IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

LEODEGARIO VEGA, CARLOS VEGA and MISAEL HERNANDEZ	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION FILE
	)	NO. 04VS070145-B
vs.	)	
	)	
LA MOVIDA, INC.,	)	
	)	
Defendant.	)	

<u>DEFENDANT'S MOTION IN LIMINE</u>
<u>AND BRIEF IN SUPPORT</u>

COMES NOW LA MOVIDA, INC., Defendant in the above styled civil action, and moves this Court to limit the testimony, argument, actions of counsel, and the introduction of evidence of the Plaintiffs and the witnesses called on behalf of Plaintiffs as follows:

1. <u>Inferences, comments, or evidence suggesting improper conduct of parties during the discovery period or Defendant's causing Plaintiffs unnecessary trouble and expense</u>

Defendant respectfully asks the Court to instruct Plaintiffs and their counsel to refrain from making any comments regarding any alleged discovery disputes between the parties or Defendant's causing Plaintiffs unnecessary trouble and expense, as such testimony, evidence or commentary is completely irrelevant and prejudicial. The prior exclusion of irrelevant evidence from the trial of a case is a proper function of a motion in limine. *See* <u>Walton v. Datry</u>, 185 Ga. App. 88, 90-91, 363 S.E.2d 295 (1987).

For example, in General Motors Corp. v. Moseley, et al., 213 Ga. App. 875, 447 S.E.2d 302 (1994), the Georgia Court of Appeals stated that Plaintiffs' counsel's attempts to elicit information and/or present argument about GM's alleged attempts to hide information regarding problems with the type of vehicle at issue and the alleged practice of giving elusive answers to interrogatories, "woodshedding" engineers who testified, and making incomplete searches of engineering files in response to discovery requests, were all improper references to discovery disputes which should have been excluded by the trial court during trial.

Similarly, any reference to any discovery disputes in this case between the Plaintiffs and the Defendant would serve no purpose except to unduly prejudice the jury against Defendant. As the Court is well aware, resolving discovery disputes is not a function of the jury, but rather a responsibility belonging solely to the Court. The proper vehicle by which a party resolves disputes pertaining to discovery is by moving the Court for an appropriate Order.

Defendant respectfully requests that this Court instruct Plaintiffs and their counsel to refrain from referring to or eliciting any testimony which would hint, suggest, or intimate to the jury of any discovery disputes between Plaintiffs and Defendant or that Defendant allegedly caused Plaintiffs unnecessary trouble and expense or acted in bad faith. To allow Plaintiffs or their attorneys to make such improper and highly prejudicial comments would only serve to unfairly prejudice the jury against Defendant and create error in the case.

2. Inference that the jury should, by their verdict, "send a message" to Defendant regarding any type of conduct complained of in this case or seek any result other than compensation for Plaintiffs.

Plaintiffs and their attorneys should be barred from inferring or mentioning that the jury should send a message to Defendant in rendering their compensatory verdict in this case. In Locklear v. Morgan, 129 Ga. App. 763, 201 S.E.2d 163 (1973), a verdict for plaintiff was

reversed and a new trial ordered due to counsel's argument that the jury "[r]ender such a verdict that will speak out loud, will speak out clearly, and it will be not only for the benefit of the [plaintiff], but be an inestimable benefit for everyone in this county and everyone throughout the state."

3. That Plaintiff's counsel refrain from asking improper and prejudicial questions to the jury on voir dire and refrain from certain comments in opening statement to the jury.

Defendant moves this Court in Limine for an Order instructing Plaintiffs' counsel to refrain from asking improper and prejudicial questions to the jury on voir dire and to refrain from certain comments in opening statement to the jury, to-wit:

A. Any question to the jury on voir dire concerning the amount of any potential or possible verdict. Such questions are prejudicial and improper;

B. Any question to the jury on voir dire asking the prospective jurors to agree to award or commit to award the Plaintiffs a specific amount of monetary damages or a sum in excess of a specific amount of monetary damages. Such questions are prejudicial and improper;

C. Any hypothetical questions to the jury on voir dire involving evidence to be presented to the trial jury. Hypothetical questions involving evidence to be presented to the jury are not proper voir dire. See Davis and Shulman's Georgia Practice and Procedure, §20-4.

