

**IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

CLAUDE CROGIER

PLAINTIFF

vs.

CIVIL ACTION NO. 251-13-847CIV

HERITAGE PROPERTIES, INC.

DEFENDANT

**HERITAGE PROPERTIES, INC.'S MOTION FOR JUDGMENT NOTWITHSTANDING
THE VERDICT OR, IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL**

Heritage Properties, Inc. ("Heritage"), pursuant to Miss. R. Civ. Pro. 50(b) and 59(a), files this its Motion for Judgment Notwithstanding the Verdict or, in the alternative, Motion for a New Trial. In support of this Motion, Heritage will show unto the Court the following:

I. PROCEDURAL HISTORY AND FACTS ESTABLISHED AT TRIAL

During the relevant period of time, The Crossings Apartments ("Crossings") located at 5840 and 5880 Ridgewood Road, Jackson, Mississippi 39211, had 432 units, 1200 to 1500 residents and was located on 20.5 acres. During the daytime hours (6:00 a.m. to 6:00 p.m.), the entrance gates to the perimeter fencing around The Crossings were left open and the premises was patrolled by off duty police officers who served as courtesy officers. During nighttime hours (6:00 p.m. to 6:00 a.m.), the entrance gates were closed with an armed security guard at the gate and another at times patrolling the premises.

On May 2, 2012, Plaintiff Claude Crogier resided at The Crossings. At approximately 11:00 a.m. on the morning of May 2, 2012, Crogier opened his apartment door and three men entered into his apartment. Three Jackson Police reports, two dated May 2, 2012 and one dated May 7, 2012 indicated that Mr. Crogier knew one of the assailants and let him in his apartment (Exhibit P-1). While inside Crogier's apartment, the three men assaulted and robbed Crogier.

When police arrived to Crogier's apartment, it smelled like marijuana and there was drug paraphernalia in plain sight. Crogier was arrested and charged with being a convicted felon in possession of a firearm.¹

Crogier commenced this action alleging that due to an atmosphere of violence that existed at The Crossings, his assault and robbery during the day on May 2, 2012 was reasonably foreseeable, and thus Heritage was negligent for failing to have the same security measures in place during daytime hours that it had on the premises during nighttime hours. The uncontroverted evidence offered during trial established that in the five years preceding Crogier's assault and robbery, there were only five violent crimes of any nature² committed at The Crossings during daytime hours. Specifically, the evidence established that in the five years prior to the incident, there were no murders, no manslaughters, no rapes, no aggravated assaults and only five robberies during daytime hours at the 432 unit complex housing between 1200 and 1500 residents. Over Heritage's objection, the trial court erroneously permitted Crogier to offer evidence of non-violent crimes that occurred on the premises during the daytime hours, as well as evidence of all crimes (violent and non-violent) that occurred on the premises during nighttime hours in an attempt to meet Plaintiff's burden to establish that an atmosphere of violence existed on the premises during daytime hours.

Following a four-day trial, the jury returned a verdict for Crogier, awarding \$108,000 for medical damages and \$3,000,000 for pain and suffering (non-economic damages). On February 1, 2017, the trial court entered a Final Judgment [Docket No. 130] reducing the jury award for non-economic damages, pursuant to Miss. Code § 11-1-60, from \$3,000,000 to \$1,000,000.

¹ The Court granted plaintiff's motion to exclude any evidence of Mr. Crogier's arrest and previous felony conviction.

² Under the FBI's Uniform Crime Reporting Program, which Crogier's expert adhered to as chief of police in Gallatin, Tennessee, the FBI classifies "violent crimes" as murder and non-negligent manslaughter, forcible rape, robbery and aggravated assault.

II. ARUMENT AND AUTHORITY

A. Heritage is entitled to entry of Judgment Notwithstanding the Verdict in its favor and against Plaintiff.

The evidence offered at trial was legally insufficient to establish that an atmosphere of violence existed on the premises during daytime hours, thus Crogier's assault and robbery were not reasonably foreseeable and judgment as a matter of law should be entered in favor of Heritage.

