IN THE COURT OF APPEALS
STATE OF GEORGIA

Appeal Case No. A19A1888

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

HENRY HOUSTON and SHERRAINE HOUSTON,
Plaintiffs/Cross-Appellants,

v.

HILTON WORLDWIDE, INC. AND
HLT EXISTING FRANCHISE HOLDING, LLC, ET AL.,
Defendants/Cross-Appellees.

CROSS-APPELLANTS' INITIAL BRIEF

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CROSS-APPELLANTS' INITIAL BRIEF

This is a premises liability (negligent security) case where hotel guest Henry Houston was brutally assaulted during an attempted robbery in the parking lot of Defendants' Hampton Inn-Southlake hotel.[1] Leading up to Mr. Houston's assault, Defendants had knowledge of ongoing crime on the property, including the robbery of a front desk clerk. Before the incident, hotel employees repeatedly complained to management about the crime problem, requested an exterior security guard, and warned that if something was not done about the crime that a guest was going to be assaulted. One of the front desk clerks testified that she was so afraid for her safety that she brought a gun to work for protection. Despite this prior knowledge of a dangerous condition on the property, Defendants did nothing. Mr. Houston suffered a severe brain injury in this foreseeable assault and now requires twenty-four hour care.

Defendants hired as an expert witness college professor Volkan Topalli, Ph.D., who said he is an expert in the field of "offender decision-making." Two areas of Dr. Topalli's testimony are the subject of this appeal. First, Dr. Topalli testified that that the unknown perpetrator was "probably relatively undeterrable." "Probably relatively undeterrable" is not sufficiently reliable, is not probative of anything, and is not helpful to the jury.

[1] Since there is an appeal and a cross appeal, Appellants herein will use the terms "Plaintiffs" and "Defendants" for ease of identification.

Second, Dr. Topalli testified that even though the perpetrator demanded Mr. Houston's money, the incident likely was not a robbery. Dr. Topalli explained that this opinion is relevant to foreseeability of crime on the property; however, Defendants withdrew Dr. Topalli's foreseeability opinions. Dr. Topalli also used this opinion as a springboard to offer rank speculation, such as that Mr. Houston and the perpetrator "could have" known each other, or that "it is possible" they knew each other, or that "[i]t could be that [Houston] cut him off in traffic," or that "Mr. Houston had some relationship with the person." The trial court abused its discretion in allowing this testimony.

I. RELEVANT FACTUAL BACKGROUND

A. Facts Surrounding 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 when an unidentified male approached him and asked him for directions. *See* (R1:V2 – 3616-3619; Morrow Police Department Incident Report)[2]; (R1:V2 – 3088; Incident Report by Defendants' General Manager Bobby Tipton). When Mr. Houston turned around, the man struck him in the face and head and demanded his money. (*See* R1:V2 – 3617);

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

(R1:V8, Depo – p. 38); (R1:V2 – 3612-3621, Affidavit of SGT Roberts). The perpetrator fled when another guest approached. (R1:V2 – 3088). Hotel guest Martha Wood testified that prior to the assault she saw a man 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 person that she said, "I was glad that I was not alone." (R1:V2 – 3337-3339, ¶ 2). City of Morrow Police officer Sergeant Roberts, who investigated the incident, testified that the man Ms. Wood saw loitering matched the description of the perpetrator. (R1:V2 – 3613-3614, ¶¶ 6 & 7). Sgt. Roberts also stated that based on his investigation, he concluded that Mr. Houston was assaulted during an attempted robbery. *Id*. at ¶ 8. According to the general manager, Bobby Tipton, there was a video that should have captured the incident, but Mr. Tipton said the video "froze" right when it got to the incident. (R1:V7 – p. 137-139). Mr. Tipton said that he called Imperial and told them and they came and got the video. (*Id.*). The video has never been produced.

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 severely cognitively impaired. (R3:V29, Depo – p. 23). Mr. Houston will require 24-hour care for the rest of his life. As a result of his brain damage, 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).

