant-Appellant-  
Cross-Appellee**

**VS.**

**RONNIE LEE LYMAS,**

**No. 2008-CA-01713**

**Plaintiff-Appellee-  
Cross-Appellant**

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**APPEAL FROM THE CIRCUIT COURT OF HUMPHREYS COUNTY, MISSISSIPPI  
HONORABLE JANNIE M. LEWIS, CIRCUIT JUDGE, PRESIDING**

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**REPLY BRIEF OF APPELLANT DOUBLE QUICK, INC. AND OPPOSITION BRIEF  
OF CROSS-APPELLEE DOUBLE QUICK, INC. TO BRIEF ON CROSS APPEAL OF  
CROSS-APPELLANT RONNIE LEE LYMAS**

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DOUBLE QUICK, INC.

IN THE SUPREME COURT OF MISSISSIPPI

DOUBLE QUICK, INC.,

Defendant-Appellant-  
Cross-Appellee

VS.

No. 2008-CA-01713

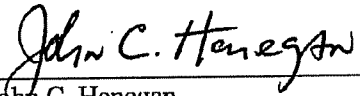
RONNIE LEE LYMAS,

Plaintiff-Appellee-  
Cross-Appellant

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case.

- 1) Ronnie Lee Lymas, Plaintiff-Appellee/Cross-Appellant
- 2) Double Quick, Inc., Defendant-Appellant/Cross-Appellee
- 3) State of Mississippi, Non-aligned Intervenor
- 4) Butler, Snow, O'Mara, Stevens & Cannada, PLLC, Attorneys  
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- 5) Mitchell, McNutt & Sams, P.A., Attorneys  
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- 8) Tanisha Gates, Attorney for Plaintiff-Appellee/Cross-Appellant
- 9) Honorable Jim Hood, Attorney General of Mississippi
- 10) Bradley Arant Boult Cummings LLP, Attorneys for *Amicus Curiae*, Home Builders  
Association of Mississippi, et al.
- 11) Precious Martin & Associates, Attorneys for *Amici Curiae*, The Magnolia Bar  
Association

  
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**REPLY BRIEF OF APPELLANT DOUBLE QUICK, INC.**

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Double Quick showed in its opening brief that Lymas failed to prove his premises liability claim arising from the criminal acts of Orlando Newell, who shot Lymas on the Double Quick premises. The shooting incident was a random act of spontaneous violence that had no nexus to Double Quick's retail business. Nothing Double Quick did or failed to do impelled Newell's impulsive and unpredictable act of violence. Lymas failed to prove proximate cause and nothing in Lymas' response contradicts this fact.

Nor does Lymas' response further his claim that the incident was foreseeable because Double Quick knew about Newell's "violent nature," or that police call logs and incident reports indicated the Double Quick was located within an "atmosphere of violence."

Lymas' sole proof of Newell's "violent nature" is a November 2005 indictment in which Newell shot Calvin Jefferson. But Lymas' evidence on that point was inadmissible, and the incident, alone, proved nothing. The only evidence properly of record shows Newell acted in self-defense with respect to that November 2005 incident. Lymas also failed to rebut another point Double Quick made in its opening brief: The Double Quick employees who had "heard about" the 2005 incident had no duty to report what they had heard to Double Quick. Their purported "knowledge" of this incident did not put Double Quick on notice of what they had heard.

As to Lymas' "atmosphere of violence" claim, nothing in his response negates what Double Quick has already shown: The call logs upon which Lymas and his experts primarily rely should have been excluded from evidence under Miss. R. Evid. 403. And even if admissible, Lymas' proof of a surrounding "atmosphere of violence" falls far short of what the

Mississippi courts have relied upon to establish this factor.

Finally, because the evidence that Lymas' liability experts relied upon for their causation and foreseeability opinions was insufficient as a matter of law, their opinions should have been excluded at trial. For all the reasons set forth in Double Quick's opening brief and herein, the \$1,679,717.00 judgment against Double Quick should be reversed and rendered or, in the alternative, reversed and remanded for a new trial.

## LEGAL ARGUMENT

### I. Lymas Still Has No Proof of Proximate Cause.

Double Quick's principal brief pointed out the complete absence of evidence sufficient to support a finding that anything Double Quick did or failed to do was a proximate cause of Newell's spontaneous "unprovoked" (Lymas' word--Lymas Brief p. 3) and wholly unpredictable crime. Double Quick Brief pp. 11-23; *see Blizzard v. Fitzsimmons*, 10 So. 2d 343, 345-46 (Miss. 1942) (reversing and rendering for defendant, where there was "no showing from which it can be determined which of several possible causes produced the injury where some of the causes do not involve negligence of the party charged"). What says Plaintiff in response?

First, that proximate cause is "traditionally" a jury question. Lymas Brief pp. 17-18. For this Lymas cites *Donald v. Amoco Production Co.*, 735 So. 2d 161, 174 (Miss. 1999) and *Mathews v. Thompson*, 95 So. 2d 438 (Miss. 1957). But *Donald* is about duty being a question of law; its statement about proximate cause was made in passing. And *Mathews* says merely that "when reasonable minds might differ on the matter, the question of what is the proximate cause of an injury is usually a question for the jury. . . ." *Mathews*, 95 So. 2d at 448 (emphasis supplied).

Lymas' second response is to point out that his experts, Dr. Smith and Commander Lewis, uttered the words "proximate cause" in their testimony (eight and thirty-eight words on the subject, respectively).<sup>1</sup> Lymas Brief p. 18. But this will be sufficient only when *Hubbard v. Wansley*, 954 So. 2d 951 (Miss. 2007), is overruled. The plaintiff in *Hubbard* had an expert whose affidavit "contained the 'magical' language: '[I]t is my opinion that had Ruby Hubbard been treated properly by Dr. Wansley, or if Dr. Wansley had notified appropriate personnel, it is my opinion that Ruby Hubbard would have had a greater than fifty percent chance of reduced neurological injury.'" The affidavit, however, "g[ave] very little in the way of specific facts and medical analysis to substantiate the claim." This Court held, quite properly, that the affidavit was insufficient to support finding of proximate cause and that the defendant was therefore entitled to judgment as a matter of law. *Hubbard*, 954 So. 2d at 965-66.

