IN THE COURT OF APPEALS
STATE OF GEORGIA

Appeal Case No. A19A1887

State Court of Clayton County
Civil Action File No. 2015CV00989C

HILTON WORLDWIDE, INC. AND
HLT EXISTING FRANCHISE HOLDING, LLC, ET AL.,
Defendants/Appellants,

v.

HENRY HOUSTON and SHERRAINE HOUSTON,
Plaintiffs/Appellees.

APPELLEES' BRIEF IN RESPONSE

Peter A. Law
Georgia Bar No. 439655
pete@lawmoran.com
E. Michael Moran
Georgia Bar No. 521602
mike@lawmoran.com
Patrick J. Wheale
Georgia Bar No. 546904
patrick@lawmoran.com
LAW & MORAN
563 Spring St., NW
Atlanta, Georgia 30308
(404) 814-3700
Attorneys for Plaintiffs/Appellees

APPELLEES' BRIEF IN RESPONSE

The trial court correctly found that the large volume of property crime in Defendants' parking lot, the robbery of the front desk clerk, the testimony of Defendants' employees about the dangerous condition on the property and their repeated requests for a security guard and warnings to the general manager that a guest was going to be assaulted if something was not done, gave rise to a jury question regarding whether Defendants knew or should have known about the risk of a criminal attack in their parking lot. The trial court was also correct in ruling that Plaintiffs' expert can testify about the factors that security professionals rely upon in evaluating foreseeability of a violent attack, how such factors were present in this case, and also that security guard likely would have deterred this crime. [1]

Lastly, the trial court correctly found a jury question existing on the issue of whether the owner and manager of the Hampton Inn were the apparent agents of the Hilton Defendants.

[1] In heading "2" on page 19 of their brief, Defendants state that the trial court erred in denying summary judgment not only as to foreseeability but also as to causation. Defendants did not enumerate as error the trial court's denial of summary judgment on causation and also did not address it in the body of their brief. Therefore, the issue of causation has not been properly raised on appeal and Plaintiffs are not addressing it herein.

I. STATEMENT OF FACTS

A. The Incident.

On January 25, 2015, at approximately 7:20 p.m., Hilton Diamond Elite Member and travelling salesman Henry Houston had just checked in to Defendants' Hampton Inn located at 1533 Southlake Parkway in Morrow, Georgia and returned to his car to retrieve his bags. (R1:V2 – 3616-3619; Morrow Police Department Incident Report);[2] (R1:V2 – 3088; Incident Report by Defendants' General Manager Bobby Tipton). While Mr. Houston was retrieving his bags, an unidentified male approached and asked him for directions. When Mr. Houston turned around, the man struck him in the face and head and demanded his money. (*See* R1:V2 – 3617); (R1:V8, Depo – p. 38); (R1:V2 – 3612-3621, Affidavit of SGT Roberts). The perpetrator fled when another guest approached. (*See* Incident Report by Defendants' General Manager Bobby Tipton, Ex. 1).

Hotel guest Martha Wood testified that prior to the assault she saw a man wearing a hooded jacket and a toboggan cap loitering in the area near where Mr. Houston parked. (R1:V2 – 3337-3339, ¶¶ 2 & 3; Affidavit of Martha Wood); (R1:V2 – 3621; statement of Martha Wood). Ms. Wood was so unsettled by the man that she said, "I was glad that I was not alone." (R1:V2 – 3337-3339, ¶ 2). Sergeant Michael Roberts, the investigating officer, testified that the man Ms.

[2] Plaintiffs' citations herein are to the record provided in Defendants' Appeal – Case No. A19A1887.

Wood saw loitering in the parking lot matched the description of the perpetrator. (R1:V2 – 3613-3614, ¶¶ 6 & 7). Sgt. Roberts testified that based on his investigation, Mr. Houston was assaulted during an attempted robbery. (*Id*. at ¶ 8).

Hotel general manager Bobby Tipton testified that a surveillance camera captured the incident but that when he was watching it the video "froze" right when it got to the incident. (R1:V7, Depo – pp. 137-139). Mr. Tipton said that he called Imperial and told them about the problem and they came and got the video. (*Id.*). Defendants have never produced the video, which could contain critical evidence favorable to Plaintiffs, such as how long the perpetrator was loitering on the property, how easily he was deterred when the other guest appeared, etc.

Mr. Houston was transported via ambulance to Atlanta Medical Center, where brain scans revealed a massive stroke in the right side of his brain necessitating an emergency craniectomy to remove part of Mr. Houston's skull to relieve the pressure from swelling and save his life. (R1:V2 – 3111-3114; AMC Discharge Summary); (R3:V29, Depo – p. 23; Dr. Cumberbatch). As a result of the stroke, a large portion of the right hemisphere of Mr. Houston's brain died, leaving him with severe brain damage. (R3:V29, Depo – p. 23). Mr. Houston will require 24-hour care for the rest of his life. After a competency evaluation, the probate court in Rutherford County, Tennessee, where the Houstons live,

determined that Mr. Houston is "incapacitated" and appointed his wife as his conservator. (R1:V2 – 113-116).

In the five-year period leading up to the assault, Defendants had actual knowledge of at least 28 property crimes in their parking lot, in addition to a fight between employees (R1:V2 – 3151), the assault of a police officer by a trespasser (R1:V2 – 3164), and the robbery of a front desk clerk (R1:V2 – 3209-3213), for a total of 31 criminal incidents. See (R1:V2 – 3116-3239). Although not technically a crime, the general manager also discovered a handgun in the parking lot that he reported to law enforcement (R1:V2 – 3215). Following are the prior crimes Defendants had knowledge of:

- January 22, 2015 – **Car break-in** (R1:V2 – 3116; MPD Report);
- December 26, 2014 – **Theft of Auto Parked Near Entrance**. (R1:V2 – 3119; MPD Report);
- November 5, 2014 – **Damage to Auto** (R1:V2 – 3122; MPD Report);
- October 15-16, 2014 –**Car break-in Near Entrance**. (R1:V2 – 3125; MPD Report); (R1:V2 – 3128; Defs' Report);
- August 1, 2014 –**Car break-in Near Entrance**. (R1:V2 – 3131; MPD Report);
- July 9-10, 2014 – **Theft from Auto**. (R1:V2 – 3134; MPD Report);

