SIGNIFICANT TENETS IN THE DEFENSE OF NEGLIGENT SECURITY CLAIMS

By: Catherine Carter Semler of Waldon Adelman Castilla Hiestand & Prout

The defense of a negligent security claim is rooted in the threshold inquiry of whether the property owner/occupier ("proprietor") had superior knowledge of an unreasonable risk of harm to his/her invitees. In general, an intervening criminal act by a third party insulates a proprietor from liability unless the criminal act was reasonably foreseeable. Does the fact that the property was located in a "high crime" area establish the "reasonably foreseeable" element as a matter of law? No. Are police reports from crime grids surrounding the property admissible to show the proprietor had constructive knowledge of criminal activity and, therefore, should have foreseen the risk of a particular crime? No. Should a proprietor reasonably foresee an altercation on the premises and, therefore, be held liable for injuries caused as a result? Maybe.

As discussed below, despite an occasional hiccup in the analysis of what constitutes a "substantially similar crime," the Georgia appellate courts have consistently followed several well-established tenets when evaluating a proprietor's liability for injuries caused by a third-party.

I. STANDARD: Elements of Premises Liability

Under Georgia law, an owner or occupier of land owes its invitees a duty to exercise ordinary care in "keeping the premises and approaches safe." [1] OCGA § 51-3-1. The proprietor

[1] The Georgia Supreme Court has interpreted the statutory text as imposing "a duty on a landowner regarding approaches to his premises that are public ways to exercise due care within the limited confines of his right in the

is not the insurer of the safety of its invitees but is bound to exercise ordinary care to protect its invitees from unreasonable risks of which it has *superior* knowledge. Robinson v. Kroger Co., 268 Ga. 735, 740 (1), 493 S.E.2d 403 (1997); Lau's Corp. v. Haskins, 261 Ga. 491, 492 (1), 405 S.E.2d 474 (1991) (Emphasis added).

Generally, an intervening criminal act by a third party insulates a proprietor from liability unless the act was reasonably foreseeable. Lau's Corp., 261 Ga. at 492 (1); The Medical Center Hospital Authority v. Cavender, 331 Ga. App. 469, 473, 771 S.E.2d 153 (2015), *citing* Days Inns of America v Matt, 265 Ga. 235, 236, 454 S.E.2d 507 (1995) ("Put simply, 'without foreseeability that a criminal act will occur, no duty on the part of the proprietor to exercise ordinary care to prevent that act arises.'") [2] Where the proprietor has reason to anticipate a criminal act, the proprietor then has the duty to exercise ordinary care to guard against injury

public way, notwithstanding the landowner's lack of control over that public way approach." *Motel Props., Inc. v. Miller,* 263 Ga. 484, 485(1), 436 S.E.2d 196 (1993), citing *Todd v. F.W. Woolworth Co.,* 258 Ga. 194, 197(1), 366 S.E.2d 674 (1988). The term "approaches" means that property which is 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. *Motel Props., Inc.,* 263 Ga. at 486. Property that is "contiguous, adjacent to, and touching" means "property within the last few steps taken by invitees, as opposed to 'mere pedestrians,' as they enter or exit the premises." Id., citing *Todd*, 258 Ga. at 197. *Cf.,* "The question of what constitutes an approach to premises has both factual and legal elements." *Todd*, 258 Ga. at 199. See also *Six Flags Over Georgia II, L.P. v. Martin*, 301 Ga. 323, 329, 801 S.E.2d 24 (2017) ("Nothing in O.C.G.A. §51-3-1 requires that the injuries caused by a property owner's failure to exercise due care actually be inflicted within the four corners of the landowner's premises and approaches for liability to attach.")

[2] See *Cavender*, 331 Ga. App. at pp. 473-474 for additional cites considering the definition of "reasonable foreseeability:" "Foreseeable consequences are those which are probable, according to ordinary and usual experience, or those which, because they happen so frequently, may be expected to happen again." *Brown v All-Tech Investment Group,* 265 Ga. App. 889, 894, 595 S.E.2d 517 (2003). See also *Thomas v. Food Lion,* 256 Ga. App. 880, 882(1), 570 S.E.2d 18 (2002); *Cope v. Enterprise Rent–A–Car,* 250 Ga. App. 648, 651(2), 551 S.E.2d 841 (2001) (the law judges foreseeability of consequences "according to the usual experience of mankind"). "One is not bound to anticipate or foresee and provide against that which is unusual or that which is only remotely and slightly probable." *Strickland v. DeKalb Hosp. Auth.,* 197 Ga. App. 63, 68(I)(2)(d), 397 S.E.2d 576 (1990); *Brown,* 265 Ga. App. at 894. Stated differently, the exercise of ordinary care "simply does not create a duty to anticipate unlikely, remote, or slightly possible events." *McDaniel v. Lawless,* 257 Ga. App. 187, 189, 570 S.E.2d 631 (2002). See also *Adler's Package Shop v Parker*, 190 Ga. App. 68, 69, 378 S.E.2d 323 (1989) ("Not what actually happened, but what the reasonably prudent person would then have foreseen as likely to happen, is the key to the question of reasonableness.")

from dangerous characters. Id.; Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 786, 482 S.E.2d 339 (1997).

