No. A19A1887

In the Court of Appeals For the State of Georgia

HILTON WORLDWIDE, INC., ET AL.,

Appellants,

v.

HENRY HOUSTON AND SHERRAINE HOUSTON,

Appellees.

Brief of Appellants

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STATEMENT OF THE PROCEEDINGS BELOW

Appellees Henry and Sherraine Houston brought this premises-liability action against Appellants after Henry Houston was assaulted outside a Hampton Inn. Appellees invoked an apparent-agency theory of liability against the hotel's franchisor, Appellant HLT Existing Franchise Holding, LLC and its former parent company, Appellant Hilton Worldwide, Inc. (collectively "Hilton Appellants"). They sued the franchisee and hotel management company—Appellants Imperial Investments Group, Inc. and Imperial Investments Southlake, LLC, d/b/a Hampton Inn Atlanta-Southlake—under a traditional premises-liability theory of liability. Appellants moved for summary judgment, and the trial court denied their motions in an order dated January 3, 2019.[1] Appellants also filed a *Daubert* challenge to Appellees' purported security expert, which was partially granted and partially denied on January 3, 2019.[2] This Court granted Appellants' application for interlocutory appeal on February 22, 2019.[3] Appellants timely filed their Notice of Appeal, raising all the issues addressed herein.[4]

[1] (R1:V2-3809-3820).

[2] (R1:V2-3805-3808).

[3] (R1:V2-3823).

[4] (R1:V2-1-15).

STATEMENT OF FACTS

1. The assault.

On Sunday, January 25, 2015, at a little after 7:00 p.m., an unknown criminal walked up to Henry Houston and, without warning, started punching him in the head with brass knuckles. Houston was seriously injured.

Houston had just checked into the Hampton Inn Southlake and was walking to his rental car, parked a few feet from the front door. A clean-cut African-American man approached him and asked him for directions.[5] This man was not in the area when Houston arrived.[6]

Houston saw the man approach, but he was not acting suspicious.[7] Houston did not feel threatened.[8] In fact, Houston "trusted" the man and started to give him directions as requested.[9] Suddenly and unexpectedly, the man began to hit Houston with brass knuckles.[10] As he was beating Houston, the assailant said "give me the money."[11] But he never stopped beating Houston, nor

[5] (Depo. Vol. 15, pp. 86, 91, 111).

[6] (*Id.* at p. 89).

[7] (*Id.* at pp. 90-91).

[8] (*Id.* at p. 90).

[9] (*Id.* at pp. 78, 94).

[10] (*Id.* at pp. 91, 95, 109).

[11] (*Id.* at pp. 91, 94).

did he give Houston a chance to give him any money.[12] In the end, the assailant took nothing from Houston.[13]

The unidentified assailant—there were no other eyewitnesses—left and has never been apprehended. There is no known motive for the attack. The attack's brazeness is captured by the following picture of the hotel's front door and Houston's rental car, with the assault occuring next to the driver's door:

2. Henry Houston

Houston was a frequent guest the Hampton Inn Southlake, which is located at 1533 Southlake Parkway, Morrow, Georgia 30260 ("the Hotel"). Before this January 2015 incident, Houston spent 21 of 24 nights of 2015 in

[12] (*Id.* at p. 92).

[13] (*Id.* at p. 93).

different Hilton-family hotels, including 2 nights at this hotel.[14] In 2014, he spent 171 nights in various hotels, nearly all less than an hour from his house.[15] Houston was very familiar with the Hotel, having spent 50 nights there in prior years, even though it was less than an hour from his house.[16] On the night of the incident, while his wife Sherraine was in Savannah, Henry Houston was at the Hotel to meet his girlfriend.[17] So frequent were their visitis to the Hotel, his girlfriend referred to it as their "regular spot."[18]

3. Houston's hotel complaints.

Houston never hesitated to complain if he felt something was out of order at a Hilton-family hotel.[19] He was a Diamond Member of the Hilton Honors rewards program;[20] and he would frequently call the Honors' line or complain at the front desk if he was dissatisfied about something—even minor things, like his pillows touching the floor.[21]

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[14] (R1:V2-1787-1880).

[15] (R1:V2-445; Depo. Vol. 15, pp. 63-65).

[16] (R1:V2-1787-1880).

[17] (Deposition of Marcella Stewart, pp. 8-9)(Appellants have filed a Motion to Supplement the Record to include this Deposition).

[18] (*Id.* at p. 85).

[19] (Depo. Vol. 22, p. 140).

[20] (R1:V2-445; Depo. Vol. 15, pp. 63-65; Depo. Vol.14, p. 179).

[21] (Depo. Vol. 22, pp. 140-141).

From August 2011 until the month of the incident, Houston had made 59 separate complaints regarding his stays at Hilton-family hotels.[22] Despite spending 50 nights at the Hotel, including two nights earlier in January, Houston never made a single complaint about a stay at the Hotel, and he certainly never complained about safety at that hotel.[23]

4. The Appellants.

The Hotel is owned by Appellant Imperial Investments Southlake, LLC.[24] It is managed under contract by Appellant Imperial Investments Group, Inc.[25] It is a franchised hotel.[26] The owner of the Hampton Inn franchise is HLT.[27] Defendant Hilton Worldwide was the parent company of HLT at the time of the incident.[28]

5. The franchise agreements.

The business relationship between HLT and the Hotel is governed by Hampton Inn's Brand Standards. The standards require that the Hotel's operation remain under the franchisee's control: "Franchisee at all times will remain responsible for the operation of the hotel and all activities occurring at

[22] (R1:V2-445; Depo. Vol. 15, pp. 63-65).

[23] (R1:V2-445; Depo. Vol. 15, pp. 63-65).

[24] (R1:V2-158-161, 430; *see also* R2 (Franchise Agreement)).

[25] (*Id.*).

[26] (*Id.*).

[27] (*Id.*).

