6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00573 COA

JIMMY HYNUM AND BETTYE HYNUM

APPELLANTS

v.

INDU VAGHELA, MIKE VAGHELA, AND JIJI PARTNERSHIPS D/B/A DAYS INN OF BATESVILLE

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ANDREW C. BAKER

COURT FROM WHICH APPEALED: PANOLA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

HELEN BAGWELL KELLY

ATTORNEYS FOR APPELLEES:

DAVID L. CALDER AND JAY GORE, III OF

HICKMAN, SUMNERS, GOZA AND GORE

NATURE OF THE CASE: CIVIL-PERSONAL INJURY

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED IN FAVOR OF DEFENDANTS

MANDATE ISSUED: 7/8/97

BEFORE THOMAS, P.J., COLEMAN, AND SOUTHWICK, JJ.

COLEMAN, J., FOR THE COURT

The plaintiffs in this suit, Jimmy Hynum and Bettye Hynum, appeal from a grant of summary judgment in favor of the defendants, Indu Vaghela, Mike Vaghela, and JIJI Partnerships, who do business collectively as Days Inn of Batesville (Days Inn). We affirm.

I. FACTS

About four o'clock in the morning of Saturday, April 27, 1991, Jimmy Dale Hynum and his former wife, Bettye Chafton Hynum, left their respective homes in Pascagoula and Moss Point and drove to the home of their son, Robert Dale Hynum, and his wife in Courtland, which is located in Panola County. The Hynums had been divorced on November 7, 1990, after twenty two years of marriage. They had driven to Courtland to attend a pageant in which their one-year-old grandson, Mikey, was to participate that Saturday evening. Mikey was the son of Robert Dale Hynum. After the Hynums had visited with their son, Robert Dale Hynum, and his family for a couple of hours, they drove with their grandson, Mikey, to Batesville where they checked into room 117 of the Days Inn.

As they entered room 117, they noticed that the door to the adjoining room 116 was open. The Hynums heard loud music emanating from within room 116. Among the occupants of room 116 were: (1) Diane Cole, (2) her cousin, identified in the record by his first name, Calvin, (3) an unidentified friend of Calvin's, and (4) Curtis McNeil. Before the Hynums left their room later that afternoon to attend the pageant in which Mikey was to participate, Ms. Hynum played with Mikey on the concrete apron outside their room and the adjoining room 116. Before they went to the pageant, Ms. Hynum strolled past room 116 with Mikey in tow to get a soft drink. When they passed room 116, Ms. Hynum spoke to one of the male occupants who was dressed in a gold suit. He returned her greeting.

Sometime between 9:00 and 10:00 o'clock that evening after the pageant had ended, the Hynums returned with their grandson Mikey to room 117 in the Days Inn. As they came back to their room, the Hynums noticed that door to room 116, which was next to theirs, was again wide open. They observed the room's four occupants listening to loud music inside their room. One of the male occupants, Curtis McNeil, had traveled from Memphis with Diane Cole the day before and had checked into that room with Cole. Cole's purpose in traveling from her home in Memphis was to visit her parents and other relatives who lived in Panola County.

After the Hynums had removed the tux which Mikey had worn as a participant in the pageant, they laid Mikey in the bed and began to encourage him to go to sleep. As the Hynums laid Mikey in the bed, they heard their neighbors bumping the walls in the adjoining room 116. Jimmy Hynum stepped to his neighbors' room and asked them to quiet down so that their grandson Mikey might go to sleep. Someone in room 116 assured Hynum that they would be quiet, after which Hynum returned to his room. After some fifteen minutes had passed, the racket in room 116 continued unabated. The Hynums continued to hear loud profanity, and bumping against the wall between their room and room 116 continued.

At this point, Bettye Hynum called the front desk and complained of the noise coming from the adjacent room 116. Bettye Hynum called the front desk to complaint a second time about the noise,

but again to no avail. This time, Jimmy Hynum walked to the front desk in the lobby and asked the man on duty to do something about the disturbance which the occupants of room 116 were causing. The desk clerk first told Hynum that there was nothing that he could do because the motel security guard could not be located. In fact, the Days Inn had no security guard. When Hynum persisted, the desk clerk called room 116 and spoke to Diane Cole. The desk clerk asked the room's occupants to get quiet, and he warned them that if they did not become quiet, he would call the police, who would evict them.

Jimmy Hynum began walking back to his motel room. On his way to the room, he stopped at a vending machine to buy a Coke, and then he continued on to the door of his room. As Hynum began to enter the door to his room, McNeil stepped out of the door to room 116. Hynum and McNeil exchanged racial epithets and cursed each other. While Hynum's and McNeil's versions of their encounter differed markedly, counsel for Days Inn agreed that for the purpose of presenting the motion for summary judgment, Days Inn would adopt Jimmy Hynum's version. Hynum testified that he told McNeil that the "best thing for you to do is get back in your room and quieten down, or they're going to kick you out of here." McNeil, who continued to stand his ground outside the door to room 116, threatened that he would blow Hynum's head off. Hynum retorted to this threat by telling McNeil: "If that's what you want to do, you go for it." McNeil ran back into his room. Hynum heard the occupants of the room yelling at McNeil to leave his gun alone.