- July 8-9, 2014 – **Employee Attempted to sell Drugs to Guest**. (R1:V2 – 3137; Guest Complaint);
- July 4, 2014 – **Theft from Auto Near Entrance**. (R1:V2 – 3141; MPD Report); (R1:V2 – 3144; Defs' Report).
- July 1-2, 2014 – **Car break-in**. (R1:V2 – 3146; MPD Report); (R1:V2 – 3149; Defs' Report).
- June 3, 2014 – **Employee Fight in Lobby**. (R1:V2 – 3151; Guest Complaint);
- May 14-15, 2014 – **Theft of Wheels and Tires**. (R1:V2 – 3154; MPD Report);
- April 17-18, 2014 – **Car break-in**. (R1:V2 – 3157; MPD Report); (R1:V2 – 3160; Defs' Report);
- March 20, 2014 – **Attempted Theft of Battery**. (R1:V2 – 3162; Defs' Report).
- January 17, 2014 – **Obstructing Officer & Assault in Lobby**. (R1:V2 – 3164; MPD Report);
- January 11-12, 2014 – **Car break-in**. (R1:V2 – 3167; MPD Report); (R1:V2 – 3170; Defs' Report);
- September 23, 2013 – **Attempted Car break-in**. (R1:V2 – 3172; MPD Report); (R1:V2 – 3175; Defs' Report);

- September 5, 2013 – **Car break-in**. (R1:V2 – 3177; MPD Report);
- August 13-14, 2013 – **Stolen Vehicle**. (R1:V2 – 3180; MPD Report);
- April 29, 2013 – **Stolen Vehicle & Handgun Near Entrance**. (R1:V2 – 3183; MPD Report); (R1:V2 – 3186; Defs' Report);
- March 6-7, 2013 – **Car break-in**. (R1:V2 – 3188; MPD Report); (R1:V2 – 3191; Defs' Report);
- March 6-7, 2013 – **3 car break-ins**. (R1:V2 – 3193; MPD Report); (R1:V2 – 3196; Defs' Report);
- February 16-17, 2013 – **Theft of 2 Handguns from Auto**. (R1:V2 – 3198; MPD Report); (R1:V2 – 3201-3202; Defs' Reports);
- January 23-24, 2013 – **Theft of Handgun from Auto**. (R1:V2 – 3204; MPD Report); (R1:V2 – 3207; Defs' Report);
- November 18, 2012 – **Robbery of Front Desk Clerk**. (R1:V2 – 3209; MPD Report); (R1:V2 – 3212-3213; Defs' Reports);
- July 23, 2012 – **Car break-in**. (R1:V2 – 3218; MPD Report);
- July 6-7, 2012 – **Catalytic Converter Stolen Near Entrance**. (R1:V2 – 3221; MPD Report); (R1:V2 – 3224; Defs' Report);
- February 6-7, 2012 – **Theft of Wheels and Tires**. (R1:V2 – 3226; MPD Report);
- May 9-10, 2011 – **Car break-in**. (R1:V2 – 3229; MPD Report);

- March 12, 2011 – **Stolen Auto Blocks Entrance**. (R1:V2 – 3232; MPD Report);
- September 13, 2010 – **Stolen Auto**. (R1:V2 – 3235; MPD Report);
- July 9-10, 2010 –**Car break-in**. (R1:V2 – 3238; MPD Report).[3]

Twenty-eight of the crimes occurred within three years of Plaintiff's injury. (See R1:V2 – 3116-3226). The majority occurred during the evening hours and in the parking lot. Defendants' summary judgment brief cited to 43 prior crimes in less than five years before the incident. (R1:V2 – 927-931).

Defendants incorrectly stated in their brief that "[t]here has never been a violent crime … at the hotel." (Defs' Brief, p. 7). Prior to Mr. Houston's assault, the front desk clerk, Punkti Gandhi, was robbed. (R1:V2 – 3209; MPD Report); (R1:V2 – 3212-3213; Defs' Reports). Ms. Gandhi testified that the perpetrator had his hand in his pocket and "brandished it as if he had a weapon …." (R1:V2, Depo – 3657; depo p. 23).[4]

---

[3] Sixteen of the prior crimes are identified in police reports where officers' narratives refer to discussion of the crimes with employees or the review of surveillance video. (R1:V2 – 3116, 3119, 3122, 3131, 3134, 3154, 3164, 3177, 3180, 3215, 3218, 3226, 3229, 3232, 3235, & 3238). Although Defendants have not produced internal incident reports that correspond with these police reports, calling into question the accuracy of their documentation, the police reports are evidence of notice of the crimes to Defendants.

[4] Defendants inadvertently did not file the original deposition with the trial court, but instead filed a copy of her complete deposition as an exhibit, which is part of the record. *See* (R1:V2, Depo – 3635-3697);

The foregoing number likely underrepresents the prior crime on the property. One hotel employee testified that crime on the property was not consistently documented (R3:V25, Depo – pp. 14, 16, & 18); another employee testified that sometimes there were fifteen car break-ins per month (R1:V8, Depo – p. 54); and another testified that sometimes there were several break-ins per week. (R3:V28, Depo – p. 18). Defendants did not produce internal reports that reflect this level of crime testified to by their employees, evidencing Defendants incomplete documentation of crime.

Most ominously, prior to Mr. Houston's assault, Defendants' employees repeatedly warned the general manager that the parking lot was dangerous, they repeatedly requested a security guard for the parking lot, and specifically warned that if something was not done a guest was going to get injured.

Front desk clerk Hector Guzman testified that prior to Mr. Houston's assault, he told Mr. Tipton that they needed a security guard in the parking lot and that if something was not done that a guest was going to get injured. (R1:V8, Depo – pp. 23-25 & 50). Mr. Guzman also testified that he was so concerned about crime that he kept a wooden club at the front desk for protection. (*Id*. at pp. 23 & 28).

Front desk clerk Tiffanie Prater testified that she also voiced concerns to Mr. Tipton about crime on the property and that the assault of Mr. Houston was exactly what she was afraid was going to happen. (R3:V25, Depo – pp. 29 & 39). "I

knew at some point it was bound – something of that nature was bound to happen to a guest or one of us ….” (*Id.* at p. 29). Ms. Prater further testified that she brought a gun to work for protection and expressed concerns to Mr. Tipton about the surveillance system, exterior lighting, and the need for a security guard in the parking lot. (*Id.* at pp. 24-25 & 50). Ms. Prater believed that the criminals knew what areas the surveillance cameras did not cover. (*Id*. at p. 22).