The determination of whether a proprietor could have reasonably foreseen a criminal attack is generally for the jury. Sturbridge Partners, Ltd. v. Walker, 267 Ga. at 786. Where the evidence is "plain, palpable and undisputed," however, the issue can be resolved by summary adjudication. *See* Brown v All-Tech Investment Group, Inc., 265 Ga. App. 889, 893, 595 S.E.2d 517 (2004).

II. REASONABLE FORESEEABILITY: Defining "Substantially Similar" Crimes

A plaintiff may establish that a criminal act was reasonably foreseeable on the part of the proprietor by showing the proprietor's actual knowledge of prior "substantially similar" crimes on the premises such that a reasonable person would take ordinary precautions to protect his/her invitees against the risks posed by that type of activity. Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 786, 482 S.E.2d 339 (1997). The location of the premises in a "high crime" area is not, in and of itself, notice of the proprietor's knowledge such that criminal activity should be reasonably foreseen. Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474, 477 (1991); Bolton v. Golden Business, Inc., 348 Ga. App. 761, 763, 823 S.E.2d 371, *cert. denied* (2019).

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." Sturbridge, 267 Ga. at 786. While the primary criminal activity must be substantially similar, it need not be identical; what is required "is that the prior

incident be sufficient to attract the proprietor's attention to the dangerous condition which resulted in the litigated incident." Id. Without a showing of substantial similarity, the evidence is irrelevant as a matter of law and there is nothing upon which the court's discretion can operate. Adler's Package Shop v. Parker, 190 Ga. App. 68, 70, 378 S.E.2d 323 (1989).

The Georgia Supreme Court and Court of Appeals have continually refined what constitutes a "substantially similar crime" such that a proprietor can be charged with the duty to have reasonably foreseen the alleged dangerous activity. *See, e.g.*, Six Flags Over Georgia II, L.P. v. Martin, 301 Ga. 323, 332, 801 S.E.2d 24 (2017) (judgment in favor of plaintiff upheld following a vicious attack on a park patron at a public bus stop where evidence demonstrated amusement park proprietor was aware of ongoing violent gang activity at the park, attempted to cover up known gang activity to maintain wholesome "family" image, and failed to eject gang members who participated in violent threats and activity on the subject incident date); Sturbridge Partners, Ltd. v. Walker, 267 Ga. at 786 (summary judgment reversed; where the statutory definition of "burglary" includes the suggestion of personal injury, several prior burglaries of vacant apartments during daylight hours constituted "substantially similar crimes" such that proprietor had reason to foresee the violent sexual attack on tenant in her own apartment after midnight); Sun Trust Banks, Inc. v Killebrew, 266 Ga. 109, 464 S.E.2d 207 (1995); (summary judgment affirmed; prior assault on bank customer accessing ATM did not establish bank's duty to reasonably foresee shooting of plaintiff in same scenario where bank had no actual knowledge of prior incident); Lau's Corp. v. Haskins, 261 Ga. 491, 492 (1), 405 S.E.2d 474 (1991) (summary judgment affirmed; while proprietor's actual notice of prior purse snatching established his duty to reasonably foresee another such event, the evidence showed that he, thereafter, fulfilled his duty to exercise ordinary care to guard against injury to his invitees);

Bolton v. Golden Business, Inc., 348 Ga. App. 761, 823 S.E.2d 371 (2019) *(*summary judgment affirmed; where convenience store proprietor had no actual knowledge of police reports allegedly detailing violent crimes in and around store, proprietor could not have reasonably foreseen murder of plaintiff); The Medical Center Hospital Authority v. Cavender, 331 Ga. App. at 469 (denial of summary judgment reversed; where hospital proprietor had no actual knowledge of prior incidents documented in "collection of police reports," perpetrator's homicidal rampage was so unlikely and remote that proprietor could not have legally foreseen the danger); and Baker v. Simon Property Group, Inc., 273 Ga. App. 406, 408, 614 S.E.2d 793 (2005) (summary judgment affirmed; despite proprietor's actual knowledge of same, prior property crimes in mall's parking lot did not constitute "substantially similar" crimes such that the subject carjacking and shooting were reasonably foreseeable to proprietor).

A. The Proprietor Has No Duty to Warn of Location in "High Crime" Area.

In Lau's Corp., restaurant patrons who were robbed and assaulted in an adjacent parking lot sued the restaurant proprietor for failing to provide adequate warnings/security. Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474, 475 (1991). Specifically, the plaintiffs alleged the proprietor failed to warn them that the restaurant was located in a dangerous area. Id. at 477. The trial court granted summary judgment for the restaurant; the Court of Appeals reversed. Id. at 475.

Granting *certiori*, the Georgia Supreme Court considered, as follows: Plaintiffs Mr. and Mrs. Haskins were robbed when two men took Mrs. Haskins' purse and hit Mr. Haskins over the head. Via affidavit, the owner stated that, in his six years of operating the restaurant, he was aware of only one prior incident in which a woman's purse was snatched in the same parking lot; the woman was not, however, assaulted. Id. at 476. (Interestingly, the prior incident occurred

only four days before to the subject incident.) The owner operated four floodlights at the front of the restaurant that were specifically directed at the subject parking lot. He also maintained two floodlights on the restaurant sign located in the parking lot. According to the owner, the subject lot was indirectly illuminated by streetlights and the lights of other businesses in the area. Once notified of the prior purse snatching, the owner began personally patrolling the parking lot several times each evening.