Commander Lewis offered the very same opinion in *Alqasim v. Capitol City Hotel Investors*, 989 So. 2d 488 (Miss. Ct. App. 2008) as he has in this case; the Court of Appeals rightly rejected it. Affirming summary judgment for the hotel, and against a patron who had been shot and robbed in the hotel parking lot, the Court held that Commander Lewis' "general statements and broad conclusions"<sup>2</sup> regarding the Hampton Inn's alleged negligence "are not sufficient to show that any action or inaction of Hampton Inn caused Alqasim's injury." *Id.* at 493. Continuing, the Court held that "Alqasim has not shown that if the security was somehow

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<sup>1</sup> Lymas complains that the thirty eight words merely summarized a great deal of prior testimony. Lymas Brief p. 23 at n. 1. The record, however, shows a great deal of prior testimony *on what Double Quick should have done*. None of it is on proximate cause. On proximate cause there really are only thirty-eight words.

<sup>2</sup> Just as in this case, Lewis' expert designation showed he would opine that the Hampton Inn "did not provide adequate security"; 'had no surveillance cameras in place'; 'should have provided a fenced-in parking area'; 'should have provided for additional trained officers' [and] should have foreseen the incident 'in light of the atmosphere of violence which existed on the premises. . . ." *Alqasim*, 989 So. 2d at 493.

different, the incident would not have occurred.” *Id.*<sup>3</sup> The same is true in the case at bar.

In his search for proof of proximate cause, Lymas next turns to Shavon Ellis, and her act of “walking pass [sic] and ignoring Orlando Newell and Allen Unger arguing when she knew both men were presently charged with aggravated assault,” rather than “calling the police or notifying her manager. . . .” Lymas Brief p. 18.<sup>4</sup> “Th[e] 5-6 minute time lapse” between when Ellis walked out and she heard shots, Lymas concludes, “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.” Lymas Brief p. 18.

This argument is full of holes. To begin with, there *was* no “5-6 minute time lapse.” Lymas cites the testimony of Shavon Ellis. Lymas Brief p. 18, citing “14 R. 281, lines 18-22.” Let’s look at the testimony of Ellis, who is being questioned by Lymas’ attorney:

18 Q How long did it take you to get to that  
19 one street over after you got in your car and backed  
20 out and pulled out of there?

21 A No more than like five or six minutes, if  
22 that long.

“**No more than like** five or six minutes, **if that long.**” (Emphasis added).

Was it even “that long”? No. Look at the entirety of Ellis’ testimony on the subject:

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<sup>3</sup> *Accord Watts v. Radiator Specialty Co.*, 990 So. 2d 143, 150 (Miss. 2008) (affirming j.n.o.v., despite expert testimony “that ‘to a reasonable degree of medical certainty’” Plaintiff’s illness was caused by defendant’s product, where data simply did not support the conclusion); *Davis v. Christian Brotherhood Homes of Jackson, Miss., Inc.*, 957 So. 2d 390, 409 (Miss. Ct. App. 2007) (Commander Lewis’ conclusory proximate cause opinion in premises liability case *held*: insufficient, as a matter of law, to support finding of proximate cause); *Rogers v. Barlow Eddy Jenkins P.A.*, 2009 WL 2232228, at \*5 (Miss. Ct. App. July 28, 2009) (conclusory expert opinion *held*: insufficient, as a matter of law, to support finding of proximate cause) (citing *Davis*).

<sup>4</sup> Lymas does his best to make it sound as though Unger’s “violent nature” was also somehow at issue, *see, e.g.*, Lymas Brief, p. 5 (Unger under indictment); p. 6 (Unger subsequently convicted), but this will not do. Not only was it never pled or tried, but the law simply will not accept the suggestion that Double Quick should be subjected to liability because, at the time of A’s “unprovoked” (again, Lymas’ word) attack on B, a third person, who had a “violent nature,” was present.

9 Q Okay. How far did you get in your car  
10 before you realized something had happened, and what  
11 was that something that made you realize something  
12 had happened?

13 A I had got like right down the street.

14 Q How far?

15 A It was like a street over. A street over.

16 Q So one street over?

17 A Yes.

18 Q How long did it take you to get to that  
19 one street over after you got in your car and backed  
20 out and pulled out of there?

21 A No more than like five or six minutes, if  
22 that long.

23 Q Did you have to wait at the stop light or  
24 anything like that?

25 A No, I didn't. No.

26 Q Okay. So you backed out, pulled out, came  
27 around, drove down the street, and then you, what  
28 did you hear?

29 A Some gunshots.

14 R. 281.

Ellis was "right down the street . . . *one street over*." That tallies perfectly with the fact that she was close enough to hear the shots. Had the shots come five minutes after she left she would have been over a mile and a half away, even creeping along at twenty miles per hour. No reasonable person could conclude, on this record, that there was a "5-6 minute time lapse" between when Ellis supposedly should have called the police<sup>5</sup> and when Newell shot Lyman.

