IN THE COURT OF APPEALS
STATE OF GEORGIA

A21A1341

PAPPAS RESTAURANT, INC.

Defendant/Appellant,

v.

CYNTHIA WELCH, INDIVIDUAL, AND AS ADMINISTRATOR OF THE ESTATE OF ANTHONY L. WELCH, DECEASED,

Plaintiff/Appellee.

AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

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INTRODUCTION

These cases[1] present the Court with the opportunity to reaffirm Georgia courts' commitment to well-established principles regarding the scope of liability in premises liability cases involving third-party criminal conduct. The first concerns a property owner's obligation to take reasonable efforts to protect invitees against third-party criminal conduct **only** when such conduct is foreseeable. Pertinent decisions make it clear that the mere possibility that such events may occur cannot sustain a premises liability claim; instead, courts require **probability**, a standard that Appellee Cynthia Welch ("Appellee") cannot meet here given the constraints that decisive precedent have placed on the use of evidence of other acts. The trial court here erred in not sufficiently or properly assessing foreseeability. The Georgia Defense Lawyers Association ("GDLA") writes with concern that if foreseeability is found here merely on the basis of prior property crimes in Appellant Pappas Restaurants, Inc. ("Pappas") parking lot and in the surrounding county (without reference to spatial or temporal proximity to Pappas' property and the events underlying this incident) without any evidence of incidents resulting in personal injury to customers in the parking lot, then such a decision would engender unpredictability and serve as an anomaly upon which any defendant

[1] GDLA writes in support of Appellant Pappas in Case A21A1341 and Appellant Tactical in Case A21A1342. GDLA refers to both matters collectively as "these cases."

owner/occupier could be found to have anticipated any heinous attack, no matter how out of character for a particular location.

The second principle concerns proximate cause. It is improper for a plaintiff to establish proximate cause through simple speculation that simply **doing more** would have prevented an incident from occurring. As applied to third-party criminal conduct cases, plaintiffs may not meet their burden on summary judgment by offering conjecture that an attack may have been prevented if there was more security. Instead, plaintiffs must meet this showing with respect to the facts of their particular cases. The trial court erred here, too, in not properly scrutinizing Appellee's argument for speculation.

The third principle concerns the scope of liability of defendants providing security services at locations where these incidents may occur. It is axiomatic that only the parties to contracts and their intended third-party beneficiaries have standing to sue on the agreements for the rendering for such services. Appellee's claims here against Appellant Tactical Security Group, LLC ("Tactical," and collectively with Pappas, "Appellants") is for breach of duties that arise entirely out of their contract, and she can point to no independent duty that justifies recovery against Tactical on other grounds. Again, GDLA is concerned that Appellee's arguments would serve to erode important precedent.

If applied across the state, the trial court's determinations would drastically expand the scope of liability for defendants in cases of third-party criminal conduct, improperly shift primary responsibility away from the actual perpetrators to unsuspecting business owners and security companies, and turn these classes of defendants into insurers of the safety of all on their property. Georgia law does not countenance these outcomes. The Court properly took the first step in rectifying these tendencies by granting the petition for interlocutory review. It should now reverse.

I. STATEMENT OF INTEREST

GDLA is an association of nearly 1,000 Georgia lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, primarily for defendants in civil lawsuits. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise promoting improvements in the administration of justice. Members of the GDLA commonly represent defendants in cases of third-party criminal conduct across the state and have an interest in seeing that the law is applied properly and fairly in these cases. Accordingly, GDLA writes this brief in support of Appellants here.

II. BACKGROUND

These negligent security cases arise out of an October 7, 2016 armed robbery turned murder in the parking lot owned by Pappas, which had a contract with Tactical to provide security for the same. Pappas hired Tactical to provide security for two of its restaurants, their parking lots, and another lot ("the lower lot") connected to the properties in 2009 ("the Windy Hill location"). The agreement between Pappas and Tactical does not identify any third-party beneficiaries to the agreement and does not otherwise purport to impart a benefit on anyone other than the parties to the contract.

The trial court set out the pertinent facts as follows:

> Plaintiff and her husband went to dinner at Pappasito's restaurant to celebrate Plaintiff's birthday. As they were leaving, two criminals robbed and shot Plaintiff and her husband in the restaurant parking lot. Mr. Welch tragically died as a result, and this suit for premises liability and wrongful death followed. . . .
>
> Construed in favor of Plaintiffs/non-movants, the record shows that on the night in question, Plaintiffs went to Pappasito's for dinner. Three Tactical employees were initially on duty, wearing visible "security" clothing. One was patrolling in a marked security vehicle.
>
> About an hour after Plaintiffs' arrival, several things happened roughly at once. Plaintiffs left the restaurant and walked thorough the parking lot toward their car; one of the three guards clocked out and left; and the two assailants drove into the parking lot and parked. Though somewhat difficult to tell, one of the assailants got in and out of the assailants' vehicle at least once, and they were on the premises for what appears to be at least five minutes before the attack.
>
> About sixty seconds before the attack, Tactical's marked security vehicle, lights flashing, passed through the spot where the attack would occur and proceeded down into a lower parking lot with no view of the site of the attack. Tactical's remaining security agent

