IN THE SUPREME COURT
STATE OF GEORGIA

S22G0618

CYNTHIA WELCH, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ANTHONY L. WELCH, DECEASED,

Appellant/Plaintiff,

v.

TACTICAL SECURITY GROUP, LLC,

Appellee/Defendant.

AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

Prepared by:

Philip Thompson
Georgia Bar No. 963572
Ellis Painter
P.O. Box 9946
Savannah, Georgia 31412
(912) 233-9700 (phone)
(912) 233-2281 (fax)
pthompson@ellispainter.com

On Behalf of the Georgia
Defense Lawyers Association

James D. Meadows, President
Philip Thompson, Co-Chair
Patrick Silloway, Vice Chair

Amicus Curiae Brief Committee
GEORGIA DEFENSE LAWYERS ASSOCIATION
Post Office Box 67
Rossville, GA 30741
706-956-4848

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INTRODUCTION

The Court of Appeals in these cases[1] rectified significant errors that, if applied to Georgia law as a whole, would have drastically expanded the scope of liability for defendants in cases of third-party criminal conduct, improperly shifted primary responsibility away from the actual perpetrators to unsuspecting business owners and security companies, and turned these classes of defendants into insurers of the safety of all on their property. In the process, the court reaffirmed Georgia's commitment to appropriate principles limiting the duties of premises owners and occupiers to foreseeable risks of danger from criminal activity (at least, outside of knowledge of a particular imminent danger on the premises) while also providing appropriate plaintiffs with a path to relief.

The Court of Appeals' decision was consistent with Georgia precedent, which establishes that Georgia courts view foreseeability of a criminal act as a precondition to the imposition of any duty on Appellees Pappas Restaurants, Inc. ("Pappas") or Tactical Security Group, LLC ("Tactical," and collectively with Pappas, "Appellees") to prevent that act. And given that the law is plain that duty is a question of law for the courts, it falls on Georgia trial courts to perform the appropriate inquiry (the prior similar incidents test) in the first instance. The outcome of the decision below was also correct in that Tactical cannot be held

[1] GDLA writes in support of Pappas in Case S22G0617 and Tactical in Case S22G0618. GDLA refers to both matters collectively as "these cases."

liable to Appellant Cynthia Welch ("Appellant") under Restatement § 324A, as both the duty and causation elements of a negligence claim proceeding under that code section must be linked to the undertaking at issue, and there is no evidence of such here.

Accordingly, GDLA writes in support of Appellees to answer the Court's questions to the parties and to encourage the Court to affirm.

I. STATEMENT OF INTEREST

GDLA is an association of more than 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 Appellees 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 Pappas' parking lots 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 through 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.

Appellant has previously pointed to a number of dissimilar incidents she claims establish reasonable foreseeability of the attack at issue here. For example, in May 2014, Cobb County Police held a meeting with Pappas' Security Director Heenan to discuss thefts from unoccupied vehicles at the Windy Hill location. At the meeting, Cobb County Police presented Pappas with a list of incidents.

Appellant further points to other incidents occurring in and around Pappas parking lots after this meeting, including 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. But there is no evidence that a gun stolen from a vehicle was used in a crime or that any of these thefts from vehicles were perpetrated by armed individuals.

Finally, Appellant 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. Appellant 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. But Appellant points to no incidents involving murders, shootings, weapon discharges, or significant injuries in Pappas parking lot.

The incidents identified by Appellant, dissimilar non-violent property crimes involving no personal contact between the perpetrator and their potential victims, are insufficient as a matter of law to establish that the awful attack on Appellant and her husband was foreseeable by Appellees. The record in these cases likewise does not support Tactical's liability under Restatement § 324A. GDLA now addresses each of the questions posed by the Court to the parties.

III. ANALYSIS

A. Proof that the underlying criminal act occurring on the premises was reasonably foreseeable relates primarily to plaintiff's burden to prove the negligence element of duty.

