IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

JANE DOE,)
)
Plaintiff,)
) CIVIL ACTION FILE
vs.)
) NO. 95-A-962-4
BRIARGATE APARTMENTS, INC.)
d/b/a BRIARGATE APARTMENTS,)
)
Defendant.)

DEFENDANTS BRIEF IN SUPPORT OF ITS MOTION IN LIMINE

COMES NOW BRIARGATE, INC., Defendant in the above-styled civil action, and submits the following Brief in Support of its Motion in Limine.

1. Evidence that Defendant is covered by liability insurance is not admissible.

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 (1988); Goins v. Glisson, 163 Ga. App. 290 (1982). Thus, any reference to the Defendant's liability insurance, either during the actual trial of the case or during the determination of the jury's legal qualifications, 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 August v. Lee, 153 Ga. App. 94, 99 (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 (1991), disapproved on other grounds, Grisson v. Gleason, 262 Ga. 374, 376 (1992) (citing Wigmore, Evidence, Sect. 282A[3][Chadbourne rev. 1979]). The Denton court then held that, just as evidence of the defendant's insurance is irrelevant and highly prejudicial, likewise evidence of the plaintiff's insurance coverage is irrelevant and violates the plaintiff's equal protection rights under the Georgia Constitution. Id.

2. **No mention of the Defendants insurance carrier should be made during the qualifications of the jury on voir dire.**

Prior to the Denton decision, during voir dire, jurors were provided evidence of both the defendant's liability insurance, through their qualification as to the defendant's liability insurance carrier, and of the plaintiff's collateral sources of insurance. The opposing parties were thus treated fairly and no undue prejudice was felt by either side. However, after the Denton decision, the Defendant was deprived of this equal treatment. In the wake of Denton, the defendant was prejudiced by the jury qualification as to defendant's liability insurance carrier, depriving defendant equal protection under the law.

In Franklin v. Tackett, Judge Beasley, specially concurring, responded to this situation with a thoughtful analysis of the undue prejudice which results when the opposing party makes reference to the Defendant's liability insurance carrier during the voir dire process. Franklin v. Tackett, 209 Ga. App. 448, 450 (1993). Judge Beasley offered an alternative to permitting the identity of defendant's liability insurance carrier to be revealed to potential jurors during voir dire:

> Far better it would be to ferret out the insurer's employees and officers, if such need be, by simply asking for jurors' occupations and then, having disclosed only to the judge the identity and interest of the insurer, challenge for a cause not revealed to the prospective juror.

Franklin, 209 Ga. App. at 453. Judge Beasley also recommended that a juror questionnaire be used as a means of identifying the financial interest of a juror in any liability insurance carrier having a potential interest in the outcome of a case. Id. "While this may take a little time, it would assure the true objective of excluding insurance coverage from becoming a factor in the case's adjudication." Id.

In addition to or instead of a juror questionnaire, the Court could simply ask each juror if he/she, or any number of his or her immediate family, is an officer, director, employee, or stockholder of any company. This process would provide the needed information, regarding jury qualification as well as information helpful to the overall process of juror selection. As a result, plaintiff's right to test the qualifications of the jury would be preserved; yet, defendant would not be prejudiced through the injection of an express reference to its liability insurance carrier. Such reference would have the obvious effect of signaling to the jury that defendant has liability insurance which is in some way applicable to the case. Such prejudicial effect is in complete derogation of the public policy underlying the exclusion of evidence of a liability insurance carrier at trial.

Judge Beasley's approach has been recently refined further still by the Court of Appeals in Byrd v. Davis, 218 Ga. App. 145 (1995). In Byrd, the trial court applied Judge Beasley's approach from Franklin by asking each potential juror if they had any financial interest in the case and by having each panel member fill out a questionnaire which would reveal their occupation. Rather than overturning Judge Beasley's approach by laying down a bright line rule that a trial court must mention the defendant's liability insurer in order to fairly qualify the jury, the Court of Appeals expressed its approval of Judge Beasley's approach in principle. Id. at 145-6. However, Judge Johnson pointed out that, the trial court in Byrd, in its effort to qualify the jury panel without mentioning the defendant doctors' liability insurer, did not go far enough to ensure that the immediate family members of potential jurors did not possess a financial interest in the insurance company.

Thus, Byrd stands for the proposition that, while the trial court need not bring "the forbidden subject inexcusably into the mix of influences on the jury's deliberations,"Franklin, 209 Ga. App. 455, by mentioning the name of defendant's liability insurance carrier, it must ask enough qualifying questions to adequately insure that neither the potential juror nor members of the jurors immediate family are employees of, or have any financial interest in defendant's liability insurance carrier. Byrd, 218 Ga. App. at 146. Therefore, both Franklin and Byrd require a careful balancing of the plaintiff's interest in having the jury qualified with respect to the defendant's liability insurer, and defendant's interest in not having the trial court, at the beginning of the case, unfairly inform the jury that, in the event it should return a verdict in favor of the injured plaintiff, it is a large impersonal insurance company, rather than the defendant, who will have to compensate the plaintiff.