Jimmy Hynum entered his room and told Bettye Hynum to go into the bathroom with their grandson Mikey. Hynum then got his .38 caliber pistol from the table in their room and stepped back outside the door to their room. McNeil came running outside room 116. Hynum threatened to kill McNeil if he did not get back inside his room and behave. Jimmy Hynum testified in his deposition that he then told McNeil, "It's bad to die over running your mouth," whereupon McNeil turned to run back into his room. As McNeil did so, he shot at Hynum with a .22 caliber handgun. McNeil missed Hynum. With his pistol still in his hand, Hynum then walked to the door to McNeil's room and told McNeil through the closed door, "Don't come back out of there until the police get here."

Just as Hynum turned around and started back toward his own room, the door to room 116 opened, and McNeil stuck his pistol outside the door and shot Hynum in the arm at a point-blank range. However, Hynum did not realize that he had been shot in the arm until Hynum re-entered his room and Bettye Hynum pointed out to him that his arm was bleeding. Undeterred by his wound, Hynum returned to McNeil's room and warned its occupants through the closed door that if any one of them came out before the police arrived, he would shoot them. Jimmy Hynum sat down outside the two adjacent rooms to stand guard until the police arrived. When the police arrived, they investigated the affray, pursuant to which they declined to charge McNeil with any crime because they concluded from their investigation that McNeil had shot Hynum in self-defense.

Jimmy Hynum had been scheduled to begin a new job as a welder at Ingall's Ship Yard that immediately following Monday. As the result of McNeil's shooting him, Hynum was unable to report for work at his new job. Since the time of the shooting, Hynum's capacity to do heavy work has been significantly diminished, and he had only been able to find work as a truck driver when Bettye Hynum and he file their complaint against Days Inn. Hynum incurred significant medical expenses as the result of the surgeries required to remove the bullet fragments from his arm and to repair the bullet's damage to his arm. Physicians had told him that he would require approximately two years of therapy

and healing before his arm would return to normal use.

II. Litigation

On October 8, 1991, the Hynums filed their complaint against Days Inn and Curtis McNeil. In their complaint, the Hynums alleged that McNeil was liable to Jimmy Hynum for assault and battery because he had shot Hynum and that McNeil was liable to Bettye Hynum for assault because he had threatened to shoot her with the .22 caliber pistol with which he had shot her husband. With respect to Days Inn, the Hynums alleged that it owed them "a high duty of care to provide reasonable protection against the wrongful and/or criminal acts of third persons, including . . . McNeil, which were directed [at them]. The Hynums further charged that this duty was "non-delegable" by Days Inn. In this manner, the Hynums charged Days Inn with negligence, the proximate result of which Jimmy Hynum "sustained grievous personal injury, emotional distress, and loss of wage earning capacity." Finally, the Hynums charged that as the proximate result of Days Inn's negligence, Bettye Hynum "sustained severe emotional distress."

In its motion for summary judgment, filed on March 18, 1993, Days Inn alleged that "[t]here is no genuine issue of any material fact such as would preclude summary judgment in favor of Defendant Days Inn of Batesville." In response to Days Inn's motion for summary judgment, the trial judge held that "Days Inn did not breach any duty owed to the plaintiffs which resulted in an injury or damage to the plaintiffs;" and he granted summary judgment in favor of Days Inn by order rendered on March 28, 1994. From this order, the Hynums have appealed.

III. Issue and the Law

In their brief, the Hynums frame their one issue as follows:

I. Whether the trial court erred in granting [Days Inn's] motion for summary judgment, finding that the Defendant, Days Inn, did not breach any duty owed to the plaintiffs which resulted in an injury or damage to the plaintiffs.

In its brief, Days Inn presents four issues, which we quote from its brief as follows:

1. Whether summary judgment in favor of [Days Inn] was properly granted by the trial court.

2. Whether [the Hynums] failed to make an adequate showing of the essential elements of duty, breach of duty, and proximate cause in regard to their claims of negligence against [Days Inn], thereby making summary judgment appropriate.

3. Whether Jimmy Hynum's own acts constituted an independent intervening cause that the sole source of the harm sustained by [the Hynums].

4. Whether Jimmy Hynum assumed the risk of the harm he sustained by voluntarily engaging in a confrontation with Curtis McNeil.

This Court need not consider any of these four issues because Days Inn filed no notice of cross-

appeal which Mississippi Rule of Appellate Procedure 4(c) requires. *See Maupin v. Estate of Perry*, 396 So. 2d 613, 616 (Miss. 1981) (The Mississippi Supreme Court does not address other issues which the appellee raised because they were not raised on direct appeal and the appellee did not file a cross-appeal.). Nevertheless, Days Inn's second issue is inherent to the Hynums' first issue and thus will be considered in our consideration of the Hynums' one issue in this appeal. Our resolution of the Hynums' one issue renders moot Days Inns' issues numbers 3 and 4.

A. Rule 56 and the standard of review

Rule 56(c) of the Mississippi Rules of Civil Procedure provides:

The [summary] judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

M.R.C.P. 56(c). On appeal from a grant of a motion for summary judgment, the Mississippi Supreme Court, and hence this Court, reviews the record *de novo. Northern Elec. Co. v. Phillips*, 660 So. 2d 1278, 1281 (Miss. 1995). The following explanation by the Mississippi Supreme Court in *Galloway v. Travelers Ins. Co*., 515 So. 2d 678, 684 (Miss. 1987) describes the nature of the *de novo* review when a trial court has granted summary judgment against a plaintiff:

Our own construction of Rule 56 embodies th[e] concept that when a party, opposing summary judgment on a claim or defense as to which that party will bear the burden of proof at trial, fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law.

