**IN THE COURT OF APPEALS**
**STATE OF GEORGIA**

**Appeal No. A19A2438**

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ST. JUDE'S RECOVERY CENTER, INC.,

Appellant,

v.

LAURA VAUGHN,

Appellee.

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# AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

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| **LAURA VAUGHN,** | ) | **State Court of Fulton County 17EV003544** |
| Appellee. | ) | |

# AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

COMES NOW the Georgia Defense Lawyers Association ("GDLA") and files this Brief as *amicus curiae* in the above-styled appeal, showing this Honorable Court as follows:

## INTRODUCTION

This case arises from a random, unforeseeable criminal attack which occurred more than one mile away from Appellant St. Jude's Recovery Center, Inc.'s ("St. Jude's") premises. St. Jude's is an in-patient facility offering drug rehabilitation services to individuals like Appellee who opt to avoid confinement in prison in favor of volunteering to undergo rehabilitation. While the attack on Appellee is very unfortunate, as a matter of law, St. Jude's had no duty to protect Appellee from a random and unforeseeable attack that did not occur on, or even near, St. Jude's

premises or approaches. The unforeseeable criminal attack did not even occur at a bus stop used by Appellee to transport her to her job as part of her voluntary drug rehabilitation. Instead, the attack occurred after Appellee deviated from the prescribed route, walking away from the bus stop to a convenience store a mile away from St. Jude's premises to buy cigarettes. Appellee was not required to walk to the convenience store to buy cigarettes for herself. She did not walk to the convenience store to seek "the apparent safety of the well-lit and populated convenience store nearby." (See p. 3, Brief of Appellee). She was not walking to any program-mandated employment at the time she was attacked. Instead, she was attacked while running a personal errand to a location she was prohibited from visiting. While maintaining employment was required by St. Jude's recovery program (and the Georgia Department of Behavioral Health and Developmental Disabilities with whom St. Jude's contracted) as a means to offer residents the opportunity to become productive and responsible adults, Appellee chose to break the program's rules by walking to the store to buy her own cigarettes. In pursuit of her own personal venture, Appellee acknowledged that she was breaking the program's rules which are designed, in part, for her own safety.[1]

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[1] Appellee acknowledged:

Q. So it's your understanding that the rules were in place for your safety? Yes? Is that a yes. You're nodding.

A. Yes, among, I'm sure, other things. I'm sure they had many reasons for the rules.

This Court has very recently reiterated that, "[b]efore we can impose the duty to protect against the criminal acts of third parties, we must find that the defendant has a duty to control the security of the premises where the criminal act took place…" Sadlowski v. Beacon Mgmt. Servs., 348 Ga. App. 585, 593 (2019). As St. Jude's clearly did not have a duty or right to control the security of the public sidewalk one mile away from St. Jude's premises, the Appellee cannot make a premises liability claim.[2] Further, in a premises liability case, the hallmark of liability for third party criminal attacks is foreseeability as a result of prior substantially similar crimes; however, Appellee has never shown a single prior substantially similar crime on St. Jude's premises, approaches, or even at the bus stops where residents would catch buses to go to their employment. Appellee could only say, "Atlanta is dangerous," and she was aware that residents were "harassed" by men while they walked to the bus stops. This does not establish foreseeability. Thus, as Appellee failed to demonstrate evidence to support a premises liability claim, Appellee instead relies on a theory that St. Jude's assumed a duty to Appellee through a "voluntary undertaking." As more fully discussed herein, this theory also

(R2- 293).

[2] In her response to St. Jude's motion for summary judgment, the Appellee specifically denied that she had made a premises liability claim. (R3-1010). However, for the first time, before this Court, she claims she is making a premises liability as an alternate claim because "Plaintiff's claims sound in premises liability." (See p. 32, Brief of Appellee).

fails because Appellee cannot show a voluntary assumption of a duty to provide security services, her detrimental reliance, or an increased risk of harm as a result of St. Jude's alleged voluntary undertaking.

Contrary to Appellee's contention and Georgia law, St. Jude's was not the insurer of Appellee's safety at *all* times at *all* locations during *all* activities. Yet, Appellee has stated that, in her view, St. Jude's was responsible for her safety at all times, whether or not she was on St. Jude's premises, its approaches, walking to a bus stop, riding a bus, while working, or even when Appellee broke St. Jude's rules and walked a mile away from St. Jude's premises for her own personal errand. This is simply not required of St. Jude's. According to Appellee, St. Jude's would be liable as long as she was a resident of St. Jude's program. Appellee's proposed theory disregards Georgia law and seeks to create a never-ending duty of care that would require St. Jude's to be an insurer of Appellee's safety at *all* times at *all* locations during *all* activities.