In response to a motion for summary judgment, the patrons submitted affidavits from local police officers in which the prior purse-snatching incident was described. Two local businesspersons also submitted affidavits opining that the subject restaurant was located in a "high crime" area. The locals also claimed to have "heard" that several businesses in the area had experienced problems with robberies and burglaries.

Addressing the proprietor's alleged failure to adequately warn that the business was located in a "high crime" area, the Court "declined … to require owners to post warnings of a generalized risk of crime. It is difficult to even imagine what such warnings would include: 'Watch out! This is a high crime neighborhood,' or 'Since 1982, two rapes and one robbery have occurred in this parking lot.'" Noting it could find no authorities to the contrary, the Court concluded that "no such duty currently exists in the law." Id. at 477.

Continuing its analysis, the Court found that the proprietor was *actually aware* of one prior purse-snatching incident and, therefore, it was reasonable to infer that the proprietor knew his business was located in a "high crime" area. Id. at 476-477 (Emphasis added). The Court held this evidence was sufficient to give rise to a triable issue as to whether the proprietor had a duty to exercise ordinary care to guard his patrons against the risk posed by criminal activity. Id. at 477. After considering the measures the owner had taken (the provision of lighting and

personal patrols in the subject lot), however, the Court concluded that no jury could find the proprietor breached that duty in light of the reasonable risk of harm. Id. at 477 – 478. Where there was no evidence of negligence, the defendant was entitled to summary judgment. Id. at 478.

B. The Proprietor Has No Duty to Proactively Search Police Records for Incidents on the Property.

In Sun Trust v. Killebrew, a bank customer sued Sun Trust after being robbed and shot while using the ATM in the bank's parking lot. Sun Trust Banks, Inc. v Killebrew, 266 Ga. 109, 109, 464 S.E.2d 207 (1995). The customer claimed Sun Trust failed to take the necessary precautions in keeping its premises safe for invitees due to the bank's knowledge of a prior "substantially similar" criminal incident. Id. at 109. Five months before Killebrew was shot, another customer attempting to access the ATM in the parking lot was threatened by an assailant with a broken wine bottle. Significantly, the incident was reported to police, but not to the bank. On deposition, the bank's security officer confirmed that the security team was expected to investigate all crimes on bank property.

The trial court's grant of summary judgment to Sun Trust was reversed on appeal. While acknowledging (1) a proprietor may not be liable for a criminal act unless it has reasonable grounds to anticipate same; and (2) the bank did not have actual knowledge of the prior incident, the Court of Appeals held that the security officer's testimony coupled with the existence of a police report documenting the prior crime created a fact issue concerning the bank's *constructive* knowledge of the risk of harm. Id. at 109 (Emphasis added), *citing* Savannah College of Art and

Design, Inc. v Roe, 261 Ga. 764, 409 S.E.2d 848 (1991), *overruled by* Sturbridge Partners, Ltd. v. Walker, 267 Ga. at 786. [3]

Arguing *inuendo* that constructive knowledge of a prior substantially similar criminal incident could charge a proprietor with the duty to take reasonable precautions to protect its invitees from similar criminal activity, the Georgia Supreme Court stated "there is no authority in this State imposing a duty upon a property owner to investigate police files to determine whether criminal activities have occurred on its premises." Id. at 109; *see also* ABH Corporation v. Montgomery, 2020 WL 5554162, ____ S.E.2d ____ (2020). The Court also noted that the bank security officer's statements did not establish a duty to investigate crimes, including seeking out police reports of incidents not reported directly to the bank. Id. at 109-110. On that basis, the appellate court's ruling was reversed, upholding the original grant of summary judgment. Id. at 110; *cf.,* Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474, 477 (1991) (evidence that the property was located in a "high crime" area *coupled* with evidence that proprietor actually knew of a prior purse snatching on premises was sufficient, albeit "weak," evidence that gave rise to issue of fact as to whether proprietor had duty to protect patrons from the risk of violent criminal activity.) (Emphasis added).

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[3] In *SCAD v Roe*, an art student, who was raped after the perpetrator broke into her dormitory at night, sued the college for negligent failure to provide adequate security. Savannah College of Art and Design, Inc. v Roe, 261 Ga. 764, 764, 409 S.E.2d 848 (1991), *overruled by* Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 786, 482 S.E.2d 339 (1997). Evidence showed that the college was located in an urban area, the college had received prior reports of petty thefts and "peeping toms" at the dormitory, college personnel had removed vagrants and intoxicated persons from the dorm, and a prior student had surprised a burglar in her dorm room. Id. at 765. The trial court denied the college's motion for summary judgment; the Court of Appeals denied the college's application for interlocutory review. Id. at 764. Upon a grant of *certiori*, the Georgia Supreme Court found the evidence presented to the trial court (urban setting, petty thefts, "peeping toms," etc.) was "irrelevant" because none of those incidents were "substantially similar" to the sexual assault made the basis of the instant suit. Id. at 765. That the college was aware that the dormitory was located in an area of downtown Savannah where various crimes had previously been committed did not put the college on notice that its students were subject to a risk of violent sexual attack. Id. at 765(n.2). "It is undisputed that the college had no knowledge of any criminal sexual assaults previously occurring (on the premises)." Id. at 765. In light of the "dearth of evidence" of prior substantially similar incidents, the Georgia Supreme Court reversed the trial court, holding the college was entitled to summary judgment. Id. at 765.