Later in *Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So.2d 1346, 1355 (Miss. 1990), the Mississippi Supreme Court applied this same construction of Rule 56 to a claim for damages which were the direct result of a defendant's negligence:

In a negligence action, the plaintiff bears the burden of producing evidence sufficient to establish the existence of the conventional tort elements of duty, breach of duty, proximate causation, and injury. Therefore, in a summary judgment proceeding, the plaintiff must rebut the defendant's claim (*i. e.*, that no genuine issue of material fact exists) by producing supportive evidence of significant and probative value; this evidence must show that the defendant breached the established standard of care and that such breach was the proximate cause of her injury. Mere allegation or denial of material fact is insufficient to generate a triable issue of fact and avoid an adverse rendering of summary judgment. More specifically, the plaintiff may not rely solely upon the unsworn allegations in the pleadings, or "arguments and assertions in briefs or legal memoranda."

(citations omitted).

B. General Review of the law

The Mississippi Supreme Court expressed the following general rule concerning the duty which an owner or occupier of land owes to his business invitee in *J. C. Penney Co. v. Sumrall*, 318 So.2d

829, 832 (Miss. 1975):

Although the owner of a store to which he invites the public is held to the exercise of reasonable care in maintaining his place of business in a safe condition for the use of his customers, he is not an insurer of their safety.

Negligence -- not strict liability -- is the basis of an owner's liability to a business invitee.

In *Kelly v. Retzer & Retzer, Inc.*, 417 So. 2d 556, 557 (Miss. 1982), the family of Rodney Kelly brought suit against Retzer & Retzer, Inc., d/b/a McDonald's Restaurant (McDonald's) for the wrongful death of Rodney Kelly, who was shot and killed while he and his assailant were quarreling on the parking lot of the McDonald's parking lot in Clarksdale. The Kelly family charged that McDonald's had been negligent in not providing adequate security and safe premises for its patrons and that the shooting death of Rodney Kelly was the result of that negligence. *Id.* The trial judge granted McDonald's motion for a directed verdict, from which the Kelly family appealed. *Id.* at 563. The supreme court sustained the trial court's grant of the motion for directed verdict. *Id.*

In *Kelly*, which it described as "a case of first impression," *Id.* at 561, the Mississippi Supreme Court explained that the Kelly family's theory of McDonald's negligence required them to prove "the duty owed by McDonald's to Rodney Kelly, . . . the duty was breached, . . . the breach caused Kelly's death as well as . . . the elements of damages." *Id.* at 560. In *Kelly* "the question presented is whether there was a breach of that duty and whether the injury to Rodney Kelly was proximately cause by such breach under the presented facts." *Id.* The supreme court answered that question in the negative by opining:

In view of this sudden and spontaneous encounter, coupled with McDonald's notice only seconds prior to the shooting and plaintiffs' decedent's voluntary intervention into the affray, we are of the opinion that McDonald's was not negligent in either failing to assist Kelly at the time of the encounter by not providing an armed security guard or by the assistant manager's failing to interject himself into the affray rather than call the police.

Id. at 561. The following sentence in which this Court paraphrases this quotation by substituting the names of appropriate parties in the case *sub judice* is harmonious with the facts in this case. In view of this sudden and spontaneous encounter [between Jimmy Hynum and Curtis McNeil], coupled with [Days Inn's] notice only [after] the shooting and [Jimmy Hynum's] voluntary intervention into the affray, we are of the opinion that [Days Inn] was not negligent in either failing to assist [Jimmy Hynum] at the time of the encounter by not providing an armed security guard or by the [desk clerk's] failing to interject himself into the affray rather than call the police. This Court opines that *Kelly* supports the trial court's grant of summary judgment for Days Inn.

The second case we consider is *Grisham v. John Q. Long V.F.W. Post, No 4057, Inc.*, 510 So. 2d 413 (Miss. 1988). *Grisham* involved Hazel Williams Grisham's attack with a bottle enclosed in a brown paper bag at night on Mabeline Grisham as Mabeline Grisham left the John Q. Long V.F.W. Post in Tupelo. *Id.* at 414. Both Hazel Williams Grisham and Mabeline Williams were former wives of the same man. *Id.* Mabeline Grisham filed suit against the post and claimed that it had been negligent in failing *inter alia*: (1) to light properly the outside premises, (2) to provide security personnel to protect guests and patrons of the lodge, and (3) to supervise and regulate the conduct of

its patrons. *Id.* at 414-15. The trial court granted summary judgement in favor of the lodge. The Mississippi Supreme Court affirmed the trial court's grant of summary judgment to the V. F. W. Post. *Id.* at 417.