The GDLA respectfully submits that, in denying St. Jude's motion for summary judgment, the trial court erred in holding that disputed issues of fact exist; instead, whether St. Jude's owed a duty to a program resident who deviated from the program's rules while on a personal errand to a location she was prohibited from visiting is a question of law for the court to decide. Further, the trial court erroneously relied on the Martin v. Six Flags Over Ga. II, L.P. premises liability case

and by doing so, has exponentially enlarged the potential liability of a business owner for criminal attacks. Martin v. Six Flags Over Ga. II, L.P., 301 Ga. 323 (2017). The holding in the Six Flags case is limited to the specific facts of that case where the attack that caused the patron's injuries began while both the patron and the assailants were on Six Flags' property.

The GDLA respectfully submits that the trial court should have granted St. Jude's motion for summary judgment and respectfully requests that this Court reverse the trial court's decision.

## STATEMENT OF IDENTITY AND INTEREST

The GDLA is an association of 960 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. The GDLA and its members hope to ensure that basic principles of Georgia tort law are clearly defined and uniformly applied. In addition, the GDLA, its members, and their clients have an interest in ensuring that case law is appropriately construed by the trial courts to avoid the result reached by the trial court in this case.

Although the case below involves allegations of negligence against a single

in-patient drug rehabilitation facility, the issues raised in this appeal will affect every institutional facility in the State of Georgia, including schools, churches, hospitals, nursing homes, and penal institutions. If the trial court's decision is allowed to stand, countless facilities will necessarily become the insurers of their clients'/patients' safety, whether on the premises or a mile away from the premises, or whether they are carrying out personal errands in violation of the facility's rules. This is not the law in Georgia.

## STATEMENT OF ADDITIONAL PERTINENT FACTS

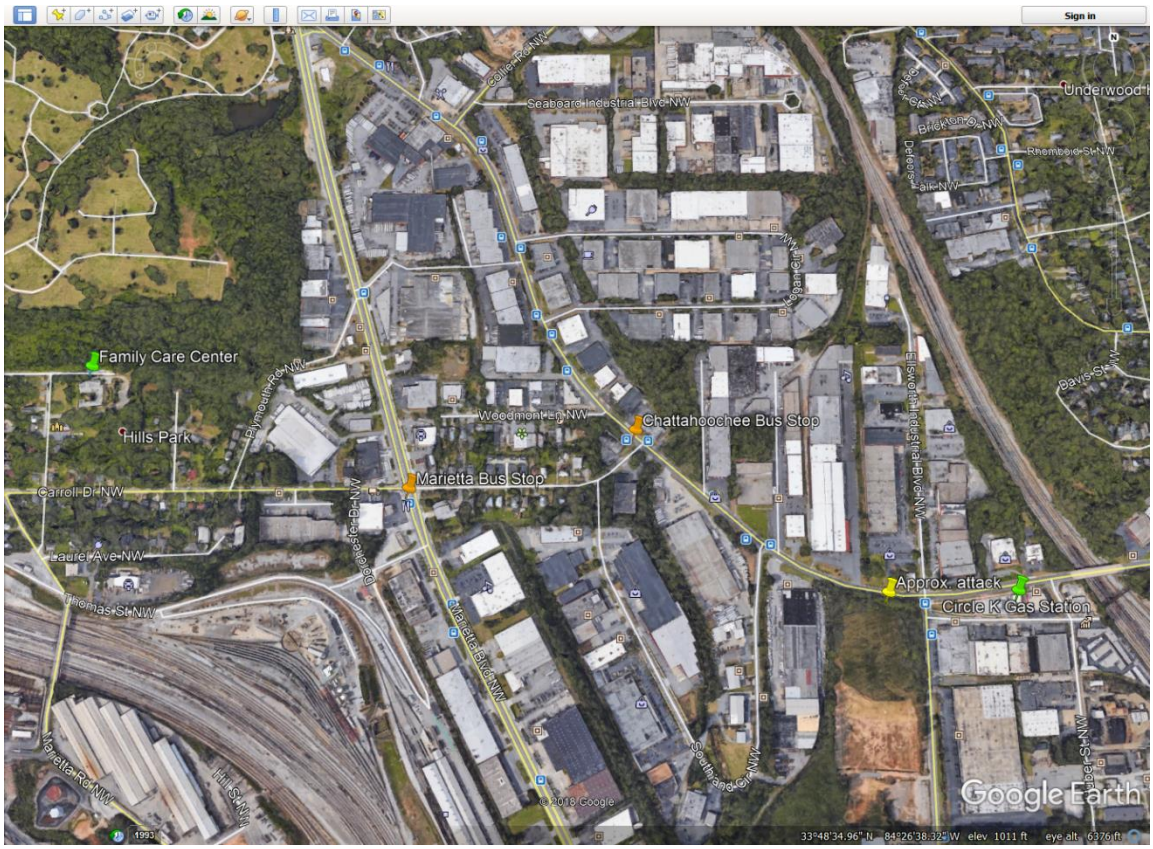
On December 30, 2014, Appellee was admitted as a resident of St. Jude's Family Care Center ("FCC") program, which is an in-patient program located in Atlanta, Georgia, as an alternative to completing a prison sentence. (R2-17-25, 281-283). St. Jude's purpose is to provide "services to those seeking treatment for substance abuse and co-occurring mental health disorders." (R3-901). St. Jude's is a contracted provider for the Georgia Department of Behavioral Health and Developmental Disabilities (DBHDD). (R1-149-150). St. Jude's "[s]ervices and programs are licensed by the DBHDD Office of Licensure and Standards and are accredited nationally by the CARF" (Commission on Accreditation of Rehabilitation Facilities) (R3-900).