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<sup>5</sup> Even this is a leap, unsupported by the record. While two witnesses agreed that it was "not

Nor could they, without engaging in naked speculation, find that even five to six minutes would in fact have been “enough time” for the police to be called and to arrive. It is true that the police station was only a few blocks away, but this does not tell us anything, unless we posit that the City of Belzoni has an unlimited supply of police officers, sitting around the station like Maytag repairmen, and that an “argument in progress” call would have caused them to *dash* to the Double Quick. It may be that an officer was just around the corner, doing nothing. But it’s equally possible that he was on the other side of town, actively engaged in something more important, for the moment, than an “argument in progress” call. He *might* have gotten there in five to six minutes, but there is no evidence that would allow a jury to find, as a fact, that he likely would have done so, because Plaintiff offered none (perhaps because the available evidence would have been fatal to Plaintiff’s case).<sup>6</sup>

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proper” for Ellis to just “wal[k] past,” Lymas Brief pp. 19-20 (testimony of Davis and Taylor), neither witness said what Ellis should have done instead. Lymas has cited no evidence that Ellis should have “call[ed] the police or notif[ied] her manager.” For all that appears in the record, Ellis “should” have done no more than to speak a quiet word for the arguing men. It was, after all, only an “argument” (Ellis’ word, 14 R. 271 line 22) – “a normal, everyday argument. I didn’t think it escalated.” 14 R. 281. No crime was being committed; indeed, the “argument” was so “normal” and “everyday” that four or five other men were standing around, listening, 21 R. 932-33, and customer Charles Gowdy led his daughter-in-law right past the men, less than five feet from them, into the store. *Id.* There was nothing threatening about the situation to him; “I just thought,” he testified, “it was some guys just shooting the breeze.” *Id.* at 934. No one can reasonably insist that the retailer’s *first* reaction to such a situation must be to call the police on its customers, “to have [the arguing men] removed from the property.”

The whole “argument” point is a red herring. Even if we suppose that an “argument” of this type poses a foreseeable risk of “escalation” – a dubious assumption that ignores the fact that different cultures are comfortable with different styles of interaction – a moment’s reflection will show that the risk has nothing to do with the case at bar. Lymas didn’t catch a stray bullet. He was the intended victim. Lymas himself emphasizes a witness statement that was given to the police: “When Ronnie Lymas got shot 4 or 5 boys ran behind the blue house on the corner. . . . All of them had black on. After Ronnie got shot the boys kicked him then ran off.” Lymas Brief p. 7. Newell didn’t shoot Lymas because there had been an “argument” on the premises. Newell shot Lymas because he wanted to shoot Lymas.

<sup>6</sup> No one can expect that the Belzoni police department would have responded to an “argument in progress” call faster than to a violent crime call, yet U.S. Department of Justice statistics show that less than a third of violent crime calls bring police within five minutes.  
[http://www.ojp.usdoj.gov/bjs/abstract/cvus/response\\_time\\_to\\_victim584.htm](http://www.ojp.usdoj.gov/bjs/abstract/cvus/response_time_to_victim584.htm) (Table 107, “Percent

Let us suppose that the officer does arrive before Newell shoots Lymas, and “removes” from the property the men who are arguing. Who, according to Ellis, the witness that Lymas cites on this key point, would be “removed”? Newell? No! According to Ellis, it was not Newell that she saw arguing with Unger. Ellis testified that she did not even see Newell on the Double Quick premises that day – not then, not at any time. 14 R. 282. Per Ellis, the man arguing with Unger was not Newell, but Lymas himself. *Id.* Lymas’ position before this Court, then, is that *his* conduct was beyond the pale; therefore Double Quick should have had the police remove *him* from the premises, and had Double Quick done so he would not have been there to be shot.

This is every bit as untenable as it sounds. Beyond that, it demands yet more speculation. Where is the evidence that Newell wanted to shoot Lymas, but only if he could do so while Lymas was standing within the Double Quick property lines? On this record the jury could only speculate on all of these points.<sup>7</sup>

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distribution of incidents where police came to the victim, by police response time and type of crime”).

<sup>7</sup> Even the notion that once the police arrived Newell would wait for a more convenient opportunity to shoot Lymas is speculation. As Double Quick observed in its principal brief, the presence of numerous witnesses – who could all identify Newell, and thus guarantee his eventual prosecution – did not deter Newell. Experience has shown that while some criminals can be deterred, others can not be. *Compare Whitehead v. Food Max of Miss., Inc.*, 163 F. 3d 265, 268 (5th Cir. 1998) (Mississippi law) (“Another of the Whiteheads’ experts opined that Seaton and Jones were ‘power reassurance rapists,’ who probably chose Kmart because of its lack of security in its parking lot, and who would probably have been deterred by the presence of a uniformed security guard”) *with* “West Pullman man charged after police witness shooting,” <http://www.chicagobreakingnews.com/2009/08/west-pullman-man-charged-with-attempted-murder.html> (“A West Pullman man was charged today with attempted murder after police witnessed him shoot another man over the weekend, Chicago police said”); “Guarded by police, woman slain,” [http://www.upi.com/Top\\_News/US/2009/11/12/Guarded-by-police-woman-slain/UPI-56821258073017/](http://www.upi.com/Top_News/US/2009/11/12/Guarded-by-police-woman-slain/UPI-56821258073017/) (“Investigators were trying to determine Thursday how a man got into a woman’s apartment and killed her while police stood watch outside, Los Angeles police said. Police at the scene shot the attacker but not before he fatally stabbed the woman”).

In fairness Double Quick would point out that Lymas' testimony conflicted with Ellis' on the key point: Lymas adamantly denied arguing with anyone. The Jury was, of course, entitled to reject Ellis' testimony, but the observations made above are the same regardless of who was arguing: there was in fact no "5-6 minute time lapse"; there was no reason to call the police; there was no evidence that the police would have arrived in time; and there was no evidence that had they been called, and arrived in time, and "removed" the arguing men – whoever they were – that Newell would not have shot Lymas anyway, albeit off the premises rather than on.

Lymas goes on to talk about other arguments at the Double Quick. Lymas Brief pp. 20-22. These might conceivably bear on duty, but nothing about them could ever prove proximate cause in the case at bar. As for *Gatewood v. Sampson*, 812 So. 2d 212 (Miss. 2002) and *Lyle v. Mladinich*, 584 So. 2d 397, 399 (Miss. 1991), Lymas Brief pp. 23-24: the only thing that *Gatewood* says about proximate cause is that "evidence establishing proximate cause . . . was presented to the jury." 812 So. 2d at 221. This does not begin to answer the question in the instant case, to wit, whether such evidence was presented to this jury. *Lyle* was, moreover, a "violent atmosphere" case, not a "violent nature" case. *Lyle*, 584 So. 2d at 399. It speaks to the causal connection between the presence or absence of a security guard and a rational, economically-motivated crime, robbery. It does not purport to speak at all to what would have deterred Newell from his unprovoked, motiveless, and entirely unpredictable attack.