Front desk clerk Vanese Blake-Leggett testified that she reported concerns to Mr. Tipton about crime and suspicious people loitering in the parking lot and that she was concerned about her safety. (R3:V28, Depo – pp. 8-9 & 21-22). She also testified that she remembered other employees voicing the same concerns in meetings with Mr. Tipton and asking if they were going to get a security guard. (*Id.*). Ms. Blake-Leggett stated that at one staff meeting with the general manager, “staff [were] voicing their concern and they were asking if we were gonna get security.” (*Id*. at p.21). When defense counsel asked if this was to prevent car break-ins, Ms. Blake-Leggett answered, “I mean for my safety. They could, I mean hold up – come in and hold us up at the front desk at gunpoint, so that was my concern” and that was because another employee had been robbed before. (*Id.* at pp. 23-24). Defendants did nothing in response.

B. The Hilton Brand

The hotel was owned by Imperial Investments Southlake, LLC ("IIS") and managed by Imperial Investments Group, Inc. ("IIG"). IIS and IIG operated the hotel pursuant to a Franchise License Agreement with HLT Existing Franchise Holding, LLC ("HLT"). *See* (Defendants' Exhibit A to Affidavit of Naren Shah, Franchise License Agreement; filed under seal). HLT was a "wholly owned subsidiary of Hilton Worldwide, Inc." ("Hilton"). (R1:V2 – 52-23 & 72, ¶ 1(a), Plaintiffs' First Amended Complaint and Def. HLT's Answer);

The evidence is that Mr. Houston saw the Hampton Inn as a Hilton property and that Defendants did nothing to make any distinction to guests between Hilton and the ownership and management of the property. Mr. Houston "loved staying at the Hilton Properties," and chose Hilton brand properties "90 percent of the time." (R2:V14, Depo – pp. 39, 81-82, & 160). Mrs. Houston testified that they were loyal Hilton customers and that "when you stay at a Hilton property, you're going to be safe." (*Id*. at p. 142). Mr. Houston would stay at the Hilton property *because* of the Hilton brand. (R2:V15, Depo – pp. 63 & 66). His trust in the Hilton brand is demonstrated by the fact that in 2014 alone, he stayed at Hilton hotels for 171 nights, traveling for his job. (*Id*. at pp. 63-65). *See generally* (R1V2 – 1790-1880; Houston's Loyalty Membership Records with Hilton).

On the date of the incident, Mr. Houston called Hilton's reservation hotline on two separate occasions before checking in. (R1:V2 – 480-481, T-Mobile records; "800-445-8667"); (R1:V2 – 483, Hilton Inn Customer Support, dated 1/6/2015; "800-445-8667"). Mr. Guzman testified that most of Mr. Houston's reservations at the Hampton Inn were paid using Hilton loyalty points. (R1:V8, Depo – pp. 37, 60-61).

Defendants displayed no signage indicating that the hotel was owned and managed by IIG and IIS, not Hilton. (R1:V2 – 492-493, Defs. Hilton & HLT's Resp. to Pl.'s Interrog., ¶ 1); (R1:V2 – 492-493, IIS & IIG Resp. to Pl.'s Interrog., ¶ 1). IIS's risk manager testified that she did not know of any information that was given to the guests or any signage that the Hampton Inn was owned and managed by IIG and IIS, not by Hilton. (R1:V13, Depo – p. 67).

Hilton monitored guest complaints through its customer service lines. (R1:V18, Depo – pp. 58-59); (R1:V2 – 531, Hilton OnQ Guest Assistance Reports); (R1:V7, Depo – pp. 94 & 98-99); (R1:V13, Depo – p. 93). In addition, all crime incident reports at the property and customer complaints were kept on-site in a binder that was reviewed by Hilton during the quality assurance inspections. (R1:V7, Depo – pp. 43-44 & 57-58).

C. Defendants' Misstatements of Fact.

Defendants state that Mr. Houston was assaulted in a "sudden attack …." (Defs' Brief, p. 7, #1). However, hotel guest Martha Wood testified that the perpetrator was loitering in the area prior to the assault, which would not make it a sudden attack.

Defendants state that the perpetrator hit Mr. Houston with brass knuckles, which is a mischaracterization of Mr. Houston's testimony. (Defs' Brief, p. 2 and p. 7, #2). Despite Mr. Houston's severe brain damage, Defendants insisted on taking his deposition, apparently to try to get some useful soundbites, whether accurate or not. When defense counsel asked Mr. Houston what part of his body the perpetrator hit, Mr. Houston answered, "On brass knuckle," which obviously makes no sense. (R1:V15, Depo – pp. 94-95).

Defense counsel then began questioning Mr. Houston about whether the perpetrator hit him with brass knuckles. (*Id*. at pp. 98-101). Mr. Houston's initial answers are incoherent, but in response to the final question on the topic, he answered with clarity:

> *Mr. Keith*: "So you don't really know if it was brass knuckles. You just know something hard was hitting you in the head, right?"
>
> *Mr. Houston*: "That's true."

(*Id*. at p. 101). Despite this, Defendants repeatedly state that Mr. Houston was struck with brass knuckles. It is unclear what difference this would make, but it is a misstatement of fact regardless.

Defendants stated in their brief that the perpetrator did not take anything from Mr. Houston "despite no one else being present to scare him away or prevent any theft." (Defs' Brief, p. 7, #2). This is simply not accurate. General manager Bobby Tipton viewed the surveillance video before it was spoliated and wrote in his incident report that the perpetrator fled when another guest approached. (*See* R1:V2 – 3088; Incident Report by Defendants' General Manager Bobby Tipton).

Defendants stated that Mr. Houston continued to stay at Hilton hotels "despite making frequent complaints … about his stays." (Defs' Brief, p. 7, #5). Mr. Houston never complained about anything significant such as the hotels being dangerous.

Defendants stated that there has never been a violent crime at the hotel. (Defs' Brief, p. 7, #8). As noted above, prior to Mr. Houston's assault front desk clerk Punkti Gandhi was robbed. (R1:V2 – 3209; MPD Report); (R1:V2 – 3212-3213; Defs' Reports). Ms. Gandhi testified that the perpetrator had his hand in his pocket and "brandished it as if he had a weapon …." (Gandhi Depo, p. 23). Threatening a concealed weapon during a robbery is a violent crime.