At a certain point in the program, residents such as Appellee are required to obtain employment to learn personal responsibility. (R3-903) ("Employment is a

therapeutic issue that emphasizes personal responsibility"). The DBHDD's contract with St. Jude's requires that residents obtain employment. (R2-160-161). To travel to their places of employment, residents are allowed to take the bus and can use two bus stops—the bus stop at Marietta Boulevard and Carroll Drive ("Marietta bus stop") and the bus stop at Chattahoochee Avenue and Carroll Drive ("Chattahoochee bus stop"). (R2-299-300, 497). The Marietta bus stop is located approximately 0.6 miles from the St. Jude's facility. The Chattahoochee bus stop is 0.2 miles further from the FCC. (R2-299-300).

Appellee had been employed at Hardee's fast food restaurant for a month or more prior to the subject incident. (R2-295, 479). She had been working the same shift the entire month. (R2-480). Appellee normally took the bus from the Marietta bus stop to get to her job at Hardee's on weekdays, and she caught the bus at the Chattahoochee bus stop on weekends as the Marietta bus did not run on weekends. (R2-299-300). On the date of the subject incident, Appellee woke up ten minutes late and consequently missed her bus at the Chattahoochee bus stop. (R2-295, 480). "It was about 40 minutes until the next bus would come." Id. Appellee could have returned to St. Jude's, but she "didn't really see the point in walking all the way back and literally turning around and going straight back to the bus stop." (R2-300, 500). Instead, and although she knew it was prohibited, she decided to walk over a mile away from St. Jude's to a Circle K gas station and convenience store to buy cigarettes

for herself. (R2-295, 296, 300, 480). While she was walking back towards the Chattahoochee bus stop, she was attacked by an unknown assailant. (R2-296-297). The relevant locations (St. Jude's FCC, Marietta bus stop, Chattahoochee bus stop, gas station, and approximate area of attack) are shown below.




(R2-102).

## ARGUMENT AND CITATION OF AUTHORITY

### I. ST. JUDE'S OWED NO DUTY "SOUNDING IN NEGLIGENCE FROM A 'VOLUNTARY UNDERTAKING.'"

Duty is a threshold element of any negligence claim. Sadlowski, 348 Ga. App. at 589. See also Ford Motor Co. v. Reese, 300 Ga. App. 82, 84 (2009) ("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… In the absence of a legally cognizable duty, there can be no fault or negligence"). It is axiomatic that an action for negligence cannot be maintained if the defendant did not owe the plaintiff a legal duty. Armor Elevator Co. v. Hinton, 213 Ga. App. 27, 29 (1994). See also Womack v. Oasis Goodtime Emporium I, Inc., 307 Ga. App. 323, 328 (2010) (without a legal duty, there can be no negligence arising from the failure to protect a plaintiff). "Such a duty can arise either by statute or be imposed by a common law principle recognized in the caselaw." Wells Fargo Bank, N.A. v. Jenkins, 293 Ga. 162, 164 (2013).

Here, St. Jude's owed no duty to Appellee, under any statute or under any common law principle recognized in Georgia, where and when she was attacked by the criminal assailant.

### A. As an Initial Matter, the Trial Court Erred in Failing to Make a Ruling on Whether St. Jude's Owed a Duty to Appellee, Which is a Question of Law For the Court to Decide.