In *Grisham* the Mississippi Supreme Court did not depart from the rule that the owner of premises is not an insurer of a business invitee's safety, but it did elaborate on the nature of the owner's duty to such a business invitee as follows:

[T]he keeper of a bar or tavern, though not an insurer of his guests' safety, has a duty to exercise reasonable care to protect them from reasonably foreseeable injury at the hands of other patrons. Authorities indicate, however, that the owner can be liable only where he had cause to anticipate the wrongful or negligent act of the unruly patron. The requisite "cause to anticipate" the assault may arise from 1) actual or constructive knowledge of the assailant's violent nature, or 2) actual or constructive knowledge that an atmosphere of violence exists in the tavern.

Grisham, 519 So. 2d at 416-17 (citations omitted). Nonetheless, without formally deciding whether the plaintiff had made a sufficient showing on the issue of the foreseeability of the assault, the court concluded "that [Mabeline Grisham] ha[d] made absolutely no showing of proximate cause." *Id.* at 417. The supreme court then explained:

[A]s to her claims that the V.F.W. should have provided better lighting, hired security guards, and maintained a less violent atmosphere, Mabeline has made absolutely no showing that any of those omissions was the proximate cause of the attack. Mabeline has utterly failed to make any showing as to an essential element of her claim, proximate cause. Therefore, under the rule set forth in Galloway and Celotex, summary judgment in favor of the V.F.W. was appropriate.

Id. This Court will subsequently consider whether the Hynums "made any showing as to an essential element of [their] claim, proximate cause."

A third case in which the Mississippi Supreme Court dealt with this issue was *May v. V.F.W. Post No. 2539*, 577 So. 2d 372 (Miss. 1991). In *May*, Ricky Triplett attacked and severely injured David May while May and his wife Donna were on the premises of the V.F.W. Post No. 2539 attending a "charitable benefit dance." *Id.* at 373. The V.F.W. had donated its hall to the organizers of the event, the purpose of which was to raise money for a member of the community *Id.* The Mays sued the V.F.W. Post to recover for David May's injuries which Triplett had inflicted on him while David May was a guest at the dance on the V.F.W.'s premises. *Id.* at 372. The Mays charged that the V.F.W. post was negligent in the following respects:

A. failing to exercise reasonable care for the safety of patrons on its premises;

B. failing to provide adequate security for the protection of its patrons;

C. failing to prevent . . . Triplett from attacking [May] when . . . VFW knew, or in exercise of reasonable care, should have known, of the violent propensities of Triplett; and

D. failing to provide adequate supervision of its security personnel.

Id. at 372-73. The similarity between the allegations of the V.F.W. Post's negligence and Days Inn's

negligence are apparent. A salient factual difference between *May* and the case *sub judice* is that in *May,* there were two security persons on duty at the dance, both of whom were also deputy sheriffs. *Id.* at 374. At least one of these two security persons participated in breaking up the fight between May and Triplett. *Id*. The trial court granted summary judgment to the V.F.W. Post, from which the Mays appealed.

The Mississippi Supreme Court affirmed the trial court's grant of summary judgment in favor of the V.F.W. Post. The supreme court opined that the Mays had failed to establish a breach of the V.F.W. Post's duty as owner of the premises to exercise reasonable care to protect May from reasonably foreseeable injury on the premises where the affray between May and Triplett occurred . *Id.* at 377. In concluding that the attack was not foreseeable, the supreme court stated that nothing in the record supported a conclusion that the V.F.W. Post possessed an atmosphere of violence and nothing in the record alerted the V.F.W. Post that the assailant Triplett had violent propensities. *Id.* at 376. The supreme court next noted that May had "failed to make a showing that an increased number of security guards would have prevented the attack. *Grisham*, 519 So. 2d at 417" *Id.* The court commented further:

The fact that the attack or altercation happened in a quick and unexpected manner also strikes against May's assertion that the VFW was negligent. . . . Because of the spontaneity of the event in question, it is inconceivable that the VFW reasonably could have protected May from Triplett's attack.

Id. at 376-77. As in *Grisham*, one of reasons that the Mississippi Supreme Court affirmed the summary judgment was that the Mays had failed to show that an increased number of security guards would have prevented the attack.

A fourth case which is favorable to Days Inn is *Crain v. Cleveland Lodge 1532*, 641 So. 2d 1186 (Miss. 1994). Crain was a member of the band scheduled to play at a Moose Lodge social event. *Id.* at 1187. After Crain arrived and parked behind another car in the lodge's crowded parking lot, an unknown assailant struck him in the head from behind as Crain attempted to open his car's rear door to unload his guitar. *Id.* Crain sued the Moose Lodge for its negligence *inter alia* in having failed to provide adequate security measures in the parking lot to protect its patrons. *Id.* at 1189.

Crain opposed the Moose Lodge's motion for summary judgment by submitting crime reports form the Cleveland Police Department for the five-year period which immediately preceded the assault on him. *Id.* at 1187. These reports showed that one hundred ten commercial burglaries, three residential burglaries, eleven assaults, robberies and other violent crimes, one hundred fifty two larcenies, and one bomb threat had been reported to have occurred within a two-block radius of the Moose Lodge. *Id.* Nevertheless, the trial court granted summary judgment in favor of the lodge. *Id*. at 1188. On appeal, the Mississippi Supreme Court affirmed the trial court's grant of summary judgment to the Moose Lodge. *Id.* at 1192. The supreme court stated:

Everyone can foresee the commission of a crime virtually anywhere and at any time. If foreseeability itself gave rise to a duty to provide "police" protection for others, every residential curtilage, every shop, every store, every manufacturing plant would have to be patrolled by the private arms of the owner.