> was parked in the emergency lane in front of the restaurant, as he had been all night, with no view of where Plaintiffs were attacked.
>
> As Plaintiffs walked through the spot in question about a minute after the security vehicle had passed, one assailant accosted Plaintiffs with a gun and said something like "give it to me." He reached out to grab Mrs. Welch's necklace and she threw her arms up on instinct. The assailant responded by shooting Plaintiffs and then both attackers fled the scene. Tactical employees immediately converged on Plaintiffs and called the police, who later apprehended the criminals. A Cobb county jury convicted both assailants of murder.

Order Denying Defendants' Motions for Summary Judgment ("Order") at 1-2. There appears to be no evidence that the act was anything other than a singularly heinous crime of opportunity. *See* Case A21A1341, Appellee's Brief ("Appellee's Brief") at 15 (citing no record evidence for the assertion that the Welches were not randomly targeted).

Particularly notable here are incidents pointed to by Appellee as purportedly establishing reasonable foreseeability of the incident underlying these cases. Appellee states that in May 2014, Cobb County Police held a meeting with Pappas' Security Director Heenan to discuss the crime at the Windy Hill location. At the meeting, Cobb County Police presented Pappas with a list of incidents.

Appellee asserts that after this meeting, numerous incidents occurred in and around the Pappas parking lots, "many of which mirror the facts of that night [when this incident occurred]." Appellee's Brief at 7. Of those focused on by Appellee are a February 3, 2015 instance of a man sitting in his car outside of the

restaurants, a March 17, 2015 theft of a gun from a customer's truck, a May 20, 2015 theft of a gun from a customer's truck, a July 7, 2015 incident involving a paranoid gang member on drugs, a July 31, 2015 report of six entering-auto thefts in which two more guns were stolen, a November 9, 2015 report of car thefts involving smashed vehicle windows and additional thefts of guns, a December 22, 2015 case of a license plate being stolen off of a Tactical security vehicle, a May 14, 2016 case of another theft of a gun from a vehicle and a marijuana sale in the parking lot. Appellee's Brief at 7-8. Additionally, Pappas' restaurants were burglarized in 2016. *Id.* at 8. Finally, Appellee also focuses on emails between Pappas's security manager and Tactical's co-owner/operations manager in September of 2015. Therein, Tactical emailed Pappas to alert it of multiple break-ins in surrounding businesses involving armed criminals. Appellee also cites concerns in the weeks before the accident of "a professional crew" that was breaking into cars in the areas around the Windy Hill site. Appellee, however, cites no record evidence that the individuals performing any of these break ins were involved at all in the incident here. *See* Appellee's Brief at 9-10. Appellee likewise points to no incidents involving murders, shootings, weapon discharges, or significant injuries in Pappas parking lot.

Both Pappas and Tactical moved for summary judgment in this case. Pappas moved on the ground of lack of foreseeability and Appellee's inability to show

proximate cause, while Tactical pertinently moved for the same on the grounds of lack of standing to sue on its agreement with Pappas and on proximate cause and foreseeability grounds as well.

The trial court denied both motions for summary judgment. Three of its reasons for doing so are important for purposes of this brief. First and with reference to the incidents discussed above, the trial court determined that "[p]rior crime was of such a nature and frequency as to allow a jury to determine whether Defendants should have foreseen this particular incident, and whether they had enacted reasonable safety measures." Order at 3. Second, the trial court did not address the proximate cause argument directly, but appeared to credit Plaintiff's expert's opinion that the incident was more likely preventable with more guards, more patrols per hour, and other measures. *Id.* Third and with respect to Tactical's motion, the trial court found that Tactical could be held liable as having voluntarily undertaken the duty to keep Pappas's parking lot secure and that liability could attach to this undertaking. *Id.* at 3.

These core components of the trial court's order are inconsistent with binding precedent, are erroneous, and require reversal for the reasons explained in Appellants' briefs and those discussed here below.

III. ANALYSIS

GDLA first addresses the issues of foreseeability and proximate cause focused on in Pappas' briefs[2] before turning to issues of scope of liability unique to Tactical's role as a security company. The trial court's decisions to deny Appellants' motions for summary judgment in its order were erroneous, and both decisions should be reversed. GDLA addresses each issue in turn.

A. The trial court's foreseeability analysis was improper.

First, the trial court did not apply a proper foreseeability analysis. These cases fit comfortably within the traditional paradigm of a negligent security case arising out of an injury caused by the criminal act of a third party.