It is well established that the existence of a legal duty is a question of law for the court. Garner & Glover Co. v. Barrett, 321 Ga. App. 205, 208 (2013); Diamond v. DOT, 326 Ga. App. 189, 195 (2014) ("…what duty a defendant owes is a question of legal policy to be decided as an issue of law…"). The trial court erroneously held that because there are questions concerning the knowledge and

foreseeability of the "possible dangers" to Appellee, there is an issue of fact as to the scope of St. Jude's duty for off premises attacks. (R4-1184-1186). Whether, and to what extent, St. Jude's owed a duty to Appellee is a question of law that the trial court was required to decide.

### B. St. Jude's Did Not Voluntarily Assume a Duty to Insure the Safety of Appellee at All Times and At All Places.

Since Appellee did not bring a premises liability claim, she relies on a theory of negligence based on a voluntary undertaking. According to Appellee, St. Jude's voluntarily undertook "a duty of protection" in consideration for "the fees and costs paid" by Appellee through her earnings at Hardee's. (R2-21). However, any such claim fails because: (1) St. Jude's did not voluntarily undertake to provide security services to Appellee, particularly where the subject incident occurred; (2) Appellee could not have relied on St. Jude's for security services where the subject incident occurred because she knew that she was in an area where she was not allowed to go; and (3) St. Jude's did nothing to increase the risk of harm to Appellee.

The voluntary undertaking doctrine provides as follows:

> One who undertakes to do an act or perform a service for another has the duty to exercise care, and is liable for injury resulting from his failure to do so, even though his undertaking is purely voluntary or even though it was completely gratuitous, and he was not under any obligation to do such act or perform such service, or there was no consideration for the promise or undertaking sufficient to support an action ex contact based thereon; in order for this principle to apply, however, an injured

> person must show either detrimental reliance or an increased risk of harm.

Dale v. Keith Built Homes, Inc., 275 Ga. App. 218 (2005) (emphasis added). See also Osowski v. Smith, 262 Ga. App. 538 (2003).

**1. St. Jude's did not voluntarily undertake to provide security services to Appellee, particularly where the subject incident occurred.**

St. Jude's did not undertake to provide security services to Appellee (such as the defendant did in Monitronics Int'l, Inc. v. Veasley, 323 Ga. App. 126 (2013), cited by Appellee), particularly in areas where Appellee was prohibited. St. Jude's undertook to provide "services to those seeking treatment for substance abuse and co-occurring mental health disorders," not security services. (R3-901). Appellee understood that "one of the overall goals of the program [was] to help [her] get to a point of being able to live self-sufficiently." (R2-305). The goal of the program was not to provide security, and certainly not while residents engaged in prohibited personal errands. There is simply no evidence in the record that St. Jude's agreed to provide security services to Appellee when she chose to deviate from the program's rules and to walk a mile away from St. Jude's to perform a personal errand, i.e. buying her cigarettes. There is indisputably no evidence that St. Jude's undertook to provide any kind of security services to Appellee while running a personal errand that was expressly prohibited by the program's rules (and necessarily those of the Georgia DBHDD).

**2. Appellee could not have relied on St. Jude's for security services where the subject incident occurred because she knew that she was in an area where she was not allowed to go.**

The first of the two possible prerequisites is reasonable reliance by the injured person. Abundant Animal Care, LLC v. Gray, 316 Ga. App. 193 (2012). In this case, Appellee cannot have acted in reliance upon any undertaking by St. Jude's to protect her when and where she was attacked because she knew she had deviated from her required route. At her deposition, she admitted that she knew she was breaking the program's rules by walking to the convenience store for cigarettes instead of waiting for the next bus:

> Q. At that time — at the time this incident occurred, were you able to leave and go to the gas station if you wanted to, or is that against the rules?
> A. No. Against the rules.

(R2- 296-297, 484-485).

> A. You weren't supposed to deviate, come back, nothing. If you missed the bus, you catch the next one.
> Q. But you weren't supposed to deviate and go to the store either. Right?
> A. Correct.

(R2-300, 500).

Given that Appellee was in an area she knew was prohibited by the program's rules, she could not possibly have relied on St. Jude's to protect her.

### 3. St. Jude's did nothing to increase the risk of harm to Appellee.

The second of the two possible prerequisites is an increased risk of harm. "Failing to take all possible actions to prevent an occurrence is not the same as increasing the risk of the occurrence." Dale, 275 Ga. App. at 220; Griffin v. AAA Auto Club S., Inc., 221 Ga. App. 1, 3 (1996). "Liability does not attach for failing to decrease the risk of harm." Boyd v. Big Lots Stores, Inc., 347 Ga. App. 140, 146 (2018).