[28] (Depo. Vol. 18, p. 18).

the hotel [and the] Franchisee must hire and train its own employees."[29] The standards further provide: "The brand is not responsible for and does not direct or control the conduct of any hotel employee."[30]

The Franchise Agreement governing the parties' rights and duties likewise emphasizes that the franchisee is "at all times responsible for management of the Hotel's business."[31] The Franchise Agreement also provides that the franchisee is an independent contractor:

> [Franchisee is] an independent contractor. Neither of us is the legal representative or agent of the other, or has the power to obligate (or has the right to direct or supervise the daily affairs of) the other for any purpose. [The Franchisee] expressly acknowledge[s] that we have a business relationship based entirely on, and defined by, the express provisions of this Agreement and that no partnership, joint venture, agency, fiduciary or employment relationship is intended or created by reason of this Agreement. Neither we nor any of the Entities will have any responsibility to any person for any debts, liabilities, damages, claims or expenses related to the establishment, construction or operation of the Hotel or arising out of or related to your policies, procedures, practices or alleged practices in the operation of the Hotel or any other business conducted at the Hotel.[32]

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[29] (Depo. Vol. 18, p. 31).

[30] (*Id*).

[31] (R2, p. 9, ¶6(b)).

[32] (R2, p. 22, ¶15).

6. Summary of pertinent undisputed facts

1. Henry Houston was assaulted in a sudden attack by a man not acting suspicious and who seemed "trustworthy."

2. The assailant struck Houston with brass knuckles and did not take anything, despite no one else being present to scare him way or prevent any theft.

3. Houston was a Diamond Rewards member and, thus, a frequent guest at Hilton Hotels, including 50 prior stays at the Hotel.

4. Houston stayed in Hilton Hotels, despite having a place to stay in nearby Douglasville.

5. Houston continued to frequent Hilton Hotels despite making frequent complaints to Hilton about his stays.

6. Houston was frequently rewarded with Hilton Honors points to resolve his complaints.

7. Houston never complained to Hilton about the Hotel, including any complaints about security or his personal safety.

8. There has never been a violent crime, including, but not limited to a physical assault, at the Hotel.

9. There has never been a crime reported in the area where Houston was assaulted, by the front door.

10. There is no known motive for the crime and the suspect responsible for Houston's injuries has never been apprehended.

ENUMERATION OF ERRORS

1. The trial court erred in denying Hilton's motion for summary judgment on the apparent-agency theory of liability.

2. The trial court erred in denying the motion for summary judgment filed by all Appellants based on the Houstons' lack of foreseeability evidence.

3. The trial court erred in allowing Appellees' offered expert to opine on foreseeability and causation.[33]

JURISDICTIONAL STATEMENT

The Court has jurisdiction because the Georgia Supreme Court does not have exclusive jurisdiction. *See* GA. CONST. Art. VI, § V, ¶ III; art. VI, § VI.

STANDARD OF REVIEW

1. On appeal from the denial of summary judgment, the Court applies a *de novo* standard of review and views the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant. *See Bituminous Ins. Co. v. Coker*, 314 Ga. App. 30, 30 (2012).

2. Whether expert testimony ought to be admitted is a question committed to the sound discretion of the trial court. But when a trial court exercises that discretion, the law imposes a special obligation upon the trial judge, who must act as a gatekeeper to ensure the relevance and reliability of proffered expert testimony. *See Scapa Dryer Fabrics, Inc. v. Knight*, 299 Ga. 286, 289 (2016).

[33] O.C.G.A § 5-6-34(d) applies and allows this Court to review all these issues.

ARGUMENT AND AUTHORITIES

1. The trial court erred in denying Hilton's motion for summary judgment on the Houstons' apparent-agency theory.

This is a premises liability action, which may only be brought against property owners or occupiers. The trial court undertook no analysis of whether Hilton qualified as either. Nor did the trial court undertake a classic franchisor-liability analysis. That analysis would have focused on whether Hilton assumed the right to control the time and manner of the franchisee's execution of work, as distinguished from the right merely to require results in conformity to the contract. *Summit Auto. Group*, *Summit Auto. Group, LLC v. Clark Kia Motors Amer., Inc.*, 298 Ga. App. 875, 883 (2009).

Instead, despite being entirely inapplicable and incorrectly utilized here, the trial court addressed the Houstons' claims against Hilton under an apparent-agency analysis. Under that analysis, a plaintiff must establish three elements: (i) the alleged principal held out another as its agent; (ii) the plaintiff justifiably relied on the care or skill of the alleged agent based on the alleged principal's representation; and (iii) this justifiable reliance led to the injury. *Kids R Kids Intl. v. Cope*, 330 Ga. App. 891, 894 (2015). The trial court's analysis fails on all aspects of the test.

A. There is no evidence Hilton held the Hotel out as an agent.

On the first element, there is no evidence that Hilton held the Hotel out as an agent. Beyond the logo, there is nothing to suggest that Hilton tried to make the world believe that the Hotel was Hilton or its agent. There is no evidence of any attempt to deceive or otherwise confuse the market. *Compare New Star Realty, Inc. v. Jungang PRI USA, LLC*, 346 Ga. App. 548, 557 (2018) (holding there was evidence franchisor held franchisee as its apparent agent where evidence showed franchisor directed franchisees to "try to make [the general public] believe" that the franchisee and franchisor were "the same company," the two entities had the same name in the Korean language, and web pages referred to franchisee simply as franchisor's "branch" that was the "Atlanta, Ga. Office.").

While Houston seemingly knew that Hampton Inns were part of the Hilton family, that is not the test. The test is what the *franchisor* did and what it held out to the world. "[I]t is not enough that the plaintiff believe that an agency relationship exists. Neither is it sufficient that the agent represent his status as agent. It must be established that the principal held out the agent as its agent." *Kids R Kids*, 330 Ga. App. at 895. There is no evidence that Hilton held out the Hotel as its agent. To the contrary, the operating documents confirm that there is no agency relationship and that the relationship is one of independent contractor.