Still in search of proximate cause evidence, Lymas turns to "failure to train." Lymas Brief pp. 24-27. But none of the evidence cited there has to do with proximate cause; it is all devoted to breach of duty,<sup>8</sup> not proximate cause. As for the absence of a camera: Lymas again

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<sup>8</sup> There was, by the way, absolutely no evidence of any "duty to train." Lymas cites *Gamble v. Dollar General Corp.*, 852 So. 2d 5, 14 (Miss. 2003), but the duty in *Gamble* came from the store's own "written shoplifting policy that stated that no employee should leave a store to go after a suspected shoplifter and no employee should ever touch a shoplifter." *Id.* at 14.

points to his conclusory expert testimony, and then attempts to supplement same by positing that a camera “would have allowed the store manager Frances Byest to view this brewing violent altercation . . . and take action to have Orlando Newell and Allen Unger removed from the property. . . given the 8 to 10 minute time length it spanned.” Lymas Brief pp. 27-28. The problem with this theory (apart from the lack of record citation for the “8 to 10 minutes”) is the same one we saw with the Ellis theory: it rests entirely on speculation. Would the camera have been pointing in the right direction? If so, what would it have shown? Ellis knew there was an argument because she could *hear* what was being said, but security cameras don’t have audio. Where is the evidence that what could be *seen* would alert Byest to the fact that there was an “argument” in progress? There is none. Indeed, all of the evidence is to the contrary: Ellis walks right between the men and thinks nothing of it. Charlie Dowdy and his daughter-in-law walk right past them and think nothing of it. 21 R. 932-34. No rational jury could ever conclude, on this record, that arranging to have one more pair of eyes watch the scene on a television screen would have made a difference.

And if we get past all of this we still have to find that Byest would have noticed the “argument,” and called the police, and that the police would have arrived (in response to an “argument in progress” call) all within the “8 to 10 minutes” that Lymas claims passed between the beginning of the argument and the shooting.

Lymas’ last, best hope for evidence of proximate cause is the security guard argument. Lymas Brief pp. 29-30. Here again, though, Lymas can point to no evidence other than his experts’ thirty-eight words. Lymas adds Commander Lewis’ statement that “an armed uniformed security officer plays a big deterrent in crime occurrences,” but even if this were not purely conclusory, and thus insufficient under *Hubbard*, it tells us nothing about this crime.

Lymas Brief p. 29. Newell was willing to shoot in broad daylight, in front of countless witnesses, in his own hometown, thus guaranteeing that he would be caught and prosecuted. To say that a guard would have deterred him is not just speculation; it is speculation in the teeth of common sense.

Double Quick's principal brief demonstrated that there was no proximate cause connection between anything that Double Quick did or failed to do, and Newell's spontaneous, unprovoked, and wholly unpredictable crime. Lymas' brief has, literally, no answer. This point alone entitles Double Quick to judgment as a matter of law.

## **II. Lymas Fails to Prove Foreseeability.**

### **A. The Evidence Is Insufficient as a Matter of Law To Show That Newell Had a "Violent Nature."**

Double Quick's principal brief pointed out (pp. 23-28) that Lymas' proof was, as a matter of law, insufficient to show that Newell had a "violent nature." Among other things, Double Quick pointed out that Lymas relied *exclusively* on the November 2005 incident in which Orlando Newell shot Calvin Jefferson -- but Lymas' evidence that Newell was the aggressor was inadmissible. Without such evidence the incident proved nothing. There is no record evidence Newell was convicted of anything with respect to the Jefferson incident, the shooting being, for all the record showed, an act of self defense. 21 R. 959.

Lymas responds that the police report by which he attempted to prove the criminality of the 2005 shooting was admissible under Miss. R. Evid. 803(8)(B) and 803(8)(C). Lymas Brief pp. 37-39. Lymas has, apparently, dropped the "business records" argument that he advanced at trial. Lymas Brief p. 37 & n. 14. The problem with his new argument, however, is essentially the same: At bottom, there is no exception to the hearsay rule for the part of the police report

that matters to Lymas, and upon which his case rests, viz., the statements made to the police by witnesses to the shooting.

Rule 803(8) permits use of a police report to prove that a particular statement was in fact made to a police officer. It does not, however, permit use of the police report to prove that the particular statement is true. *Miller v. Field*, 35 F. 3d 1088, 1091 (6<sup>th</sup> Cir. 1994) (plaintiff, a prisoner, brings 1983 action, alleging that he was assaulted in prison; defendants offer official reports reflecting, inter alia, that they interviewed fellow prisoners, and the fellow prisoners said that the assault did not take place; *held*: admission of reports under 803(8) was reversible error).

This makes perfect sense. “[J]ustification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record.” *Miller*, 35 F. 3d at 1090 (quoting notes prepared by the Advisory Committee on the federal rules). The witness who makes the statement to the officer, by contrast, is under no duty to speak the truth, nor is there any reason to fear, in the ordinary case, that he will be unable to remember what he saw.

The best treatment of the distinction in Mississippi is found in *Vince v. State*, 844 So. 2d 510 (Miss. Ct. App. 2003), where the Court explained that 803(8) permits admission of the State’s own records of defendant’s incarceration, but does not permit admission of

NCIC records, which purport to be a compilation of information gathered from various jurisdictions throughout the country, the accuracy of which cannot necessarily be certified by the NCIC compiler. By way of example, though the NCIC custodian may properly certify that the NCIC report is an accurate transcription of criminal records supplied by the State of Idaho, that custodian is not in a position to assess the accuracy of the underlying information provided by the records custodian.