In *Sturbridge*, a tenant, who was raped in her apartment just after midnight, sued the apartment complex and the operating manager for their failures to provide proper security. Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 482 S.E.2d 339, 340 (1997). The plaintiff claimed the defendants failed to take action despite the occurrence of three burglaries in the sixty-day period leading up to the attack. The trial court granted the apartment owner's motion for summary judgment, agreeing with its argument that, because it had no notice of prior rapes or violent sexual attacks, the attack on plaintiff was not reasonably foreseeable *as a matter of law*. Id. at 340 (Emphasis added.) The Court of Appeals reversed, finding that, for purposes of determining foreseeability, "the distinction between the risks posed by burglaries that involved brutal sexual attacks and those that did not is unfounded." On that basis, the appellate court held that plaintiff's evidence was more than sufficient to create a genuine issue of material fact as to the defendants' "appreciation of the risks posed by burglars" to its tenants.

As noted during review by the Georgia Supreme Court, "the difficulty arises in determining which criminal acts are foreseeable." In its motion, the proprietor had relied upon the case of *Savannah College of Art and Design v. Roe*, in which the appellate court had seemingly held that a proprietor's knowledge of prior crimes against property could not establish the foreseeability of a brutal sex crime as a matter of law. Id. at 340, *citing* Savannah College of Art and Design, Inc. v Roe, 261 Ga. 764, 764, 409 S.E.2d 848 (1991), *overruled by* Sturbridge Partners, Ltd. v. Walker, 267 Ga. at 786. Reviewing that opinion, the Court commented, "such a restrictive and inflexible approach does not square with common sense or tort law and represents a significant departure from the precedent of this Court." Id. at 340, *citing* Days Inns of America, Inc. v. Matt, 265 Ga. 235, 236, 454 S.E.2d 507 (1995) (affirming the appellate court's reversal of summary judgment; prior robbery committed by force at a hotel raised triable issue as

to whether the hotel had a duty to exercise ordinary care to guard patrons against risks posed by similar criminal activity); and Lau's Corp. v. Haskins, 261 Ga. 491, 492 (1), 405 S.E.2d 474 (1991). On that basis, "to the extent that *Savannah College of Art and Design* supports such an analysis for determining foreseeability, it is overruled." [4]

The proprietor had argued that, based on the nature of the prior burglaries (*i.e.*, they had occurred in the daytime when no tenants were home and did not involve forced entry), it was unreasonable to anticipate that a brutal sex crime could occur. The Court disagreed, stating the following: "The issue is not the foreseeability of the rape itself, but whether Sturbridge had actual knowledge of the prior burglaries and, because of that knowledge, should have reasonably anticipated the risk of personal harm to a tenant that might occur in the burglary of an occupied apartment." Id. at 341, *citing* Sun Trust Banks, Inc. v Killebrew, 266 Ga. 109, 464 S.E.2d 207 (1995). Because the record demonstrated the proprietor had actual knowledge of two of the three prior burglaries committed while apartments were vacant, the Court held that it was reasonable to anticipate that an unauthorized entry might occur while an apartment was occupied resulting in personal harm to a tenant. Id., *citing* O.C.G.A. §16-7-1(a) ("the very nature of burglary suggests that personal injury could occur …") The judgment of the Court of Appeals was affirmed.

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[4] "The majority's overruling of SCAD is an unfortunate jettisoning of precedent." *Sturbridge*, 267 Ga. at 342-344 (Chief Justice Benham, dissenting) Chief Justice Benham's dissent contains a comprehensive analysis of several prior decisions and the factors considered in determining when "substantially similar" crimes establish reasonable foreseeability on the part of proprietors. The Chief Justice believed the appellate court was headed in the right direction when it decided *Piggly Wiggly v Snowden*, which held "the key to sufficient similarity is … in the nature of the offense: was the prior incident also an offense against a person, or was it an offense against property or public morals?" *Sturbridge*, 267 Ga. at 343, citing *Piggly Wiggly v Snowden,* 219 Ga. App. 148 (1a), 464 S.E.2d 220 (1995).

In *Bolton*, the parent of a murdered convenience store patron brought wrongful death claims against the owner/proprietor. Bolton v. Golden Business, Inc., 348 Ga. App. 761, 823 S.E.2d 371, *cert. denied* (2019). The trial court granted summary judgment to the convenience store proprietor, after which the plaintiff appealed. Id. at 761. Plaintiff/appellant argued that Golden's owner should have anticipated and, therefore, taken reasonable steps to prevent the deadly assault because (1) people often loitered around the convenience store; (2) other violent crimes had occurred in the area; and (3) the store was located in a "high crime" area. Id. at 762. While foreseeability of a criminal act may be established by evidence of one or more prior substantially similar crimes, the appellate court emphasized the paramount analysis was whether the proprietor had superior knowledge of the criminal activity. Id. at 762-763, *citing* Fair v. CV Underground, LLC, 340 Ga. App. 790, 792(1), 796, 798 S.E.2d 358 (2017).

Based on his examination of the property and the surrounding neighborhood, the proprietor testified he believed the convenience store was located in a safe area. He was not actually aware of any prior crimes in and around the store. While the store had been equipped with safety glass and security cameras several years before, these items had been installed in all of the stores which Golden company built and/or occupied, regardless of store location. During his periodic visits to the store, there was no evidence that the proprietor witnessed any criminal activity or misconduct, that he was informed by his tenant of any criminal activity in/around the store, or that he received any requests for heightened security measures.