Crain, 641 So. 2d at 1190 (quoting *Radloff v. National Food Stores, Inc*. 121 N.W.2d. 865 (Wis.

1963)). The court went so far as to imply that imposing liability on the Moose Lodge as the owners of the parking lot in which Crain was assaulted would be a "burden approaching strict liability." *Crain*, 641 So. 2d at 1191. The court further concluded:

While the amount and type of criminal activity in the general vicinity of the defendant's business premises is one factor that should be given consideration when determining foreseeability, merchants are not required to carry out the duties of the police force. Crime has become so prevalent in recent years that even without taking the financial burden into consideration, it would be impossible for a business to guarantee the safety of everyone coming onto its premises.

Id. at 1192. The supreme court elaborated that the attack on Crain could not have been foreseeable because, during fifty five of the sixty months prior to the assault on Crain, there were "only" eleven assaults, robberies and other violent crimes reported in the neighborhood of the lodge. *Id.* at 1192.

The supreme court also held that Crain had failed to establish proximate cause. *Id.* It explained that "[P]roximate cause arises when the omission of a duty contributes to cause an injury." *Id.* (citations omitted). About Crain's failure to establish proximate cause, the supreme court further clarified:

There is absolutely no evidence which was made part of the record for this appeal which shows a causal link between the amount of lighting in the Moose Lodge parking lot and the injury sustained by Crain at the hands of his assailant. Crain made no showing that any omission on the part of Moose Lodge was the proximate cause of the attack of injury. This failure on the part of Crain to make any showing as to proximate cause, an essential element of his claim, makes summary judgement in favor of Moose Lodge appropriate in this instance.

Id.

Notwithstanding the four cases which we have thus far reviewed, one case remains which appears favorable to the Hynums. That case is *Lyle v. Mladinich*, 584 So. 2d 397 (Miss. 1991). In *Lyle*, James Lyle, the plaintiff, was beaten and robbed as he exited from his car parked in the parking lot of a Biloxi tavern which belonged to John and A. Jake Mladinich. *Id.* at 397. The Mladiniches had once hired a security guard for the parking lot, but had discontinued employing a security guard before the assault on Lyle. As did the plaintiffs in the other four cases which we have reviewed, Lyles sued the Mladiniches as the owners of the parking lot and alleged that they were negligent by failing to provide adequate security in their parking lot. *Id.* at 398. As had the Hynums in the case *sub judice* and as the plaintiff in *Crain* had done to oppose the owners' motions for summary judgment, Lyle offered an affidavit from Chief Frank Duggan, records custodian of the Biloxi Police Department, which contained a compilation of criminal charges filed against persons in the parking lot in which Lyle had been assaulted for a six-year period immediately preceding the attack on Lyle. *Id.* The opinion provides no details of the contents of that compilation, however.

The trial court granted summary judgement in favor of the Mladiniches on the issue of proximate cause because "no genuine issue of fact existed as to whether the alleged breach of duty was the proximate cause of the alleged injuries." *Id.* The trial judge reasoned that "a jury would have to speculate to find proximate cause because Lyle presented no evidence to show that the presence of a guard could have prevented the assault and kidnapping [of Lyles]." *Id.* On Lyle's appeal, the

Mississippi Supreme Court reversed the trial court's grant of summary judgment and remanded the case for trial. *Id.* at 400.

To support its reversal of the trial court's grant of summary judgment in a case where the facts and issues were quite similar, if not identical, to those in the other four cases in which it had affirmed motions for directed verdict or summary judgment for the property owners, the Mississippi Supreme Court reasoned as follows:

The trial judge held that there was no evidence of proximate causation -- reasoning that the presence of a security person would have made no difference and that the jury would have had to speculate in order to resolve the issue. This was a close call for the judge to make and, in view of the standard of review, this Court feels compelled to hold that a triable issue of fact exists regarding the proximate-causation element. On remand, the jury must determine *whether the Mladiniches' discontinuance of its previous policy of hiring security personnel to patrol the parking lot constituted a breach of duty and, if so, whether this breach proximately caused or contributed to Lyle's injuries*.

Id. (emphasis added).

Thus, in reversing the trial court's grant of summary judgment for the defendant owners of the parking lot, the supreme court relied upon the tavern owners' previous employment of security guards to patrol their premises. In the case *sub judice*, Days Inn had never hired a security guard prior to the night of the affray between Jimmy Hynum and Curtis McNeil. Because Days Inn had never hired a security guard in the first place, there can be no issue of whether Days Inn's discontinuance of its employment of security guards was a proximate cause of Jimmy Hynum's injuries and Bettye Hynum's damages.

The specific factual difference in *Lyle* that the defendant-owners of the parking lot had discontinued their practice of employing security guards, which the supreme court held created an issue of proximate cause of Lyle's damages, remains the only basis for reconciling the appellate result in *Lyle* with the appellate result in the other four cases of *Kelly*, *Grisham*, *May*, and *Crain*. Nevertheless, we should endeavor to resolve the Hynums' issue of whether the trial court erred when it granted Days Inn's motion for summary judgment harmoniously with all five of these cases.