*Vince*, 844 So. 2d at 517-18 (emphasis supplied).<sup>9</sup>

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<sup>9</sup> *Accord*, *Singleton v. State*, 948 So. 2d 465, 471 (Miss. Ct. App. 2007) (“It is equally clear, possibly more so, that the NCIC report would not fall under M.R.E. 803(8)(B). Again, the NCIC is a database of information provided by other law enforcement agencies. As such, those working for the

The same is true of subsection (C) to Rule 803(8), for essentially the same reason. See *Jones v. State*, 918 So. 2d 1220, 1232-33 (Miss. 2005) (coroner's report not admissible under 803(8)(C), where it showed on its face that coroner relied on hearsay to prepare it, and it was "at least arguable" that he did so as to the important part, time of death; such a report "unquestionably lacked trustworthiness"). The cases that Lymas cites, Lymas Brief pp. 37-38, are not to the contrary.<sup>10</sup>

Neither the "business records" exception, invoked at trial, nor Rule 803(8), now advanced, made it permissible for Lymas to prove, through witnesses who never appeared at trial

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NCIC, and the NCIC itself, do not observe those matters reported upon within their reports. Furthermore, we have identified that 'an issue of trustworthiness arises when one organization seeks to introduce records in its possession that were actually prepared by another.' Therefore, the NCIC report in the case *sub judice*, as submitted by a member of the Madison County Sheriff's Department, cannot fall under the public records and reports exception." (citation omitted).

<sup>10</sup> *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988) merely holds "that portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report." As for *Clark v. Clabaugh*, 20 F.3d 1290 (3<sup>d</sup> Cir. 1994), despite broad dicta, the holding was that a report was admissible to prove what one of the defendants had told the writer of the report. *Id.* at 1296. Under 801(d)(2) the admissions of a party opponent are not even within the hearsay rule, so there was no question in *Clark* of using 803(8) as a vehicle for admitting the hearsay statements of non-party witnesses. The Oregon bankruptcy court decision, *Melridge, Inc. v. Heublein*, 125 B.R. 825 (D. Or. 1991), does support Lymas' position, but it misread the case upon which it relied, *Baker v. Elcona Homes Corp.*, 588 F.2d 551 (6<sup>th</sup> Cir. 1978). The *Baker* Court expressly rejected use of 803(8)(C) as a vehicle for admission of statements from non-party witnesses. *Baker*, 588 F.2d at 559 ("The appellants also challenge the admissibility of the report insofar as it contained the statement of the driver Slabach. This would not, in our judgment, be admissible under Rule 803(8). The statement was neither an observation nor a factual finding of the police officer . . .") (ultimately concluding that Slabach's statement was not hearsay because of 803(d)(1)(B)). Finally, in *Combs v. Wilkinson*, 315 F.3d 548 (6<sup>th</sup> Cir. 2002), prisoners who claimed that officials of the Ohio Department of Rehabilitation and Correction had used excessive force quelling a prison riot were permitted to introduce, under 803(8), an investigative report rendered by the Ohio Department of Rehabilitation and Correction. *Id.* at 554-55. Although the report referenced witness interviews, it was admitted for its "factual findings, conclusions, and recommendations regarding the use of force," *id.* at 554, which findings, etc. tended to show that excessive force had in fact been used. *Id.* at 555. *Combs* stands for admitting against a defendant his own investigative report which tends to admit that he was in the wrong. None of Lymas' cases hold that one may prove that "X" happened via a report in which a public official writes "a private citizen told me 'X happened.'"

and who were never subjected to cross examination, that Newell was the aggressor in the 2005 incident. PX 10A should have been excluded, and a verdict directed for Double Quick. Instead the case was presented to a jury that had been improperly exposed to hearsay statements making Newell out to be a violent actor. This was error, and manifestly prejudicial.<sup>11</sup>

Double Quick also pointed out the Double Quick employees who had “heard about” the 2005 incident had no duty to report what they had heard to Double Quick, and thus Double Quick was not on notice of what they had heard.<sup>12</sup> Lymas responds by citing the opinion in *Glover ex rel. Glover v. Jackson State University*, 968 So. 2d 1267, 1280 (Miss. 2007) (Dickenson, J., with two justices concurring, and two justices concurring in result).<sup>13</sup> The difference is that the knowledge possessed by the employee in *Glover* was squarely within the scope of his responsibilities: Luster, the employee who was “aware of the two boys' violent history,” was a Senior Aide for the NYSP program and “testified that his most important job was to supervise the children in the NYSP program. JSU had instructed that, once the children got on the bus, he was responsible for delivering the children to JSU, and that the program was

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<sup>11</sup> Lymas argues that Double Quick, having objected to PX 10A, should have objected again when the police officer was asked to state what was in PX 10A. The law neither requires nor desires such needless and pointless acts.

<sup>12</sup> Lymas lays great stress on the fact that Thurman, as a Courthouse employee, had “actual knowledge, not just street knowledge or rumor knowledge,” Lymas Brief p. 32, but the Jury was expressly invited, by Plaintiff's expert, to find that a Double Quick employee should have “based her actions on gossip and rumor that she heard in the community.” 18 R. 618-20 (Smith).