As Appellees have pointed out, the "reasonably foreseeable criminal act" analysis (hereinafter, "the reasonably foreseeable analysis" or "the analysis")

touches on duty, breach, and proximate cause in various ways. What is clear, however, is that in Georgia the reasonably foreseeable analysis is a precondition for the imposition of duty in third-party premises liability cases.

"Before negligence can be predicated upon a given act, some duty to the individual complaining must be sought and found, the observance of which duty would have averted or avoided the injury or damage." *CSX Transp., Inc. v. Williams*, 278 Ga. 888, 889 (2005) (quotation omitted).

> [I]n fixing the bounds of duty, not only logic and science, but policy play an important role. . . . However, it must also be recognized that there is a responsibility to consider the larger social consequences of the notion of duty and to correspondingly tailor that notion so that the illegal consequences of wrongs are limited to a controllable degree.

Id. at 890 (quotation and citation omitted). Foreseeability is generally a necessary, not sufficient, condition for the imposition of duty. *Cf. id.* at 890; *City of Douglasville v. Queen*, 270 Ga. 770, 773 (1999) ("We decline to hold that the foreseeability of such situations places an affirmative duty upon a municipality to protect individuals from all privately-created and privately-maintained hazards they might encounter on the properties of third parties while approaching, viewing, and departing the parade.").

The statutory duty owed by premises owners and occupiers is well established. *See* O.C.G.A. § 51-3-1. And of course, "[t]he duty imposed under OCGA § 51–3–1 does not make a premises owner an insurer of an invitee's

safety—rather, it requires the exercise of ordinary care to protect the invitee from unreasonable risks of harm of which the premises owner has superior knowledge." *McDonald v. W. Point Food Mart, Inc.*, 332 Ga. App. 753, 755 (2015) (quotation omitted). "This includes inspecting the premises to discover possible dangerous conditions of which the owner/occupier does not have actual knowledge, and taking reasonable precautions to protect invitees from dangers **foreseeable from the arrangement or use of the premises**." *Robinson v. Kroger Co.*, 268 Ga. 735, 740 (1997) (emphasis added) (citation omitted). In the context of third-party criminal conduct, these general rules apply, and "any liability from such attacks must be predicated on a breach of duty to 'exercise ordinary care in keeping the premises and approaches safe.'" *Sturbridge Partners, Ltd. v. Walker*, 267 Ga. 785, 785 (1997) (quoting O.C.G.A. § 51-3-1).

Consistent with this focus on superior knowledge of a danger or defect within the owner/occupier's control on the premises, Georgia law is clear that "a business proprietor owes a duty to patrons resulting from criminal acts of third parties" only with respect to a reasonably foreseeable criminal attack. *Adler's Package Shop, Inc. v. Parker*, 190 Ga. App. 68, 69 (1989); *see also, e.g., Shockley v. Zayre of Atlanta, Inc.*, 118 Ga. App. 672, 673 (1968) ("The proprietor of a business has a duty, when he can reasonably apprehend danger to a customer from the misconduct of other customers or persons on the premises, to exercise ordinary

care to protect the customer from injury caused by such misconduct."). "**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." *Lau's Corp. v. Haskins*, 261 Ga. 491, 492 (1991) (emphasis added) (quotation omitted); *see also Atl. Coast Line R. Co. v. Godard*, 211 Ga. 373, 376–77 (1955) ("The allegation that the respondent had reason to know that the yards were frequented by dangerous characters sufficed to charge the trustee with the duty to exercise ordinary care to guard against injury from dangerous characters.").