D. Any attempt to inform the jury that the potential award in this case could be substantial or large. Such questions are prejudicial and improper;

E. Any attempt to ask the jury on voir dire questions which describe the Plaintiffs as having been "wronged". Such questions are prejudicial and improper;

F. Any attempt on voir dire to ask hypothetical questions to the jury that involve a substantial outline of the case and ask the jury to assume evidence prior to its introduction. Such questions are prejudicial and improper. Davis and Shulman's Practice and Procedure, §20-4.

4. The existence of a liability insurance policy or policies which provide coverage for Plaintiffs' claims against Defendant or suggesting the amount of any such coverage.

The Court of Appeals of Georgia has ruled that evidence of the fact that a defendant is covered by liability insurance is irrelevant and inadmissible at trial. Collins v. Davis, 186 Ga. App. 192, 366 S.E.2d 769 (1988); Goins v. Glisson, 163 Ga. App. 290, 292, 292 S.E.2d 917 (1982). Thus, any reference to the Defendant's liability insurance, either during the actual trial of the case or during the determination of the voir dire, would also deny Defendant equal protection of the laws. Article I, Section I, Paragraph II, of the Constitution of the State of Georgia of 1983 proclaims:

> Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.

Ga. Const. Art. I, § I, Para. III (amended 1983). In addition to consistently holding that evidence of liability insurance is inadmissible, Georgia Courts have held that reference to such evidence may be grounds for a mistrial. City Council of Augusta v. Lee, 153 Ga. App. 94, 99, 264 S.E.2d 683 (1980).

The Supreme Court of Georgia has also voiced its opinion of the policies underlying such an exclusion:

> Knowledge of the fact of insurance against liability will motivate the jury to be reckless in awarding damages to be paid, not by the defendant, but by a supposedly well-pursed and heartless insurance company that has already been paid for taking the risk.

Denton v. Con-Way Express, Inc., 261 Ga. 41, 42, 402 S.E.2d 269 (1991), overruled on other grounds, Grissom v. Gleason, 262 Ga. 374, 376, 418 S.E.2d 27 (1992) (citing Wigmore,

Evidence, Sect. 282A[3][Chadbourne rev. 1979]). See also Chambers v. Gwinnett Community Hosp., Inc., 253 Ga.App. 25, 26, 557 S.E.2d 412, 415 (2001)("As our Supreme Court has recognized, the concern is that introducing evidence of a defendant's insurer could motivate a jury to award increased damages.")

The law in Georgia is clear that any question or comment or suggestion regarding the limits of a defendant's liability insurance policy is an improper area of inquiry. See, e.g., Ashley v. Goss Bros. Trucking, 269 Ga. 449, 450, 499 S.E.2d 638 (1998); Denton v. Con-Way Southern Express, supra, 261 Ga. 41 n.2.

5. Evidence intimating that Defendant should be judged by any standard or afforded any level or degree of justice different from that applicable to a natural person is inadmissible.

Any type of evidence implying that Defendant La Movida, Inc. should be judged by a standard different from that applicable to a natural person is inadmissible because any such evidence is irrelevant and is more prejudicial than probative. Any such evidence is in no way relevant to any issue raised by Plaintiffs' Complaint and, in addition, would very likely prejudice the jury towards Defendant. Further, under the Constitution and laws of the United States, the parties in this case are entitled to the right of trial by jury which jury must be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them. U.S. Const. Amend. VII; Lashley v. Ford Motor Co., 359 F. Supp. 363, 367-68 (M.D. Ga. 1972). No implication that Defendant should be treated differently due to its corporate status aids the jury in making any reasonable inferences in this case. Id.; see also Western & A.R. Co. v. Cox, 115 Ga. 715, 42 S.E. 74 (1902) (verdict for plaintiff was reversed and a new trial ordered due to counsel's argument that "[t]he only way to reach a railroad is to make it pay money. A railroad has no soul, no conscience, no sympathy and no God.").

6. Any Suggestion That Additional or Different Evidence Will Be Forthcoming in the Second Phase of the Bifurcated Trial in a Punitive Damages Case Is Not Appropriate

Although Defendant denies that there is any evidence to support the issue of punitive damages going to the jury, should this Court allow it, Defendants move for bifurcation of the punitive damages claim. Plaintiffs should be barred from suggesting that additional evidence will be forthcoming on those issues during the first phase of trial. The very reason the legislature required a bifurcated trial in a punitive damages case was so that evidence which goes solely to punitive damages does not taint the liability and damages verdict in the main portion of the case. *See,* O.C.G.A. § 51-12-5.1. Thus, Defendants move for an Order barring any such comment, inquiry, or reference by plaintiffs or their counsel at any time prior to the punitive damages portion of the trial.