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 (R1:V2 – 3151), the assault of a police officer (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). The twenty nine exterior crimes include fourteen vehicle break-ins or attempts (R1:V2 – 3116, 3122, 3125-3128, 3131, 3146-3149, 3157-3160, 3167-3170, 3172-3175, 3177,3188-3191, 3193-3196, 3218, 3229, & 3238); eight thefts or attempts from vehicles (R1:V2 – 3134, 3141-3144, 3154, 3162, 3198-3202, 3204-3207, 3221-3224, & 3226); five stolen vehicles (R1:V2 – 3119, 3180, 3183-3186, 3232, & 3235); and a drug solicitation in the *porte cochere* area (R1:V2 – 3137). 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).

Nine of the crimes occurred either in the front parking lot or in the lobby of the hotel. (R1:V2 – 3119, 3125, 3131, 3146, 3151, 3183, 3209, 3221, & 3232). Twenty-eight of the crimes occurred within three years of Plaintiff's injury.[3] (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).

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 in a 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 reflected the 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 premises was dangerous, requested

[3] Sixteen of the prior crimes are identified in police reports where officers' narratives refer to discussion of the crimes with onsite management and/or other employees. (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.

a security guard for the exterior, and 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 hotel general manager Bobby Tipton that they needed a security guard in the parking lot and that if something was not done about crime on the property 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, you know, there was issues and concerns that there was no security, 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).

The property was owned by Defendant Imperial Investments Southlake, LLC ("IIS") and managed by Defendant Imperial Investments Group, Inc. ("IIG"). IIS and IIG operated the Hampton Inn pursuant to a Franchise License Agreement with Defendant HLT Existing Franchise Holding, LLC ("HLT"). *See generally* (R2:V23, Franchise License Agreement; filed under seal). Defendant HLT was a "wholly owned subsidiary of Defendant Hilton Worldwide, Inc." ("Hilton"). (R1:V2 – 52-53 & 72, ¶ 1(a); Plaintiffs' First Amended Complaint and Def. HLT's Answer).

B. <u>Testimony of Defense Expert Volcan Topalli, Ph.D.</u>

Defendants retained college professor Volkan Topalli, Ph.D. as an expert witness. Dr. Topalli admitted that he is not an expert in security measures or crime

prevention, and that he has never consulted with any hotels or business on methods to effectively deter crime. (R1:V20, Depo – pp. 53, 187, & 225-26). Dr. Topalli testified that his area of expertise is in the "decision making of offenders." (R1:V2 – 118-119; Defs' Expert Disclosure); (R1:V20, Depo – p. 131). He explained that he gained that expertise largely by paying criminals to sit down for interviews and provide to him the details of crimes they had committed in the past and crimes they planned to commit in the future. (*Id*. at pp. 11, 54, 62, & 67). Dr. Topalli pays a commission to a recruiter who goes out into the streets to find criminals who for money will go to Dr. Topalli's office and admit to all of the details of their crimes. (*Id*. at pp. 68-70). Dr. Topalli then relies on what the people tell him – actually believing that real criminals would come to a university and talk to a professor about all of the crimes they have committed and plan to commit, and that they would tell him the truth about the crimes. Although this methodology seems inherently unreliable, there appear to be a group of professors who believe in it.

Dr. Topalli admitted that he only "can speculate on the kinds of things that would have deterred … this offender . . . ," and he admitted that it is not within his expertise to say what additional security measures likely would have deterred this incident. (R1:V20, Depo – p. 104) (emphasis added). When directly asked if he was going to offer any opinions regarding the deterrability of the perpetrator, Dr. Topalli answered, "I can't." (R1:V20, Depo – pp. 105 & 189).

Despite admitting that he can only speculate what may have deterred the perpetrator, admitting that he has no expertise in deterring crime, and saying that he cannot offer an opinion regarding deterrability, Dr. Topalli went on to testify that it is his opinion that the unknown perpetrator was "probably relatively undeterrable." (*Id*. at p. 189).