"In other words, the landowner's duty extends only to foreseeable criminal acts.'" *Martin v. Six Flags Over Georgia II, L.P.*, 301 Ga. 323, 328 (2017) (quotation omitted)). Substantial similarity "establish[es] the foreseeability of risk." *Sturbridge Partners*, 267 Ga. at 786. "**Simply put, without foreseeability that a criminal act will occur, no duty on the part of the proprietor to exercise ordinary care to prevent that act arises.**" *Days Inns of Am., Inc. v. Matt*, 265 Ga. 235, 235 508 (1995); *see also Tara Bridge Apartments, LP v. Benson*, 365 Ga. App. 647, 650 (2022) (same); *Hillcrest Foods, Inc. v. Kiritsy*, 227 Ga. App. 554, 559 (1997) (same)

Failure to allege reasonable foreseeability or knowledge is failure to allege a duty and thus subjects such a premises liability claim to demurrer:

> As to these allegations [that a guard or patrol should have been maintained], the special demurrer should have been sustained. There

> is no allegation in this subparagraph showing any duty on the defendants to maintain any guard or patrol of the premises maintained by them at the place therein described, and in and of itself this charge of negligence furnished no legal basis for recovery. It makes no reference whatever to allegations of the petition appearing elsewhere as to the defendants' knowledge that dangerous, reckless, and lawless characters and persons who are strangers frequent the premises during the nighttime, including prowlers and hoboes, **which allegations were held, in the preceding division of this opinion to be necessary to charge the defendants with any duty** to anticipate any criminal attack upon the plaintiff or to place any duty upon the defendants to exercise ordinary care to protect their employees therefrom.

Godard, 211 Ga. at 377 (emphasis added); *see also, e.g.*, *Bolden v. Barnes*, 117 Ga. App. 862, 863 (1968) ("Both the defendant and his employee testified they did not see decedent about to remove the cap. **This being so, no duty arose to warn against it.** Should they have anticipated or foreseen that decedent would go back and remove the cap at the time he did? We think clearly and indisputably that it was not reasonably foreseeable and, therefore, no negligence on the part of the defendant appears." (emphasis added)).

The First and Second Restatements of Torts both viewed foreseeability in these circumstances as important to the issue of whether the duty exists as well. *See* Restatement (First) of Torts § 302 cmt. n.8 (1934) (providing that action to prevent against third-party misconduct is required only where the actor "knows of peculiar conditions which create a strong likelihood of intentional or reckless misconduct"); Restatement (Second) of Torts § 344 cmt. f (1965) ("If the place or character of his business, or his past experience, is such that he should reasonably

anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it . . . .").

Thus, the reasonably foreseeable analysis clearly and primarily applies to the duty element that Plaintiff must prove, though it has application and bearing on the other elements as well.

B. Whether a criminal act occurring on the premises was reasonably foreseeable is generally for the judge in assessing duty or scope thereof.

Given that the *Sturbridge* analysis primarily determines whether a duty exists, it is clear that the analysis must be performed by the judge at least as it pertains to the duty element. "The essential foundation for all actionable negligence is the existence of a duty which the defendant owed to the plaintiff in connection with the particular subject-matter and the breach of that duty by the defendant. The duty is defined by the law." *Moone v. Smith*, 6 Ga. App. 649 (1909). It is a truism that "[t]he existence of a legal duty is a question of law for the court." *Rasnick v. Krishna Hosp., Inc.*, 289 Ga. 565, 567 (2011).

As this Court has explained in the context of a Federal Employers' Liability Act claim,

> Whether the defendant has a duty to the plaintiff is a question of law to be decided by the court. The other three elements—foreseeability,

> breach, and causation—are questions of fact to be decided by a jury, assuming that there is evidence in the record creating a genuine issue for trial. Thus, at the summary judgment stage, keeping the legal question of duty distinct from the factual questions of foreseeability, breach, and causation is essential to ensure that the court does not inappropriately decide factual issues that should be submitted to the jury.

Norfolk S. Ry. Co. v. Zeagler, 293 Ga. 582, 586–87 (2013).