Although the trial court allegedly did "not place great weight on the comingled branding," it looked to *Watson v. Howard Johnson Franchise Systems,* 216

Ga. App. 237 (1995), as support for its holding. *Watson* is entirely inapposite. There, this Court held that a fact issue existed as to whether franchisor held out the franchisee as its apparent agent because there was a "prominent" display of the franchisor's logo and a known failure to comply with the franchise agreement's requirement of posting a sign noting that the hotel was a franchise operation. It was this latter fact that was dispositive to this Court's decision.

This Court has repeatedly held that merely displaying signs or a trademark may be insufficient to establish an apparent-agency relationship, and that failing to post a sign stating that someone other than the franchisor owns and operates a business is insufficient, standing alone, to show apparent agency. *Texaco, Inc. v. Youngbey*, 211 Ga. App. 789, 790 (1994); *Anderson v. Turton Dev.*, 225 Ga. App. 270, 275 (1997); *Bright v. Sandstone Hosp., LLC*, 327 Ga. App. 157, 159 (2014). Thus, it was the franchisor's acquiescence to the violation of the franchise agreement that was the operative fact in *Watson*.

Here, Hilton imposed no signage obligation.[34] And there is no other evidence that Hotel violated the franchise agreement's terms. Thus, the key and operative fact from *Watson* is missing. *Cf. McGuire v. Radisson Hotels, Intl.*, 209 Ga. App. 740, 743 (1993) (physical precedent only) (where partnership operated hotel through franchise from Radisson, was authorized by franchise agreement to

[34] (Depo. Vol. 18, pp. 74-75).

display Radisson signs, and posted no sign indicating that anyone other than Radisson owned and operated the hotel, no apparent agency found because partnership — rather than Radisson as the franchisor—was solely responsible for holding itself out as Radisson).

B. There is no justifiable reliance on any Hilton representation.

Next, there is no admissible evidence that Houston justifiably relied on any representation by Hilton. First, the trial court did not point to any evidence that Hilton made any representations. Thus, there was nothing for Mr. Houston to rely on. But even assuming some representations were made, there is no admissible evidence that Houston justifiably expected that he would not be assaulted at the Hampton Inn because he believed that Hilton operated the hotel. Without that evidence, he cannot recover under an apparent authority theory. *See Little v. Howard Johnson Co.*, 455 N.W.2d 390, 394 (Mich. Ct. App. 1990).

In *Little*, the plaintiff fell on a restaurant walkway that had not been adequately cleared of snow and ice. The restaurant was being operated as a franchise. The plaintiff asserted various bases of liability against the franchisor, including vicarious liability based on apparent agency. *Id.* at 392.

With respect to the justifiable-reliance requirement of apparent agency, the court correctly required that the plaintiff's decision to attach importance to her belief in the agency relationship—that the franchisor Howard Johnson Corporation operated the restaurant—must have been justifiable, *i.e.,* reasonable. *Id*

at 394. Thus, the court rested its decision in favor of the franchisor on the fact that the plaintiff failed to present evidence indicating "that plaintiff justifiably expected that the walkway would be free of ice and snow because she believed that defendant operated the restaurant." *Id.*

Georgia law also requires justifiable reliance. *Kids R Kids*, 330 Ga. App. at 894. And just as in *Little*, there is no evidence here that Mr. Houston justifiably expected that he would not be assaulted at the Hotel because he believed that Hilton operated the hotel. There is no admissible evidence that Houston cared about ownership or management of the Hotel, much less that he believed he would be safe there because he thought the property owner was Hilton's agent.

C. There is no causal connection between any alleged reliance and the injury.

Finally, the law requires a nexus between the alleged reliance and the injury. That too is missing. The only nexus is that Houston was at the hotel. How he paid or made his reservation is immaterial. And those are the only links that the trial court could find. To hold that presence at the hotel is the nexus effectively eliminates the test's third element. There is no nexus, and the Houstons' claim fails all parts of the apparent-agency test.

D. The central reservation system and the loyalty program do not create a fact issue.

The trial court concluded that Hilton's central reservation system and its loyalty program were sufficient to create a fact issue on apparent agency. This is

a radical departure from existing case law and the notions that underlie the franchise system. As one court put it, "the fact that the Hotel used Marriott's trade name and trademarks and that reservations for the hotel were made through a central reservation system would not satisfy the objective element required to demonstrate the existence of an apparent agency." *Stenlund v. Marriott Int'l Inc.*, 172 F. Supp. 3d 874, 889 (D. Md. 2016).

This Court has cautioned that the law must be "mindful of the special relationship created by" a franchise arrangement. *Kids R Kids*, 330 Ga. App. at 893. Franchisors are faced "with the problem of exercising sufficient control over a franchisee to protect the franchisor's national identity and professional reputation, while at the same time foregoing such a degree of control that would make it vicariously liable for the acts of the franchisee and its employees." *Id.* The trial court's decision ignores this delicate balance and effectively negates the protection the franchise relationship affords both parties.

If use of a common reservation system is tantamount to a representation of apparent agency, every franchised hotel in the state is at risk. All major hotel chains provide this service, and it is critical to operating this type of business. The same may be said of a loyalty system. As explained below, the existence of a loyalty system or central reservation system does not satisfy the requirement that the franchisor appear to control the franchisee's day-to-day operation.

