OVERVIEW OF RECENT TRENDS IN GEORGIA PREMISES LIABILITY LAW

Lynn M. Roberson*

In premises liability cases arising out of violent crimes and claims of negligence in providing security, the issue of prior substantially similar incidents is almost always present. The question is frequently, "What prior substantially similar incidents are admissible in evidence?" The corresponding question is, "How does one prove the occurrence of prior substantially similar incidents?" This paper will address these issues from the defense perspective.

1. What prior substantially similar incidents are admissible?

The appellate courts of Georgia have been all over the board in the past few years and have essentially provided confusing or no guidance for practitioners and trial judges in determining what is admissible evidence in ruling on a Motion for Summary Judgment and what is admissible evidence at trial. Many trial court judges seem to have thrown up their hands in frustration and abdicated their responsibility to sift through the proffered evidence

---

* Ms. Roberson is a senior partner with the firm of Swift, Currie, McGhee & Hiers in Atlanta, Georgia, where she practices litigation, particularly in the areas of premises liability for violent crime, sexual harassment, and other personal injury law. Lynn has completed over 65 jury trials in these areas. She is the secretary of the Litigation section of the Atlanta Bar Ass'n and chair of the premises liability committee of the Georgia Defense Lawyers Ass'n. She is a member of the Insurance Law Committee and the Trial Tactics and Techniques Committee (currently vice chair) of the Defense Research Institute. She was Program Chair for DRI's recent national seminar on premises liability for violent crime held in Atlanta in 2001. Lynn has long been a regional editor for the Covered Events DRI newsletter.

Ms. Roberson was certified as a civil trial advocate in 1990 by the National Board of Trial Advocacy. She is also a certified mediator. Lynn has been invited to teach trial advocacy by the National Institute of Trial Advocacy, the Atlanta Bar Ass'n, the Georgia Defense Lawyers Ass'n, and Emory University School of Law.

Ms. Roberson graduated cum laude from the University of Maryland in 1973 with a B.A. degree in psychology and received her law degree from the University of Minnesota Law School, cum laude, in 1979.

and make a reasoned determination of what evidence is properly admissible under the particular circumstances of the case before them.

A. What is "substantially similar"?

The Plaintiff has the burden of proving that the Defendants were 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", 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." Wade v. Findlay Management, Inc., 253 Ga. App. 688, 689 (2002); Grandma's Biscuits, Inc. v. Baisden, 192 Ga. App. 816, 817 (1989). "The prior incident need not be the same crime, and the means of inflicting injury need not be identical [to be deemed substantially similar.]" Wade v. Findlay Management, Inc., 253 Ga. App. at 690. Arguably, 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); Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 786, 482 S.E.2d 339 (1997); Washington Road Properties, Inc. v. Stark, 178 Ga. App. 180, 342 S.E.2d 327 (1986), cert. denied.

For example, notice of prior robberies which occurred at a motel front desk three and five years earlier did not establish a duty on the part of the defendants to protect against personal attacks which occurred outside the Plaintiff's room. See Washington Road Properties, Inc. v. Starks, 178 Ga. App. 180 (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 (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 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). In Nalle v. Quality Inn,183 Ga. App. 119, 358 S.E.2d 281 (1987), where the plaintiff was attacked and robbed as he was standing near the swimming pool on the premises of the defendant's motel drinking a cup of coffee, the court held there were no prior substantially similar incidents although there were 25 prior offenses relied upon by the plaintiff to establish the defendant's knowledge of the danger in question. Only two had involved "personal confrontation," and both of those had occurred at the front office. These cases show that the necessary elements to prove a crime to be substantially similar to a prior crime require the subsequent crime to be substantially similar in location, circumstance, condition and substance to the prior crime. See also Woods v. Kim, 207 Ga. App. 910 (1993).

Geographically, plaintiffs frequently rely on prior crimes of violence on neighboring or surrounding properties. Arguably any crimes which did not occur on the Defendant's property are inadmissible to show notice to the Defendant of a risk of crime to its own invitees. See Sun Trust Banks, Inc. v. Killebrew, 266 Ga. 109, 109 (1995). In addition, it is

hard to explain how a crime on a neighboring property puts the defendant on notice of some dangerous condition on its own property.

On the other hand, the more recent decisions from the Georgia appellate courts seem to ignore the above precedent authority without overruling it. In Woodall v. Rivermont Apartments Ltd. Partnership, 239 Ga. App. 36 (1999), the Court of Appeals reversed the trial court's ruling on Defendant's motion in limine in a case in which a tenant was violently assaulted near the apartment complex mail boxes. The motion in limine dealt with "evidence of twenty separate property crimes that had occurred at the apartment complex in the previous year, including eight burglaries of apartment units, nine instances where cars in the parking lot were either broken into or stolen, and three instances where mailboxes at the apartment complex were broken into.