C. Application of the Foregoing Review to the Issue in this Case

1. Breach of Duty

All five cases are consistent with the proposition that a premises owner is not an insurer of the safety of business invitees who are on those premises. All five cases are consistent with the requirement that the injured claimant must "establish the existence of the conventional tort elements of duty, breach of duty, proximate causation, and injury." *See Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So.2d at 1355. The Hynums "must rebut the defendant's claim [that no genuine issue of material fact exists] by producing supportive evidence of significant and probative value . . . that the defendant breached the established standard of care and that such breach was the proximate cause of her injury." *Id.*

As did the plaintiffs in *Kelly*, *Lyle*, and *Crain*, the Hynums opposed Days Inn's motion for summary

judgment by submitting to the trial judge the affidavits of Chief Gerald Legge, Patricia McDaniel, Renee Hubbard, and Shirley Terry and the City of Batesville Police Radio Dispatch Log to establish that the log contained ninety-seven (97) entries concerning the Days Inn of Batesville, Mississippi, between February 21, 1990, and April 27, 1991. The radio dispatch log also contained at least fourteen different entries in the three-year period prior to the Hynum-McNeil confrontation for summoning the police to the Days Inn to assist the desk clerk. These incidents included an on-the premises robbery, an assault on a woman by a man, complaints of noise, and suspicious cars. The Hynums maintain that Days Inn must therefore be charged with the knowledge of all these prior incidents and from its knowledge of these incidents, it also must have further known that an atmosphere of violence existed on their premises.

This Court now compares the Hynums' evidence of other crimes and incidents at the Days Inn with the evidence of crimes and related incidents which the plaintiffs submitted in *Kelly, Lyle, and Crain*. In *Kelly*, the plaintiffs introduced into evidence the top portion of twenty eight police offense reports made between January 1, 1976, and September 24, 1979, when officers were dispatched to investigate various activities at McDonald's. *Id.* at 559. Of these twenty eight reports, nine dealt with theft or burglary from automobiles in the parking lot, seven concerned reports of thefts of purses, a wallet, a bicycle and a bicycle tire on McDonald's premises. *Id.* The other reports included 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. *Id.* For the same time interval, January 1, 1976, and September 24, 1979, the Clarksdale Police Department had recorded 5,435 offenses for the entirety of the city of Clarksdale. *Id.* In the face of the foregoing evidence of the twenty eight crimes and disturbances which had occurred at McDonald's parking lot, the Mississippi Supreme Court nevertheless found that "the tragedy [of Rodney Kelly's death] was not reasonably foreseeable." *Id.* at 460.

As we noted earlier in *Lyle v. Mladinich*, 585 So. 2d at 398, James Lyle also introduced an affidavit from the records custodian of the Biloxi Police Department to which an exhibit containing a compilation of criminal charges filed against persons from 1981 through 1989 in the Mladiniches' parking lot was attached. However, as we further noted, the opinion did not relate the number nor details of those criminal charges. Thus, we are unable to compare the evidence of other crimes in *Lyle* with the Hynums' evidence of other crimes in the case *sub judice*.

On page 12 of this opinion we recited the crime statistics introduced by the plaintiff to oppose the lodge's motion for summary judgment in *Crain*. The Mississippi Supreme Court commented on this evidence as follows:

Crain's assertion that his injury was foreseeable is without merit. As Moose Lodge indicates, there had been only two reports of crime on the premises within the year prior to the assault on Crain. In February, 1984, burglars entered through the roof of the Lodge, and stole $643.00 from game machines. Later that year, in October, a tire and C.B. radio were stolen from a vehicle parked at the Lodge. These incidents, in and of themselves, hardly seem adequate to put Moose Lodge on notice that a serious assault upon an invitee was foreseeable. As to the incidence of crime in the vicinity of the Moose Lodge, the record indicates that in fifty-five of the sixty months prior to the attack on Crain there were numerous commercial burglaries and reports of larceny in the vicinity of the Moose

Lodge, *but there were only eleven assaults, robberies and other violent crimes in that five year period*. Based on the scant evidence in the record it would be difficult to say the assault on Crain was foreseeable.

Crain, 641 So. 2d at 1192.

In its brief, Days Inn offers the following argument about the Hynums' evidence of other crimes and incidents at Days Inn:

This case at bar does not involve an allegation by [the Hynums] that Days Inn was located in a "high-crime" neighborhood. Rather, plaintiffs contend that the Days Inn allowed an "atmosphere of violence" to exist on the Days Inn business premises . . . . The Court's holding in *Crain* . . . is directly applicable to the instant case, because [the Hynums] have only produced evidence concerning two prior crimes (robbery and a man['s] beating a woman) that were allegedly committed on the Days Inn premises. These two incidents hardly seem adequate to put Days Inn on notice that a serious assault on one patron by another was foreseeable.

Whether a duty exists is a question of law; but whether that duty, once it has been established as a matter of law, has been breached is a question of fact. *See Lyle v. Mladinich*, 584 So.2d 397, 399 (Miss. 1991). Was the Hynums' evidence of the crimes and incidents at the Days Inn sufficient to create a material issue of fact as to whether Days Inn breached its duty to Jimmy Hynum to exercise reasonable care to protect him from reasonably foreseeable injury at the hands of Curtis McNeil because it had "actual or constructive knowledge that an atmosphere of violence exist[ed] in the [motel]"? *See Grisham*, 519 So. 2d at 416-17. Were this Court to hold that their evidence was sufficient to create a material issue of fact as to whether Days Inn had breached its duty to Jimmy Hynum, it would ignore the Mississippi Supreme Court's findings that similar evidence in *Kelly* and *Crain* was insufficient to create such a material issue of fact.