<sup>13</sup> Lymas also concludes from *Glover* that since “child fights” made rape foreseeable, it follows a fortiori that “the prior shooting aggravated assault charge and conviction on [sic] Newell and Unger are . . . enough to equate to a ‘violent nature’ . . .” Lymas Brief p. 33. The assailants' prior behavior in *Glover* – the behavior that established foreseeability – was indisputably wrongful. One of the assailants had been expelled from the program on account of it, and the other had been threatened with expulsion. *Glover*, 968 So. 2d at 1270-71. Indeed, the *Glover* opinion expressly rejected the trial court's characterization of the behavior as “adolescent horseplay.” *Id.* n.1. The behavior in the case at bar, by contrast --Newell's shooting of Jefferson -- was not necessarily wrongful, and never proven to be wrongful. There is no evidence he was ever convicted of anything with respect to the Jefferson incident. As for Unger's past: Lymas' brief repeatedly refers to it, but it is simply irrelevant. It was Newell, not Unger, who shot Lymas. Whether Unger was a devout Quaker or a modern-day Attila makes absolutely no difference.

responsible for the children from the time they boarded the bus.” *Glover*, 968 So. 2d at 1271 (emphasis added). Once these two boys boarded Luster’s bus, it was as if his employer, JSU, knew what he knew, because that knowledge was directly related to his job responsibilities. This is the context in which the *Glover* opinion stated that “[a]n employee’s knowledge is imputed to his employer.” *Glover*, 968 So. 2d at 1276 & n. 9. It is impossible to derive from *Glover* the rule for which Lymas contends, and on which his case depends, that everything an employee knows, regardless of how, or even whether, it relates to his job responsibilities, is also known to his employer.

**B. The Evidence Is Insufficient as a Matter of Law To Show That the Double Quick Store Was Located Within an “Atmosphere of Violence.”**

Lymas and his liability experts rely upon incident lists from the Belzoni Police Department (Tr. Ex. P-8) to prove Double Quick had notice of an “atmosphere of violence” not merely on the premises but also in the surrounding one-mile radius of the store. Double Quick showed in its opening brief that these incident lists should have been excluded from evidence under Miss. R. Evid. 403. Other than just three incident reports, Lymas and his experts relied primarily on these call lists, without verification of their accuracy (18 R. 586 (Smith); 19 R. 769 (Lewis)), and in light of the fact that these lists did not indicate the actual circumstances or outcome of any listed incident. *See* Double Quick Brief pp. 29-30. The misleading, prejudicial effect of allowing these incident lists into evidence, and allowing Smith and Lewis to opine based on these incident lists, far outweighed any probative value. *Id.* at 29-31.

In response, Lymas first claims Double Quick “impermissibly” raised new objections on appeal; but this claim is unsupported by the record. Lymas Brief pp. 39-41. Double Quick raised two grounds for excluding Tr. Ex. P-8 at trial: (i) the incident lists covered off-premises occurrences exceeding the scope of the expert disclosures for Lymas’ liability experts, Smith and

Lewis; **and** (ii) the incident lists should be excluded under Miss. R. Evid. 403 (16 R. 365) because they show only potential crimes, including those occurring at other locations, which is “highly prejudicial, and whatever probative value they have is outweighed by [their] prejudicial effect.” 16 R. at 365-66. Double Quick properly raised both these objections at trial and preserved them both as grounds for appeal. Appellant’s brief raised no “new objections” regarding the incident lists; Double Quick simply opted to pursue only its Rule 403 objection on appeal.

Next, Lymas cites *American National Insurance Co. v. Hogue*, 749 So. 2d 1254 (Miss. Ct. App. 2000), as support for the “reliability” of the incident lists, but ignores that even the *Hogue* court recognized the potential **prejudicial effect** of such evidence where the jury is not “informed [by the trial judge] that the mere fact that a call was made did not necessarily mean that a crime had been committed.” *Id.* at 1261. The jury was not so informed in this case. The prejudicial effect was made worse by Lymas’ liability experts’ adopting and relying upon these lists, given the undeniable tendency of jurors to give even more credence to their opinions in light of their “expert” status. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993); *Edmonds v. State*, 955 So. 2d 787, 792 (Miss. 2007).

Lymas cites *Lyle v. Mladinich*, 584 So. 2d 397 (Miss. 1991), to show this Court has accepted incident lists as evidence of an “atmosphere of violence.” Lymas Brief p. 41. *Lyle* does not support this assertion. The plaintiff in that case relied upon “a compilation of criminal charges filed against persons from 1981 through 1989 in the Fiesta Night Club and the adjacent parking lot,” 584 So. 2d at 398 (emphasis added) -- not a compilation of calls reporting potential crimes within a one mile radius of the subject premises, as reflected on the incident lists at issue here.

In any event, even considering (i) the lay witness testimony regarding fights on the Double Quick premises; and (ii) the calls for service listed on Tr. Ex. P-8, this evidence is insufficient to create a jury question on the "atmosphere of violence" issue. Lymas Brief pp. 41-42. Further, because Lymas' liability experts Smith and Lewis base their "atmosphere of violence" opinions on this same data, their opinions likewise are insufficient to create a jury question on this issue. The other decision cited by Lymas, *Gatewood v. Sampson*, 812 So. 2d 212 (Miss. 2002), actually shows why the evidence Lymas and his liability experts rely upon satisfies neither the proximity, nor the frequency, of reported crime that the Mississippi courts have found sufficient to create a jury question on the existence of an "atmosphere of violence" in other premises liability cases. In *Gatewood*, though calls for service may have been considered by the Court in that case (though there is no explicit description of what plaintiff's expert relied upon in that case), the relevant point is that it demonstrates the frequency and proximity of violent crimes necessary to uphold a jury verdict on the "atmosphere of violence" issue -- factors not met here. Sixty violent crimes in the preceding three-year period were reported in the neighborhood surrounding the Exxon where the incident occurred, including a bullet fired into the Exxon, and 32 of the 60 violent crimes occurred in the adjacent shopping center. *Gatewood*, 812 So. 2d at 220.<sup>14</sup>