Mississippi Rule of Civil Procedure 50(b) provides that a party may file a motion to have a judgment set aside within ten days after entry of the judgment. A motion for judgment notwithstanding the verdict requires the trial court to test the legal sufficiency, not weight, of the evidence supporting the verdict. Wilson v. General Motors Acceptance Corp., 883 So.2d 56, 63 (Miss. 2004) (citations omitted). “[W]hen the plaintiff fails to establish a prima facie case showing the elements of the cause of action, JNOV is proper.” Id. (citations omitted). “In making its evaluation, the trial court must consider not only the evidence offered by the non-moving party, but any uncontroverted evidence offered by the moving party. If the facts so construed point so overwhelmingly in favor of the appellant [movant] that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render.” Bullock Brothers Trucking Co. v. Carley, 930 So.2d 1259, 1261 (Miss. Ct. App. 2005) (citations omitted). A motion for JNOV “asks the Court to hold, as a matter of law, that the verdict may not stand.” Jesco, Inc. v. Whitehead, 451 So.2d 706, 713 (Miss. 1984) (Robertson, J., specially concurring).

In Carley, the Mississippi Court of Appeals held that the trial court committed reversible error in denying defendant's motion for JNOV due to plaintiff's failure to offer legally sufficient evidence to establish the prima facie element of supplying the chattel to a third party in order to establish a claim for negligent entrustment. Id. at 1263. Similarly, in First United Bank of Poplarville v. Reid, 612 So.2d 1131, (Miss. 1992), the Mississippi Supreme Court held that the

trial court committed reversible error in denying defendant's JNOV due to "insufficient evidence in the record to establish directly or by reasonable inference that [defendant] failed to fulfill any duty assumed by it or on behalf of [plaintiffs] with respect to the procurement" of insurance for the benefit of plaintiffs' decedent. Id. at 1139. Finally, in Berry v. Patten, 51 So.3d 934 (Miss. 2011), the Mississippi Supreme Court held that the trial court committed reversible error in denying defendant's motion for JNOV due to plaintiff's failure to present legally sufficient evidence to establish the standard of care owed by medical professionals and a breach of that standard of care, prima facie elements of plaintiff's claim. Id. at 945.

As was the case in Carley, Reid and Berry, this Court is faced with a similar circumstance where Plaintiff has failed to offer legally sufficient evidence to establish the prima facie element of reasonable foreseeability in support his negligence/premises liability claim against Heritage.

Mississippi law is clear:

Although not the insurer of an invitee's safety, a premises owner does have the duty to keep the premises reasonably safe, and when not reasonably safe, to warn only where there is hidden danger or peril that is not in plain and open view. This duty extends to protecting tenants from the foreseeable criminal acts of others

. . . .

[T]he criminal acts of a third party may be deemed reasonably foreseeable if the premises owner had cause to anticipate such acts. Cause to anticipate may be imputed to the premises owner by virtue of his (1) actual or constructive knowledge of the third party's violent nature, or (2) actual or constructive knowledge that an atmosphere of violence existed on the premises. The overall pattern of criminal activity prior to the event in question that occurred in the general vicinity of the defendant's business premises, as well as the frequency of criminal activity on the premises are both relevant factors in determining whether an atmosphere of violence exists on the premises.

Davis v. Christian Brotherhood Homes of Jackson, Mississippi, Inc., 957 So.2d 390, 400-401 (Miss. Ct. App. 2007) (internal quotations and citations omitted).

Plaintiff failed to offer any evidence at trial to establish that Heritage had either actual or constructive knowledge of the violent nature of the three men that assaulted and robbed him in his apartment. Thus, in order to establish the prima facie element of foreseeability, Plaintiff must offer legally sufficient evidence to establish that an atmosphere of violence existed at The Crossings during daytime hours. The uncontroverted evidence offered during trial established that in the **five years** preceding Plaintiff's assault and robbery, there were only **five violent crimes of any nature committed at The Crossings during daytime hours**. Specifically, the evidence established that in the five years prior to the incident, there were no murders, no manslaughters, no rapes, no aggravated assaults and only five robberies during daytime hours at the 432 unit complex housing between 1200 and 1500 residents. Heritage submits as a matter of well-established Mississippi law evidence of five violent crimes in the five years prior to Plaintiffs' assault and robbery is insufficient as a matter of law to put Heritage on notice of an atmosphere of violence at The Crossings during daytime hours.