Appellee cannot show that any action taken by St. Jude's increased the risk of harm to Appellee. Appellee recites several actions that St. Jude's could have taken to attempt to prevent the subject occurrence, such as transporting every single resident to a nearby MARTA station at varying times or utilizing a dedicated cab driver. (See pp. 10-11, Brief of Appellee). Failing to have taken these actions to attempt to prevent the attack on Appellee is not the same as increasing the risk of occurrence. Appellee cannot show that any action taken by St. Jude's increased the risk of harm to Appellee.

Any claim by Appellee that any action by St. Jude's amounts to the negligent performance of a voluntary undertaking must fail as a matter of law. The Appellee cannot show a voluntary agreement to provide security, or detrimental reliance, or an increase in the risk of harm.

## II. CONTRARY TO APPELLEE'S CONTENTION, UNDER GEORGIA LAW, NO DUTY WAS CREATED THROUGH THE EXISTENCE OF A "SPECIAL RELATIONSHIP," WHICH IS A QUESTION OF LAW THE TRIAL COURT SHOULD HAVE DECIDED.

In attempting to establish a duty of care through a "special relationship" between St. Jude's and Appellee, Appellee cites to a single 2004 Alaska case which holds no precedential or persuasive value in Georgia. Under Georgia law, no "special relationship" existed between Appellee and St. Jude's.

"A special relationship is one in which one person has control over another, such as the employer-employee relationship." Miraliakbari v. Pennicooke, 254 Ga. App. 156, 159 (2002). A "special relationship" generally applies to employer-employee relationships, governmental entities, and physicians with control of individuals they know pose a danger to the public. Trammel v. Bradberry, 256 Ga. App. 412, 416 (2002)("The criteria for determining whether a person has a special relationship over another giving them control of such individual with the attendant duties are analogous to when a physician has such special relationship of control over a mental patient"); Shortnacy v. N. Atlanta Internal Med., P.C., 252 Ga. App. 321 (2001); Rome v. Jordan, 263 Ga. 26 (1993). Whether a special relationship giving rise to a specific legal duty exists under the peculiar facts of each case is generally a question of law for the court. Feise v. Cherokee Cty., 207 Ga. App. 17, 25 (1992).

Under Georgia law, the trial court should have found that no "special relationship" existed between St. Jude's and the Appellee under the facts presented by this case.

## III. TO THE EXTENT THAT APPELLEE HAS MADE A PREMISES LIABILITY CLAIM, THERE IS NO EVIDENCE THAT ST. JUDE'S OWED A DUTY TO APPELLEE UNDER O.C.G.A 51-3-1.

The Appellee did not bring a premises liability claim, but she includes it as an alternate theory in her Brief filed in this Court by stating that her claims "sound in premises liability."[3] (See p. 32, Brief of Appellee). Any claim based upon premises liability cannot survive summary judgment because St. Jude's had no duty to keep safe any "approaches" over which it had no control, much less those in an area one mile away from St. Jude's premises. Additionally, the attack on Appellee was entirely unforeseeable to St. Jude's.

### A. St. Jude's Had No Duty to Keep Safe "Approaches" Over which It Had No Control, Much Less an Area One Mile Away.

A premises owner has no duty to keep safe approaches over which the proprietor has no right of control. Hillcrest Foods, Inc. v. Kiritsy, 227 Ga. App. 554, 557 (1997). The premises owner's duty to keep the approaches safe does not generally extend to a busy public thoroughfare on which the premises is located,

[3] In her response to St. Jude's motion for summary judgment filed in the trial court, Appellee admitted that she has not made a premises liability claim. (R2-1010).

where the owner has no legal right to control such thoroughfare.[4] Instead, O.C.G.A § 51-3-1 generally contemplates approaches over which the proprietor has a right of control.

A recent case decided by this Court defines an "approach" to a premises for the purpose of O.C.G.A. § 51-3-1 and illustrates the limits of a proprietor's liability for incidents occurring on those approaches. Boyd v. Big Lots Stores, Inc., 347 Ga. App. 140. In Boyd, plaintiff was an invitee at a store leased and occupied by Big Lots Stores, Inc., which was located in a shopping center with a common area parking lot owned by the shopping center owner/lessor. Id. at 140-141. After the plaintiff left the Big Lots store, she was injured when she slipped and fell in the parking lot 45 feet from the store entrance while walking to her car. Id. at 141. The plaintiff sued Big Lots, "claiming that her injury was proximately caused by the negligent failure of Big Lots: (1) to discharge the duty imposed on it by OCGA § 51-3-1 to keep the store premises and approaches safe for invitees; or (2) to discharge a duty it voluntarily assumed pursuant to Restatement (Second) of Torts § 324A to protect its invitees from the dangerous condition in the parking lot of which it had notice." Id. The trial court granted summary judgment. The undisputed facts