Like courts elsewhere, this Court has explained that the franchisee's use of a logo or trademark alone does not create apparent agency. *See Anderson v. Turton Dev.*, 225 Ga. App. 270, 274-75 (1997). The reason it does not is that apparent agency requires that the franchisor convey the idea that it is exercising substantial control over the franchisee's day-to-day operations. *See People v. JTH Tax, Inc.*, 212 Cal. App. 4th 1219, 1242 (Cal. Ct. App. 2013); *Jackson Hewitt, Inc. v. Kaman*, 100 So.3d 19, 32 (Fla. Ct. App. 2011); *Patterson v. Western Auto Supply Co.*, 991 F. Supp. 1319, 1325 (M.D. Ala. 1997). This requirement that the franchisor appear to control the franchisee's day-to-day operations at the location in question flows from the basic legal elements required to establish apparent agency:

> The root idea of the apparent agency doctrine is that even if there was not an actual sufficient relationship between the franchisor and franchisee upon which to pin vicarious liability, we may nevertheless excuse that requirement when the franchisor has created the appearance of an agency relationship, and the plaintiff detrimentally relied upon the existence of an agency relationship. Extrapolating, then, one would expect that the appearances necessary to support an apparent agency would consist of facts that created an appearance that the franchisor possessed that level of control over the specific conduct in the daily operations of the franchisee that caused the harm to make the plaintiff believe that such control was the reality.

Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 WASH. & LEE L. REV. 417, 441 (2005).

As with use of a franchisor's logo or trademark, use of the franchisor's centralized reservation system and other support services—such as loyalty pro-

grams and customer-service lines—does not communicate the idea that the franchisor is exercising substantial control over the local franchisee's day-to-day operations. *See Allen v. Choice Hotels Int'l*, 942 So. 2d 817 (Miss. Ct. App. 2006) (franchise arrangement requiring franchisee to use franchisor's centralized reservation system and participate in franchisor's business referral and credit card arrangement were not sufficient to hold franchisor liable for franchisee's actions).

The trial court's unwarranted expansion of agency principles cannot be allowed to stand. Common reservation systems and loyalty systems do not confuse the public and are common business practices. If merely providing a centralized reservation system and loyalty points creates apparent agency, then every franchised hotel in the State will be deemed an apparent agent of its franchisor. Nearly every franchised hotel in the State will be deemed an apparent agent of its franchisor because central reservations and loyalty programs are universal across the industry.

Moreover, there is no logical end to the trial court's expansion of agency principles. Every McDonald's offers gift cards that can be used at any McDonald's restaurant. Under a natural expansion of the trial court's decision, that would create apparent agency for *every* franchised McDonald's. And the same goes for all franchised fast-food restaurants and every franchised gas station that uses a common payment system. The trial court's expansion of agency principles creates an entirely unworkable system.

E. The trial court incorrectly denied Hilton Worldwide's Motion for Summary Judgment.

Hilton Worldwide also moved for summary judgment individually because, as HLT's corporate parent, it was not the franchisor. The trial court erroneously held that apparent agency also precluded granting that motion.

Even if HLT were a proper defendant, Hilton Worldwide would be entitled to summary judgment. Because HTL was a corporate subsidiary that maintained a legal identity apart from its then-parent corporation, the general rule is that the parent corporation, Hilton Worldwide, is not liable for subsidiary's alleged negligence. *Ramcke v. Ga. Power Co.*, 306 Ga. App. 736, 738 (2010).

As a parent corporation, Hilton Worldwide could only be liable for negligence on the part of its subsidiary under one of three intertwined theories: (i) piercing the corporate veil; (ii) apparent or ostensible agency; or (iii) joint venture. *Id.* at 839.

> Courts most often "pierce the corporate veil" where fraud would result if the corporate structure were allowed to shield shareholders from liability . . . . Independent corporate status may be disregarded when such factors as gross undercapitalization, fraud, failure to observe corporate formalities, non-functioning of officers and directors, or similar circumstances indicate that the subsidiary is merely the shadow of the parent. If, as in this case, the shareholder happens to be another corporation, piercing the corporate veil results in disregard for the separate existence of parent and subsidiary.

Kissun v. Humana, Inc., 267 Ga. 419, 421 (1997).

The Houstons produced no evidence to support any of these theories. There is no evidence that the corporate form was disregarded or that there was a nefarious purpose in establishing HLT as a subsidiary. There is no evidence that Hilton Worldwide held HTL out as its agent or that there was any justifiable reliance. In fact there is no evidence that the Houstons even knew of HLT. Finally there is no evidence of joint venture status at all. Once more, the absence of evidence forecloses this theory and the denial of summary judgment was improper.

F. The trial court's apparent-agency holding is irreconcilable with the traditional understanding of that doctrine.

In sum, under the trial court's holding, "the apparent authority doctrine, itself an extension of traditional tort principles, would be stretched so far from its heartland that the state policy supporting the doctrine would be severely attenuated." *Carris v. v. Marriott Int'l, Inc.*, 446 F.3d 558, 562 (7th Cir. 2006). "[A]lmost everyone knows that chain outlets, whether restaurants, motels, hotels, resorts, or gas stations, are very often franchised rather than owned by the owner of the trademark that gives the chain its common identity in the marketplace." *Id.* And "it is well understood that the mere use of franchise logos and related advertisements does not necessarily indicate that the franchisor has actual or apparent control over any substantial aspect of the franchisee's business or

employment decisions." *Mobil Oil Corp. v. Bransford*, 648 So.2d 119, 120 (Fla. 1995).

2. The trial court erred in denying summary judgment to all Appellants based on the lack of foreseeability and causation evidence.

In a separate motion for summary judgment, all Appellants moved for summary judgment on the Houstons' premises-liability claim brought under O.C.G.A. § 51-3-1, the general premises liability statute, which the trial court denied.[35] Section 51-3-1 places a duty on the owner of land to exercise ordinary care in keeping the premises and approaches safe. The trial court erred in denying summary judgment on the Houstons' premises liability claim for the reasons discussed next.

A. Foreseeability is required to impose liability for a third-party criminal attack.

A property owner is not an insurer of an invitee's safety, and an intervening criminal act by a third party generally insulates a proprietor from liability unless the criminal act was reasonably foreseeable. *Snellgrove v. Hyatt Corp.*, 277 Ga. App. 119, 123 (2006). Foreseeability is determined by assessing the prior criminal activity on the property and assessing whether those prior crimes were substantially similar to the one at issue. *Sturbridge Partners v. Walker*, 267 Ga. 785 (1997).