Plaintiff/appellant argued that rampant, ongoing crime in the area "should have" put the proprietor on notice of a dangerous condition on the property. To demonstrate the crime-riddled area, the plaintiff presented police reports documenting investigations of criminal activity in and allegedly on the property. The plaintiff could not rest on the reports, however, because there was

no evidence that the owner had *actual* knowledge of the crimes reported. Id. at 763 (Emphasis added). [5]

The Court confirmed that there is no authority in Georgia imposing a duty on a proprietor to investigate police files to determine if criminal activity has occurred on the subject premises. Id. at 763, *citing* Sun Trust Banks, Inc. v Killebrew, 266 Ga. 109, 109, 464 S.E.2d 207 (1995). Thus, the existence of crime in the area – in and of itself – could not raise a genuine issue of material fact as to Golden's knowledge of the alleged prior crimes. Id. at 764, *citing* Baker v. Simon Property Group, Inc., 273 Ga. App. 406, 407(1), 614 S.E.2d 793 (2005) (where plaintiffs failed to show that defendants were actually aware of crime reports made to police, reports could not be used to demonstrate foreseeability of the subject attack); *see also* ABH Corporation v. Montgomery, 2020 WL 5554162, ____ S.E.2d ____ (2020) (trial court's denial of summary judgment reversed on interlocutory appeal; patron assaulted just outside convenience store failed to demonstrate that proprietor was actually aware of prior incidents described in 911 calls to premises.) [6]

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[5] *See also* the *Amicus Curiae* Brief of the Georgia Defense Lawyers Association, submitted to the Court on August 26, 2019, at pp. 5, 10-17, containing an excellent analysis confirming the long-standing premise that the proprietor must be shown to have had *actual* knowledge of prior crimes on the premises before evidence of the prior crimes may be considered by the jury. "The analysis turns to whether, based on actual knowledge of the prior crimes, the landowner had actual or constructive knowledge of an unreasonable or foreseeable risk to its invitees, *i.e.*, whether, based on the information the landowner *actually* knew, the landowner *knew or should have known* of an unreasonable risk to its invitees. Id. at p. 13, citing *Sturbridge Partners, Ltd. v. Walker*, 267 Ga. 785, 787, 482 S.E.2d 339 (1997) (Emphasis in original).

[6] In *ABH Corporation*, Plaintiff claimed the store "should have foreseen" his assault because a 911 call log indicated police were routinely called to investigate "suspicious" activity at the mall in which the store was located. Further, one of plaintiff's assailants had previously been arrested on drug and trespass charges and ordered to stay away from the area. Because there was no evidence that the proprietor was *actually* aware of the prior incidents, the Court did not reach an analysis of whether the prior criminal activity was "substantially similar" such that the proprietor should have foreseen plaintiff's assault. In contrast, there was "ample evidence" that plaintiff was personally aware of the criminal element in the area: he had witnessed criminal activity at the barber shop where he worked and several of his co-workers carried guns for personal security. On that basis, plaintiff failed to raise a genuine issue of material fact as to the store's superior knowledge of criminal activity on the premises. ABH Corporation v. Montgomery, 2020 WL 5554162, ____ S.E.2d ____ (2020).

Because plaintiff/appellant could not demonstrate the proprietor had *actual* knowledge of the prior crimes, plaintiff/appellant also could not meet her burden in showing that the attack was reasonably foreseeable. Id. at 764 (Emphasis added). For that reason, the trial court's grant of summary judgment was affirmed.

C. A Crime May Be So Remote and Unlikely That It is Not Legally Foreseeable.

In *Cavender*, the surviving spouses of several victims of a homicidal rampage at a hospital sued the hospital and its security provider for wrongful death and negligent security claims. The Medical Center Hospital Authority v. Cavender, 331 Ga. App. 469, 469, 771 S.E.2d 153 (2015). The evidence demonstrated that Charles Johnson, carrying at least two concealed weapons, visited Doctors' Hospital in March of 2008. Id. at 471. Proceeding to the intensive care unit, Johnson followed hospital employee Peter Wright into a room. Apparently believing Wright deliberately caused his mother's death, Johnson shot Wright twice at close range. Id. at 473. Plaintiff Cavender saw the shooting. Id. at 471. As he and Harris, another employee who heard the gunshots, attempted to monitor the floor, Johnson shot and killed Harris, after which Johnson struck Cavender on the back of the head.

After receiving several "code blue" signals, the lone security guard on duty ran to the ER to shut things down and prevent others from entering or leaving. Id. at 471-472. He then called 911 and warned people to take cover as he followed Johnson to the parking lot. There, Johnson shot and killed another person. Finally, law enforcement authorities surrounded the parking lot and took Johnson into custody. Id. at 472.

The trial court denied the defendants' motions for summary judgment. Id. at 470. Granting an interlocutory appeal, the appellate court reviewed the evidence to determine whether Johnson's criminal acts were reasonably foreseeable. Id. at 473. At the outset of its analysis, the

Court specifically noted that, absent evidence the homicidal rampage was reasonably foreseeable, summary judgment in the defendants' favor would be appropriate. Id. at 474, *citing* McDaniel v. Lawless, 257 Ga. App. 187, 189, 570 S.E.2d 631 (2002) (The exercise of ordinary care "simply does not create a duty to anticipate unlikely, remote, or slightly possible events.")