> Where an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe.

O.C.G.A. § 51-3-1.

As in any other premises liability case, relative knowledge is the primary concern in determining the scope of the duty, if any, owed by a proprietor or landlord to an invitee:

[2] As pointed out by Tactical, proper resolution of these arguments would have necessitated that summary judgment be granted in its favor as well.

> The mere ownership of land or buildings does not render one liable for injuries sustained by persons who have entered thereon or therein; the owner is not an insurer of such persons, even when he has invited them to enter. Nor is there any presumption of negligence on the part of an owner or occupier merely upon a showing that an injury has been sustained by one while rightfully upon the premises. **The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner or occupant and not known to the person injured that a recovery is permitted.**

Emory Univ., Inc. v. Duncan, 182 Ga. App. 326, 328 (1987) (emphasis added).

But superior knowledge of a potential hazard entails foresight into the potential for harm, and this foreseeability is the primary concern of premises liability cases based on third-party criminal conduct. It is a truism that "[a] property owner is not an insurer of an invitee's safety, and an intervening criminal act by a third party generally insulates a proprietor from liability unless such criminal act was reasonably foreseeable." *Retail Prop. Tr. v. McPhaul*, 359 Ga. App. 345, 347 (2021) (quotation omitted). "If the proprietor has reason to anticipate a criminal act, he or she then has a duty to exercise ordinary care to guard against injury from dangerous characters." *Wojcik v. Windmill Lake Apartments, Inc.*, 284 Ga. App. 766, 768 (2007) (quotation omitted). "[A] proprietor's duty to exercise ordinary care to protect invitees against third-party criminal attacks extends only to foreseeable criminal acts, that is, acts which the proprietor had reason to anticipate." *Vega v. La Movida, Inc.*, 294 Ga. App. 311,

312 (2008) (quotation omitted). Thus, "an owner is not bound to anticipate or foresee and provide against that which is unusual or that which is only remotely and slightly probable. Indeed, without foreseeability that a criminal act by a third party will occur, the proprietor has no duty to exercise ordinary care to prevent the act." *Retail Prop. Tr.*, 359 Ga. App. at 348 (quotation and citation omitted).

The foreseeability analysis typically focuses on certain prior criminal acts as giving landowners reason to anticipate third-party criminal acts. Specifically, prior criminal acts may give a landowner reason to anticipate other third-party criminal activity, but only if those prior acts are substantially similar:

> Thus the incident causing injury to the plaintiff "must be substantially similar in type to the previous criminal activities occurring on or near the premises so that a reasonable person would take ordinary precautions to protect his or her customers or tenants against the risk posed by that type of activity. . . ."

Wojcik, 284 Ga. App. at 768 (quoting *Sturbridge Partners, Ltd. v. Walker*, 267 Ga. 785, 786 (1997)).

> In determining whether previous criminal acts are substantially similar to the occurrence causing harm, thereby establishing the foreseeability of risk, the court must inquire into the location, nature and extent of the prior criminal activities and their likeness, proximity or other relationship to the crime in question. While the prior criminal activity must be substantially similar to the particular crime in question, that does not mean identical. **What is required is that the prior incident be sufficient to attract the landlord's attention to the dangerous condition which resulted in the litigated incident.**

Vega, 294 Ga. App. at 313 (emphasis added). "Without a showing of substantial similarity, the evidence [of other acts] is irrelevant as a matter of law and there is nothing upon which the court's discretion can operate." *Retail Prop. Tr.*, 359 Ga. App. at 348 (quotation omitted).

The foregoing may be distilled into the principle that "[**f**]**oreseeable consequences are those which, because they happen so frequently, may be expected to happen again**." *Id.* at 349 (emphasis added) (quotation omitted); *see also Boone v. Udoto*, 323 Ga. App. 482, 484 (2013) ("Foreseeable consequences are those which are **probable,**" and "[o]ne is not bound to anticipate or foresee and provide against that which is unusual or that which is only remotely and **slightly** probable." (quotation omitted)). "Said in a different way, one is bound to anticipate and provide against what **usually happens and what is likely to happen**; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what is only remotely and slightly probable." *Id.* (emphasis added) (quotation omitted). "To be foreseeable, there must be more than a generalized risk of harm, and the evidence must show that the criminal acts could reasonably have been anticipated, apprehended, or foreseen by the proprietor." *Shadow v. Fed. Express Corp.*, 860 S.E.2d 87, 91 (Ga. Ct. App. 2021) (physical precedent only) (quotation omitted).