Defendants stated that there "is no known motive for the attack." (Defs' Brief, p. 3 and p. 7, #10). However, it clearly was an attempted robbery. The perpetrator demanded Mr. Houston's money, and the police sergeant concluded that it was an attempted robbery.

Defendants stated that their employees' fear of crimes in the parking lot were concerns only about interrupting a car break-in and being assaulted. (Defs' Brief, pp. 28-29). The only citation to the record that Defendants made in support of that statement is to pages 19-21, 40, and 50-51 of Hector Guzman's deposition. (*Id*. p. 28, footnote 38). However, Mr. Guzman did not say that on those pages and did not in any way limit his testimony in that regard, nor did the other employees. Mr. Guzman stated on page 20 of his deposition that he was concerned that one of the same criminals who were breaking into cars might also rob or assault a guest. Then on page 50 of his deposition, Mr. Guzman said that he was afraid the car break-ins would lead to the assault of a guest, which is exactly what Mr. Villines testified to. That is materially different from being concerned **only** about someone being assaulted because he or she surprised someone breaking into a car.

Lastly, Defendants stated that Mr. Houston was at the hotel to meet Marcella Stewart and cited to pages 8-9 of Ms. Stewart's deposition. (Defs' Brief, p. 4). Ms. Stewart did not say that on those pages. Ms. Stewart testified that Mr. Houston was in Morrow to meet with some of his vendors. (R4:V31, Depo – p.

150). She said he was supposed to meet her later but that he never arrived. (*Id.*, pp. 147-148 & 151).

ARGUMENT AND CITATION TO AUTHORITY

I. The Trial Court Properly Found That It Is a Question for the Jury Whether IIS and IIG Are Apparent Agents of Hilton and HLT.

A franchisor may be held responsible for the acts or omissions of a franchisee under the theory of apparent agency when: (1) the franchisor held out the franchisee as its agent; (2) the plaintiff justifiably relied on the care or skill of the franchisee based upon the franchisor's representation; and (3) this justifiable reliance led to the injury. *See Bright v. Sandston Hospitality, LLC*, 327 Ga. App. 157, 158 (2014), *citing Butkus v. Putting Greens Int'l Corp.*, 222 Ga. App. 661, 663 (1996). The trial court properly found that there is sufficient evidence to give rise to a jury question as to whether IIS and IIG were apparent agents of Hilton and HLT.

Clearly Hilton wanted guests to believe that the hotel was no different from Hilton and profited from this. Mr. Houston primarily conducted his business through Hilton and frequently paid for his room with Hilton points. Neither Hilton nor the other Defendants did anything to indicate to Mr. Houston that the property was not operated by Hilton. There is no evidence of anything whatsoever that would have indicated to Mr. Houston that IIG or IIS even existed. A reasonable

jury could conclude that this was intentional so that prospective guests, such as Mr. Houston, would believe the Hampton Inn was Hilton and rely on that.

There is also evidence from which a reasonable jury could conclude that Mr. Houston relied on the care and skill of the hotel based on Hilton's representations. According to Mr. Houston's wife, Mr. Houston loved staying at the Hilton Properties. (R2:V14, Depo – pp. 39, 81-82, & 160). Mrs. Houston testified that they were loyal Hilton customers and that "when you stay at a Hilton property, you're going to be safe." (*Id*. at p. 142). His trust in the Hilton brand is demonstrated by the fact that in 2014 alone, he stayed at Hilton hotels for 171 nights, traveling for his job. (R2:V15, Depo – pp. 63 & 66). *See generally* (R1V2 – 1790-1880). Mr. Houston's reliance that the Hampton Inn was a Hilton property led to him staying at the property and being injured.

In the analogous case of *Watson v. Howard Johnson Franchise Sys., Inc.*, 216 Ga. App. 237 (1995), the plaintiff was injured at a HoJo Inn owned and operated by Williams Investment Company pursuant to a franchise agreement with Howard Johnson. The hotel's advertisements did not refer to the franchisee as the owner and operator of the franchise, the sign in the parking lot referred to the hotel as a HoJo Inn by Howard Johnson, and the franchise agreement provided that no advertising could be used without prior written approval from Howard Johnson. The franchise agreement also required Williams to display a permanently fixed

plaque at the registration area which stated that the hotel is independently operated by Williams, but Williams did not display such a sign. Also, Howard Johnson was aware Williams did not display the sign, as its absence had been noted in Howard Johnson's audits and inspections reports. *Id.* at p. 237. This Court held that these facts gave rise to a jury question on apparent agency. *Id.*

Similar facts exist here. The Hilton Defendants made no effort to distinguish Hilton from the Hampton Inn brand and this specific hotel. Defendants did not provide signage indicating that the hotel was not owned and operated by Hilton, which should have become evident to Hilton in the biannual quality insurance inspections by the Hilton Defendants. (R1:V2 – 492-493, Defs. Hilton & HLT's Resp. to Pl.'s Interrog., ¶ 1); (R1:V2 – 492-493, IIS & IIG Resp. to Pl.'s Interrog., ¶ 1). *See* (R1:V13, Depo – p. 67). This failure clearly left guests like Mr. Houston with the belief that the hotel was operated by Hilton, and a jury could conclude that was Hilton's intent.

Defendants' reliance on *Kids R Kids Intl. v. Cope,* 330 Ga. App. 891 (2015), is misplaced. In that case, the plaintiff signed an enrollment agreement specifically acknowledging that the store was a franchise and that the franchisor was not responsible for the negligence of the franchisee. *Id* at 895. None of the other cases relied on by Appellees have facts similar to those here as well.

Here, even Defendants' employees were confused about the relationship between IIS and IIG and the Hilton Defendants. Although the technical owner of the Hampton Inn franchise seemingly is HLT Existing Franchise Holding, LLC, the Defendants blur any distinction between HLT and Hilton to such a degree that some Hampton employees believed that the franchisor was Hilton, not HLT. Naren Shah, the Chief Operating Officer for Defendant IIS, testified Hilton was the franchisor, admitting he has never heard of Defendant HLT. (R1:V12, Depo – pp. 36-37). IIS's Risk Manager and Administrative Director, Marcy Smythe, believed that Hampton Inn Southlake is a "Hilton franchisee." (R1:V13, Depo – pp. 60-61).