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<sup>14</sup> See also *Glover ex rel. Glover v. Jackson State Univ.*, 968 So. 2d 1267, 1279 (Miss. 2007) ("sixty-three crimes . . . reported to have occurred on the JSU campus [the subject premises] during the three months prior to the rape" (emphasis added), of these 63 crimes "twenty-one . . . were violent, and four were reports of rape and sexual battery," held sufficient to allow jury to find existence of atmosphere of violence), compare to *Kelly v. Retzer & Retzer, Inc.*, 417 So. 2d 556, 559, 561-62 (Miss. 1982) (despite evidence of 28 reported crimes in the subject parking lot in the previous three years, including "three incidents of vandalism, two assaults, one attempted auto theft, one auto theft, one attempted fraud, an armed robbery in a restroom, one strong armed robbery of a child by a fifteen year old boy, one simple assault, and one unknown complaint," peremptory instruction for the defendant as to an atmosphere of violence affirmed on appeal); *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So. 2d 1186, 1187 (Miss. 1994) ("difficult to say the assault on [the plaintiff] was foreseeable" though the evidence showed crime in the preceding 60 months within two blocks of the business which included 110 commercial burglaries, 113 residential burglaries, 111 assaults, 152 larcenies, one bomb threat, and one

Lymas ignores this aspect of *Gatewood*, as well as the other cases cited by Double Quick in its opening brief that show the evidence Lymas and his liability experts rely upon is insufficient as a matter of law to show an “atmosphere of violence” existed on the Double Quick premises such that Double Quick would have “cause to anticipate” the unexpected, random shooting that caused Lymas’ injuries. See *Davis v. Christian Bhd. Homes of Jackson, Miss., Inc.*, 957 So. 2d 390, 401 (Miss. Ct. App. 2007).

Finally, Lymas claims there is no basis for this Court to re-assess the “atmosphere of violence” standard “entrenched in Mississippi law for decades.” Lymas Brief p. 42. But this conclusory pronouncement ignores what both Double Quick’s opening brief and the supporting brief of amici have shown: The current ambiguous “atmosphere of violence” criteria leave business owners without clear and workable standards governing their duties with respect to third party criminal acts like that occurring in the instant case. Indeed, the term “atmosphere of violence” -- repeatedly used before the jurors in premises liability cases -- is highly inflammatory. Coupled with the current vague standards, this term allows jurors to impose liability essentially guided by their inherent desire that crime be prevented, without direction as to the reasonable standards that should govern their determination. As applied in this case, Double Quick has been imputed with knowledge of incidents occurring within an arbitrary one-mile radius of the premises as proof the actual premises was a “violent” place. This is wrong and demonstrates both an extreme example and extension of premises liability in Mississippi. The judgment should be reversed.

The Court should also use this opportunity to delineate appropriate standards which not

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indecent exposure); *Scott v. City of Goodman*, 997 So. 2d 270, 275 (Miss. Ct. App. 2008) (evidence that premises “was frequently robbed” held insufficient to show “atmosphere of violence”); *Stevens v. Triplett*, 933 So. 2d 983, 986 (Miss. Ct. App. 2005) (“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 [the property owner] breached the duty he owed to [plaintiff] when he invited her to see the property.”).

only (a) reaffirm the duty of reasonable care owed customers for hazards created by or related to the business itself, or which involve foreseeable and imminent dangers to identified patrons; but also (b) make clear that premises owners are not required to protect invitees from criminal attacks that have no connection to the premises, and which arise out of criminal activity in the community. Business owners are entitled to clearly defined premises liability standards to enable them to determine what the law demands in this context.

**III. The Expert Testimony of Lymas' Two Liability Experts Was Both Conclusory and Wholly Speculative and Should Have Been Excluded Under the Standards Established by *Daubert/McLemore* and Miss. R. Evid. 702.**

Because “[t]he sufficiency of foundational facts or evidence on which to base an [expert] opinion is a question of law,” *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 60 (Miss. 2004) ( citations omitted), this Court should review de novo the sufficiency of the “evidence” at issue here in assessing whether the trial court erred in failing to exclude the testimony of Lymas’ liability experts, Michael Smith and Commander Tyrone Lewis. As shown above and in Double Quick’s principal brief, Lymas had **no** evidence that anything Double Quick did or failed to do was a proximate cause of Newell’s unprovoked and unpredictable crime, and Lymas’ purported “evidence” of Newell’s “violent nature” or the “atmosphere of violence” at the store was insufficient as a matter of law. The opinions of Plaintiff’s liability experts, which were based upon such evidence, should have been excluded at trial for this precise reason: Their testimony was not “based upon sufficient facts or data” within the meaning of Rule 702. Because it had no basis in fact, their testimony was irrelevant and thus even failed Rule 702’s basic requirement that it be first found to “assist the trier of fact to understand the evidence or to determine a fact in issue.” *See* Double Quick Brief pp. 11-38.

Opposing Double Quick’s reliance on these fundamental concepts, Lymas cites *Pipitone*

*v. Biomatrix, Inc.*, 288 F. 3d 239 (5<sup>th</sup> Cir. 2002), a case in which the court recognized that where expert testimony was based on “competing versions of the facts,” this factor, alone, was not a basis for excluding expert testimony as “unreliable.” *Pipitone*, 288 F. 3d at 249. Lyman Brief pp. 44-45. Lyman claims this analysis applies here, suggesting that Double Quick’s *Daubert* challenge “is an invitation to this Court to impermissibly weigh in on the ‘weight’ of opposing expert opinions.” Lyman Brief p. 44.

But Double Quick does not challenge the expert testimony of Smith and Lewis because it rests on a “competing version” of the facts relied upon by Double Quick’s expert, Warren Woodfork. On the contrary, the basis for Double Quick’s *Daubert* challenge as to both experts is that the information upon which Plaintiff’s experts’ testimony is based (i.e., the purported “evidence” of causation, or Double Quick’s notice of Newell’s “violent nature” or the “atmosphere of violence” at the store) -- even taken as true -- is insufficient as a matter of law. See Double Quick Brief pp. 11-38; pp. 18-19, *supra*. As such, their opinions are unreliable and should have been excluded under Miss. R. Evid. 702 and *Daubert/McLemore* standards. See *Mississippi Transp. Comm’n v. McLemore*, 863 So. 2d 31, 36 (Miss. 2003) (expert’s opinion must rest on “a reliable foundation” and “not merely [the expert’s] subjective beliefs or unsupported speculation”) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993)).<sup>15</sup>