Given the framework above, precedent from Georgia state and federal courts has developed some constraints on what may constitute triggering events for purposes of foreseeability and resulting duty of care. The first is that foreseeability is assessed differently in the context of a residence context as opposed to a commercial or common area context due to the isolation or vulnerability of a tenant in his or her home. *See Spear v. Calhoun*, 261 Ga. App. 835, 837 (2003) (distinguishing between cases involving duties owed to residential tenants from other premises liability cases). As explained by the Supreme Court:

> In the present case, on the other hand, we conclude that the prior property crimes, largely thefts from automobiles and acts of vandalism, are insufficient to create a factual issue regarding whether Regency Square could reasonably anticipate that a violent sexual assault might occur on the premises. First, the very nature of the thefts and acts of vandalism committed in this case do not "suggest that personal injury may occur. Further, because the parking garage where the prior crimes occurred is a common area, used by all the tenants and their guests, there is only the potential for a tenant to confront a thief in an isolated situation, and, even if such an encounter occurs, there is always the possibility that the isolation could be brief. **In contrast, a tenant encountering a burglar in the privacy of her apartment inevitably will be isolated with the intruder, and will have little chance of a third party interrupting the encounter**. **Finally, a tenant generally will have opportunities for escaping an isolated encounter with a thief in a common area, but will not have similar opportunities when encountering a burglar in her apartment.**

Doe v. Prudential-Bache/A.G. Spanos Realty Partners, L.P., 268 Ga. 604, 606 (1997) (quotation and citation omitted). Included in this excerpt and understanding is the recognition that common area parking lots are treated differently from other

places where these incidents may occur. *See id.*; *see also Agnes Scott Coll., Inc. v. Clark*, 273 Ga. App. 619, 623 (2005) ("The parking lot was a common area used by several students, where the potential confrontation with any attacker could be brief, especially during the middle of the day when the parking lot was full.").

Another important principle recognized by precedent concerns spatial proximity; foreseeability has been held to relate only to a dangerous condition at a specific location of specific hazard or incident resulting in injury. "[G]enerally, it may be said that it is not permissible, for the purpose of establishing whether a condition at one place is dangerous, to show conditions at places other than the one in question." *Vega*, 294 Ga. App. at 314 (quotation omitted). Thus, some courts applying Georgia law have held that crimes occurring in a surrounding neighborhood or police beat are insufficient to generate notice of the possibility of concurring criminal activity on a landlord's own property. *See, e.g. Gordon v. Starwood Hotels & Resorts Worldwide, Inc.*, 821 F. Supp. 2d 1308, 1314 (N.D. Ga. 2011) ("Plaintiff offers no information or evidence regarding the breadth of the geographical area covered within 'Beat 506,' but this particular page of the report's use of the phrase 'including 210 Peachtree St' indicates that the crime statistics reported on the page cover geographical areas beyond the Hotel. There simply is insufficient evidence for the Court to conclude that the areas included are in such close proximity to the Hotel so as to put the Hotel on notice of the possibility of

criminal activity occurring at the Hotel."); *but see Woodall v. Rivermont Apartments Ltd. P'ship*, 239 Ga. App. 36, 40 (1999) (physical precedent only) (determining in landlord/tenant context that being in a high-crime area may be relevant to the question of whether an increase in crime at the subject location should place defendants on notice of the risk of violent crime). This is particularly true where the crimes in the surrounding areas have no connection to a dangerous condition on the subject premises. The question as with all similar incident evidence is whether the incidents to be proven were "**sufficient to attract the owner's attention to the alleged dangerous condition which resulted in the litigated incident**." *McCoy v. Gay*, 165 Ga. App. 590, 593 (1983) (emphasis in original) (quotation omitted). "Notice of one defect or of one fact is not notice of another wholly unconnected defect or fact, even though the two may be similar in nature." *Id.* at 592 (quotation omitted).

At least in the commercial context, Georgia courts have applied this principle even more strictly to exclude crimes occurring on one part of a landlord's property from providing notice of the possibility of the same occurring on another part:

> Here, the Draytons presented evidence that an armed robbery occurred at the Kroger store at 10:15 p.m. on May 4, 2003, in which an intruder took $5,000 from a Kroger employee. There is no indication that the robbery, which occurred inside the store and not in the parking lot, involved any Kroger customers. The Draytons also presented evidence of numerous nonviolent property crimes, such as shoplifting,

> occurring inside the Kroger store, one act of distributing obscene materials at the store, and several customers falling in the parking lot during the several years prior to the attack on Mrs. Drayton. None of these incidents, however, put Kroger or Banks Crossing on notice that customers were in danger of being the victim of violent criminal activity in the parking lot.