Georgia precedent regarding the reasonably foreseeable analysis shows how the trial court must conduct the duty assessment in this context, too. In *Sturbridge*, the Court said that "[i]n 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." *Sturbridge Partners*, 267 Ga. at 786 (emphasis added). Although the Court also noted that "the question of reasonable foreseeability of a criminal attack is generally for a jury's determination rather than summary adjudication by the courts" and "agree[d] with the Court of Appeals that evidence of the prior burglaries was sufficient to give rise to a triable issue as to whether or not Sturbridge had the duty to exercise ordinary care to safeguard its tenants against the foreseeable risks posed by the prior burglaries," it would render *Sturbridge* internally inconsistent (by stating on the one hand that the court must engage in an inquiry while on the other hand noting that the reasonable

foreseeability of a criminal attack is generally for a jury's determination) and would overlook this Court's own precedent and the apparent weight of authority from other jurisdictions to read this language as giving the jury the responsibility to determine duty and the scope thereof. *Id.* at 786-87.

Consistent with the foregoing, "[i]n a negligence case, presented on motion for summary judgment by a defendant charged with negligence, **the trial judge must determine**: (1) **the defendant's duty to the plaintiff and the risks that fall within the scope of that duty**, and (2) the sufficiency of the evidence to raise an issue of fact." *Carden v. Georgia Power Co.*, 231 Ga. 456, 456 (1973); *see also City of Rome v. Jordan*, 263 Ga. 26, 27 (1993) ("The threshold issue in any cause of action for negligence is whether, and to what extent, the defendant owes the plaintiff a duty of care. Whether a duty exists upon which liability can be based is a question of law." (citation omitted)); 57A Am. Jur. 2d Negligence § 75 ("A determination that, as a matter of law, no duty is owed to the plaintiff may occur where the defendant's responsibility for the activities of third persons is involved."); 86 C.J.S. Torts § 106 ("Whether a tort plaintiff's interests are entitled to legal protection against the defendant's conduct is a question of law for the court to decide. . . . Ascertaining a duty and defining its scope is a function of the courts, and the question of whether the defendant breached a duty owed to the plaintiff is one of law for the court to determine, although it has also been held that whether a

party has breached a duty generally presents a question of fact."). The notion that a jury should generally determine whether or not a duty exists flatly contradicts this clear directive. As such, Georgia courts have rightly assessed for themselves in the first instance whether evidence (construed in the nonmovants favor) presented on a motion for summary judgment established the existence of a duty. *See Carden*, 231 Ga. at 457 ("Without such notice, and the summary judgment evidence shows none in this case, the risk involved here was not within the scope of the duty owed by the power company to the plaintiff.").

Other jurisdictions expressly allocating responsibility for determining whether a duty exists in these cases also typically seem to give this responsibility to courts, not juries. *See, e.g.*, *Isaacs v. Huntington Mem'l Hosp.*, 38 Cal. 3d 112, 124, 695 P.2d 653, 658 (1985) (in third-party premises liability case, "[w]hether such a duty exists is a question of law to be determined on a case-by-case basis"), *holding modified by Ann M. v. Pac. Plaza Shopping Ctr.*, 6 Cal. 4th 666, 863 P.2d 207 (1993); *Delta Tau Delta, Beta Alpha Chapter v. Johnson*, 712 N.E.2d 968, 971 (Ind. 1999) (same), *abrogated on other grounds by Rogers v. Martin*, 63 N.E.3d 316 (Ind. 2016); *Seibert v. Vic Regnier Builders, Inc.*, 253 Kan. 540, 547, 856 P.2d 1332, 1338 (1993) (same); *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 766 (La. 1999) (same); *Madden v. C & K Barbecue Carryout, Inc.*, 758 S.W.2d 59, 63 (Mo. 1988) (finding facts sufficient to create duty of care, but "[w]hether the

defendants satisfied this duty of care is a question for a jury"); *Clohesy v. Food Circus Supermarkets, Inc.*, 149 N.J. 496, 502, 694 A.2d 1017, 1020 (1997) (duty is question of law); *Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 53 (Tex. 1997) (same). *But see Maguire v. Hilton Hotels Corp.*, 79 Haw. 110, 117 (1995) (suggesting that reasonable foreseeability in totality of the circumstances test is, for that jurisdiction, "only a question of law when reasonable minds cannot differ").