7. The Court Should Bar Any Evidence Of Prior or Subsequent Police Incident Reports Based Solely Upon Their Authentication As Business Records.

This Court must bar any evidence of prior or subsequent police incident reports based solely upon their authentication as business records as such is inadmissible hearsay. See Brown v. State, 274 Ga. 31, 33-34, 549 S.E.2d 107, 109-110 (2001), in which the Supreme Court held that the narrative portions of police reports are not admissible under the business records hearsay exception. The Supreme Court also made it crystal clear that its ruling applied to civil premises security cases when it overruled Shoney's Inc. v. Hudson, 218 Ga.App. 171, 460 S.E.2d 809 (1995), to the extent it may have held that a police report narrative was admissible as a business record. Id. at 34. In Scott v. LaRosa and LaRosa Inc., 253 Ga.App. 489, 490, 559 S.E.2d 525, 527 (2002), Court of Appeals reversed the trial court which had granted summary judgment to the defendant in a wrongful death case. The Court of Appeals addressed the issue as follows:

> [I]n Brown, supra, the Supreme Court of Georgia considered the admissibility of narrative portions of police reports as business records. Id. at 32(1), 549 S.E.2d 107. The Court found that "police work is often heavily influenced by the beliefs, impressions, and, at times, hunches of the investigating officer. It is because of these difficulties that police report narratives do not fit easily within the business records exception to the hearsay rule." Id. at 33(1), 549 S.E.2d 107. Because these narratives do "not have the reliability inherent in other documents that courts have traditionally considered to be business records," id., the Supreme Court held that they "are not the appropriate subject of an exception to the hearsay rule." (Footnote omitted.) Id. Clearly, under Brown, the trial court erred in relying on the narrative in this case. Consequently, its ruling was based on mere hearsay, which has no probative value, whether objected to or not.

The LaRosa case provides clear authority that the Brown v. State case does not apply solely to criminal cases and bars evidence from the narratives of police incident reports as business records. Therefore, this Court must bar any such evidence in the trial of this case.

8. Evidence of prior substantially similar crimes is the only admissible evidence of other crimes on the issue of this Defendant's alleged liability.

The Plaintiffs must prove that the Defendant owed a duty to them to protect them from the risk of criminal attack while they were on its premises by showing that Defendant had superior knowledge of an unreasonable risk of criminal attack before the shooting in question. Savannah College of Art and Design v. Roe, 261 Ga. 764, 765, 409 S.E.2d 848 (1991). The Plaintiffs have the burden of proving that Defendant was placed on notice of the danger by a prior substantially similar incident. Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 482 S.E.2d 339 (1997); Donaldson v. Olympic Health Spa, Inc., 175 Ga.App. 258, 259, 333 S.E.2d 98 (1985), cert. denied.

For crimes to be "substantially similar" to the instant crime, Georgia law requires that the circumstances surrounding the prior incident be sufficiently similar "to attract the owner's attention to the alleged dangerous condition which resulted in the litigated instance." Grandma's Biscuits, Inc. v. Baisden, 192 Ga.App. 816, 817, 386 S.E.2d 415 (1989). Under Georgia case

law, for the crimes to be substantially similar, they must (1) occur at comparable locations, (2) occur under similar physical circumstances and conditions, (3) be of a similar type and (4) not be too remote in time. Burnett v. Stagner Hotel Courts, Inc., 821 F. Supp. 678, 683 (N.D. Ga. 1993), aff'd 42 F.3d 645 (1994). For example, a robbery at the front desk of a hotel has been held not to be similar to a robbery in a guest room. See Washington Road Prop., Inc. v. Stark, 178 Ga.App. 180, 342 S.E.2d 327 (1986), cert. denied. Instances occurring in the parking lot have been held not to be similar to those occurring at other locations on the premises. McCoy v. Gay, 165 Ga.App. 590, 302 S.E.2d 130 (1983). A shooting in the same parking lot, in which a subsequent shooting occurs, has been held not to be similar when there was no showing that the lot was similarly lighted or patrolled at the time of the second crime. Id. at 593. An incident involving a sexual assault has been held not to be similar to instances involving peeping Toms, vagrants, intoxicated persons or petty thefts. Savannah College, 261 Ga. at 765. An incident not involving a shooting has been held not to be similar to one that involved a shooting. Grandma's Biscuits, 192 Ga.App. at 817. An incident involving theft from a vehicle in a parking lot was held not to be similar to an assault/rape in the same parking lot. See Tolbert v. Captain Joe's Seafood, 170 Ga.App. 26, 316 S.E.2d 11 (1984), cert. denied.