In this case, this careful balancing can be best accomplished by asking each potential juror to indicate whether he or she or any member of his or her immediate family is an officer, director, employee, or the holder of some financial interest in any company, and if so, what is the name of the company. Such a question would meet Judge Beasley's concerns that the defendant not be unfairly prejudiced at the outset of the case, as well as Byrd's concerns that both the potential juror and the members of the jurors' immediate family be qualified with respect to any financial interest in the outcome of the case.

For the above reasons, Defendant requests that any reference to Defendant's liability insurance carrier be excluded not only at trial, but also during the voir dire process, and that the jury not be qualified as to the Defendant's liability insurance carrier, State Farm Fire and Casualty Company.

3. Evidence of prior substantially similar crimes is the only admissible evidence of other crimes on the issue of this Defendants liability.

The Plaintiff must prove that the Defendant owed a duty to her to protect her from the risk of criminal attack while she was on its premises by showing that Defendant had superior

knowledge of an unreasonable risk of criminal attack. Savannah College of Art and Design v. Rhoads, 261 Ga. 764, 765 (1991). The Plaintiff has the burden of proving that Defendant was placed on notice of the danger by a prior substantially similar incident. Donaldson v. Olympic Health Spa, Inc., 175 Ga.App. 258, 259 (1985).

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 (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. Burnette v. Stagner Hotel Courts, Inc., 821 F. Supp. 678, 683 (N.D. Ga. 1993). For example, a robbery at the front desk has been held not to be similar to a robbery in a guest room. See Washington Row Prop., Inc. v. Starks, 178 Ga.App. 180 (1986). 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 (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 (1984). These cases show that the first three necessary elements to prove a crime to be substantially similar to a prior crime require the subsequent crime to be almost identical in location, circumstance, condition and substance to the prior crime. See also Woods v. Kim, 207 Ga.App. 910 (1993).

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 (1987); see also Burnette, supra.

Plaintiff alleges she was raped in her apartment by a perpetrator who allegedly gained entry to her apartment by using a ladder to gain entry through the second floor bedroom window during the early morning hours of 5:30 to 6:00 A.M., and was raped by an unarmed person whom she did not know. For any evidence of prior crimes occurring on Defendants 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 of a sexual nature between strangers, they must involve a resident of the complex as the victim, and they must involve some issue of forced entry into the apartment. Moreover, any such crimes fitting these conditions must have occurred within the two years prior to October 3, 1994. The Defendant moves in limine to prohibit the Plaintiff from admitting into evidence on the issue of this Defendants liability any other criminal activity that occurred on Defendants premises, which does not fall within these requirements to make it "substantially similar" to the crime at issue.

Defendant submits to the Court that none of the prior criminal activity produced by the Plaintiff during discovery of this litigation meets the requirements set forth under Georgia law to be "substantially similar" to the crime at issue. In fact, in the two years preceding the alleged assault/rape against Ms. Doe, there were no crimes of violence between strangers. All crimes which Plaintiff claims to be substantially similar either did not involve violence, were a domestic dispute or were between people who knew each other, occurred at a time before this Defendant owned or had any responsibility for the property, or did not occur on this Defendants property.

The Plaintiff can present to this Court no prior criminal activity that occurred on Defendants premises after June of 1992, when this Defendant took over the property, which would be "substantially similar" to the manner in which the alleged rape at issue occurred. For these reasons, Defendant moves the Court in limine to preclude the admission by the Plaintiff of any such prior criminal activity.

A. Too Remote in Time

The incident from which this case arises occurred on October 3, 1994. Georgia courts have repeatedly found that the prior incident must have occurred in the "recent past," and that prior crimes occurring two years before the crime in question are "too remote in time to cast on defendant a reasonable apprehension of a criminal act on a guest." Donaldson v. Olympic Health Spa, Inc., 175 Ga. App. 258, 261 (1985) Burnett, supra, 821 F. Supp. at 683; Nalle v. Quality Inn, Inc., 183 Ga. App. 119, 122 (1987). Furthermore, this Defendant did not even own the property or have any responsibilityfor it until June 6, 1992. Accordingly, any crimes occurring prior to that time are not admissible against this defendant because they would not create a reasonable apprehension in this defendant of future crime. If Plaintiff cannot prove that **this Defendant** was aware of the prior crime, that crime is insufficient to demonstrate foreseeability of the Plaintiffs crime by the defendant. See Sun Trust Banks Inc. d/b/a Trust Company Bank v. Killebrew, Case No. S95G0807 (Ga. Dec. 4, 1995). In the Killebrew case,
an incident that occurred on the defendants premises, but which was reported to the police but not to the defendant, was insufficient to create an issue of fact as to whether the defendant was on notice of the risk of crime. In the present case, the defendant can certainly not be held to be on notice of crime which occurred on the property before it even owned or had any responsibility for the property. Furthermore, the Killebrew case clearly held that there is no duty on the part of a premises owner to investigate police files to determine whether criminal activity has occurred on its premises, even when that crime occurs during the period of time that the defendant owns the property. Surely, there can be no such duty to investigate police files to determine whether criminal activity occurred on the premises before the defendant even took possession of the property. Thus, any crimes which occurred prior to June 6, 1992 are not admissible in the present case to show any knowledge, constructive knowledge, or notice of a risk of crime on the part of this defendant.