Texas, which like Georgia employs the prior similar incidents test and explicitly links the analysis to the duty element of a negligence claim, makes it clear that courts there are to consider the same factors identified in *Sturbridge*. *See Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 757 (Tex. 1998) ("In determining whether the occurrence of certain criminal conduct on a landowner's property should have been foreseen, **courts** should consider whether any criminal conduct previously occurred on or near the property, how recently it occurred, how often it occurred, how similar the conduct was to the conduct on the property, and what publicity was given the occurrences to indicate that the landowner knew or should have known about them." (emphasis added)). New York, which also employs the prior similar incidents analysis but which overtly suggests that foreseeability is generally a jury question, still has its courts apply similar principles to cull scenarios that cannot establish foreseeability as a matter of law. *See Polomie v. Golub Corp.*, 640 N.Y.S.2d 700, 701 (1996) ("The

evidence of the prior incidents in this case was not sufficient to raise a question of fact as to foreseeability [of an abduction and sexual assault]. The prior episodes involved complaints of solicitation, a person sleeping in a car in the parking lot, harassment of an employee who refused to sell beer to certain customers, an unverified claim of a shotgun in a car in the parking lot and a fistfight between an employee and an acquaintance. The cited events simply do not bear a sufficient relationship to the incident at issue such that it could be said that defendants should have known of the likelihood of its occurrence.").

Given that duty and the risks that fall within that scope of duty are questions of law, the reasonably foreseeable analysis is generally for the trial judge.

C. Outside of "evidence that the landowner had knowledge of a volatile situation brewing on the premises," the appropriate legal test for determining whether a criminal act occurring on the premises was reasonably foreseeable is the prior similar crimes analysis.

In *Sturbridge*, the Court specified that Georgia generally is a prior similar crimes jurisdiction. The Court thus adopted a multifactor test for "determining whether previous criminal acts are substantially similar to the occurrence causing harm, thereby establishing the foreseeability of risk." *Sturbridge Partners*, 267 Ga. at 786. Again, those factors require the Court to "inquire into the location,

nature and extent of the prior criminal activities and their likeness, proximity or other relationship to the crime in question." *Id.*

Other courts have recognized this approach as one of a few different approaches typically used by courts to determine foreseeability in this context: (1) the specific harm test, (2) the prior similar incidents test, (3) the totality of the circumstances test, and (4) the balancing test. *See Delta Tau Delta*, 712 N.E.2d at 971 (discussing different approaches); *Krier v. Safeway Stores 46, Inc.*, 943 P.2d 405, 414 (Wyo. 1997) (same); *Posecai*, 752 So. 2d at 767 (same).

Appellant encourages the Court to change course and adopt the "totality of the circumstances" test. That test differs from current Georgia jurisprudence in that it "takes additional factors into account, such as the nature, condition, and location of the land, as well as any other relevant factual circumstances bearing on foreseeability." *Posecai*, 752 So. 2d at 767.

But Georgia courts have already rejected this approach to assessing foreseeability. Instead of applying a hyper-specific inquiry to the nature of the **property and its surrounding neighborhood**, Georgia courts have developed rules that focus on a categorical approach to whether certain types of **crimes** may be said to be foreseeable given certain types of historical events occurring on certain types of property. *See Piggly Wiggly S., Inc. v. Snowden*, 219 Ga. App. 148, 149 (1995) ("Based on these cases, we consider the key to sufficient similarity

to be not in the details of the crime or even in the degree of force used, but rather in the *nature* of the offense: was the prior incident also an offense against a person, or was it an offense against property or public morals?").

For example, Georgia courts assess foreseeability 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 Doe v. Prudential-Bache/A.G. Spanos Realty Partners, L.P.*, 268 Ga. 604, 606 (1997) (distinguishing between danger encountered in common areas and elevated danger faced by tenant encountering burglar in privacy of her apartment); *Spear v. Calhoun*, 261 Ga. App. 835, 837 (2003) (distinguishing between cases involving duties owed to residential tenants from other premises liability cases).