The Supreme Court has addressed a sufficiency of the evidence challenge in an analogous case and held that **four** prior instances of similar criminal acts over the **three years preceding the criminal act at issue** was insufficient as a matter of law to put the premises owner on notice of an atmosphere of violence. In Kroger Co. v. Knox, plaintiff was approached in the parking lot of a grocery store by a man that knocked her to the ground, punched her several times and stole her purse. Plaintiff's experts testified that Kroger's security measures were inadequate because an armed off duty police officer should have been placed in the parking lot. Id. at 442-43. The jury returned a verdict for plaintiff, and the trial court denied Kroger's motion for JNOV. Id. at 442. On appeal, the Mississippi Supreme Court reversed and held that

there was insufficient evidence in the record to establish that an atmosphere of violence existed in Kroger's parking lot:

In an attempt to establish Kroger's knowledge of an atmosphere of violence in its parking lot, [plaintiff] presented evidence of four Kroger incident reports involving three purse-snatchings and one stolen purse, over the course of three years. . . . We find as a matter of law that—in the context of Kroger's more than three million customer visits over the course of three years—**four incidents of criminal activity are wholly insufficient to establish an atmosphere of violence on Kroger's parking lot.** And imposing liability without notice of an atmosphere of violence would be nothing short of strict liability for injuries caused by criminal activity of third parties. It is well settled that a property owner is not an insurer of an invitee's safety, but owes only a duty to exercise reasonable care to protect the invitee from reasonably foreseeable injuries at the hands of others.

Id. at 444 (emphasis added). If as a matter of law four instances of purse snatching over the course of three years was legally insufficient to put Kroger on notice of an atmosphere of violence, plainly notice of five violent crimes committed during the daytime hours over the course of five years likewise is legally insufficient to put Heritage on notice of an atmosphere of violence at The Crossings during daytime hours. Imposing liability on Heritage under these circumstances is akin to adopting a strict liability standard, which the Mississippi Supreme Court has expressly rejected.

Similarly, in Stevens v. Triplett, 933 So.2d 983 (Miss. Ct. App. 2005), the Mississippi Court of Appeals affirmed the trial court's grant of summary judgment for a premises owner holding that the premises owner had no notice that an atmosphere of violence existed on his property. The Court of Appeals held that the Vicksburg Police Department report reflecting "[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 [defendant] breached the duty owed to [plaintiff]." Id. at 986 (emphasis added). The Court of Appeals noted that these prior incidents were insufficient to put the premises owner on notice "especially considering that **the incident in**

question occurred in the middle of the afternoon.” *Id.* (emphasis added); see also *Magnusen v. Pine Belt Investment Corp.*, 963 So.2d 1279, 1283-84 (Miss. Ct. App. 2007) (affirming summary judgment for premises owner and holding that evidence of sixteen police reports, only one of which involved a violent crime, was insufficient as a matter of law to establish that “Burger King had actual or constructive notice that an atmosphere of violence existed on its property”); *Crain v. Cleveland Lodge 1532*, 641 So.2d 1186, 1192 (Miss. 1994) (affirming summary judgment for the premises owner and holding that a serious assault upon the plaintiff, a business invitee, was not foreseeable based on evidence of two reports of crime on the premises in the prior year and “eleven assaults, robberies, and other violent crimes in [the] five year period” prior to the assault in the vicinity of the premises).