B. <u>Prior Burglaries are Irrelevant</u>

Plaintiffs expert has testified he does not know whether there were any prior burglaries on defendants property, but lists several burglaries Ain the general area@. He does not know how far away from defendants property these alleged burglaries occurred, yet he proposes introducing evidence of these other burglaries to show this defendant was on notice of the risk of rape to this plaintiff. In fact, an examination of the police incident reports reveals that **none** of those burglaries occurred on the Briargate property. See police incident reports attached hereto as Exhibit AA@. Evidence regarding prior burglaries which occurred on Briargates premises (and certainly those which did **not** occur on Briargates premises) should be excluded since they are not "substantially similar" to the incident involved here. As previously stated above, to be substantially similar "the crimes must (1) occur at comparable locations, (2) occur under similar physical circumstances and conditions, (3) be of similar type, and (4) not be too remote in time." <u>Burnett</u>, <u>supra</u> at 683. Burglaries are clearly not of similar type to the crime of rape at issue here.

In fact, the Georgia Court of Appeals has previously stated that a prior burglary was not substantially similar to an incident of violent domestic assault, and therefore evidence of "the prior burglary is irrelevant..." <u>Camelot Club v. Bonner</u>, 207 Ga. App. 634, 636 at Footnote 2 (1993). Additionally, the Court of Appeals has previously found that crimes directed against property are not similar to incidents arising out of the personal animosity and malice toward the victim. <u>Adler's Package Shop v. Parker</u>, 190 Ga. App. 68, 70 (1989). Property crimes are deemed not sufficiently similar to put the defendant on notice of the risk of a crime of violence like rape.

C. <u>Domestic Disputes and date rape are irrelevant</u>

Plaintiffs own security expert has testified that he does not consider the domestic dispute or date rape incidents to be substantially similar or relevant in determining the Defendants liability in this case. See deposition of Norman Bates at pages 21, 22. Therefore, those incidents or any others which are domestic disputes or date rapes should be excluded from evidence.

D. <u>**Crimes which did not occur on this Defendants property are not admissible as they are irrelevant to a determination of this Defendants liability.**</u>

Geographically, plaintiffs expert claims to have relied on prior burglaries and crimes of violence within a 3 mile radius of the defendants property. That is frankly because there are no prior substantially similar crimes on this defendants property. Yet, plaintiffs expert even goes beyond his own defined 3 mile radius in his list of crimes. Any crimes which did not occur on this defendants property are inadmissible to show notice to this defendant of a risk of crime to its own tenants. <u>See Killebrew, supra.</u>

4. <u>**Any evidence that an unidentified individual told officer Mattox that the ladder purportedly belonged to this Defendant is inadmissible.**</u>

Defendant anticipates that Plaintiff will attempt to offer evidence that an unidentified individual, whom the investigating police officer believed to be a maintenance man employed by the Defendant, told the officer that the ladder allegedly used to gain access to Plaintiffs second floor bedroom window belonged to this Defendant. Such evidence is clearly inadmissible hearsay under Georgia law. The general rule in Georgia is that statements are inadmissible if the utterer cannot be identified, located, summoned, and cross-examined. <u>Johnston v. Grand Union Co</u>., 189 Ga.App. 270 (1988), <u>cert. denied</u>, 189 Ga.App. 912. <u>See also</u> <u>Fuller v. Charter South, Inc.</u>, 216 Ga.App. 211, at 213 (1995)(testimony that the driver admitted to the plaintiff at the scene of the motor vehicle accident that he was on his way to work was inadmissible hearsay). The Court held in <u>Johnston</u> that the trial court was correct in determining that the plaintiff could not introduce statements made to plaintiff by an unidentified employee after the plaintiff was injured in a grocery store door. The Court stated:

> The statement is ... hearsay of the worst sort, for it seeks to prove the essential fact of superior knowledge by allowing the witness, the plaintiff, to say what an unknown person said she said to another....Testimony of this sort is only rumor, *asserted to prove the truth of what this unknown person said*....The nature of the evidence shows its weakness; the alleged person who made the alleged remark is not before the court and cannot be questioned....Its defectiveness is not cured by the fact that it is allegedly an Aadmission@ by an Aagent.@ The two underlying reasons for any exception to the hearsay rule are a necessity for the exception,

> A>*and a circumstantial guarantee of the trustworthiness of the offered evidence*.[Cit.]@... These elements are completely lacking in this evidence. Some cases which have held that such evidence offered of the sayings of an employee are inadmissible, have done so on grounds that it was not shown the utterer was in fact an agent...and wherever this is the case, as here, there is certainly no authority for its entry into evidence as an admission against interest by an employee under " 24-3-33 and 24-3-34.

Because the plaintiff was unable to identify the employee, the defendant would have no opportunity to cross-examine. Therefore the trial court was correct in not allowing the Aputting forward of some unidentified, unspecific person as an >employee, who would allegedly make certain remarks that would bind or incriminate the employer, and as to whom there is no showing that the person can be brought forth at trial, or even located.@ Id. at 272.

The admission of this type of evidence was held to be reversible error in Cannady v. Lamb, 146 Ga.App. 850 (1978). In that case, the judgment of the trial court was reversed because it had improperly admitted the testimony of one person regarding a telephone conversation with another person, in which the person testifying did not know the other person or recognize the others voice.

Any evidence of an alleged admission against interest by an agent-employee is not admissible where there is no evidence that the unidentified person was acting within the scope of his authority at the time. See, e.g., A Childs World, Inc. v. Lane, 171 Ga.App. 438 (1984). The law of Georgia clearly requires that an admission by an agent is only attributable against the principal if the agent was acting Aduring the existence and in pursuance of his agency.@ O.C.G.A. ' 24-3-33. In fact, it has been held reversible error to allow into evidence admissions that the agent was not authorized to make. Black v. New Holland Baptist Church, 122 Ga.App. 606 (1970). The Georgia Supreme Court has held that in the absence of showing that admissions were made by an agent acting within the scope of his authority, the admission of such evidence is not proper. Seaboard Coastline Railroad Co. v. Carter, 126 Ga. 825 (1970).

Even when the speaker is identifiable and an employee, evidence of a statement by that employee is still not admissible as an admission against interest unless the party who offers the

evidence can show that the speaker was authorized to speak on behalf of the principal when the alleged statement was made. A Childs World, Inc. v. Lane, 171 Ga.App. 438 (1984); Nordmann v. International Follies, Inc., 148 Ga.App. 77 (1978). In Nordmann, the plaintiff was prohibited from introducing evidence of a statement made by an employee because it could not be shown that the employee was transacting corporate business.

In the present case, to admit evidence of a statement by an alleged employee who is not identified would clearly be reversible error.

5. Any testimony or other evidence intimating that Defendant Briargate, a corporation, 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 Briargate, Inc., a corporation, 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 this 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 Briargate 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 intimation the jury should, by their verdict, "send a message" to Defendant Briargate regarding any type of conduct complained of in this case or seek any result other than compensation for the Plaintiff by an award of damages against this Defendant is inadmissible.

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."

In Central of Georgia Railroad Company v. Swindle, 260 Ga. 685, 398 S.E.2d 365 (1990), a verdict for plaintiff was reversed based upon "a pervasive and persistent attempt on the part of plaintiff to establish improper motive and anti-union sentiment on the part of defendant railroad, 'suggesting that damages be awarded...for the purpose of punishing the defendant'" where punitive damages were not an issue in the case and forbidden under the FELA.

As Plaintiff cannot properly seek punitive damages against this Defendant, it would be improper for them to urge the jury to "send a message" to this Defendant or to punish, penalize or deter this Defendant or landlords in general through an award of damages.

7. Defendant moves the Court for an Order in limine barring Plaintiff and her counsel from introducing portions of the deposition of officer Doug Mattox as such are inadmissible.

Defendant moves the Court for an Order in limine barring Plaintiff and her counsel from introducing the following portions of the deposition of officer Doug Mattox:

page 10 lines 2-5

page 12 line 6 through page 13 line 1

page 14 lines 8-10

page 58 lines 11-18

page 62 line 13 through page 63 line 12

The above testimony should be excluded from the jury because it relates to objections, prior crimes on other properties or which are not substantially similar to the case in point, or to inadmissible hearsay statements. See legal arguments set forth in sections 3 and 4 above.

WHEREFORE, Defendant respectfully requests the Court to instruct Plaintiff and her 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 Plaintiff and her 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 phase of this 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 Plaintiff or her counsel violate the Courts 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.

This _______day of _________________, 1996.

Respectfully submitted,

SWIFT, CURRIE, McGHEE & HIERS

By: ________________________________
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