[35] (R1:V2-1308-1320).

In virtually all cases, presenting evidence of a prior substantially-similar act is "the only possible way to" establish notice and foreseeability on the part of the land owner. *Med. Ctr. Hosp. Auth. v. Cavender*, 331 Ga. App. 469, 480 (2015). To be "substantially similar," the prior crimes must: (i) occur at comparable locations; (ii) occur under similar physical circumstances and conditions; (iii) be of similar type; and (iv) not be too remote in time. *See Burnett v. Stagner Hotel Courts, Inc.*, 821 F. Supp. 678, 683 (N.D. Ga. 1993).[36]

But even if an intervening criminal act may have been reasonably foreseeable, "the true ground of liability is the superior knowledge of the proprietor of the existence of a condition that may subject the invitee to an unreasonable risk of harm." *Cook v. Micro Craft*, 262 Ga. App. 434, 438 (2003). These two principles of reasonable foreseeability and the proprietor's superior knowledge "guide [the Court's] consideration of the question of whether an owner or occupier has breached its duty to keep an invitee safe from the criminal act of a third party and limit the circumstances in which the law imposes liability for the failure to protect against such criminal act." *Whitfield v. Tequila Mexican Rest. No. 1*, 323 Ga.

[36] *See also Gordon v. Starwood Hotels & Resorts Worldwide, Inc.*, 821 F. Supp. 2d 1308 (N.D. Ga. 2011); *Washington Rd. Prop., Inc. v. Stark*, 178 Ga. App. 180 (1986) (location); *McCoy v Gay*, 165 Ga. App. 590 (1983) (physical circumstances and conditions); *Savannah College of Art & Design, Inc. v. Roe*, 261 Ga. 764 (1991) (type of crime); *Nalle v. Quality Inn, Inc.*, 183 Ga. App. 119 (1987) (Beasley, J., concurring) (time between incidents).

App. 801, 803 (2013) (*quoting B-T Two, Inc. v. Bennett*, 307 Ga. App. 649, 654-55 (2011) (physical precedent)).

B. There was no prior substantially similar criminal activity.

There were no prior physical attacks on a guest like the assault on Houston. The Houstons are thus forced to rely mainly on property crimes to argue Appellants were on notice that a random, unexpected, sudden attack would occur just feet from the front door of the hotel on a Sunday evening.

The chart located at R1:V2- 927-931 was culled from the testimony and report of Mr. Villines, the Houstons' expert, and includes all of his identified incidents.[37] These incidents fail to rise to the level of substantial similarity, as required by Georgia's four-part test to give notice to Appellants that a personal attack involving brass knuckles and a vicious beating in close proximity to the hotel's front door was foreseeable.

(i) The incidents did not occur at comparable locations.

None of the prior events occurred at the front door or porte-cochere area and thus are not substantially similar. *See, e.g., Nalle v. Quality Inn*, 183 Ga. App. 119, 120 (1987). In *Nalle*, this Court held that crimes occuring in different portions of a hotel are not legally sufficient to place a property owner on notice of a third-party criminal attack in a different portion of the same hotel. There,

[37] (Depo. Vol. 19, Ex 107, pp. 26-30).

the plaintiff was attacked and robbed in the parking lot. The trial court granted summary judgment in the hotel's favor, and this Court affirmed.

The Court found for the hotel because previous criminal incidents were not sufficiently similar to the incident suffered by the plaintiff. While the plaintiff was able to produce evidence of prior crimes, those were "crimes from locked places, such as rooms and vehicles, or were in the lobby, where the security guards were on this occasion [and none] involved an attack on a patron out in the open, nor an attack on a patron's person in the first place." *Id.* at 122; s*ee also Burnett v. Stagner Hotel Courts*, 821 F. Supp. 678 (N.D. Ga. 1993).

Consider also this Court's holding in *McCoy v. Gay*, 165 Ga. App. 590 (1983). The plaintiff was a patron of the Downtowner Motor Inn's cocktail lounge. He left for his car in one of the Inn's periodically-patrolled and lighted parking lots and was attacked and robbed by an unknown, armed assailant.

The plaintiff offered evidence of two prior robberies at or in close proximity to the actual guest facilities. The first was a purse-snatching and the second an unarmed robbery of two guests using physical violence. The plaintiff was, however, assaulted in the parking lot located on "the periphery of the premises some distance from the actual Inn facility itself." *Id.* at 592.

The Court noted that "generally, it may be said that it is not permissible, for the purpose of establishing whether a condition at one place is dangerous to show conditions at places other than the one in question." *Id.* (*citing MARTA v.*

Tuck, 163 Ga. App. 132, 138 (1982)). Thus, the plaintiff's evidence of the two prior crimes at a location other than the asserted "dangerous" parking lot "would have no relevancy or probative value with regard to appellees' knowledge of that 'dangerous condition.'" *Id.*

The Court in *McCoy* further noted that while evidence of a prior substantially-similar incident is admissible to show the existence of a dangerous condition and knowledge of that condition so long as the prior incident was sufficient to attract the owner's attention to the alleged dangerous condition, "the proffered prior incidents were dissimilar in nature and location." *Id.* at 593. As such, the Court held "the evidence of these two prior robberies at the Inn did not meet the 'similarity' requirements so as to constitute a sufficient showing of appellees' knowledge of the 'litigated' dangerous condition." *Id.* at 592-93.

Here, none of the prior incidents occurred at the front door. Therefore, they are not substaintially similar and cannot be considered.

(ii) The prior incidents did not occur under similar physical circumstances and conditions.