Another important rule 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 v. La Movida, Inc.*, 294 Ga. App. 311, 314 (2008) (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) ("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, this principle applies 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 Coll., Inc. v. Clark*, 273 Ga. App. 619, 620 (2005) (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 landowner 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 v. Windmill Lake Apartments, Inc.*, 284 Ga. App. 766, 769 (2007) (quotation omitted); *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."). And "it has repeatedly been held that 'there 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)). 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 nature 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 v. Fed. Express Corp.*, 359 Ga. App. 772, 776 (2021) ("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" carjacking and shooting).

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 involv[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").

Thus, Georgia precedent focuses on applying general precepts or limiting principles on the alleged prior similar incidents involved to determine whether a duty has been created based on the occurrence of qualitatively similar crimes, not a

specific analysis of the characteristics of the property involved. Georgia's test is in both form and function a prior similar incidents test that is dissonant with a totality of the circumstances approach.

Application of the test here demonstrates that Appellees are entitled to summary judgment. 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.

Finally, the Court should recognize the continued application of the prior similar incidents test as a matter of policy. Some courts have rightfully criticized the totality of the circumstances test as

> being too broad a standard, effectively imposing an unqualified duty to protect customers in areas experiencing any significant level of criminal activity. The approach might deem criminal attacks on customers foreseeable as a result of circumstances such as the level of crime in the neighborhood, inadequate lighting, or architectural designs, even if no prior instances of crime had occurred. As a practical matter, the totality approach arguably requires businesses to implement expensive security measures (with the costs passed on to consumers) and makes them the insurers of customer safety, two results which courts seek to avoid. Businesses may react by moving from poorer areas where crime rates are often the highest. Not surprisingly then, the totality of the circumstances test has been described as imprecise, unfair, and troublesome because it makes liability for merchants even less predictable than under the prior incidents rule.

McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 900 (Tenn. 1996) (quotation omitted). Georgia, of course, rejects application of such factors and the notion that premises owners and controllers are insurers of customer safety.

For its part, the prior similar incidents test has been criticized on the grounds that

> under the PSI test the first victim in all instances is not entitled to recover, landowners have no incentive to implement even nominal security measures, the test incorrectly focuses on the specific crime and not the general risk of foreseeable harm, and the lack of prior similar incidents relieves a defendant of liability when the criminal act was, in fact, foreseeable.

Delta Tau Delta, 712 N.E.2d at 972. But Georgia's analysis allays these concerns by allowing foreseeability to be established not only through prior similar incidents but also through "evidence that the landowner had knowledge of a volatile situation brewing on the premises." *Martin*, 301 Ga. at 331. Thus, Georgia's current test incentivizes protection for victims whose attacks should have been foreseen on account of particularized knowledge while at the same time preventing the imposition of a general duty to protect from third-party criminal conduct. The substantial similarity test on the other hand would turn premises owners and occupiers into insurers of safety of invitees, an outcome that is inconsistent with Georgia law and policy.

Accordingly, the appropriate test to be performed under Georgia law is a prior similar incidents test performed by the trial court to determine whether a duty exists.

D. The Court should not construe liability under Section 324A of the Restatement (Second) of Torts to expand contractual undertakings.

With respect to the fourth question, GDLA writes to urge the Court not to allow liability to expand the obligations of a security company beyond those it has contractually undertaken to the extent it determines that § 324A applies to such companies. This principle, combined with Georgia precedent interpreting § 324A, shows that § 324A is not properly applied to Tactical here.

The American Law Institute made it clear that § 324A is not intended to expand the undertakings of the alleged tortfeasor:

> 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.

Restatement (Second) of Torts § 324A (1965) (emphasis added).