"In addition to these property crimes, there were two other incidents involving encounters by a resident or security guard with suspicious individuals. In granting defendants' motion in limine to exclude evidence of these incidents, the trial court examined each incident separately and concluded that each individual incident was not sufficiently similar to the attack on Woodall to render it admissible. The trial court also excluded certain internal reports of defendants referencing these property crimes. **The court did not consider whether the volume of crime, alone or combined with other factors, affected the question of admissibility**, but simply considered each prior incident separately. However, the court stated in its order that it had 'misgivings that the jury will not have a fair and accurate picture of the condition of the Rivermont [Apartments] at the time of trial.' The court denied defendants' request to exclude evidence relating to violent

crimes occurring in the vicinity of the apartment complex." Woodall v. Rivermont Apartments Ltd. Partnership, 239 Ga. App. 36, 520 S.E.2d 741, 742-743 (1999)(emphasis added).

The Woodall decision went on to explain:

> Thus, although Sturbridge rejected the proposition that the occurrence of property crimes may never render the occurrence of violent crimes foreseeable, the Court in Doe appears to have restricted the applicability of Sturbridge. Doe appears to establish the following principles: (1) a crime against property will make an act of violent crime foreseeable if the "very nature" of the property crime "suggest[s] that personal injury may occur"; and (2) if an individual who encounters someone committing such a property crime has "opportunities for escaping" the encounter, then the occurrence of the property crime, in and of itself, may not render it foreseeable that a violent crime will occur.
>
> In this case, it does not appear that any of the property crimes, standing alone, would raise an issue of foreseeability under the standards set forth in Sturbridge and Doe. The trial court clearly believed that these cases required it to analyze each prior crime independently to determine its similarity to the attack at issue in this case, without reference to other crimes at the complex or other evidence placing the crimes in context.

The court went on to note:

> Given the fact that the area adjacent to the Rivermont complex was known as a high-violent crime area, and that defendants were concerned about security issues relating to the increase in crime, we believe that evidence of an increase in property crimes at the complex is relevant to whether defendants should have foreseen a risk of personal injury to their tenants from an attack such as the one on Woodall. In analyzing each prior property crime individually, without reference to any context, the trial court applied an overly rigid interpretation of the Supreme Court's decisions in

> Sturbridge and Doe. As discussed above, Georgia law "favors the admission of any relevant evidence, no matter how slight its probative value; evidence of doubtful relevance or competency should be admitted and its weight left to the jury." Johnson, supra. Because we cannot say that such evidence was inadmissible for any purpose, the trial court erred in granting defendants' motion to exclude evidence of the various property crimes and of defendants' knowledge of those crimes."

Woodall v. Rivermont Apartments Ltd. Partnership, 239 Ga.App. 36, 520 S.E.2d 741, 745 (1999). Thus, the determination of what prior crime evidence is admissible seems to be getting more difficult to decipher and seems to depend in large measure to which panel of the Court of Appeals the case is assigned and not on legal precedent.

Only prior crimes which occurred on the subject premises should be relevant and admissible because these cases are **premises** liability cases and because the Defendant has no responsibility for the **surrounding** properties. Plaintiffs always try to circumvent this argument by relying on the decision in Matt v. Days Inns of America, Inc., 212 Ga.App. 792, 795 (1994), to support their claim that evidence of crime **in the area** of the subject property is admissible to establish foreseeability. In the Matt case the Court of Appeals stated, "In this appeal, however, the record of criminal activity in the parking lots of nearby hotels, including serious crimes against persons, when coupled with the record of criminal activity in [Days Inns'] own parking lot (a crime about once every two weeks) was sufficient to create a genuine issue of material fact on whether Days Inns was put on notice that criminal conduct against its guests was foreseeable". The court never said that evidence of

crime in the area of the subject property but off the property is admissible at trial and the Supreme Court, which affirmed the decision, explicitly did **NOT** adopt that standard. See Days Inns of America, Inc. v. Matt, 265 Ga. 235, 236, 454 S.E.2d 507, 508 (1995), in which the Supreme Court stated, "proof of the prior robbery committed by force [which occurred on Days Inns' property] creates a triable issue as to whether Days Inns had a duty to exercise ordinary care to guard its patrons against the risks posed by similar criminal activity.") Thus, **there is as of yet no appellate decision in Georgia holding that crime unknown to the defendant which occurs on other properties is relevant to a determination of foreseeability or that such evidence of crime on other properties is admissible at trial**. However, the Woodall decision discussed above clearly took the position that some surrounding crime was admissible, without really citing legal authority for that position.