None of the prior events—including a so-called "strong-arm robbery" of the hotel clerk—involved an attack on a person with or without a weapon. Instead, they almost universally deal with petty property thefts from vehicles left alone, at night. The Georgia Supreme Court has held that property crimes do not predict future violent crimes against persons and do nothing to avoid a

summary judgment. In *Doe v. Prudential-Bache/A.G. Spanos Realty Partners, L.P.*, 268 Ga. 604 (1997), the Court acknowledged there are many instances where the dissimilar nature of prior property crimes would warrant summary judgment on a claim arising from a violent crime.

Doe was sexually assaulted and robbed in a common area of her apartment building after parking her car underneath the building. She presented evidence of prior property crimes, including thefts of bicycles, thefts from automobiles, and vandalism. The trial court granted, and this Court affirmed summary judgment for the building owners, holding that the prior property crimes were insufficient to establish foreseeability of the subsequent rape and robbery. *Doe, 222* Ga. App. 169, 171-72 (1996).

Affirming, the Supreme Court held that the prior crimes were not sufficiently similar to be admissible. The Court held that "the very nature of the thefts and acts of vandalism committed in this case do not suggest that personal injury may occur." *Doe*, 268 Ga. at 606.

Cases following *Doe* have reached the same conclusion. In *Agnes Scott College, Inc. v. Clark*, 273 Ga. App. 619 (2005), a student sued the university after she was kidnapped from an on-campus parking lot and raped. Although she presented evidence of prior crimes on campus, there was no evidence of any prior kidnappings, rapes, or attacks in the parking lot. The prior crimes were all

either property crimes, *e.g.*, car break-ins, or reports of "suspicious persons" in the parking lot late at night.

The trial court denied the university's motion for summary judgment. This Court reversed, holding that "[t]he prior criminal acts here do not suggest that personal injury would occur in the manner that it did in this case." *Id.* at 622. The prior property crimes were not "similar occurrences … that would have made the attack on [the plaintiff] foreseeable," requiring summary judgment in favor of the university. *Id.*

In *Baker v. Simon Property Group, Inc.*, 273 Ga. App. 406 (2005), the Court held that prior property crimes in a mall parking lot were insufficient to create a jury issue as to whether the owner of the lot could reasonably anticipate a carjacking and shooting. *Id.* at 408.

Similarly, in *Ritz Carlton Hotel Co. v. Revel*, 216 Ga. App. 300 (1995), the Court held a property owner owed no duty to protect invitees. The plaintiff argued dissimilar property crimes made the sexual assault foreseeable. But the Ritz had no prior incidents of third-party assaults on a guest. The Court held the evidence regarding the other crimes was irrelevant because none of the incidents was substantially similar to the assault. *Id.*

The property crimes here are so decidely different than the vicious beating that they cannot be considered. The fact that cars were broken into in outer reaches of the parking lot—outside of the surveillance camera coverage

area—does not make it foreseeable that someone would approach a patron at the front door and without warning beat him with brass knuckles before walking away without taking anything. Nor does the non-violent robbery of the hotel clerk. And with zero substantially-similar prior incidents, obviously Houston's attack was not legally foreseeable.

(iii) The trial court erred in finding foreseeability based on the reasoning in *Woodall.*

The trial court found support for denying summary judgment in *Woodall v. Rivermont Apartments Ltd. P'ship*, 239 Ga. App. 36 (1999) (physical precedent). In particular, the court relied on the suggestion in that case that a large volume of non-violent crimes over a period of time can make it foreseeable that a violent crime could occur. *Id.* at 40. In doing so, the trial court erred.

Woodall's holding that the volume of prior crimes can give rise to foreseeability is inextricably intertwined with its finding that the evidence there showed that the apartment complex was in a high crime area experiencing "an increase in violent crimes, particularly armed robbery." *Id.* at 40. The Court explained, "[w]e believe this evidence that Rivermont was located in a high crime area is relevant to the question of whether the increase in property crimes at Rivermont should have placed defendants on notice of the risk of violent crime." *Id.*

There is no similar evidence here. Thus, *Woodall*, beyond being nonbinding, lends no support to the trial court's denial of Appellants' motion for sum-

mary judgment. Here, there is no evidence either that the Hotel was in a high crime area or that there was an increase in violent crimes. Thus, *Woodall* does not support denying summary judgment.

C. The trial court erred in denying summary judgment based on the reasoning and holding in *Piggly Wiggly.*

The trial court also erroneously agreed with the Houstons that the holding in *Piggly Wiggly Southern, Inc. v. Snowden,* 219 Ga. App. 148 (1995), supported denial of summary judgment. To begin with, *Piggly Wiggly* pre-dates *Doe*, which set the standard for determining foreseeability in a case like this. The trial court was therefore bound to apply *Doe*, which holds that prior dissimilar property crimes are not sufficient to place a property owner on notice of the possibility of a later personal assault.

Further, *Piggly Wiggly* is factually distinguishable. There, a patron was stabbed, beaten, robbed, abducted, and sexually assaulted in a store parking lot. Unlike the single, non-violent robbery of the hotel clerk in this case, there had been 17 prior purse snatchings involving customers entering and leaving the store and perpetually-present loiterers who would harass customers and employees and occasionally threaten violence. *Id.* at 149. The plaintiff also offered evidence that the store managers "considered the parking lot unsafe, that they had repeatedly suggested the hiring of a security guard, that male employees always walked female employees to their cars at night, and that they would not allow

their wives to go to the store alone." *Id.* The Court held that a question of fact as to foreseeability existed under those facts.

Here, the Houstons deposed two former hotel employees, whose testimony touched on "fear" of crimes in the parking lot, specifically if they interrupted or came upon a criminal during a car break-in.[38] This testimony was elicited, over Appellants' objections, through blatantly-leading questions and should not have been considered by the trial court. *See Travis Meat & Seafood Co. v. Ashworth*, 127 Ga. App. 284, 287 (1972). In any event, for three reasons, these recently-expressed fears do not create a fact issue on foreseeability.