Drayton v. Kroger Co., 297 Ga. App. 484, 486 (2009); *see also Agnes Scott College*, 273 Ga. App. at 620 (finding summary judgment appropriate on issue of foreseeability where "there had been no reported incidents of kidnapping, rape, or any other violent crimes occurring in the South Candler lot at Agnes Scott. Only crimes against property, such as car break-ins, and other crimes not involving person-to-person contact had been reported. Even reports of suspicious persons in the lot involved people who were seen *late at night and who had no direct contact with students in the lot."); McCoy*, 165 Ga. App. at 592 (holding that events occurring inside and in entrance of inn "would have no relevancy or probative value with regard to appellees' knowledge of that 'dangerous condition'" in parking lot); *McClendon v. Citizens & S. Nat. Bank*, 155 Ga. App. 755, 755 (1980) (officer response to at least 10 alarms at bank and primary concern of bank robberies not sufficient to establish notice of robbery at gunpoint in parking lot and holding that "[t]here was no evidence that appellee was aware of a dangerous situation and chose to ignore it. Instead, the evidence shows without dispute that no robberies had previously occurred in the parking lot of the bank. Thus, the trial court properly directed a verdict for the appellee.").

Another general limitation on the foreseeability analysis concerns the quality of the landlord's knowledge. It must be established that the property owner is **actually** aware of these prior criminal acts, or else it cannot be demonstrated that a land owner has superior knowledge of the alleged hazard. "Knowledge of a dangerous condition giving rise to the incident is necessary in order to show the existence of even an initial duty to provide preventive security measures for this type of attack." *Wojcik*, 284 Ga. App. at 769 (quoting *Bishop v. Mangal Bhai Enterprises*, 194 Ga. App. 874, 877 (1990)); *see also Ritz Carlton Hotel Co. v. Revel*, 216 Ga. App. 300, 303 (1995) ("Since there were no prior substantially similar attacks on the premises, there was no such knowledge and no duty to provide security adequate to protect against this kind of attack.").

As recognized by Appellants, case law has greatly limited the extent to which (if any) property owners must be proactive in ascertaining whether criminal activity has occurred at their premises. Specifically, a property owner has no duty to research police records to determine an area's criminal history. "[I]t has repeatedly been held that '[t]here is no authority in this State imposing a duty upon a property owner to investigate police files to determine whether criminal activities have occurred on its premises.'" *Wojcik*, 284 Ga. App. at 769 (quoting *Sun Trust Banks v. Killebrew*, 266 Ga. 109 (1995)). Additionally, the mere fact that police have been called by other parties to respond to a particular occurrence cannot be

used to impute knowledge of that occurrence to the property owner. *See Baker v. Simon Property Group*, 273 Ga. App. 406, 407 (2005) (considering evidence of calls to police to be irrelevant to issue of foreseeability where plaintiff "failed to show that the defendants were aware of the reports made to the police").

Yet another consideration (and a particularly important one here) concerns the quality of the prior incident when compared to the incident at issue. Georgia courts have held in the commercial context that prior property crimes not involving murders, shootings, weapon discharges, or significant injuries, without more, are generally insufficient as a matter of law to establish that a subsequent violent crime on a particular property is foreseeable. *See Retail Prop. Tr.*, 359 Ga. App. at 349 (citing cases); *Shadow*, 860 S.E.2d at 91 ("We have described the inquiry into the **nature** of the prior offense to consider whether the prior incident was a physical attack or a property crime."); *Drayton*, 297 Ga. App. at, 486 (nonviolent property crimes insufficient to give notice of potential for violent criminal activity); *Baker*, 273 Ga. App. at 407-08 (evidence of "five thefts or burglaries from unoccupied vehicles, two reports of criminal damage to unoccupied vehicles, and three cars stolen from the parking lot while the customers were inside the mall shopping" insufficient "to create a factual issue whether the defendants could reasonably anticipate that a carjacking and shooting resulting in personal injury might occur")

Applying these general considerations, Georgia courts have determined that one-off attacks such as the event underlying these cases were unforeseeable as a matter of law, even given other incidents of prior crime. *See Shadow*, 860 S.E.2d at 93-94 (summary judgment appropriate in mass shooting at FedEx packaging facility despite prior incidents of threatened workplace violence and a domestic violence/suicide incident at another FedEx facility); *Drayton*, 297 Ga. App. at 484 (robbing and assault in parking lot unforeseeable as a matter of law); *Agnes Scott Coll.*, 273 Ga. App. at 619 (kidnapping from parking lot and subsequent rape unforeseeable as a matter of law even in the face of prior reported "crimes against property, such as car break-ins, and other crimes not involving person-to-person contact" and "reports of suspicious persons in the lot involve[ing] people who were seen late at night and who had no direct contact with students in the lot"); *Baker*, 273 Ga. App. at 407 (carjacking and shooting in parking lot unforeseeable as a matter of law where evidence included owner's awareness of "five thefts or burglaries from unoccupied vehicles, two reports of criminal damage to unoccupied vehicles, and three cars stolen from the parking lot while the customers were inside the mall shopping" in the year before plaintiff's shooting); *Prudential-Bache/A.G. Spanos Realty Partners*, 268 Ga. at 604 (rape and robbery in parking lot unforeseeable as a matter of law where there was evidence of "prior property crimes, largely thefts from automobiles and acts of vandalism").