The rule appears to be that if a landowner knows of a prior burglary (even if the perpetrator entered an apartment during the day when no one was at home solely to steal property, for example), it is arguably foreseeable to the landlord the same or another perpetrator could break into an apartment and commit a violent assault or battery (during the night when the perpetrator could reasonably expect the resident to be home in bed). In that example, the "nature" of burglary requires a breaking and entering, and it becomes foreseeable to the owner that a perpetrator could break in again and commit a personal attack. See Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 482 S.E.2d 339 (1997). Arguably, under the Sturbridge circumstances, the prior burglaries should have at least put the landlord on notice that the apartments were not secure when locked. However, the

Supreme Court has held car thefts in the parking lot are not substantially similar in nature or extent to a personal attack in the parking lot. See Doe v. Prudential-Bache, 268 Ga. 604, 492 S.E.2d 865 (1997). Therefore, under the same analysis, a car theft or thefts in the parking lot of a commercial property are not substantially similar to a personal attack in the parking lot or outside a guest's room. The Supreme Court in Doe distinguished the knowledge of burglaries in Sturbridge from the thefts from autos at issue in Doe by emphasizing the likelihood of an isolated encounter with little chance of escape in an apartment burglary versus opportunities for escape in a parking lot. See Doe, 268 Ga. at 606.

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, 821 F. Supp. at 678. Yet many trial courts put no time limits on how far back plaintiffs may go to show evidence or prior crimes.

B. Only evidence of crimes known to the Defendant should be admissible.

If Plaintiff cannot prove that **the Defendant** was aware of the prior crime, that crime is arguably insufficient to demonstrate foreseeability of the Plaintiff's crime by the defendant. See Sun Trust Banks Inc. v. Killebrew, 266 Ga. 109 (1995). "[I]t is the law in Georgia that a property owner is under no obligation to investigate police files to determine whether criminal activities have occurred on his property. Sun Trust Banks v. Killebrew,

266 Ga. 109, 464 S.E.2d 207 (1995). . ." Habersham Venture, Ltd. v. Breedlove, 244 Ga.App. 407, 410, 535 S.E.2d 788, 791 (2000)(also citing to Johnson v. Atlanta Housing Auth., 243 Ga.App. 157, 159, 532 S.E.2d 701, 704 (2000)). Since this is the law of Georgia, I submit no so-called "expert" should be permitted to testify that, in his or her opinion, the standard of care requires such an investigation of police files to determine whether criminal activities have occurred on this property. Yet some trial courts continue to ignore binding appellate precedent and admit such evidence.

2. How does one put in evidence of prior substantially similar incidents?

Although many plaintiff's attorneys have done so in the past, the Georgia Supreme Court has recently made it crystal clear that the trial court may not admit into evidence police incident reports based solely upon their authentication as business records. Brown v. State, 274 Ga. 31, 33-34, 549 S.E.2d 107, 109-110 (2001). In Brown, 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 clear that its ruling applied to civil premises security cases when it specifically 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. See also Scott v. LaRosa and LaRosa Inc., 253 Ga. App. 489, 559 S.E.2d 525 (2002), in which the Court of Appeals reversed the grant of summary judgment to the defendant in a wrongful death case on the ground that "the narrative portion of a police report [which] showed that two employees of LaRosa and LaRosa were not acting within the scope of their employment when the decedent in this case was killed in a collision involving a car loaned out by one of

the employees' . . . was not admissible as a business record under the recent decision of Brown v. State, 274 Ga. 31 (549 SE2d 107) (2001)." The LaRosa case makes it clear that the Brown decision is applicable to civil cases.

Thus, how does a plaintiff present admissible evidence of prior substantially similar incidents? I submit that the plaintiff must have admissible evidence that the crime occurred and of the circumstances surrounding the crime which arguably support a finding that the crime was substantially similar to the one at issue or should have called the owner's attention to the alleged dangerous condition. In order to do that without the use of inadmissible hearsay, the plaintiff must either have an eyewitness to the crime testify to the crime or have a record of that crime which was prepared by the defendant, which could arguably be presented as an admission, an exception to the hearsay rule. In addition, where the defendant's own records can be used to present evidence of prior substantially similar incidents, the plaintiff also gets the benefit of simultaneously proving notice to the defendant of the incident because it was obviously reported to the defendant if the defendant made a record of it. Thus, under this scenario, the conscientious defendant is arguably prejudiced by its efforts to keep advised about what is occurring on the property and keeping records of such information whereas the defendant who keeps no records and keeps its head buried in the sand won't have any damning records to give to the plaintiff to assist the plaintiff in proving the prior substantially similar incidents. Nevertheless, I believe property owners are still better off keeping abreast of what is happening on their property and keeping records of such activity as ignorance is rarely bliss in the legal arena.