First, all of the stated fears involved parking-lot crimes. Houston was attacked right in front of the hotel. No one ever expressed any concerns about the loading area or the front door. Much like a court must consider the locations of prior crimes in determining if they can make a later crime foreseeable, a court must also look to area of the stated concerns. Unlike *Piggly Wiggly,* the attack did not occur in the area of concern.

Second, the employees in *Piggly Wiggly* had a factual basis to fear a violent criminal attack. *Piggly Wiggly* involved many "prior incidents [of] confrontational attacks on persons." *Id.* at 149. Not so here. There was nothing about the prior

[38] *See* Depo. Vol. 8, 19-21, 40, 50-51.

crimes that should have made a reasonable person apprehensive about being attacked by a criminal outside the Hotel's front door.

Third, what these former employees were frightened of is not what happened at all. They expressed concerns about happening upon a car break-in in progress in the parking lot and then someone being assaulted by the surprised criminal. That is most certainly not what occurred here. Instead, Houston was approached at the front door, asked a question, and then viciously beaten. This was not an incident of happenstance or "lucking upon" something. This was violent and personal. There was nothing about the occasional (less than one a month) overnight car break-ins at the Hotel that would have made a reasonable person think a brass knuckle beat-down at the front door would occur.

This was targeted, intentional, and personal. It simply cannot be the law that a fact issue on foreseeability exists whenever a plaintiff can locate a former employee of the property owner who will give *post-hoc* testimony that the employee thought "more" security was needed, especially when what they feared would happen never materialized. To hold that the Houstons can create a fact issue with this type of evidence eviscerates the foreseeability standard and invites fraud.

D. *Cavender* controls

The case that controls here is *Med. Ctr. Hosp. Auth. v. Cavender*, 331 Ga. App. 469 (2015), involving a random, violent rampage at a hospital. A man shot

numerous people while apparently trying to exact revenge on an employee. This Court reversed the denial of summary judgment to the hospital, holding that despite evidence of 43 prior crimes on the property, the event was unforeseeable.

The plaintiffs in *Cavender* supplied a collection of police reports detailing incidents at the hospital and a neighboring medical center. *Id.* at 474-75. None of the 11 police reports from the hospital or the 32 reports from the neighboring medical center "involved multiple murders, a single murder, a shooting, a weapon, or, for that matter, a significant injury." *Id.* at 475. Two of the incidents involved a weapon, but none actually involved the discharge of that weapon. *Id.*

The same logic holds here. Nothing—including the non-violent robbery of the hotel clerk—that happened on the property before Houston's beating would have alerted anyone that such a violent action would occur. No one had ever been hurt on the property. There had been no prior incident involving any weapon or violence. As such, the assault was not legally foreseeable, as it was so unusual, contrary to ordinary experience, and rare that no reasonable jury could find Appellants should have guarded against it.

3. The trial court erred in allowing John Villines to opine on foreseeability and causation.

Finally, the trial court erred when it held that the Houstons' "expert" may testify regarding foreseeability and causation. This expert is, as described the trial

court, "a retired mall cop."[39] He opined Mr. Houston's beating was foreseeable based on his extrapolation of the personal crime inflicted on Mr. Houston and the prior property crimes. The trial court held that Mr. Villines may testify that the prior crimes, when considered with other factors, create a fact issue on foreseeability.[40] The court did not explain the other factors.

The problem with the "combined with other factors" analysis is that it essentially abdicates the gatekeeper function. The *ad hoc*, unsupported, "Villines-only" analysis that underpins his opinion is wholly unreliable, and the law requires that each step must be examined before an opinion is admissible. As the Eleventh Circuit explained: "The *Daubert* requirement that the expert testify to scientific knowledge—conclusions supported by good grounds for each step in the analysis—means that any step that renders the analysis unreliable under the Daubert factors renders the expert's testimony inadmissible." *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1245 (11th Cir. 2005).

The trial court ignored the central issue raised by the *Daubert* challenge: Is there peer-reviewed or empirical support for Villines' opinion that car break-ins are harbingers of personal assaults? The simple answer to that is "no." There was no attempt below to buttress that opinion with any type of evidence, and the trial court could not rely on Villines' assurances that "he is telling the truth."

[39] (R1:V2-3803).

[40] (R1:V2-3805-3808).

"[I]t does not suffice for an expert to say, in effect, 'I have 30 years experience in the field. So trust me, the answer is X.'" *Threet v. Corr. Health Care Mgmt. of Okla., Inc.*, 2009 U.S. Dist. LEXIS 96175, at *16 (W.D. Okla. Oct. 15, 2009). Yet that is all that was presented below. There simply was no showing that the Villines-extrapolation theory or methodology was reliable in any fashion. And that, alone, makes it inadmissible.

He has opined that Mr. Houston's beating was foreseeable based on his "extrapolation" from prior property crimes. This opinion is completely contrary to established Georgia law and the accepted norms in the field of criminology. First, In *Doe*, the Georgia Supreme Court held that evidence of prior property crimes, largely thefts from automobiles and acts of vandalism, committed in a parking garage, was determined to be insufficient to create a factual issue regarding the foreseeability of the violent sexual assault committed upon the plaintiff after she parked her car there.

Similarly, in *Agnes Scott College*, evidence of crimes against property, such as car break-ins and other crimes not involving person-to-person contact, together with general crime statistics for the city and a showing that students were afraid to go into a certain parking lot alone at night, was determined to be insufficient to create a factual issue regarding the foreseeability of the plaintiff-student's kidnapping from that parking lot in broad daylight and subsequent off-campus rape.