[4] Although the premises owner has a duty to keep the premises and *approaches* safe, (see O.C.G.A. § 51-3-1), "[i]f the approach is a public way, the occupier's duty ... is to exercise due care within the confines of his right in the public way." Rischack v. City of Perry, 223 Ga.App. 856 (1996), citing Reed v. Ed Taylor Constr. Co., 198 Ga. App. 595, 597 (1991).

showed that the plaintiff was not on the Big Lots store premises when she slipped and fell in the parking lot, and the trial court concluded that the parking lot was not an approach to the store premises within the meaning of O.C.G.A. § 51-3-1. Id. at 141. On appeal, this Court first determined that the area in which the plaintiff fell was not an approach to the store:

> [A]n approach to the premises for the purpose of OCGA § 51-3-1 means that property directly contiguous, adjacent to, and touching those entryways to premises under the control of an owner or occupier of land, through which the owner or occupier, by express or implied invitation, has induced or led others to come upon his premises for any lawful purpose, and through which such owner or occupier could foresee a reasonable invitee would find it necessary or convenient to traverse while entering or exiting in the course of the business for which the invitation was extended. By "contiguous, adjacent to, and touching," we mean that property within the last few steps taken by invitees, as opposed to "mere pedestrians," as they enter or exit the premises. It is only within the confines of this limited approach that [a duty is imposed] on a landowner [or occupier] to exercise ordinary care over property not within the landowner's [or occupier's] control.

Id. at 141-142, citing Motel Props. v. Miller, 263 Ga. 484, 486 (1993) (emphasis added). This Court concluded that, "after Boyd departed on foot from the store premises, walked across a sidewalk in front of the store, and continued walking away from the store into the common area parking lot to a point 45 feet from the store, she was no longer on a contiguous approach to the store premises when she slipped and fell." Id. at 142. "Moreover, the trial court correctly found that there was no basis

in the record to conclude that the non-contiguous parking lot where Boyd slipped and fell qualified for the exception recognized in *Motel Properties*, supra, where 'under certain circumstances non-contiguous property can be deemed an approach because the landowner [or occupier] extended the approach to his premises by some *positive action* on his part, such as constructing a sidewalk, ramp, or other *direct* approach.'" Id. (emphasis in original). Accordingly, "Big Lots had no responsibility to maintain the shopping center parking lot, which was a common area owned and maintained by the shopping center owner/lessor," nor was the evidence sufficient to show that Big Lots extended the approach to its store over the non-contiguous parking lot by taking any action reflecting a positive exercise of dominion over the common area parking lot. Id. at 143. This Court affirmed the grant of summary judgment.[5]

Here, the area of the attack cannot conceivably be deemed an approach to St. Jude's premises; it was a mile away, and St. Jude's made no effort to exert any control over such area. Appellees had no right to control the area of the attack, and

[5] This Court also affirmed summary judgment on the plaintiff's voluntary undertaking theory. "Even if there was evidence that Big Lots had notice of the dangerous condition 60 to 70 seconds before Boyd slipped and fell, and would sometimes undertake to remove that kind of condition to prevent injury, the mere failure to abate the hazardous condition did not make it worse and did not trigger the application of Section 324A (a)." Id. at 146. Further, "there was no basis to conclude that Boyd or the shopping center owner/lessor relied on any undertaking by Big Lots to remedy the hazard." Id.

consequently, no duty to exercise ordinary care to keep the area safe.

**B. The Attack on Appellee Was Entirely Unforeseeable to St. Jude's.**

With regard to criminal attacks by third parties, an owner's duty is to exercise ordinary care to guard against only foreseeable criminal attacks. Wojcik v. Windmill Lake Apts., Inc., 284 Ga. App. 766 (2007). "Foreseeability may be determined by analyzing whether the property owner has notice of substantially similar prior criminal acts." Med. Ctr. Hosp. Auth. v. Cavender, 331 Ga. App. 469, 474 (2015). "In determining whether a given crime is 'substantially similar,' a court must analyze the 'location, nature and extent of the prior criminal activities and their likeness, proximity or other relationship to the crime in question.' In addition, it is the Plaintiffs' burden to establish that the property owner had knowledge of the previous substantially similar crimes on or near the premises upon which the plaintiffs rely to establish foreseeability." Id.

Here, Appellee has not put forth evidence of even one substantially similar attack on any resident at any location. In fact, Appellee has not introduced evidence of any crimes. Appellee can only say that "St. Jude had prior knowledge that residents had been the subject of harassment from males in the area" (R2-20) and that "Atlanta is dangerous." (R2-443). This does not, by any means, establish foreseeability.

