IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

DOCKET NO. A11A0793

CARRIE RAINES, ET AL

Appellant,

v.

JOHN F. MAUGHAN, ET AL

Appellees

ON APPEAL FROM THE STATE COURT OF FULTON COUNTY
CIVIL ACTION FILE NO. 2007EV001852A

APPELLANT'S REPLY TO BRIEF OF APPELLEE JOHN F. MAUGHAN

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APPELLANT'S REPLY TO BRIEF OF APPELLEE JOHN F. MAUGHAN

Comes now CARRIE RAINES, Individually, and as Administratrix of the Estate of KEITH TAYLOR, and makes and files this her Reply to Appellee John F. Maughan, as follows:

I. Keith Taylor was not targeted by the criminals who robbed, shot and killed him. He was victim of a crime of opportunity. Keith Taylor's robbery and murder was foreseeable to Defendant.

Lead investigator Detective Wilson was asked, "Is there any evidence in your files that show that Mr. Taylor was targeted as the only victim that would ever be robbed and shot at that location at that time?" He answered "No." He was asked, "So by no, you mean no evidence of that?" He answered, "We didn't uncover anything that would indicate he was the target of this incident or target of this robbery." (T-403,l.21-p.404,l.5). Both experts John Harris and Norman Bates should have been allowed to testify how based on the prior crime at Venetian Hills Apartments, Keith Taylor's robbery and murder was a foreseeable crime of opportunity.(R-508, R-2954-2955, R-2934-2935).

II. There was no Evidence that Keith Taylor was at fault.

Keith Taylor did not know Venetian Hills Apartments was in a high crime area. Keith Taylor did not know about any crime that occurred at or near Venetian Hills Apartments. Keith Taylor never lived at Venetian Hills Apartments. Prior to December 14, 2005, Keith Taylor had never visited Venetian Hills Apartments. On his first visit to Venetian Hills, he was robbed, shot, and killed.

It cannot be logically inferred that by merely wearing jewelry and clothing to an apartment complex in Atlanta, Keith Taylor had knowingly placed himself in a position of danger.

On December 14, 2008, he wore a single silver necklace with an average sized silver cross. (T-748,l.12-750,l.1; T-587,l.6-22). He wore earrings that looked like diamonds but were not. (T-254,l.16-23). He also wore a ring, and perhaps a bracelet or watch. (T-587,l.6-22). He was dressed clean cut. (T-587,l.4-5). The medical examiner Dr. Heninger stated, "He had this white cloth around his head...He had a pair of white long Johns, long sleeves on his torso; he had a white T-shirt beneath the long johns. He had a pair of long blue denim pants around his waist; he had a brown leather belt, gold colored with a buckle fastened with loops. He had a pair of high top white athletic shoes on his

feet and a pair of white socks. There was a pair of blue shorts underneath his clothing. He had a white baseball cap in the body bag with him; he wasn't wearing it, and then he had two keys in his pants pocket." (T-480,l.1-18). Maughan argues Keith Taylor dressed expensively. Expensive is a subjective opinion. Carrie Raines explained that spending $120-$150 on tennis shoes was expensive to her because she wore cheap ones. (T-765,l.9-24).

Ordinary negligence means "the absence of or failure to use that degree of care that is used by ordinarily careful persons under the same or similar circumstances." Suggested Pattern Jury Instructions 60.010. O.C.G.A. 51-1-2.

There is nothing to indicate that Keith Taylor was negligent by wearing the jewelry and clothing he wore to Venetian Hills Apartments.

At trial Defendant did not provide any evidence that Keith Taylor acted negligently under the circumstances. Defendant did not bring forward any evidence that Keith Taylor actually knew about any crime that occurred at or near Venetian Hills Apartments. Defendant did not bring forward any evidence that Keith Taylor knew that Venetian Hills was a dangerous and high crime area. Defendant did not bring forward any evidence showing

that an ordinarily careful person in the same position as Keith Taylor, would not have worn the jewelry and clothing that Keith Taylor wore.

It cannot be logically inferred that by merely wearing jewelry and clothing to an apartment complex in Atlanta, Keith Taylor had knowingly placed himself in a position of danger.

Defendant did not prove Keith Taylor assumed the risk. In Vaughn v. Pleasant, 266 Ga. 862 (1996), Justice Sears, writing for the Court, reiterated the requirements of assumption of the risk:

> "'Knowledge of the risk is the watchword of assumption of risk,'" and means both actual and subjective knowledge on the plaintiff's part. The knowledge that a plaintiff who assumes a risk must subjectively possess is that of the specific, particular risk of harm associated with the activity or condition that proximately causes injury. The knowledge requirement does not refer to a plaintiff's comprehension of general, non-specific risks that might be associated with

such conditions or activities. As stated by Dean Prosser:

> In its simplest and primary sense, assumption of the risk means that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him, and to take his changes of injury from a known risk arising from what the defendant is to do or leave undone.

The evidence does not support that Keith Taylor was negligent or assumed the risk. York v. Winn Dixie, 217 Ga. App. 839(1995), demonstrates that the risk must be known for a plaintiff to assume it. (The Full Court reversed Summary Judgment:

> "The doctrine of the assumption of the risk of danger applies only where the plaintiff, with a full appreciation of the danger involved and without restriction from his freedom of choice either by the circumstances or by coercion, deliberately chooses an

obviously perilous course of conduct so that it can be said as a matter of law he has assumed all risk of injury" (Citations and punctuation omitted; emphasis supplied.) General Tel. Co. o f the Southeast v. Hiers, 179 Ga. App. 105, 106(2)(345 SE3d 652)(1986).

In Borders v. Board of Trustees, Veterans of Foreign Wars Clubs 2875, Inc., 231 Ga. App. 880 (1998), the Full Court reversed Summary Judgment in a premises liability case where plaintiff was knocked down by a drunk in a bar. The Court found there is evidence of constructive knowledge of the hazard on the part of the defendants and plaintiff did not assume the risk:

> ….the trial court erred in determining (1) that Borders' general awareness of 'the possibility that drunken patrons may be present' at the VFW gave her equal knowledge of the specific hazard presented by an intoxicated Hawkins staggering into her and knocking her to the floor, and (2) that Borders had the burden to negate an assumption of the risk defense prior to such being raised by the VFW through the introduction of evidence."

In the present case, apportionment is not allowed because there was no evidence that decedent Keith Taylor is partly at

fault for the injuries and damages claimed.

III. To the extent that the owner or occupier of a premises blames the criminals, it eviscerates their non-delegable duty to make the property safe.

IV. It is abominable for the owner or occupier to blame the criminals when, if the crime is foreseeable, that is the very danger against which he must guard. Blaming the criminals turns the owner's non-delegable duty on its head.

This the 21 day of February, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I have served the within and foregoing Brief of Appellants upon all parties by depositing a copy of same in the United States mail, with sufficient postage affixed, addressed as follows:

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This the 21 day of February, 2011.

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