> d. Undertaking duty owed to third person. Even where the negligence of the actor does not create any new risk or increase an existing one, he is still subject to liability **if, by his undertaking with the other, he has undertaken a duty which the other owes to the third person. Thus a managing agent who takes charge of a building for the owner, and agrees with him to keep it in proper repair, assumes the responsibility of performing the owner's duty to others in that respect.** He is therefore subject to liability if his negligent failure to repair results in injury to an invitee upon the premises who falls upon a defective stairway, or to a pedestrian in the street who is hurt by a falling sign. Such liability is in addition to that which he may have to the person to whom he has agreed to render the services.

Restatement (Second) of Torts § 324A (1965) (emphasis added).

The duty to exercise ordinary care in keeping premises and approaches safe belongs only to the owner or occupier of land by statute, and this duty is nondelegable. *See* O.C.G.A. § 51-3-1; *Camelot Club Condo. Ass'n, Inc. v. Afari-Opoku*, 340 Ga. App. 618, 627 (2017). There is no justification for imposing the duties owed by owners or occupiers onto security companies, particularly in the absence of any statute to that end.

Georgia precedent interpreting § 324A's subsections confirms this principle in practice. Under subsection (a), "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). 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). And

subsection (c) explicitly requires that the contemplated reliance be the cause of the victim's harm. *Glover v. Georgia Power Co.*, 347 Ga. App. 372, 379 (2018). All of these sections thus require harm related to some undertaking and cannot serve to impose O.C.G.A. § 51-3-1 duties on a non-owner or occupier.

Precedent from other jurisdictions supports this view as well. *Hutchison v. Fitzgerald Equip. Co., Inc.*, 910 F.3d 1016, 1024 (7th Cir. 2018) (applying Illinois law for the proposition that "under the voluntary undertaking theory of liability [of § 324A], the duty of care to be imposed upon a defendant is limited to the extent of its undertaking."); *Flanagan v. RBD San Antonio L.P.*, No. 04-16-00761-CV, 2017 WL 5615567, at *6 (Tex. App. Nov. 22, 2017); *see also Speaker v. Cates Co.*, 879 S.W.2d 811, 816 (Tenn. 1994) ("Since the plaintiffs failed to show that there was a breach of the contract, there need be no discussion of the duty owed by Security–Chek to the tenants or the issue of proximate cause.").

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 be constrained in very particular ways related to the services it agreed to provide and actually was providing. The record simply does not support the application of § 324A to Tactical.

CONCLUSION

Foreseeability in the context of third-party premises liability cases determines the duty. As such, it is a question for the trial court. And Georgia precedent clearly establishes that Georgia is a prior similar acts jurisdiction, meaning that Georgia courts apply the *Sturbridge* factors and other precepts to determine whether the underlying criminal act was, generally speaking, foreseeable given prior incidents occurring at the subject property and the owner/occupier's knowledge thereof. Finally, liability under § 324A, to the extent it applies to security companies at all, is limited only to an undertaking and any harm caused by negligent performance of that undertaking.

Given the answers to these questions, Appellees are not liable for Appellant's injuries as a matter of law. The Court of Appeals properly applied Georgia precedent in reversing the trial court. It applied a well-reasoned categorical approach in determining that the attack on Appellant was not foreseeable and thus created no duty. The court also properly determined that Tactical's agreement did not create a duty towards Appellant that was breached in these cases.

The rules discussed above are important to ensure that Georgia defendants are treated fairly. Premises liability is rightfully based on control and knowledge. Without either, landowners and occupiers cannot be held liable for dangerous

conditions on premises. This is appropriate as a matter of principle; otherwise, premises owners and occupiers would become insurers of their invitees. If the Court were to change Georgia's course as Appellant and her amicus urge, Georgia's businesses and other property owners would ultimately be forced to bear responsibility for the criminal acts of unknown third parties. Such would be an unjust and disastrous outcome.

The criminal act underlying these cases was unforeseeable as a matter of law, and there appears to be no record evidence supporting Tactical's causal involvement. Accordingly, GDLA urges the Court to render a decision consistent with the foregoing and affirm the Court of Appeals.