The Hilton Defendants took no steps to remedy any "confusion that has stemmed from a failure to distinguish between subsidiaries treated as independent entities and those in fact not independent." *Kissun v. Humana, Inc.*, 267 Ga. 419, 420–21 (1997). When some facts exist, as do here, Georgia courts leave these questions of corporate status to a jury. *See Scott Bros. v. Warren*, 261 Ga. App. 285, 288 (2003). Given these facts, a reasonable jury could conclude that there is an insufficient distinction between Hilton and HLT and that IIG and IIS are agents of Hilton and HLT. Summary judgment should be denied.

II. The Trial Court Properly Found That Foreseeability is a Question for the Jury.

"[T]he question of reasonable foreseeability of a criminal attack is generally for a jury's determination rather than summary adjudication by the

courts." *Sturbridge Partners, Ltd.*, 267 Ga. at 786.

A. Large Volume of Prior Crime Gives Rise to a Jury Question Regarding Foreseeability.

Defendants' knowledge of a large volume of prior crime on the property evidences a fundamental problem with security on the property making the risk of violent crime foreseeable. *See Woodall v. Rivermont Apts. Ltd. Partnership*, 239 Ga. App. 36, 40 (1999). As noted on page 4 above, prior to the attempted robbery and assault of Mr. Houston, Defendants had actual knowledge of at least 28 crimes in their parking lot, in addition to a fight between employees, the assault of a police officer, and the robbery of a front desk clerk, for a total of 31 criminal incidents, plus the general manager discovered a handgun in the parking lot and reported to law enforcement (R1:V2 – 3215).

Additionally, as noted above, there is evidence that the above data significantly underrepresents the prior crime on the property. There is testimony from one employee that crime on the property was not consistently documented; testimony from another employee that sometimes there were fifteen car break-ins in a month; and testimony from another employee that sometimes there were several break-ins per week. (R3:V28, Depo – p. 18; R3:V25, Depo – pp. 14, 16, & 18; R1:V8, Depo – p. 54. Defendants did not produce internal reports that reflect this level of crime testified to by their employees, evidencing Defendants incomplete documentation of crime.

In *Woodall v. Rivermont Apts. Ltd. Partnership*, 239 Ga. App. 36 (1999), a case squarely on point, the plaintiff was robbed and shot at his apartment complex's mailbox area. The plaintiff sought to admit twenty property crimes, including nine car break-ins or thefts, three mailboxes broken into, and eight burglaries of apartment units. *Id.* at 37. There were no prior violent crimes, and the defendant argued that the prior property crimes were not substantially similar. The trial court agreed and excluded them. This Court reversed. *Id.*

This Court reiterated that the Supreme Court in *Sturbridge* held that prior property crimes can establish the foreseeability of a violent crime against a person "[s]o long as the occurrence of prior crimes should attract the landlord's attention to the dangerous condition which resulted in the litigated incident, the prior crimes are relevant to the issue of foreseeability". *Woodall*, 239 Ga. App. at 38-39, quoting *Sturbridge*, 267 Ga. at 786. This Court then held that "where a [property] has experienced a large volume of crime over a period of time, the *extent* of such crime may indicate fundamental problems with security at the complex, thus making a risk of violent crime foreseeable." *Woodall*, 239 Ga. App. at 40 (emphasis in original).

As in *Woodall*, the large volume of crimes in the parking lot indicates a "fundamental problem with security," making the risk of violent crime foreseeable, especially when coupled with the robbery of the front desk clerk.

That the sheer volume of property crimes can indicate a fundamental problem with security and make violent crime foreseeable is consistent with research Plaintiffs' expert John Villines cited and is synonymous with the concept of "Rational Choice Theory" of opportunity structure, Mr. Villines relied on, which is "built on the empirically-supported concept that the offender's decision to perpetrate a crime is based on their likelihood of accomplishing their goals and the likelihood of encountering constraints limiting access to those or other pre-existing goals." (R1:V2 – 3281; Villines Report). Defendants did not respond in any meaningful way to crime on the property, making it reasonable to foresee that crime would continue on the property and likely increase in volume and severity. Mr. Villines discussed how research over the decades has demonstrated that a potential offender "weighs the risks versus the benefits at offending at a particular time and place and that some level of reasoning goes into that process." (R1:V19, Depo – pp. 10-11). Without using the same terms, for over twenty years Georgia courts have used the same analysis as the Rational Choice Theory of opportunity structure in holding that property crimes can make it foreseeable that a crime against a person could occur.

Defendants contend that this Court's holding in *Woodall* that the volume of crime can give rise to foreseeability is "inextricably intertwined" with the Court's finding that the apartment complex was in a high crime area, and that as a result, a

large volume of property crimes can make the risk of violent crime foreseeable only when there is evidence the property is located in a high crime area. (Defs' Brief, p. 26). W*oodall* makes no such limitation.

The W*oodall* Court stated that "a large volume of crime … may indicate fundamental problems with security …, thus making a risk of violent crime foreseeable." *Woodall*, 239 Ga. App. at 40 (emphasis in original). The Court then stated that "[t]his is particularly so if the complex is located in an area with a high occurrence of violent crime." *Id.* By stating that it is "particularly so" if the property is located in a high crime area, does not mean that property crimes are relevant only in a high crime area. The Court was simply looking at all factors relevant to foreseeability, not just prior crime. Furthermore, the idea that prior property crimes are relevant only where there is evidence a property is located in a high crime area is found nowhere in the Supreme Court's seminal opinion in *Sturbridge Partners, Ltd. v. Walker*.