Looking at its order, it is difficult to tell how the trial court applied these precepts or if it rejected them entirely. But these learned lessons demonstrate that summary judgment should have been granted to defendants on foreseeability grounds. From the outset, the Court should disregard the incidents identified by Appellee that occurred outside of Pappas' parking lot and for which Appellee cannot prove Pappas's actual knowledge, as Appellee cannot connect them to the existence of a dangerous condition on Pappas' lots. What remains of Appellee's similar act evidence apparently consists entirely of property crimes against unoccupied automobiles and one case of a suspicious person who does not appear to have been engaged in any violent conduct. Mere property crimes (particularly property crimes committed in unoccupied automobiles) are insufficient to establish foreseeability of this incident, which involved a double shooting in a parking lot unconnected with any attempt to steal from a vehicle.

In this vein, even a recent case in which this Court determined that summary judgment was not appropriate shows the trial court's error here. In *Rautenberg v. Pope*, 351 Ga. App. 503, 505 (2019) (physical precedent only) (a case involving duties of care not implicated here because of the lessor/lessee relationship involved), the Court found sufficient evidence to preclude summary judgment in a case of personal injuries sustained in the immediate aftermath of an attempted burglary from a vehicle in a parking lot where evidence established that the

parking lot owner admitted to knowledge of substantially similar incidents vehicle burglaries. The *Rautenberg* parking lot was not merely a common area; the owner knew that they were expected to guard against such incidents given that they had leased spaces on the lessee's specified hope that the lot would be safer than the spaces the lessee had previously used. Most importantly for present purposes and in analyzing the substantial similarities of the crimes at issue, the court noted:

> Moreover, the personal injuries Rautenberg sustained in this incident were directly related to the commission of the property crime of breaking into a tractor trailer (the type of crime of which Global Parts was on notice and expected to guard against) and the suspect's ensuing flight from the area **as opposed to, for example, a sudden intentional assault performed in an area known for minor theft**.

Id. at 506 (emphasis added). Just such a discrepancy exists here between historical, non-violent property crimes against vehicles on the one hand and an intentional assault in an area known for minor theft on the other. Appellee does not appear to have identified a single incident of injury connected with a theft of a person in Pappas' parking lot under the same conditions as were present here. Thus, even in *Rautenberg* (which was a case of enhanced duties), the Court recognized that the type of tenuous connection Appellee urges here would be insufficient proof of foreseeability to prevent summary judgment.

Applying all of the precepts gleaned from extensive precedent on the subject, it is clear that these cases are quintessential summary judgment cases on

foreseeability grounds. Accordingly, the trial court erred in finding a fact question as to foreseeability of the attack.

B. Appellee's proximate cause analysis is impermissibly speculative.

GDLA also writes in support of Pappas' argument that the trial court erred in crediting speculative testimony offered by Appellee's expert, who the trial court recognized as "opin[ing] that Defendants failed to take proper security measures based on the number, frequency, and type of crimes about which Defendants reasonably should have known." Order at 2. Most importantly for purposes of the trial court's order, the expert specifically opined that "that this incident was more likely than not preventable had Defendants had three guards, two of whom were to patrol at least three times an hour, and taken several other enumerated measures." *Id.* at 3. But as Appellee does not establish by reference to the record how the assailants entered Pappas' property and what they were doing there prior to the assault (other than parking and reentering their vehicles) such that increased security would have prevented their attack, Appellee impermissibly speculates regarding the efficacy of increased security measures.

Generally speaking, "[g]uesses or speculation which raise merely a conjecture or possibility are not sufficient to create even an inference of fact for consideration on summary judgment." *Brown v. Amerson*, 220 Ga. App. 318, 320 (1996). "A plaintiff must introduce evidence which affords a reasonable basis for

the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough." *Post Properties, Inc. v. Doe*, 230 Ga. App. 34, 39 (1997) (physical precedent only) (quotation omitted). "[A] plaintiff must do more than merely speculate as to whether enhanced security measures would have prevented an attack." *Walker v. Aderhold Properties, Inc.*, 303 Ga. App. 710, 714–15 (2010). Thus in premises liability cases, "laundry list[s] of reasons that[premises owners and occupiers] may have been negligent" are simply insufficient to establish proximate causation. *Post Properties*, 230 Ga. App. at 39. "[C]onjecture that one of a wide range of security measures might have prevented the assault cannot serve to prevent summary judgment . . . ." *Id.* The Court recently reiterated that speculative expert testimony stating that an attack would not have occurred with enhanced security measures is insufficient to create a triable fact question. *See Shadow*, 860 S.E.2d at 94 (disregarding expert's testimony about other events being similar as inconsistent with the principles above and the facts of the other cases and further determining that "the expert's opinion about inadequate security measures having an effect on the ability to carry out the attack are purely speculative. Finally, the expert opined that any facility like this would be a target for workplace violence, but such generalized risk is insufficient to establish foreseeability").