Respectfully submitted this 31st day of January, 2023.

GEORGIA DEFENSE LAWYERS ASSOCIATION

James D. Meadows, President
Philip Thompson, Co-Chair
Patrick Silloway, Vice-Chair
Amicus Curiae Brief Committee
P.O. Box 67
Rossville, GA 30741
(706) 956-4848

ELLIS PAINTER

s/ Philip Thompson
Philip Thompson
Georgia Bar No. 963572
P.O. Box 9946
Savannah, Georgia 31412
(912) 233-9700 (phone)
(912) 233-2281 (fax)
pthompson@ellispainter.com

On Behalf of the Georgia Defense Lawyers Association

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 email:

James Nicholas Sadd
Edward M. Wynn, III
SLAPPEY & SADD LLC
352 Sandy Springs Circle
Atlanta, GA 30328
jay@lawyersatlanta.com
Counsel for Appellant-Plaintiff Cynthia Welch

Aleksandra H. Bronsted
ALEXSANDRA H. BRONSTED, P.C.
6065 Lake Forest Dr., Suite 200
Atlanta, Georgia 30328
aleksandra@bronsted.com
Counsel for Appellant-Plaintiff Cynthia Welch

Michael B. Terry
Frank M. Lowrey IV
Naveen Ramachandrappa
Jennifer L. Peterson
BONDURANT MIXSON & ELMORE LLP
1201 W. Peachtree St NW, Ste. 3900
Atlanta, GA 30309
terry@bmelaw.com
lowrey@bmelaw.com
ramachandrappa@bmelaw.com
peterson@bmelaw.com
Counsel for Appellant-Plaintiff Cynthia Welch

Christine L. Mast
Warner S. Fox
Elliott C. Ream
HAWKINS PARNELL & YOUNG, LLP
303 Peachtree Street, Suite 4000
Atlanta, Georgia 30308
cmast@hpylaw.com
wfox@hpylaw.com
eream@hpylaw.com
Counsel for Appellee-Defendant Tactical Security Group, LLC
Harold Melton
TROUTMAN PEPPER HAMILTON SANDERS LLP
600 Peachtree Street NE
Suite 3000
Atlanta Georgia 30308
harold.melton@troutman.com
Counsel for Appellee-Defendant Tactical Security Group, LLC

Laurie Webb Daniel
Nicholas R. Boyd
HOLLAND & KNIGHT LLP
1180 W. Peachtree Street NW, Suite 1800
Atlanta, Georgia 30309
laurie.daniel@hklaw.com
nicholas.boyd@hklaw.com
Counsel for Appellee-Defendant Pappas Restaurants, Inc.
(Appellee in companion Appeal No. S22G0617)

Michael J. Rust
Nicole C. Leet
GRAY, RUST, ST. AMAND, MOFFETT & BRIESKE
1700 Atlanta Plaza
950 East Paces Ferry Road
Atlanta, Georgia 30326
mrust@grsmb.com
nleet@grsmb.com
Counsel for Appellee-Defendant Pappas Restaurants, Inc.
(Appellee in companion Appeal No. S22G0617)

Adam Malone
Michael J. Eshman
Bret Moore
Lawrence Washburn, IV
Georgia Trial Lawyers Association
3350 Centennial Tower
101 Marietta Street
Atlanta, GA 30303
adamm@malonelaw.com
meshman@eshmanbegnaud.com
bret@poolehuffman.com
lee.washburn@wilsonelser.com
Counsel for Amicus Georgia Trial Lawyers Association

This 31st day of January, 2023.

ELLIS PAINTER

s/ Philip Thompson

PHILIP M. THOMPSON
Georgia Bar No. 963572
pthompson@ellispainter.com
On Behalf of the Georgia Defense Lawyers Association

P.O. Box 9946
Savannah, Georgia 31412
(912) 233-9700 (t)