Also, "a showing of prior similar incidents on a proprietor's premises is not always required to establish that a danger was reasonably foreseeable. *Wade v. Findlay Management, Inc.*, 253 Ga. App. 688, 689 (2002). Otherwise, "[a]n absolute requirement of this nature would create the equivalent of a one free bite rule for premises liability, even if the proprietor otherwise knew that the danger existed." *Id.*

B. The Testimony of Defendants' Employees Alone Gives Rise to a Jury Question Regarding Foreseeability.

Piggly Wiggly Southern, Inc. v. Snowden, 219 Ga. App. 148 (1995) is squarely on point and controls the outcome here. In that case, the plaintiff was robbed and assaulted in the defendant's parking lot. Two employees testified that they considered the parking lot unsafe and had suggested the hiring of a security guard, that male employees walked female employees to their cars at night, and that they would not allow their wives to go to the store alone. *Id.* at 149. This Court held that "[e]ven in the absence prior similar crimes, this testimony would have been sufficient to create a question of fact as to whether defendant knew or should have known about the unreasonable risk of criminal attack in its parking lot." *Id.* at 149. That holding should end the inquiry here. The testimony of Defendants' employees is even more compelling.

As cited to on pages 8-9 above, there is testimony from employees that they feared for their safety on the property; that they warned the general manager about crime on the property and the risk to guests and employees if something was not done about it; that they requested a security guard be added to patrol the exterior of the building; that at a staff meeting with management employees voiced concerns about their safety and requested a security guard; that there were suspicious people loitering in the parking, and that guests and employees had reported suspicious people in the parking lot; and one employee even testified that she brought a gun to

work for protection. (R1:V8, Depo – pp. 23-25, 28 & 50); (R3:V25, Depo – pp. 22, 24-25, 29, 39 & 50); (R3:V28, Depo – pp. 8-9, 21-22, & 23-24).

Defendants cannot distinguish *Piggly Wiggly*, so they claim without support that it is no longer good law because it predates *Doe v. Prudential-Bache/A.G. Spanos Realty Partners*. (Defs' Brief, pp. 27-28). *Piggly Wiggly* has never been overruled and remains good law. As recently as 2017, the Georgia Supreme Court favorably cited *Piggly* Wiggly, and earlier this year this Court cited it. *See Martin v. Six Flags Over Georgia II, L.P.*, 301 Ga. 323, 331 (2017), and *Bolton v. Golden Business, Inc.*, 823 S.E.2d 371, 372 (2019).

Defendants' statement that *Piggly Wiggly* is factually distinguishable also fails. They point out that the prior crimes in *Piggly Wiggly* were different than those here and that that is a determinative distinction. However, the relevance of *Piggly Wiggly* here is that regardless of the level of prior crime on a property, employee testimony about a dangerous condition on the property alone is sufficient to give rise to a jury question regarding foreseeability.

Defendants also inaccurately state that their employees provided all of the damaging testimony in response to leading questions by Plaintiffs' counsel, so the testimony should be excluded. First, this Court, just as the trial court, can exercise its discretion to consider testimony that is in response to leading questions. Second, there is extensive testimony from Defendants' employees related to

Defendants' knowledge of a dangerous condition on the property which is not in response to a leading question, or was not objected to, or was in response to questions from Defendants' counsel.

Lastly, Defendants state that *Piggly Wiggly* does not apply because Mr. Houston's attack was targeted, intended, and personal. (Defs' Brief, p. 29). Defendants do not cite to a single piece of evidence in the record for that statement, because there is none.

C. The Cases Defendants Rely On Are Unavailing.

Defendants state in their Brief, p. 29, that *Med. Ctr. Hosp. Auth. v. Cavender*, 331 Ga. App. 469 (2015), controls the outcome here. That Defendants contend *Cavender* controls demonstrates the weakness of their arguments. Virtually nothing about *Cavender* resembles the facts in this case.

In *Cavender*, Charles Johnston, motivated by revenge, went to the hospital to kill a nurse who he believed contributed to the death of his mother. *Id.* at 473. This Court unsurprisingly held that it could not be said that the prior crimes on and around defendant's property made a revenge rampage foreseeable. *Id.* at 475. Defendants argue that because the Court held that the murders were unforeseeable despite evidence of 43 prior crimes on or near the property, summary judgment should be granted here as well. (Defs' Brief, pp. 27-28). *Cavender* was a textbook targeted crime. There was no evidence whatsoever that the hospital should have

foreseen that that the son of a prior patient was so enraged about a nurse's treatment of his mother that was going to come to the hospital to murder the nurse. *Cavender* is irrelevant.

The other cases Defendants rely on are also distinguishable. In *Nalle v. Quality Inn, Inc.*, 183 Ga. App. 119 (1987), the plaintiff was attacked and robbed near the swimming pool. Police reports of twenty-five prior crimes were submitted by the plaintiff; however, all but one of the prior crimes occurred more than two years prior to the attack on the plaintiff. *Id.* at 121. The one crime that occurred within two years of the subject incident was the theft of an envelope containing $100.00 from the safe at the front desk. *Id.* The Court affirmed summary judgment, holding that the prior crimes were not substantially similar **and** there was "no indication that the hotel was or should have been aware that its parking lot presented a particularly dangerous condition." *Id.* at 120-121. Here, in addition to the prior crime, there is extensive employee testimony about safety on the property that is an "indication that the hotel was or should have been aware that its parking lot presented a particularly dangerous condition."

The facts in *McCoy v. Gay*, 165 Ga. App. 590 (1983), are even more distinguishable. 165 Ga. App. 590. In that case, the plaintiff submitted evidence of three prior crimes at the hotel, one of which the court excluded as having occurred over 10 years earlier. *Id*. at 591-593. Neither of the two prior crimes

occurred in the parking lot where the plaintiff was attacked. *Id.* at 592. One occurred as the victim was walking into the building and the other occurred in a stairwell. *Id.* In affirming summary judgment, the Court noted that the plaintiff was attacked "on the periphery of the premises some distance from the actual Inn facility itself" while the two prior crimes occurred "in close proximity to the actual guest facilities provided by the Inn." *Id*. at 592.

Doe v. Prudential-Bache/A.G. Spanos Realty Partners, 268 Ga. 604 (2004), is also distinguishable. There, the plaintiff was sexually assaulted in the parking garage of her apartment complex. The Supreme Court held that unlike the burglaries in *Sturbridge*, the prior thefts and vandalism in the parking garage did not make a sexual assault in the garage foreseeable. *Id. at* 606. Significantly, the Court pointed out that there also was not any "**other evidence** that would create a factual issue on the foreseeability of the attack …." *Id.* (emphasis added). Here, there is significant other evidence in combination with prior crime to create a factual issue on foreseeability. Defendants improperly ask the Court to look at prior crime in isolation and ignore all of the other evidence relevant to foreseeability.