Appellee says nothing about the assailants' movements on the night in question except to say that they were loitering and prowling on the property per Cobb County police's determination that they had parked and reentered their vehicles several times. Appellee's Brief at 21. According to Appellee, there was no camera monitoring the lower lot and thus no video to confirm the assailants' movements. Here, it appears that "there is no evidence or testimony that reducing or increasing security would have affected the crime rate in general or the particular crime that injured [Appellee and killed decedent]." *George v. Hercules Real Est. Servs., Inc.*, 339 Ga. App. 843, 846 (2016) (finding insufficient evidence to create fact question on proximate cause where plaintiff pointed to evidence of "a request for more security based upon school ending for the summer and inclement weather, along with a comment that the property along the fence lines and behind the buildings was at the mercy of criminals, coupled with the security company's desire for more hours (though without any request for more)"). It is particularly speculative to say that increased security in the form of an extra guard doing additional patrols would have prevented this incident where the record demonstrates that **a guard had driven through the site of the attack on his patrol a minute prior.**

Appellee's argument that more security would have prevented this incident is inconsistent with the record and impermissibly speculative. Proximate cause cannot be established upon this record.

C. Tactical's undertaking to provide security services at the property does not subject it to liability.

Lastly, GDLA writes in support of Tactical's argument that the trial court erred in determining that there was a jury question as to whether Tactical could be held liable by virtue of its undertaking to provide security services for Pappas.

It is clear that liability cannot attach to Tactical on the basis of its agreement with Pappas to provide security services to Pappas' restaurants and parking areas. "[A]n injured party may not recover as a third-party beneficiary for failure to perform a duty imposed by a contract unless it is apparent from the language of the agreement that the contracting parties intended to confer a direct benefit upon the plaintiff to protect him from physical injury." *Anderson v. Atlanta Committee for the Olympic Games*, 273 Ga. 113, 117–118 (2000) (quoting *Armor Elevator Co. v. Hinton*, 213 Ga. App. 27, 30 (1994)). Georgia courts have elaborated on this general rule:

> [I]f the tort results from the violation of a duty which is itself the consequence of a contract, the right of action is confined to the parties and those in privity to that contract, **except in cases where the party would have a right of action for the injury done independently of the contract** and except as provided in Code Section 11-2-318.

O.C.G.A. § 51-1-11(a) (emphasis added). And as this Court has stated before

> [w]e recognize that whenever a premises owner contracts with a private security company the parties may expect the security services provided to benefit invitees who visit the property. As we have held, however, an injured invitee may not recover against the security company for negligent performance if the contract is silent as to the parties' intent to confer that benefit.

Med. Ctr. Hosp. Auth. v. Cavender, 331 Ga. App. 469, 478 (2015) (quotation omitted); *see also Anderson*, 273 Ga. at 117–18 ("Looking at the contract in the record between Borg Warner and ACOG as well as the uncontroverted testimony by ADI's president regarding the terms in its contract with AT & T's agent, there was no intent in the contracts to confer a benefit on Centennial Olympic Park visitors and that under the terms thereof the security services companies neither owed nor assumed any duty to protect or warn appellants.").

Given that Appellee was not in privity to the security contract here, she must establish a viable cause of action in tort independent of the contract between Pappas and Tactical. The trial court situated this duty in § 324A of the Restatement (Second) of Torts, which has been adopted by Georgia courts:

> On the question whether a party has a right of action for an injury done independently of a contract, the Supreme Court of Georgia has adopted § 324A of the Restatement (Second) of Torts, which provides: "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has

> undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

Davidson v. Meticulously Clean Sweepers, LLC, 329 Ga. App. 640, 644 (2014) (emphasis added) (quoting *Huggins v. Aetna Cas. & Surety Co.*, 245 Ga. 248, 249 (1980)); *id.* at 644 (discussing the interaction between *Huggins* and *Kelley v. Piggly Wiggly Southern*, 230 Ga. App. 508 (1997).

But Tactical is correct that they can only be held liable under that section consistent with their own contractual undertakings. Stated somewhat differently, § 324A cannot operate to enhance Tactical's responsibilities beyond what it contractually undertook.

Georgia precedent applying § 324A confirms this. Broadly speaking, the Court has previously suggested that compliance with contractual obligations may establish reasonable care as a matter of law. *See Med. Ctr. Hosp. Auth.*, 331 Ga. App. at 479 ("In short, even when viewed in favor of the Plaintiffs, as this Court must, Michaux went to great lengths to fulfill Securitas' contractual responsibility to monitor Doctors Hospital. Accordingly, it follows that the trial court erred in denying Securitas' motion for summary judgment because there was no breach of any duty allegedly owed by Securitas."). Thus, Appellee should be required to point to evidence showing a breach of that agreement before being able to recover under § 324A. *See* Tactical's Reply Brief at 5-9 (setting forth law from other

jurisdictions requiring scope of duties commensurate with that contractually undertaken by party to be held liable).