In our recitation of the standard of review for summary judgment, we established that the Hynums bore the burden of producing supportive evidence of significant and probative value to establish that there was a material issue of fact about whether Days Inn had breached its duty to Jimmy Hynum. The Hynums' production of such evidence would rebut Days Inn's claim that there were no genuine issue of material fact about Days Inn's breach of its duty to Hynum. The cases of *Kelly* and *Crain* are persuasive that the Hynums' evidence of both a robbery and an assault on Days Inn's premises was insufficient to establish that there was such a material issue about whether Days Inn had breached its duty to Jimmy Hynum. The evidence in *Kelly* and *Crain* of the crimes and related incidents was as significant and probative as was the evidence which the Hynums produced in the case *sub judice.* Yet the Mississippi Supreme Court in both *Kelly* and *Crain* affirmed the trial court's granting the defendant's motion for a directed verdict in *Kelly* and the trial court's grant of summary judgment for the defendant in *Crain*. Therefore, this Court affirms the trial court's grant of summary judgment for the benefit of Days Inn because it remains persuaded in the light of *Kelly* and *Crain* that the Hynums' evidence was insufficient to establish a material issue about whether Days Inn had "actual or constructive knowledge that an atmosphere of violence exist[ed] in the [motel]."

2. Breach of Duty

We would also affirm the trial court's grant of summary judgment for Days Inn because we also find

that the Hynums' evidence was insufficient to establish a material issue of fact about whether Days Inn's failure to hire an on-the-premises security guard was a proximate cause of Curtis McNeil's having shot Jimmy Hynum. As the Mississippi Supreme Court has reiterated endlessly, proximate cause is an essential element which a plaintiff must prove if he or she is to prevail against a defendant in a claim for damages which rests on the defendant's negligence.

For example, in *May v. V.F.W. Post No. 2539*, the plaintiffs argued that the VFW Post's failure to hire more security guards was a proximate cause of the injuries which David May sustained in a fight on the VFW Post premises. The Mississippi Supreme Court rejected the Mays' claim for the following reason:

[A]lthough May has insisted that the VFW was negligent in failing to provide adequate security, he failed to make a showing that an increased number of security guards would have prevented the attack.

The foregoing quotation aptly describes the Hynums' plight on this phase of their only issue. They offered no evidence, be it expert opinion, or otherwise, that Days Inn's employment of a security guard would have prevented Curtis McNeil's shooting Jimmy Hynum.

This Court thus has two bass on which to rest its affirmance of the trial court's grant of summary judgment to Days Inn. The first basis is the Hynums' failure to offer sufficient evidence to to create a material issue about whether Days Inn breached its duty to Jimmy Hynum, and the second basis is the Hynum's failure to offer any evidence that Days Inn's failure to hire a security guard was a proximate cause of Jimmy Hynum's injuries and Bettye Hynum's damages.

IV. Conclusion

Because it is a quite recent opinion of the Mississippi Supreme Court on this matter, *Crain* represents what this Court finds to be the most authoritative statement from our highest court. We earlier quoted from *Crain* a portion of that opinion in which the supreme court opined that the general foreseeability of the commission of crimes was insufficient to impose a duty on a premises owner toward a business invitee (See page 12). As the Mississippi Supreme Court explained in *Crain*:

This Court's decisions in *Grisham* and *Kelly*, while finding in favor of the premises owners, have imposed a duty to protect invitees from *foreseeable* attacks by third persons.

Crain, 641 So. 2d at 1192. Contrasted to *Crain*, *Lyle* becomes but an anomaly which this Court could comfortably apply only to a fact situation identical to that in *Lyle, i. e.*, the property owner's discontinuance of the employment of security personnel followed by an injury to a business invitee. For the Hynums to prevail against Days Inn's motion for summary judgment, they had the burden of establishing a material issue of fact that Days Inn had cause to anticipate the wrongful or negligent act of the unruly patron which arose from its actual or constructive knowledge that an atmosphere of violence existed in the motel. They additionally had the burden of establishing a material issue of fact about whether Days Inn's failure to provide on-site security personnel was a proximate cause of Jimmy and Bettye Hynum's injuries and damages. Because this Court has concluded that they failed on both matters, it affirms the trial court's summary judgment for Days Inn.

THE JUDGMENT OF THE PANOLA COUNTY CIRCUIT COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

THOMAS, P.J., HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR. HERRING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY BRIDGES, C.J., DIAZ AND PAYNE, JJ. MCMILLIN, P.J., NOT PARTICIPATING.

6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00573 COA

JIMMY HYNUM AND BETTYE HYNUM APPELLANTS

v.