### C. Appellee's (and, Respectfully, The Trial Court's) Reliance on Six Flags Is Grossly Misplaced.

In denying St. Jude's motion for summary judgment, the trial court relied on the Six Flags premises liability case, which is entirely distinguishable. (R4-1184-1186). See Martin v. Six Flags Over Ga. II, L.P., supra.

In Six Flags, the Supreme Court held that defendant Six Flags was liable for foreseeable criminal activity that began within Six Flags' premises and approaches and concluded adjacent to the premises. A group of men alleged to have been gang members, some of whom were off-duty Six Flags employees, threatened two families. The families alerted Six Flags security officers, who then confronted the men and reprimanded them but then released them back into the park. Shortly before the amusement park closed, the plaintiff, his brother, and his friend went to the front entrance of the park where they waited for the next bus. This same group of men surrounded the plaintiff and beat him. The plaintiff alleged that Six Flags failed to exercise ordinary care to keep the park premises and approaches safe for him as its invitee. Prior to the attack, gang-related criminal activity inside the park had occasionally spilled over to areas outside the park, and incidents were of particular concern at the park's closing time when attendees were funneled into parking lots and nearby bus stops. The Court held, in part, that Six Flags could not avoid liability simply because an attack that originated on Six Flags property was completed off the property.

Unlike the Six Flags case where the criminal activity began on the premises and concluded at an immediately adjacent bus stop, the criminal attack on the Appellee originated and concluded one mile away from St. Jude's premises. Further, the attack on Appellee shared no temporal proximity or physical proximity to Appellee's presence on St. Jude's premises.

## IV. SUBSEQUENT REMEDIAL MEASURES ARE NOT EVIDENCE THAT ST. JUDE'S OWED THE APPELLEE A DUTY OF CARE.

In this case, there is insufficient evidence in the record to create a jury issue on Appellee's claim that St. Jude's owed any duty of care to Appellee, under the voluntary undertaking doctrine, due to some "special relationship," or under a premises liability theory. The Appellee additionally argues, without citing to a single legal authority, that St. Jude's establishment of a "buddy system" is evidence that St. Jude's "exercises control over and responsibility for the women in its program," i.e. evidence that St. Jude's owed Appellee a duty of care at the time and place of the subject incident. (See p. 28, Brief of Appellee). The establishment of a "buddy system" after the subject incident is clearly a subsequent remedial measure that is not admissible as evidence.

The law is well settled that, "[i]n civil proceedings, when, after an injury or harm, remedial measures are taken to make such injury or harm less likely to recur, evidence of the remedial measures shall not be admissible to prove negligence or culpable conduct…" O.C.G.A. § 24-4-407. "This rule exists because persons 'should

be encouraged to improve, or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrong-doers.'" Mark v. Agerter, 332 Ga. App. 879, 881 (2015), citing Brooks v. Cellin Mfg. Co., 251 Ga. 395, 397 (1983). "Otherwise, 'the instituting of remedial safety measures might be discouraged if such conduct is admissible as evidence of negligence.'" Id. See also Gunter v. Jackson Elec. Mbrshp. Corp., 198 Ga. App. 629, 630 (1991).

The establishment of a "buddy system" or any other similar action is, by definition, a subsequent remedial measure that is not admissible to prove negligence or for any other purpose. See O.C.G.A. § 24-4-407. The Appellee's contention that the "buddy system" that was instituted after the subject incident establishes a duty of care is entirely without merit.

## V. TO THE EXTENT THAT APPELLEE CLAIMS NEGLIGENCE PER SE, SUCH A CLAIM LIKEWISE FAILS.

The trial court should have granted St. Jude's motion for summary judgment on the Appellee's negligence per se claim. The regulation allegedly violated by St. Jude's does not apply.

"In Georgia, negligence per se arises when a defendant violates a statute or ordinance, satisfying, as a matter of law, the first two elements of a negligence claim." Amick v. BM & KM, Inc., 275 F. Supp. 2d 1378, 1381 (N.D. Ga. 2003), citing Hubbard v. DOT, 256 Ga. App. 342, 349 (2002). In order to establish

negligence per se, plaintiffs must specify the statute, ordinance, or regulation that they allege the defendant violated. Schaff v. Snapping Shoals Elec. Membership Corp., 330 Ga. App. 161, 164 (2014), cert. denied (Mar. 2, 2015).