In response to the motions for summary judgment, the plaintiffs had submitted the testimony of a hospital security expert who opined that Johnson's rampage was foreseeable because of "the increased number of shooting incident at healthcare facilities." Id. at 476. To confirm their argument that the hospital and security service were on notice that "something like Johnson's rampage" was foreseeable, the plaintiffs also supplied "a collection of police reports" detailing incidents that had occurred at Doctors' Hospital and a neighboring property in the six years preceding the incident. Id. at 474-475. None of the reports showed multiple murders, a single murder, a shooting, a weapon, or even a significant injury. The majority of the reports evidenced "nothing more than verbal threats." Id., *citing* Aldridge v. Tillman, 237 Ga. App. 600, 605(2), 516 S.E.2d 303 (1999) (prior verbal threats of violence were not substantially similar to an assault with a knife); and Ableman v. Taco Bell Corp., 231 Ga. App. 761, 763, 501 S.E.2d 26 (1998) (prior verbal threats of violence do not constitute knowledge that a person would physically attack a third-party). Plaintiffs also relied on two reports evidencing late-night robberies in the parking lot of The Medical Center (a related medical facility) five years before the subject incident. In both cases, however, the weapons used were never discharged. Id. at 475. Significantly, the record was devoid of any evidence that the hospital facilities had *actual* knowledge of *any* of the prior incidents. Id. at 477 (Emphasis added).

In making its decision, the Court observed that "assaults like Johnson's are not legally foreseeable" because they are so "unusual, contrary to ordinary experience, and rare that no

reasonable jury could find the [proprietor] should have guarded against them." Id. at 475, *citing* Brown v All-Tech Investment Group, 265 Ga. App. 889, 894, 895, 595 S.E.2d 517 (2004) (summary judgment affirmed; day trader's shooting spree after huge financial loss was not a reasonably foreseeable consequence of investment firm's "predatory" practices despite testimony of alleged experts that "workplace/ violence is prevalent and recognized.") Thus, the Court found the trial court erred in denying the defendants' motions for summary judgment. Id. at 477.

D. The Proprietor Is Not Liable Where "Mutual Combatants" Are Deemed to Have Equal Knowledge of the Risk of Danger.

When determining a proprietor's liability, the paramount inquiry is whether the proprietor had *superior* knowledge of the existence of a condition that could subject the invitee to an unreasonable risk of harm. Lau's Corp. v. Haskins, 261 Ga. 491, 492 (1), 405 S.E.2d 474 (1991) (Emphasis added). Where a "mutual combatant" sustains injury on the premises, she/he is deemed to have equal, if not superior, knowledge of the danger; thus, *even where criminal acts are foreseeable*, the proprietor will not be held liable. *See* Fair v. CV Underground, LLC, 340 Ga. App. 790, 796, 798 S.E.2d 358 (2017) (summary judgment for proprietor affirmed where patron was shot and killed after participating in "mutual combat" with shooter and, thus, had superior knowledge of the risk of harm); *see also* Ratliff v. McDonald, 326 Ga. App. 306, 313(2)(a), 756 S.E.2d 569 (2014) (summary judgment for county affirmed; plaintiff/detention center visitor who was assaulted by another visitor, failed to show sheriff's deputies had superior knowledge of the danger where plaintiff had prior relationship with perpetrator and prior knowledge of perpetrator's propensity for violence).

When a person is injured in the course of mutual combat, the combatants are deemed to have superior knowledge of the risk of harm because "by their voluntary participation, the combatants have selected the time, date, and place for the altercation." Sailors v. Esmail Intl.,

Inc., 217 Ga. App. 811, 813 (1), 459 S.E.2d 465 (1995); Habersham Venture, Ltd. v. Breedlove, 244 Ga. App. 407, 411 (4), 535 S.E.2d 788 (2000). "Mutual combat exists where there is a fight with dangerous or deadly weapons, when both parties are at fault and when both are willing to fight because of a sudden quarrel." Sailors, 217 Ga. App. at 813 (1). In such a case, "any injuries to the combatants resulted from their own conduct. Under such circumstances, the existence of prior criminal acts on the premises is irrelevant and cannot form a basis for liability on the premises owner." Id.

In Fair, the parents of a young man shot and killed at Underground Atlanta brought wrongful death claims against the proprietor and the security services provider. Fair v. CV Underground, LLC, 340 Ga. App. 790 (2017). According to videotaped evidence, decedent Fair and a friend were involved in a brief altercation near the entrance to the shopping area. The video showed the eventual shooter, Barnes, approaching and speaking with a man in a blue shirt. Barnes and the man then appear to look out into the area where Fair just exited. Within seconds, Fair's friend is seen throwing a fire extinguisher at three men, including the blue-shirted man. A fight begins, immediately after which Fair can be seen throwing punches near a sign in the lobby. While Fair is fighting, Barnes watches and gestures. Soon after, Barnes and another man leave the lobby, apparently following Fair who had just exited. Confirmed by the alarm reflected in the faces of onlookers in the footage, a shooting then takes place off-camera in the plaza.

The undisputed facts indicated that Barnes shot Fair. There were no eyewitnesses to any exchange between Fair and Barnes just before the shooting and no one witnessed the shooting. No member of the security team was present in the entrance where the altercation took place nor were any security officers present in plaza where the shooting occurred.