INDU VAGHELA, MIKE VAGHELA, AND

JIJI PARTNERSHIPS D/B/A DAYS INN OF

BATESVILLE APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

HERRING, J., DISSENTING:

It is with deference to the author of the majority opinion that I must dissent. I am unable to read our law on summary judgment in a manner that leads to a dismissal of the case *sub judice.*

As the Mississippi Supreme Court has often stated, summary judgment is disfavored and whenever possible a case should be tried on its merits. In *Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc.,* 519 So. 2d 413 (Miss. 1988), a case cited by the majority, the Mississippi Supreme Court stated that "[s]ummary judgments should be granted with great caution . . . . When there is doubt as to whether a genuine issue of material fact exists, the non-moving party should be given the benefit of that doubt, and the motion should be denied." *Grisham,* 519 So. 2d at 415. *See also Rolison v. City of Meridian,* 691 So. 2d 440 (Miss. 1997) which states that "[w]here doubt exists as to whether there is a genuine issue of material fact, the trial judge should err on the side of denying the motion and permitting a full trial on the merits." *Rolison,* 691 So. 2d at 443.

The comment to Rule 56 of the Mississippi Rules of Civil Procedure is also helpful on this issue and states in part:

A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. Given this function, the court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists, rather than for the purposes of resolving that issue.

Appellate courts review summary judgment appeals *de novo,* and it is the prerogative of this court to determine if there is a genuine issue of material fact in regard to each element of a negligence claim. "The elements of proof required to support a claim for damages for negligence are a duty, a breach of that duty, damages, and proximate cause." *Rolison,* 691 So. 2d at 444 (quoting *Grisham*, 519 So. 2d at 416; *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So. 2d 1186, 1189 (Miss. 1994)). Therefore, to avoid summary judgment, the Appellants must put forth some evidence supporting each of the four factors necessary to establish a negligence claim. *Lyle v. Mladinich,* 584 So. 2d 397 (Miss. 1991). Whether or not the Appellees owed a duty to the Appellants is a question of law. *Mladinich,* 584 So. 2d at 400. The Mississippi Supreme Court has held that a proprietor of a business owes his patrons and invitees the "duty to exercise reasonable care to protect the invitee from reasonably foreseeable injury at the hands of other patrons." *Id.* at 399. Thus, our law establishes the first element of negligence.

Next, the Hynums must present evidence that Days Inn breached its duty to the Appellants. Our Mississippi Supreme Court has stated that whether the defendants have "breached their duty is an issue for the fact finder to resolve." *Id.* at 400. In the case *sub judice,* the Hynums put forth the following evidence to indicate a breach of the appropriate duty: (1) the hotel clerk was aware that the Hynums were having trouble with their neighbor; (2) the hotel clerk falsely stated that he did not know the whereabouts of the motel security guard, when in fact no such guard existed; (3) the hotel clerk called the rowdy neighbors and informed them that he had received a complaint from Mr. Hynum and that the police would be contacted if they did not quiet down. In this regard, the hotel clerk should have known that Mr. Hynum would come in contact with the rowdy neighbors on his way back to his room, and it was reasonably foreseeable that this confrontation could lead to dangerous action.

The third element of proof necessary to establish a negligence claim is proximate cause. In the group of cases cited by the majority, this is the central element which led to findings in favor of the defendants. In order to survive the motion for summary judgment, the Hynums must therefore present some evidence which establishes that the acts or omissions of the defendants were a proximate contributing cause of the injury suffered by Mr. Hynum. As our supreme court has stated, "[p]roximate cause arises when the omission of a duty contributes to cause an injury." *Crain,* 641 So. 2d at 1191. The evidence in the case *sub judice* shows that Mr. Hynum first attempted to handle the disturbance himself. He then turned to the motel manager, who informed him that a security guard was present and that he would call the rowdy neighbors. By making the call, the manager only made matters worse and never took any direct action to prevent the foreseeable escalation of this conflict. The escalation of the disturbance was entirely predictable, and as a result, Mr. Hynum was shot in the arm and is lucky to be alive. It is arguable whether the actions of Mr. Hynum, who was faced with an

ugly confrontation while his former wife and small grandchild were present, precipitated the confrontation which led to his injury. That, however, is a jury question in my opinion.

The final element of proof necessary to establish a negligence claim concerns damages. This element is easily satisfied, at least as to Mr. Hynum, since there is ample proof that the Mr. Hynum was injured as a result of the occurrence.

Our law requires the trial court to view the evidence in the light most favorable to the non-moving party when considering a motion for summary judgment. *Crain,* 640 So. 2d at 1188. Furthermore, the moving party must show a complete failure of proof on an essential element of the claim before a summary judgment is appropriate. *Id.* Under this standard, I would hold that the Hynums did in fact present at least the minimum amount of evidence necessary to avoid the "complete failure of proof" standard.

In *Crain*, our supreme court voiced concern that strict liability should not be imposed in cases such as this upon the proprietor of a business. *Id.* at 1188 ("even though the owner of the premises has this duty of reasonable care he is not an insurer of his guests' or invitees' safety."). I share this concern. However, it is well settled that the proprietor has a duty to exercise reasonable care to protect a business invitee from reasonably foreseeable injury at the hands of other patrons. *Mladinich,* 584 So. 2d at 399. If this duty is to mean anything, it seems to me that it is especially applicable where small children are at risk. Therefore, I would reverse and remand this case for a full trial on the merits as to Mr. Hynum's claim and for further consideration as to whether Ms. Hynum sustained recoverable injury.

BRIDGES, C.J., DIAZ AND PAYNE, JJ., JOIN THIS SEPARATE WRITTEN OPINION.