In short, because Plaintiff failed to offer legally sufficient evidence to establish the prima facie element of reasonable foreseeability, Heritage is entitled to entry of a judgment notwithstanding the verdict in its favor on Plaintiff’s claims. Accordingly, Heritage respectfully requests that the Court set aside the Final Judgment and enter judgment as a matter of law in favor of Heritage and against Plaintiff.

B. In the alternative, the Court should set aside the Final Judgment and grant a new trial.

1. The erroneous and highly prejudicial admission of evidence of violent and non-violent crimes at The Crossings during nighttime hours necessitates the granting of a new trial.

Mississippi Rule of Civil Procedure 59(a) provides: “A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of Mississippi. . . .” Further, the Rule provides that such a motion shall be filed no later than ten days after entry of the final judgment. *Id.* at 59(b). “A motion for a new trial is a

challenge to the weight of the evidence.” Alpha Gulf Coast, Inc. v. Jackson, 801 So.2d 709, 724 (Miss. 2001). “A greater quantum of evidence favoring the party against whom the motion is made is necessary for that party to withstand a motion for a new trial as distinguished from a motion for JNOV.” Jesco, 451 So.2d at 714. More than 175 years ago, Mississippi’s highest court recognized that a new trial may be granted based upon the admission during trial of inadmissible evidence that “may have had great weight with the jury.” Edwards v. Williams, 3 Miss. 846, 850 (Miss. 1838).

Prior to trial, Heritage filed a motion in limine to exclude evidence of all crimes that occurred at The Crossings during nighttime hours as well as evidence of any non-violent crimes that occurred at The Crossings at any time of the day. See Docket No. 105. In this Motion, Heritage argued that evidence of any crimes committed during nighttime hours is not relevant to the question of whether an atmosphere of violence existed on the property during daytime hours, and thus evidence of nighttime crimes is being introduced by Plaintiff solely to prejudice Heritage. Id. at pg. 3. Additionally, evidence of non-violent crimes committed at any time is not relevant as to whether an atmosphere of violence was present during the day. The Court denied this motion. Heritage renewed its objection at trial, but the Court again denied it and permitted Plaintiff’s expert to testify regarding crimes of any nature over a five year period of time, including both violent and non-violent crimes at The Crossings during daytime and nighttime hours. As Heritage previously has argued to this Court, such evidence was wholly irrelevant to any issue relevant to Plaintiff’s claim that Heritage was on notice of an atmosphere of violence at The Crossings during daytime hours, and that Heritage was negligent in failing to provide the same level of security during daytime hours as is provided during nighttime hours. The admission of this plainly irrelevant evidence was inflammatory, prejudicial to Heritage and

almost certainly resulted in the grossly excessive verdict rendered in this case. Thus, Heritage respectfully requests that the Court exercise its discretion under Rule 59(a) to grant a new trial based on the erroneous admission of this highly prejudicial evidence.

2. The Final Judgment should be vacated and a new trial granted because the amount of the verdict is grossly excessive.

Mississippi law is clear: “Should the trial court determine that a verdict is, upon the evidence, either grossly excessive or inadequate, the court has the authority to set it aside and grant a new trial. When a new trial is granted upon grounds that a verdict is excessive, the trial court may suggest a remittitur as an alternative to a new trial.” Cade v. Walker, 717 So.2d 403, 407 (Miss. Ct. App. 2000) (citations omitted). When reviewing the reasonableness of a jury verdict, the court should consider whether the award is “so excessive as to strike mankind at first blush, as being beyond all measure, unreasonable, and outrageous, and . . . to have been actuated by passion, partiality, prejudice or corruption. In short, the damages must be flagrantly outrageous and extravagant.” Jackson Public School Dist. v. Smith, 875 So.2d 1100, 1104 (Miss. Ct. App. 2004) (quoting U.S. Fidelity & Guar. Co. v. Estate of Francis, 825 So.2d 38, 47 (Miss. 2002)). When evaluating whether passion or prejudice on the part of the jury resulted in an excess verdict, the reviewing court should compare the amount of actual damages incurred by the plaintiff to the total amount of the jury verdict. See, e.g., Wells Fargo Armored Serv. Corp. v. Turner, 543 So.2d 154 (Miss. 1989) (quoting Biloxi Elec. Co., Inc. v. Thorn, 264 So.2d 404, 406 (Miss. 1972)). In its analysis, the reviewing court should evaluate whether there is substantial, credible evidence to support the jury verdict. City of Jackson v. Spann, 4 So.3d 1029 (Miss. 2009).