The trial court granted Underground's motion for summary judgment based on the determination that Fair was a "mutual combatant" and, therefore, had knowledge superior to Underground's as to the risk of injury. Fair's family appealed the ruling, arguing a question of fact existed as to whether Fair "voluntarily" engaged in the altercation and, thus, whether Fair could have possessed the "superior knowledge" necessary to negate Underground's liability. Id. at 792. Affirming the grant of summary judgment, the Georgia Court of Appeals noted that Fair had already engaged in combat, as demonstrated in the video footage, and, therefore, had knowledge superior to Underground's of the danger of retaliation *at any time* by *any of the persons, including Barnes,* with whom Fair was fighting. Id. (Emphasis added). "Nothing in our caselaw authorizes the reversal of summary judgment to a property owner on the grounds that a fighting plaintiff has no previous acquaintance with his attackers or was attacked by a different person from those who initiated the fight." Id. at 793. [7]

Considering Fair's exit from the area approximately thirty seconds before the shooting, the appellate court confirmed the trial court's observation that "a momentary pause in the fight does not alter the relative knowledge of the parties." Id. at 793, *citing* Porter v. Urban Residential

[7] See *Fair,* 340 Ga. App. at p.793, for more examples: In *Rappenecker v. L. S. E., Inc.*, 236 Ga. App. 86, 510 S.E.2d 871 (1999), we held that even when a plaintiff who enters a fight is attacked by more than one person, he is held as a matter of law to have "knowledge superior to that of the property owner of the possible risk of additional trouble," including a second assailant who "joined in the ensuing criminal assault" and later pled guilty to aggravated battery. Id. at 87, 88. Likewise, in *Fagan v. Atlanta, Inc.*, 189 Ga. App. 460, 376 S.E.2d 204 (1988), we affirmed a grant of summary judgment to a bar owner when a patron who intervened to protect a female bartender from a group of men being ejected from the bar was beaten by the same group of men as a result. Without making any distinction between the stages of the brawl inside and outside the bar, we held that "an adult of ordinary intelligence will be held to be aware of manifest risk or danger of possible injury when he deliberately and voluntarily joins in an affray, as a matter of law." Id. at 461; see also *Habersham Venture, Ltd. v. Breedlove*, 244 Ga. App. 407, 409, 411 (4), 535 S.E.2d 788 (2000) (reversing denial of summary judgment to bar owner and operator when the plaintiff "voluntarily chose to enter into mutual combat with the assailants," including not only the man the plaintiff hit with a baseball bat but also the man who stabbed plaintiff in the back moments afterwards).

Dev. Corp., 294 Ga. App. 828, 832(2), 670 S.E.2d 464 (2008) [8] Because the undisputed facts showed that Fair was an "active participant in a brawl that left him injured," the Court stated proprietor Underground did not have knowledge equal to the decedent's as to the risks posed by the violent encounter *as a matter of law*. Id. at 794, *citing* Ratliff v. McDonald, 326 Ga. App. 306, 313(2) (a), 756 S.E.2d 569 (2014) (Emphasis added). Finding no error in the trial court's grant of summary judgment, the appellate court affirmed.

In Ratliff, the plaintiff brought negligent security claims against Cobb County Sheriff's deputies for their alleged failure to protect her from an assault at the county's Adult Detention Center (ADC). Ratliff v. McDonald, 326 Ga. App. 306 (2014). On the incident date, the plaintiff had accompanied a friend to the detention center because the friend's boyfriend, Yusef Umrani, was being released from custody. Id. at 307. On the same day, defendant McDonald and Umrani's ex-girlfriend had also arrived at the detention center to pick up Umrani. McDonald had previously threatened the plaintiff and her friend on multiple occasions. McDonald had said she would kill the plaintiff's friend; she also told both of them to stay away (from Umrani) or "get what's coming to them."

When the plaintiff and her friend arrived at the detention center, they informed the deputies that McDonald was "outside" and that they were concerned about what McDonald might do. Directing the two women to the Visitor's Center, the deputies specifically informed them that they could not help. On the way to the Visitor's Center, the two women passed McDonald in the doorway but said nothing. Upon their arrival at the Visitor's Center, the plaintiff and her friend informed two more deputies that they needed help and that they did not

[8] The *Porter* decision also included the "familiar rule" that "any injuries to the combatants resulted from their own conduct," rendering the subject of prior criminal acts on the premises "irrelevant." Id., citing *Porter*, 294 Ga. App. at 832(2).

feel safe because McDonald was parked outside. The officers (in their vehicle) told the plaintiff they would follow Plaintiff and her friend to the building where Umrani was to be released.

On the way, the officers stopped at a stop sign while the plaintiff parked and exited her vehicle. Seeing When McDonald in her parked car nearby, the plaintiff and her friend yelled to the officers for help. Id. at 308. Four other deputies standing nearby instructed the plaintiff and her friend to go ahead and cross over the parking lot because McDonald was "not going to do anything." As the plaintiff and her friend started to cross, McDonald yelled something about "killing." One of the deputies also heard McDonald say she was going to "run over" the two women. Seconds later, McDonald gunned her car, striking the plaintiff and her friend.

The trial court granted the County's motion for summary judgment because the plaintiff failed to show that it was reasonably foreseeable McDonald would strike the plaintiff with her vehicle in the parking lot while the deputies looked on. Although one of the deputies had commented before the incident that McDonald was "crazy," the deputy had no actual knowledge of McDonald's prior commission of violent acts.