Analysis of each subsection of § 324A as applied by Georgia courts shows this restricted focus in action. Subsection (a)

> applies only to the extent that the alleged negligence of the defendant exposes the injured person to a greater risk of harm than had existed previously. Accordingly, Section 324A (a) applies when a nonhazardous condition is made hazardous through the negligence of a person who changed its condition or caused it to be changed. . . . Liability . . . does not attach for failing to decrease the risk of harm. **Put another way, the mere failure to abate a hazardous condition—without making it worse—does not trigger the application of Section 324A (a)**.

Herrington v. Deloris Gaulden, 294 Ga. 285, 288 (2013) (emphasis added) (quotation and citations omitted). As it cannot be contended that Tactical **created** a hazardous condition, 324A can only have application, if at all, through its other subsections. Those subsections, however, are similarly unavailing. Subsection (b) applies only "to those situations where the alleged tortfeasor's performance is to be substituted completely for that of the party on whose behalf the undertaking is carried out." *BP Expl. & Oil, Inc. v. Jones*, 252 Ga. App. 824, 831 (2001). Appellee cites to no evidence in the record establishing that Tactical entirely took over the nondelegable duty of securing Pappas' parking lots such that liability would be proper under this subsection, either. *See Cajun Contractors, Inc. v. Peachtree Prop. Sub, LLC*, No. A21A0311, 2021 WL 2678343, at *7 (Ga. Ct.

App. June 30, 2021) ("Because the owner or occupier's duties to keep the premises and approaches safe are statutory (OCGA § 51-3-1), those duties are non-delegable even though the owner has a contract for another party to provide the work." (quotation and citation omitted)). Finally, subsection (c) requires that the harm must be suffered because of reliance of the other or the third person upon the undertaking. There appears to be no contention that Appellee or the decedent actually relied upon any undertaking, and even if Pappas were relying on Tactical's provision of security in its parking lot, Appellee points to no record evidence establishing **that this reliance caused Appellee's injuries and decedent's death**. In this vein,

> The type of reliance contemplated by Section 324A (c) is explained in the following Comment to the Restatement: "Where the reliance of the other ... has induced him to forgo other remedies or precautions against such a risk, the harm results from the negligence as fully as if the actor had created the risk." Restatement (Second) of Torts § 324A, Comment e.

Glover v. Georgia Power Co., 347 Ga. App. 372, 379 (2018) (quoting Restatement (Second) of Torts § 324A, Comment e).

Although it purported to rely on § 324A in denying Tactical's motion, the trial court engaged in none of the analysis applicable with respect to any of § 324A's subsections and essentially accorded potential responsibility to Tactical equal to that of Pappas as the property owner and occupier. It is not enough to say that Tactical was providing security services by contract on the night of the

incident and therefore may be held liable. Precedent is clear that Tactical's liability should have been constrained in very particular ways related to the services Tactical agreed to provide and actually was providing on site. But the trial court's ruling did not consider Tactical's potential liability under these constraints. Because the record here fails to support liability under these parameters, the trial court's decision otherwise is erroneous and due to be reversed.

CONCLUSION

The trial court's order embodies a misunderstanding of premises liability principles that would drastically expand the scope of obligations for both premises owners/occupiers and independent contractors performing security services in cases of third-party criminal conduct. All three of the components of the trial court's order addressed above unravel various preconditions for liability that ensure fairness to defendants and that give all parties a proper roadmap for litigating these cases. The trial court's defective similar incidents determination would eschew the legally-required foreseeability analysis in favor of a "some crime" analysis. Evidence of "some crime," without reference to substantial similarity, is not evidence that any crime resulting in injury or damage should be reasonably foreseeable. Just like the "some crime" approach to foreseeability, Appellee's "more security" proximate cause argument lacks the rigor of the typical proximate cause analysis employed in negligence law generally and should not be

condoned here. Lastly, a determination that Tactical is potentially liable simply because it was rendering security services without reference to whether it actually created a hazard, completely assumed Pappas's role on site, or caused Pappas to forego remedies or precautions that would have prevented the incident would simply allow Appellee to sidestep contract law principles of standing and would impose duties on Tactical beyond those it contracted to provide. This erosion is unjustified. The Court should reverse.

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted this 23rd day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the foregoing **AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION** with the Clerk of Court using the SCED online system and served all of the parties below by depositing a copy of the same in the United States Postal Service with adequate First-Class Mail postage thereon and addressed as follows:

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