The final provision, that the prior crime not be too remote in time from the subject crime, requires that the prior incident must have occurred in the "recent past." Donaldson, 175 Ga.App. at 261. The Georgia Court of Appeals has held as a matter of law that crimes occurring two years before the crime in question are "too remote in time to cast on defendant the reasonable apprehension of criminal acts on a guest." Nalle v. Quality Inn, Inc., 183 Ga.App. 119, 120, 358 S.E.2d 281 (1987); see also Burnett, supra.

Plaintiffs allege they were shot by an acquaintance inside the Defendant's restaurant/bar in the early morning hours. For any evidence of prior crimes occurring on Defendant's property to be admissible into evidence at the trial of this matter, those other crimes must be "substantially similar," i.e., they must have been a person-to-person crime of violence, and they must have occurred inside the Defendant's restaurant/bar. Moreover, any such crimes fitting these conditions must have occurred within the <u>two years</u> prior to March 29, 2004. The Defendant moves in limine to prohibit the Plaintiffs from admitting into evidence any other criminal activity that occurred on Defendant's premises, which does not fall within these requirements to make it "substantially similar" to the crime at issue.

As the Court can see from the crime grid attached as Exhibit "A", which lists the 31 incidents produced by plaintiffs, incident number 31 is inadmissible as it occurred after the subject incident (which is incident number 30 on the grid). Incident numbers 1-6, 7-12,14-17, 19-20, 22-23, 24-25, and 29 are inadmissible as these events did not occur inside the Defendant's restaurant. Similarly, incident numbers 6a, 13, 21, 23a, 28, and 29a are inadmissible because one cannot tell from the information available whether or not they occurred inside the Defendant's restaurant. Incident numbers 3, 9, 14, and 19 did not even occur on this Defendant's property, but at the Taco Bell or another business in the same strip mall occupied by the Defendant or on Roswell Road! There is no duty of a premises owner to patrol or secure a public road in front of its property under Georgia law. See, e.g., <u>Hillcrest Foods, Inc. v. Kiritsy</u>, 227 Ga.App. 554, 489 S.E.2d 547 (1997), <u>cert. denied</u>.

The incident numbers 18 and 27 involving one patron hitting another over the head with a beer bottle or throwing a beer bottle and striking another patron are not substantially similar to the case at issue because the hazard which Plaintiffs allege caused their injuries is the alleged

failure to adequately frisk patrons upon entering the establishment. Properly frisking patrons certainly would not prevent one patron from using a beer bottle to assault another patron or throw as the beer bottle would have been obtained after entry to the premises. Incident number 26 is not admissible as it involves no violence at all but simply a patron's wallet disappearing from a table.

Therefore, there are no prior substantially similar incidents admissible in evidence in the present case. See Baker v. Simon Property Group, 273 Ga. App. 406, 614 S.E.2d 793 (2005), in which the foreseeability issue was addressed by the Court. The evidence showed "that Baker was shot during a carjacking in the parking lot of a mall on Christmas Eve. . . The incident occurred shortly after Baker parked his car in the crowded parking lot while it was still light outside. He heard a noise on his right side, and saw a man pointing a gun at him through the partially open front passenger's window of his car. The man said, 'Give it up playboy, you know what time it is,' and shot into the car's front windshield. Baker, believing that the man wanted him to get out of the car, jumped out of the car and ran about 15 steps before being shot in the chest while turning to look back at his attacker. When he looked back toward his car, he saw a second man on the driver's side of the car and the two men left with his car."

"The only admissible evidence of other criminal incidents in the parking lot of which the defendants were aware in the year before Baker's shooting was 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." The Court found that, "[a]lthough we recognize that the question of whether a criminal attack was reasonably foreseeable is generally for the jury, . . . the prior property crimes in the mall's parking lot are

insufficient to create a factual issue whether the defendants could reasonably anticipate that a carjacking and shooting resulting in personal injury might occur."