In *Agnes Scott College v. Clark*, 273 Ga. App. 619 (2005), this Court held that prior car break-ins and student concerns about being in the parking lot alone at night did not make a "broad daylight" abduction and rape foreseeable. The Court

stated that "[w]ithout any evidence of similar occurrences **or other evidence** that would have made the attack on Clark foreseeable, Agnes Scott is entitled to summary judgment as a matter of law." *Id.* at 623 (emphasis added). The Court again made clear that the foreseeability analysis is not limited to looking at prior crime in isolation.

Ritz Carlton Hotel Co. v. Revel, 216 Ga. App. 300 (1995), is also not on point. There, the plaintiff admitted that the sexual assault and robbery in her hotel room was not foreseeable based on the nature and extent of the prior crimes at the hotel. *Id*. at 303. She instead asserted a novel theory of liability, contending that as a woman traveling alone that she was a "member of a class of persons where the crime was foreseeable." *Id*. This Court rejected that theory. In addition, she argued that the hotel undertook a duty to protect her because it employed a broad-based security system, which the Court also rejected. *Id*. at 302.

Baker v. Simon Prop. Grp., 273 Ga. App. 406 (2005), is also unavailing. There, this Court held that 10 property crimes in the parking lot did not make a shooting and carjacking foreseeable. *Id.* at 408. Not only was there far less crime there than here, thus no evidence of a fundamental problem with security, but there also was not any "other evidence that would create a factual issue on the foreseeability of the attack …." *See Doe v. Prudential-Bache/A.G. Spanos Realty Partners*, 268 Ga. 604, 606 (2004).

D. The trial court properly allowed Plaintiffs' security expert, John Villines, to provide expert testimony on foreseeability and causation.

Although Defendants do not challenge Mr. Villines' extensive qualifications, nor could they, it is instructive to briefly cover them regardless. Mr. Villines is board-certified in "Security Management" by the American Society for Industrial Security (ASIS), designated by the International Society of Crime Prevention Practitioners as an "International Crime Prevention Specialist" and certified by the National Crime Prevention Association as a National Crime Prevention Specialist (Level II; Advance Certification). (R1:V2 – 3273, Villines' *Curriculum Vitae*). After earning a bachelor's assignment in the field of Urban Studies at Georgia State University with a concentration in Criminal Justice, Mr. Villines obtained a Master of Science in Security Management from Bellevue University and served as a Research Associate and Adjunct Instructor at the Georgia Police Academy. (*Id.* at p. 3273-3275). Mr. Villines completed post-graduate study in Statistics and Quantitative Methods at Harvard University and various other courses related to crime analysis and crime prevention. (*Id.* at p. 3235).

Mr. Villines' expertise is further evidenced by the fact that he teaches and trains others seeking his expertise, including law enforcement. Mr. Villines has a certification as an instructor for law enforcement, security personnel and investigators. (R1:V2 – 3273). Mr. Villines has focused his research on topics

associated with security measures as well as policies and procedures as they relate to crime and loss prevention. Mr. Villines is a POST Certified Instructor; advanced in specialized training for law enforcement in Georgia including extensive training in the field of crime prevention. (*Id.*).

Mr. Villines' vast and varied knowledge on security matters has been acknowledged by his peers. In 2003, Mr. Villines was appointed by Georgia's governor to serve on the Georgia Board of Private Detective and Security Agencies. (*Id.*). Mr. Villines' colleagues elected him Chair of that Board in 2004 and 2010. (*Id.*). In addition, the United States Department of Justice has retained Mr. Villines as part of their Expert Witness Litigation Unit.

Mr. Villines also has a wealth of practical experience. He has been in the security industry for over forty (40) years, beginning at Phipps Plaza in 1973. (R1:V2 – 3274). In addition, Mr. Villines has performed hundreds of security analysis and consultations for hotels and motels, apartment complexes, and retail establishments during that span. (*Id.*). He has been retained in close to 200 cases, approximately 40% of which are on behalf of defendants. (R1:V19, Depo – pp. 25-26). At the time of his deposition, Mr. Villines was involved in approximately three or four cases involving crimes at hotels, where he has been retained by the hotel. (*Id*. at 26). Mr. Villines also has been qualified numerous times by trial

courts to testify as a security expert, including Georgia state and federal courts. (R1:V2 – 3273).

Defendants have not met their high burden to show that trial court abused its discretion in allowing Mr. Villines to testify. *See, e.g., Moran v. Kia Motors Am., Inc.*, 276 Ga. App. 96, 97 (2005). Mr. Villines prepared a 47-page report in this case, which details his analysis and opinions. (R1:V2 – 3279-3323). His report also details the principles he applied in analyzing the facts and reaching his opinions and the research and published materials supporting them. His report contains 13 pages of detailed annotations that cite to the research and published materials he relies on as well as the evidence in the record he relies on. (R1:V2 – 3312-3323).

Defendants' real argument in their brief is not with Mr. Villines, it is with Georgia law saying that property crimes can be considered when analyzing foreseeability of a violent crime, which is what Mr. Villines did. Defendants also contend that the trial court erred in in ruling that Mr. Villines can consider prior property crimes in combination with other when explaining to the jury how security professionals evaluate the foreseeability of a violent crime. (Defs' Brief, pp. 31-34). However, the trial court's ruling in that regard is consistent with Georgia law regarding foreseeability. There is no legal requirement that security

experts must ignore property crimes when evaluating foreseeability and also cannot consider other factors such as testimony by employees.

Defendants also contend that Mr. Villines did not rely on any published materials in support of his opinion that the large volume of property crimes at the hotel supported his opinion that violent crime was foreseeable. This simply is inaccurate. As part of his analysis, Mr. Villines relied on standards, guidelines, and research to support his assessment, including: (1) John Fay's *Contemporary Security Management*; (2) Michael Knoke's *Physical Security Principles*; (3) Darrell Clifton's *Hospitality Security: Managing Security in Today's Hotel, Lodging, Entertainment, and Tourism Environment*; and (4) NFPA 730's *Guide for Premises Security*. (R1:V2 – 3303-3308).