In her First Amended Complaint, the Appellee claimed that "St. Jude and its employees' actions and/or omissions leading to this assault violated applicable statutes, regulations, and industry standards, and form the basis of negligence per se." (R2- 23). In her brief in response to St. Jude's motion for summary judgment,[6] the Appellee claimed that there is a question of fact whether St. Jude's violated Department of Human Services ("DHS") regulation 290-4-6-.03(2)(a) which states that "[a]buse of any patient is prohibited," where "abuse" is defined as "any unjustifiable intentional or grossly negligent act, exploitation or series of acts, or omission of acts which causes injury to a patient, including but not limited to verbal abuse, assault or battery, failure to provide treatment or care, or sexual harassment." Ga. Comp. R. & Regs. r. 290-4-6-.01 (4)(a).

In this case, the evidence in the record shows that St. Jude's did not violate Regulation 290-4-6-.03(2)(a) or any other statute, ordinance, or regulation. The subject incident was reported to the Georgia DBHDD, and the DBHDD found that "this incident does not meet the definition of a reportable incident because staff nor another individual was involved in this incident." (R2-122). The Appellee has not

[6] (R3- 1009).

produced sufficient evidence to create a genuine issue of material fact whether any statute, ordinance, or regulation was violated. The trial court should have granted summary judgment on Appellee's negligence per se claim.

## VI. PRETERMITTING WHETHER APPELLEE PRESENTED SUFFICIENT EVIDENCE OF A DUTY AND A BREACH TO OVERCOME SUMMARY JUDGMENT, WHICH IS EXPRESSLY DENIED, THE TRIAL COURT SHOULD HAVE FOUND THAT THE CRIMINAL ASSAILANT WAS THE PROXIMATE CAUSE OF APPELLEE'S CLAIMED DAMAGES, SUPERSEDING ANY NEGLIGENCE OF ST. JUDE'S.

"[N]egligence is not actionable unless it is the proximate cause of the injury. A wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience." Dowdell v. Wilhelm, 305 Ga. App. 102, 104 (2010), citing Morris v. Baxter, 225 Ga. App. 186, 187 (1997). "The natural and probable consequences are those which human foresight can foresee, because they happen so frequently that they may be expected to happen again. The possible consequences are those which happen so infrequently that they are not expected to happen again." Strickland v. DeKalb Hosp. Auth., 197 Ga. App. 63, 67 (1990) (emphasis added).

In Georgia, the general rule is that an "independent, intervening criminal act of a third party, without which the injury would not have occurred, will be treated as the proximate cause of the injury superseding any negligence of the defendant."

Thomas v. Food Lion, 256 Ga. App. 880, 882-83 (2002). Put another way, "the intervening criminal act of a third party, without which the injury would not have occurred, breaks the causal connection between the defendant's negligence and the injury." Davis v. Blockbuster, Inc., 258 Ga. App. 677, 679 (2002). Even when a premises owner breaches its duty to an invitee, the premises owner is "…insulated from liability by the intervention of an illegal act which is the proximate cause of the injury." Howell v. Three Rivers Sec., Inc., 216 Ga. App. 890, 892 (1995) (Although defendants bar owner and security corporation breached duty owed to plaintiff patron by admitting into bar persons who had previously been permanently banned for fighting, defendants were not liable to plaintiff for injuries he received in fight with those persons, since defendants did not have superior knowledge of risk posed to plaintiff, and therefore breach was not proximate cause to plaintiff's injuries).

In this case, St. Jude's alleged negligence was not the proximate cause of Appellee's claimed injuries. It is without dispute that Appellee was the victim of a crime. The independent, intervening criminal act of the criminal assailant was the proximate cause of Appellee's claimed injuries and damages. Even if St. Jude's owed a duty to the Appellee and breached its duty to provide security one mile away from its premises while the Appellee was on a personal errand (which St. Jude's denies), St. Jude's is insulated from liability by the intervention of the unforeseeable

criminal action of the assailant. The unforeseeable criminal act was the proximate cause of Appellee's claimed injuries and damages and supersedes any negligence of St. Jude's.

## CONCLUSION

If not reversed, the trial court's decision will lead to the unprecedented and unwarranted expansion of the voluntary undertaking doctrine and premises liability tort law. Any number of businesses and individuals will be adversely impacted by the trial court's erroneous decision to expand the scope of a property owner or rehabilitation center's duties under Georgia law. The GDLA respectfully submits that the trial court erred in denying St. Jude's Motion for Summary Judgment and requests that the trial court's order be reversed.

Respectfully submitted this 11th day of October, 2019.

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

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## CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing **AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION** on all parties by depositing a copy of same in the United States Mail with sufficient postage thereon to ensure delivery, addressed as follows:

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