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<sup>15</sup> See also *City of Jackson v. Spann*, 4 So. 3d 1029, 1039 (Miss. 2009) (testimony based upon expert’s “mere ‘guess’” held insufficient to establish substantial, credible evidence to support future damages award); *Watts v. Radiator Specialty Co.*, 990 So. 2d 143, 146 (Miss. 2008) (trial courts must ensure data relied upon by expert “is relevant to the facts at hand”); *Hubbard v. Wansley*, 954 So. 2d 951, 965-66 (Miss. 2007) (affidavit which “g[ave] very little in the way of specific facts and medical analysis to substantiate the claim” insufficient to support causation opinion); *Dedeaux Util. Co. v. City of Gulfport*, 938 So. 2d 838, 843 (Miss. 2006) (“[Expert’s] testimony was not based on sufficient facts and data and was therefore unreliable. . . . The trial court erred in admitting that testimony.”); *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 60 (Miss. 2004) (facts relied upon by expert must afford a “reasonably accurate basis” for the expert’s conclusion)(citations omitted); *Davis v. Christian Bhd. Homes*

As to proximate cause, it is only pure speculation that anything Double Quick did or did not do caused Newell to shoot Lymas: As Double Quick points out, Newell was willing to shoot in broad daylight, in front of countless witnesses, in his own hometown -- to say that a guard -- or anything else -- would have deterred him is speculative and flies in the face of common sense. *See p. 10, supra.*

Lymas' experts likewise were without sufficient facts upon which to form "reliable" opinions as to both the "violent nature" and "atmosphere of violence" prongs of the foreseeability test for premises liability. As to Newell's "violent nature," Lymas exclusively relied upon a 2005 prior shooting incident involving Newell, but Lymas' evidence that Newell was the aggressor was inadmissible, and without such evidence the incident proved nothing. *See pp. 10-13, supra.* Moreover, even if Double Quick employees Thurman and Ellis "knew" of Newell's violent nature, neither had a duty to report this information to Double Quick, and thus Double Quick was not on notice of what they had heard. *See pp. 13-14, supra.* Finally, as to the "atmosphere of violence" factor, even considering the lay witness testimony about fights on the Double Quick premises, and the calls for service listed on Tr. Ex. P-8, this evidence is insufficient as a matter of Mississippi law to support the existence of an "atmosphere of violence." *See pp. 14-18, supra.* Because the information relied upon by Lymas' liability experts was insufficient as a matter of law, their testimony should have been excluded at trial.

#### **IV. Lymas's Defense of the Jury Instructions Is Unsuccessful.**

Double Quick's principal brief pointed out (pp. 38-40) that the jury instructions were

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*of Jackson, Miss., Inc.*, 957 So. 2d 390, 409 (Miss. Ct. App. 2007); *Fresenius Med. Care & Cont'l Cas. Co. v. Woolfolk ex rel. Woolfolk*, 920 So. 2d 1024, 1032 (Miss. Ct. App. 2005) (reversing lower court allowing expert testimony premised on factual assumption unsubstantiated by any evidence in the record: "[I]f the premise upon which Dr. Stringer's opinion was based is flawed, then it necessarily follows that the opinion is also flawed."); *Rogers v. Barlow Eddy Jenkins P.A.*, 2009 WL 2232228, at \*5 (Miss. Ct. App. July 28, 2009) (conclusory expert opinions held insufficient to support finding of proximate cause).

riddled with errors. Lymas attempts to defend the instructions, but his defense is unsuccessful.

Lymas Brief pp. 46-50.

Double Quick pointed out, for example, that without the words “if any” in the first sentence of instruction seven, the instruction told the jury that there was in fact a foreseeable risk. Lymas responds by saying, first, that the words “if any” are not found in the case law, and are in any event “trivia words.” Lymas Brief p. 46. This is no response at all. When this Court recited the rule in *Minor Child v. Mississippi State Federation*, 941 So. 2d 820 (Miss. 2002), it was speaking to the bench and bar; the “if any” was understood. A jury is an entirely different audience. See *Bullock v. State*, 391 So. 2d 601, 610 (Miss. 1980) (“Instruction D-31 would have told the jury it was instructed there is nothing that would suggest the decision to afford an individual defendant mercy violates the constitution. That statement was taken from language set forth in the opinion of *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 14 L.Ed.2d 859 (1976). It is simply a statement of the opinion, and was not intended as an abstract proposition of law to be given in jury instructions.”) (emphasis added). To the jury in the case at bar, instruction seven really and truly did say that a foreseeable risk existed. And for Lymas to dismiss “if any” as trivial is to ignore stacks of Mississippi case law.<sup>16</sup>

Instruction seven also told the Jury that Double Quick was obligated to act upon any “cause to anticipate” the assault, not just “reasonable” causes to anticipate, and, further, that it

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<sup>16</sup> See, e.g., *AmFed Companies, LLC v. Jordan*, 2009 WL 2595628, at \*9 (Miss. Ct. App. Aug. 25, 2009) (quoting “if any” jury instruction); *Fair v. State*, 2009 WL 1520110, at \*3 (Miss. Ct. App. June 2, 2009) (same); *Goff v. State*, 14 So. 3d 625, 657 (Miss. 2009) (same); *Goodyear Tire & Rubber Co. v. Kirby*, 2009 WL 1058654, at \*13 (Miss. Ct. App. Apr. 21, 2009) (same); *APAC Miss., Inc. v. Johnson*, 15 So. 3d 465, 476 (Miss. Ct. App. 2009) (same); *Brown v. State*, 19 So.3d 85, 94 (Miss. Ct. App. 2008) (same); *Walton v. State*, 998 So. 2d 971, 977 (Miss. 2008) (same); *Causey v. Sanders*, 998 So. 2d 393, 410 (Miss. 2008) (same); *Striebeck v. Striebeck*, 5 So. 3d 450, 452 (Miss. Ct. App. 2008) (same).