Mr. Villines introduced his foreseeability opinions by highlighting three widely-accepted concepts – Routine Activity Theory, the Crime Triangle, and Rational Choice Theory – which "underlie a set of practices generally referred to as 'Situational Crime Prevention'" that have been established over decades of research. (R1:V2 – 3280-3282). Key concepts espoused by this research in crime prevention is employment of "capable guardianship" to discourage motivated offenders as well as employing "opportunity blocking" strategies such as physical security measures, controlling access, and deflecting offenders. (R1:V2 – 3282-3283). Based on detailed analysis of the prior crimes involved on these premises,

it's Mr. Villines' opinion that the perpetrator acted consistently with the Rational Choice Theory by seizing an opportunity to commit this crime—an act that was foreseeable given the opportunity structure. (R1:V19, Depo – pp. 92 & 163).

Even Defendants' security expert, Chad Callaghan, agreed that property crimes in a parking lot can be indicative of a security problem in the parking lot. (R1:V21, Depo – p. 131). He also admits that if he were conducting a risk assessment on a property, he would consider vehicle break-ins when determining whether they are a harbinger of future violent crimes against persons. (*Id*. at p. 103). This supports the opportunity theory discussed by Mr. Villines, as well as precedent established by Georgia courts.

1. *Sanders v. QuikTrip* has no application to this case.

That Defendants cite a federal trial court's summary judgment ruling in support of their motion to exclude Mr. Villines demonstrates the weakness of their argument. (Defs' Brief, p. 34-36). The trial court in *Sanders v. Quiktrip* did not undertake a *Daubert* analysis of the experts and in fact did not even reference expert testimony in its Order. Case No. 1:17-cv-02341-CC (N.D. Ga. March 29, 2019 Order).

Sanders is not applicable for other reasons as well. That case involved a shooting at 3:00 a.m. by a gang member at a QuickTrip gas station who mistakenly believed the victim was wearing a gang color. The trial judge arbitrarily excluded

all crimes that occurred more than 18 months before the incident and all violent crimes that occurred on days of the week other than the day of the week the plaintiff was murdered. Additionally, there was no evidence of the "other factors" related to foreseeability that were present here, including employee testimony.

The trial judge also ruled that that the fact that a police officer coincidentally pulled into the gas station mere seconds before the shooting and the shooting still occurred was dispositive of plaintiff' causation argument that a security guard likely would have prevented the crime. The court made that ruling even though an eyewitness testified that the perpetrator did see the officer pull in. Of course, there was no way the officer's presence could have deterred the perpetrator if the perpetrator never had a chance to see the officer. The court also did not consider that a security guard patrolling the property likely would have been seen by the perpetrator who went into the store before the shooting and then went out to his car to retrieve a gun.

Defendants here also cite to the fact that military police officer Miguel Martinez was briefly at the coffee station *inside* the hotel during the incident. Mr. Martinez was unable to see outside the hotel from his position, he never saw the perpetrator or the altercation, and did not even know that Mr. Houston was being assaulted until Mr. Houston came inside the hotel. *See* (R1:V22 – p. 15-16). There certainly is no evidence that the perpetrator did know, or could have known,

that Mr. Martinez was inside the hotel. It is unclear how this has anything to do with whether a guard patrolling the parking lot would have deterred or prevented the incident.

Mr. Villines's causation opinion should also be admissible. This Court has permitted and considered expert testimony relating to proximate cause. *See Mason v. Chateau Cmtys., Inc.*, 280 Ga. App. 106, 111 (2006) (relying on plaintiff's security expert's testimony that increased security measures, including an increased security patrol, could have deterred criminal activity such as the plaintiff's attack, in denying defendant's motion for summary judgment).

Mr. Villines relied on Darrell Clifton's book as well as the Protection of Assets Manual published by ASIS International to support his opinion that a security guard, more likely than not, would have prevented this incident. (R1:V19, Depo – p. 122-23). Additionally, there is also evidence that Mr. Houston's assailant fled when another guest came up, which means he was easily deterrable. (See R1:V2 - 3088; Incident Report by Defendants' General Manager Bobby Tipton). Furthermore, here, Defendants' employees testified that security guards had reduced crime at some of their other properties. (R1:V12, Depo – pp. 54-55); (R1:V13, Depo – p. 26).

Defendants' arguments should go to the weight and credibility of Mr. Villines's testimony, not its admissibility.

CONCLUSION

For the foregoing reasons, the trial court respectfully should be affirmed.

This 28th day of May, 2019.

Respectfully submitted,

LAW & MORAN

/s/ *E. Michael Moran*
Peter A. Law
Georgia Bar No. 439655
E. Michael Moran
Georgia Bar No. 521602
Patrick J. Wheale
Georgia Bar No. 546904
Attorneys for Plaintiffs/Appellees

LAW & MORAN
563 Spring Street, NW
Atlanta, Georgia 30308
(404) 814-3700

CERTIFICATE OF WORD COUNT

This Court's Rule 24(f) allows Briefs of up to 8,400 words in length, exclusive of tables of contents, tables of citations, cover sheets and certificates of service and of compliance with the word count.

Given those parameters, I certify that this Cross-Appellants' Initial Brief is 8,366 words in length, as calculated by Microsoft Word 2010 (and excluding the cover sheet, Certificate of Word Count, and Certificate of Service, as provided in Rule 24).

This 28th day of May, 2019.

Respectfully submitted,

LAW & MORAN

/s/ *Patrick J. Wheale*
Patrick J. Wheale
Georgia Bar No. 546904
Attorney for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 24th day of May, 2019 filed a PDF copy of this **Appellees' Brief in Response** using the Court's eFast system, making it available to the Clerk and Court.

I FURTHER CERTIFY that I have this day served a copy of this Brief upon the following counsel of record:

C. Shane Keith, Esq.
(skeith@hpylaw.com)
Robert Thompson, Esq.
(rthompson@hpylaw.com)
Hawkins Parnell & Young LLP
303 Peachtree Street, N.E., Suite 4000
Atlanta, GA 30308

Brent D. Anderson, Esq.
(BAnderson@talawfirm.com)
Taylor | Anderson LLP
1670 Broadway,
Suite 900
Denver, CO 80202

I certify that I have served the reference counsel by emailing a PDF copy of this document to receiving counsel at the referenced email addresses, as a prior agreement exists regarding such service.

This 28th day of May, 2019.

Respectfully submitted,

LAW & MORAN

/s/ *Patrick J. Wheale*
Patrick J. Wheale
Georgia Bar No. 546904
Attorney for Plaintiffs/Appellees