The evidence offered at trial established that Crogier was examined at University of Mississippi Medical Center the day of the assault and robbery for an abrasion allegedly sustained

as a result of a bullet grazing his leg. The examination lasted less than fifteen minutes, no medication was administered or prescribed, and the cost for the examination was \$196.

Further, the evidence offered at trial established that Crogier received no additional medical treatment of any kind relating to or as a result of this abrasion. Fifteen months after the assault and robbery and six weeks before the Complaint was filed, Crogier began seeing Dr. Gupta for psychological treatment allegedly relating to the assault and robbery. Dr. Gupta's bill for therapy rendered over a 3.5 year period of time totaled \$19,960.06 (D-39). However, \$3,526.06 of his bill was for finance charges, \$372 related to medical records requests and \$2,000 was for Dr. Gupta's preparation of a report to Plaintiff counsel. Therefore, only \$14,062 of his bill related to therapy provided by Dr. Gupta. Moreover, Dr. Gupta was only paid \$372 of his bill from any source and that was for his office's production of medical records. Disregarding this uncontroverted evidence, within the jury's \$108,000 award for medical damages,³ the jury included \$19,000 for therapy by Dr. Gupta. Thus, construing the damages evidence at trial in the light most favorable to Crogier, he incurred monetary damages totaling only \$14,062 of which he paid only \$372 over the nearly five years since the assault and robbery. The jury returned a verdict of \$3,000,000 for pain and suffering, **a multiple of more than 213 times the amount of actual damages incurred and more than 8,064 times the amount of actual damages paid by any source.** Undersigned counsel has been unable to find any reported decision of any appellate court in Mississippi affirming a verdict where total damages awarded by the jury is more than 213 times actual damages. Plainly, when the amount of actual monetary damages incurred by Crogier is compared to the amount of the jury verdict, it is indisputable that the jury's verdict is beyond all measure, unreasonable, and outrageous, and the result of passion,

³ The Plaintiff sought \$75,000 for Dr. Gupta's three year future treatment plan, \$14,000 for future medications and \$19,000 for incurred medical bills.

partiality, prejudice or corruption. Thus, for this additional reason the Final Judgment should be set aside and a new trial ordered. Alternatively, the Court should exercise its discretion to order a remittitur utilizing a single-digit multiplier of actual damages to calculate noneconomic damages.⁴

III. CONCLUSION

Heritage respectfully submits that the evidence offered at trial was legally insufficient to establish that an atmosphere of violence existed at The Crossings during daytime hours. Thus, because no atmosphere of violence existed, Crogier's assault and robbery was not reasonably foreseeable as a matter of law, and the Final Judgment should be vacated and judgment as a matter of law should be entered in favor of Heritage. In the alternative, Heritage respectfully requests that the Court grant a new trial due to the admission of irrelevant and highly prejudicial evidence at trial, and/or because the amount of the verdict is unsupported by the evidence and is grossly excessive.

Dated: February 9, 2017.

Respectfully submitted,

HERITAGE PROPERTIES, INC.

By: /s/ John E. Wade, Jr.
One of Its Attorneys

⁴ As the Mississippi Supreme Court has recognized: "A remittitur is appropriate where either (1) the jury or trier of fact was influenced by bias, prejudice, or passion, or (2) the damages were contrary to the overwhelming weight of the evidence." Entergy Mississippi, Inc. v. Bolden, 854 So.2d 1051, 1058 (Miss. 2003) (citations omitted).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the ECF system, which sent notification of such filing to the following:

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Dated: February 9, 2017.

/s/ John E. Wade, Jr.

John E. Wade, Jr.