See also Agnes Scott College Inc. v. Clark, 273 Ga. App. 619, 616 S.E.2d 468 (2005), cert. denied, in which the Court of Appeals also rejected the Plaintiff's claim that her attack was foreseeable. The Agnes Scott student "sued the college, alleging that Agnes Scott negligently failed to keep its premises safe, after the student was kidnapped from one of Agnes Scott's parking lots and raped off campus. Although there was no evidence of any kidnappings, rapes, attacks, or other similar crimes occurring in the parking lot prior to the incident involving the student, the trial court denied Agnes Scott's motion for summary judgment." The Court of Appeals asserted that the trial court's ruling was contrary to "Georgia Supreme Court precedent requiring that prior similar crimes must occur before a landowner can be held liable for injuries suffered in connection with a future crime on its premises" so it reversed.

The evidence of record showed that "[p]rior to the September 1997 incident involving Clark, 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. It is undisputed that neither Agnes Scott nor Clark had any knowledge of Hunter prior to his abduction and rape of Clark.

"In opposition to summary judgment, Clark did not come forward with evidence of violent crimes occurring in the South Candler lot prior to the incident involving Hunter. Instead, she produced general crime statistics for the City of Decatur and other areas and evidence that students were afraid of going to the South Candler lot alone at night. Acknowledging such

evidence in its order denying summary judgment to Agnes Scott, the trial court reasoned in part that although '[t]here had been no carjackings on or near campus, . . . Agnes Scott was aware that carjackings were on the rise across the nation. . . .' The trial court further focused on the fact that the South Candler lot was farther away from campus than the other parking lots, and that students expressed concern for their safety in the lot at night, in reaching its conclusion that a jury question existed regarding whether Agnes Scott could have foreseen the daytime attack against Clark." Citing to the Supreme Court decision in Doe v. Prudential-Bache/A.G. Spanos Realty Partners, 268 Ga. 604, 606 (492 SE2d 865) (1997), the Court held that the attack on Clark was not foreseeable to Agnes Scott. "As a matter of law, break-ins to unoccupied cars and other incidents that did not involve person-to-person violence or contact would not make the daytime abduction of Clark foreseeable. . . Nor would general crime statistics and student concerns about walking alone in a parking lot at *night* create an issue of fact regarding the foreseeability of a random attack on a student in broad daylight in the parking lot." This holding was demanded in spite of the expert testimony offered by Clark that the attack was foreseeable.

For these reasons, Defendant moves the Court in limine to preclude the admission by the Plaintiff of any such prior criminal activity.

9. The Court Should Bar Any Evidence Of Subsequent Crimes as Such are Irrelevant to Any Issue in the Case.

This Court must bar any evidence of subsequent crimes as such are irrelevant to show foreseeability of the subject crime and such evidence is irrelevant to any other issue in the case. Plaintiff may seek to offer evidence concerning two Hispanic men being found dead in the La Movida parking lot when the police responded to a call of a fight in the early morning hours of March 19, 2005 – nearly one year after the subject shooting on March 29, 2004. As this crime is not relevant to any issue in the case, it must be excluded by this Court.

For these reasons, Defendant moves the Court in limine to preclude the admission by the Plaintiff of any such subsequent criminal activity.

CONCLUSION

WHEREFORE, Defendant respectfully requests that the Court instruct Plaintiffs and their counsel not to mention, refer to, interrogate concerning, voluntarily answer, or attempt to convey to the jury, at any time during these proceedings, in any way either directly or indirectly, the subject matters as stated above without first informing the Court and obtaining the permission of the Court outside the presence and hearing of the jury, and further to instruct Plaintiffs and their counsel not to make any reference to the fact that this Motion in Limine was made, argued, and ruled upon by the Court; and, further to instruct counsel to warn and caution each and every witness involved in Plaintiffs' case to comply with such ruling of the Court.

Finally, it is requested that, should this Motion in Limine be granted in whole or in part, and should Plaintiffs or their counsel violate the Court's ruling as to this Motion in Limine, a mistrial of the case will be granted due to the irreparable damage which would be suffered by Defendant as a result of such violation.

Respectfully submitted,

SWIFT, CURRIE, McGHEE & HIERS, LLP

By:______________________________

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing Defendant's Motion in Limine and Brief in Support upon all parties to this matter by hand delivering a true copy of same to counsel of record as follows:

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This ___ day of ________________, 2006.

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