And it is undisputed that Villines' opinion is not based on substantially similar crimes, but instead on the existence of any crime. When one steps back and looks at what Villines is actually opining—that any type of crime predicts *any* other type of crime—it is easy to see why there is no peer-reviewed criminology support for this methodology and why the Georgia Supreme Court has rejected it in the legal setting.[41]

Nor can the Houstons cite to any criminology studies or peer-reviewed articles establishing a predictive link between the prior crimes and the crime against Houston. No academic support exists for either the opinion car break-ins lead to attacks on persons or that extrapolating from studies of one type of crime to make conclusions about a different type is a proper criminology methodology. Villines is not a criminologist and is unfamiliar with their methods.

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[41] *Sturbridge Partners* is of no help to Villines. There, the plaintiff brought a negligence action arising from an intruder raping and sodomizing her in her apartment in the early morning hours. The Court found that the landlord's actual knowledge of two or three prior burglaries made it reasonable for the landlord to anticipate that unauthorized entry might occur while apartment was occupied and personal harm to tenant could result. Thus, summary judgment was denied.

This ruling makes sense. The connection between burglaries and rapes is noted in the criminology literature. And as a matter of common sense, having a felon inside your apartment is not good and can lead to very bad things. So given the nature of the specific crimes at issue in *Sturbridge* and the published, peer-reviewed criminology support for a predictive connection between the two sets of crimes (prior burglaries and the rape) the Court's ruling is not a surprise. But it is wholly irrelevant to the pending issue.

The only criminologist in this case—Professor Volkan Topalli (a tenured criminology professor at Georgia State who is widely recognized as an expert in offender behavior)—has rejected the idea that Villines is following a proper criminology method. Moreover, Topalli points out that the criminology research shows that criminals that break into cars actively avoid confrontation with people, and accordingly are a different type of criminal than those who commit violent beatings like the one at issue here.[42] Of course, Appellants bear no burden to prove the unreliability of Villines' opinions but plainly have done so.

The trial court's Order also provides that Mr. Villines will be allowed to opine on the issue of causation with regards to the provision of a security guard.[43] The Northern District of Georgia recently issued a summary judgment order in a nearly identical case, expressly rejecting Mr. Villines' opinions that "more" security was needed and a guard would have prevented the criminal attack. *See Sanders v. QuikTrip Corp.*, Case No. 1:17-cv-02341-CC (N.D. Ga. March 29, 2019 Order). There Mr. Villines proffered that there were 18 crimes that were similar and should have placed the gas station on notice of the need for security guards on week nights. The Court rejected the vast majority of the proffered incidents as being not substantially similar. And, even in the face of Mr. Villines' testimony that there were 3 "incidents at that store, outside in the park-

[42] (R1:V2-2401-2403).

[43] (R1:V2-3808).

ing lot/gas pump area, that [he] point[ed] to as 'violent crime' incidents," the court held that the evidence did not support Mr. Villines opinion on the need for a security guard. (March 29, 2019 Order, p. 10). The court held that the crimes relied on by Mr. Villines were not "substantially similar." The court also held that "that there were no prior incidents that were sufficient to put QuikTrip or any of its employees on notice of the allegedly dangerous condition of not having a security guard on weekday nights." (*Id.* at p. 17). The same is present here; Mr. Villines, although cobbling together a "list of priors," has failed to point to any crimes substantially similar to the subject Sunday brass knuckle-beating.

The court also specifically examined the claim that security guard would have stopped the shooting. The court was presented with remarkably similar facts to those here, including a sudden and unprovoked attack at the doorway to the gas station and an armed, on-duty police officer[44] being present in the parking lot at the time of the shooting. The court held:

> Considering how quickly the crime against Mr. Spencer occurred and that a police officer had actually pulled into the QuikTrip parking lot immediately before the shooting took place, Plaintiff provides no evidence that the presence of a security guard or other heightened security measures would have prevented the sudden shooting and killing of Mr. Spencer. … Mr. Spencer was the victim of a "sudden and unpro-

[44] In this case, Miguel Martinez, a Special Agent with the Army's Criminal Investigations Division (the felony investigation division), was getting coffee from the station located at the front entrance of the Hotel, around 25 steps from the scene of the attack when it occurred. (Depo. Vol. 22, pp. 6, 8, 10, 14, 28, 29).

> voked criminal attack which the evidence shows was an independent, illegal act perpetrated unexpectedly and without warning by a third party," thus insulating Defendant from liability.[45]

Mr. Villines' speculation has not changed the facts. His opinions on security guards, like in *Sanders*, are mere speculation.

CONCLUSION

The Court should reverse the trial court's orders denying summary judgment and either render judgment that the Houstons take nothing from Appellants or remand with instructions for the trial court to grant the Appellants' motions for summary judgment. *See Skylark Enters., Inc. v. Marsh & McLennan, Inc.*, 121 Ga. App. 235, 236 (1970) ("Of course, if the evidence demands a verdict for either party, it is the duty of the appellate courts having jurisdiction, to so declare as a matter of law and end of the litigation.").[46]

COMPLIANCE CERTIFICATE

This brief does not exceed Rule 24's word-count limit.

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[45] (March 29, 2019 Order, p. 20) (*citing Palmeri v. Live Nation Utours (USA), Inc.*, 2011 WL 13274223, at *7 (N.D. Ga. Mar. 8, 2011) (finding no evidence that additional security personnel would have changed the conduct of an intervening third party who ran towards the plaintiff and injured her within 60 seconds); *Donaldson v. Olympic Health Spa, Inc.*, 175 Ga. App. 258, 261 (1985)).

[46] *See Stafford Enters., Inc. v. Am. Cyanamid Co.*, 164 Ga. App. 646 (1982); *Ford Motor Credit Co. v. Parsons*, 155 Ga. App. 46 (1980); *Shockey v. Baker*, 212 Ga. 106 (1955).

Respectfully submitted, this 7th day of May, 2019.

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SERVICE CERTIFICATE

On May 7, 2019, I served this Brief of Appellant on the Appellees via the electronic filing service and by serving their attorney via United States Postal Service, with first class postage prepaid, addressed as follows:

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