Even if McDonald's intervening act had been reasonably foreseeable, the Court noted that the proprietor's superior knowledge of the risk of danger is the touchstone of premises liability. Where the record demonstrated that it was the plaintiff who informed the deputies of the danger posed by McDonald, she clearly had prior direct knowledge of the danger. That prior knowledge constituted equal, if not superior, knowledge of the threat, negating Plaintiff's claims against the county as a matter of law. Id. at 313.

E. A Proprietor May Be Liable for Crimes Committed Beyond the Four Corners of the "Premises and Approaches."

In *Six Flags over Georgia*, an amusement park patron sued the park and several gang members after he was severely beaten at a public bus stop. Six Flags Over Georgia II, L.P. v.

Martin, 301 Ga. 323, 323-324, 801 S.E.2d 24 (2017). After a trial, the jury determined that Six Flags was liable for the plaintiff's injuries. The Court of Appeals found no error in the jury's verdict. Granting *certiori*, the Georgia Supreme Court considered whether Six Flags could be held liable for the injuries since they were imposed beyond "the premises and approaches" to which a property owner's duty attaches under O.C.G.A. § 51-3-1. Six Flags, 301 Ga. at 324.

The evidence showed that plaintiff Martin, his brother, and a friend had spent the day at the amusement park. Id. at 325. As closing time approached, the trio waited for the Cobb County bus at the park entrance on Six Flags property. While waiting, the threesome sat on a guardrail in an area adjacent to the park's main entrance on Six Flags Parkway. Earlier that day, a group of fifteen to forty young men, including several off-duty Six Flags employees, were roaming the park dressed in similar clothing. Witnesses testified that members of the group were running through the park, yelling obscenities and causing a commotion.

In the early evening, John Tapp and Eric Queen, visiting the park with their families, were accosted by the group after one of the group members almost knocked over Queen's young son. When Tapp admonished the young man, fifteen other men surrounded Tapp and Queen, threatening to beat them up. After park security appeared minutes later, the group members started to leave, making "finger gun" gestures and telling Tapp and Queen, "Watch your back" and "We'll get you in the parking lot." When the threats were reported to park security, security officers confronted those assailants they could locate, reprimanding them and then *releasing them back into the park*. Id. at 325 (Emphasis added). When the case was later tried, a Six Flags security officer testified the release was contrary to park policy which instructed the assailants should have been ejected.

As the Tapp and Queen families prepared to leave the park, they noticed the group of men that had threatened them earlier. By that time, the group had increased in size to about forty members. The group exited the park, followed by park security officers who stood outside watching them. When the security officers re-entered the park, Tapp and Queen believed the group members were gone. Along with their families, they exited the park and headed towards the parking lot. There, they saw group members congregating on the sidewalk which was outside the park but still on Six Flags property. When the group began to follow them, the families hurried to their cars. Just before departing, Tapp heard one of the gang members yell "Drop the hammer," which Tapp took to be a gun reference. Id. at 326.

The group members then made their way to the area where Martin, his brother, and their friend were waiting for the bus. Martin heard one of the group members say something like "Some guy's going to get messed up," after which Martin and his companions moved off Six Flags property and closer to the bus stop. The group then followed Martin and, without any provocation, one of the men began beating Martin with brass knuckles. At trial, a witness testified that Martin's attack began about five minutes after the group members had pursued the Tapp and Queen families in the parking lot. As a result of the vicious attack, Martin was rendered comatose for several days, resulting in permanent brain damage, among other injuries.

The evidence further showed:

- The park was a regular gathering place for gang members;
- Many, if not most, Six Flags employees were gang members;
- There were gang "tags" and other similar types of graffiti in the male locker room;

- Six Flags management was aware or should have been aware that many of its employees were gang members, according to the testimony of a Cobb County police officer who worked off-duty as a park security officer;
- A Six Flags employee was reprimanded by her superiors for reporting to the media (after the vicious attack) that gang members frequented the park and bullied patrons;
- One year prior to the attack, a fight involving gang members had broken out in one of the lines at a Six Flags ride and had continued as the participants left the park. Moments later, a drive-by shooter missed the alleged target, injuring three Six Flags employees. Despite their injuries, none of the employees would give statements about the incident to police;
- The officer investigating the drive-by shooting was contacted by a Six Flags official who sought assurances that the police officer would not release any information about the shooting that would dispel the park's "safe, family atmosphere" marketing. Rather than give any assurances, the officer told the Six Flags official that he would not take his own family to the park because of the criminal activity he had investigated there;
- The Cobb County police officer, who was responsible for coordinating off-duty officer shifts, advised park management and security services that the park needed a full-time police presence. He was told that the park's budget would not cover those expenses; and
- The Six Flags security officer who was on duty the night of the incident testified that, had Six Flags' protocols been followed, Martin's attack would never have happened.

Id. at 326-327.

Concluding its analysis, the Court agreed with the jury's verdict that Six Flags was liable for Martin's injuries. Based on the evidence, which confirmed Six Flags' actual knowledge of prior violent gang activity on its premises, the gang-related attack was reasonably foreseeable "both in the abstract and on the particular night in question." Id. at 332. Moreover, Six Flags could not escape liability simply because Martin stepped outside the park's property line to escape his attackers: "Martin's injuries were the culmination of a continuous string of events that were planned on Six Flags property, were executed at least in part on Six Flags property, and were the result of a failure by Six Flags to exercise ordinary care to protect its invitees from unreasonable risks that Six Flags understood, and even tried to obscure from its patrons." Id. at 328-329.