Dr. Topalli also offered the opinion that this incident was an "atypical robbery." (R1:V20, Depo – pp. 89, 107, 114, 118, & 150). When asked what was the significance of this opinion, Dr. Topalli answered that it "has to do with … what kinds of offenses would be expected at the property." (*Id.* at p. 122). An opinion as to "what kinds of offenses would be expected at the property" is a foreseeability of crime opinion, and Defendants stated in their brief in response to Plaintiffs' motion to exclude Dr. Topalli that they were not offering Dr. Topalli to provide opinions regarding foreseeability. (R1:V2 – 1972, footnote 2).

C. <u>Statement of Proceedings</u>

Plaintiffs filed the underlying complaint alleging premises liability and nuisance claims, along with claims for punitive damages and attorney's fees. (R1:V2 – 16). After discovery, Defendants moved for summary judgment as to the negligence claims and franchisor liability. (R1:V2 – 124-139 & 907-946). Plaintiffs opposed the motions, and the trial court agreed that genuine issues of material fact exist. (R1:V2 – 3809-3820, Order). The trial court also denied

Plaintiffs' and Defendants' motions to exclude the others' liability experts. (R1:V2 – 3802-3808; Orders).

Hilton and HLT sought a certificate of immediate review of the trial court's order denying their motion for summary judgment as to franchisor liability, which the trial court granted, and this Court granted Hilton and HLT's petition for interlocutory review. (R1:V2 – 3823; Order). Defendants then filed a notice of appeal as to all issues raised in their motions for summary judgment and motion to exclude Plaintiffs' expert John Villines, and Plaintiffs filed a notice of cross appeal of the trial court's denial of Plaintiffs' motion to exclude Defendants' expert Volcan Topalli.

II. ENUMERATION OF ERROR

The trial court erred in denying Plaintiffs' Motion to Exclude the testimony of Volkan Topalli, Ph.D. as to two areas of opinions: one, that the unknown perpetrator likely could not have been deterred (or as Dr. Topalli put it, he was "probably relatively undeterrable"); and, two, that it is unlikely the assault of Mr. Houston was an attempted robbery. (R1:V2 – 3823; Order). Plaintiffs preserved these enumerations of error in their motion to exclude Dr. Topalli, as well as raising them at the December 19, 2018 hearing on the motion. (R1:V2 – 1881-1947); (R1:V5, Transcript – pp. 35-50).

III. 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.

IV. ARGUMENT AND CITATION TO AUTHORITY

A. The Governing Standard of Review

Appeals of the denial of a motion to exclude expert testimony are reviewed for abuse of discretion. *See, e.g., Moran v. Kia Motors Am., Inc.*, 276 Ga. App. 96, 97 (2005).

B. The Trial Erred In Allowing Dr. Topalli To Testify that the Perpetrator Could Not Have Been Deterred.

Although the trial court ruled that Dr. Topalli can testify that the perpetrator could not have been deterred, what Dr. Topalli actually testified to is that the perpetrator was "probably relatively deterrable." "*Daubert* requires that trial courts act as 'gatekeepers' to ensure that speculative, unreliable expert testimony does not reach the jury." *McCovey v. Baxter Healthcare Coprp., 298 F.3d 1253, 1256 (11th Cir. 2002).* If the basis of an expert's opinion is "wholly speculative or conjectural, it must follow his opinion is without foundation and has no probative value." *Bankers Health*, 114 Ga. App. at 111.

The opinion that the perpetrator was "probably relatively undeterrable" is unreliable and has no probative value. Dr. Topalli admitted he was not an expert in security measures (*i.e.*, crime deterrents) and said that he was not even sure what is

meant by "reasonable deterrence." (R1:V20, Depo – p. 187). Dr. Topalli further admitted that he "can't offer anything specific about this [perpetrator], other than what I can infer from where and when he chose to engage in this offense." (*Id*. at p. 189). These admissions make clear that Dr. Topalli's opinions as to the deterrability of the perpetrator are not reliable. Furthermore, "probably relatively undeterrable" has no probative value whatsoever and is not helpful to the jury.

"[O]ne may be considered an expert but still offer unreliable testimony." *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1342 (11th Cir. 2003). Dr. Topalli may be an expert in offender decision making as he says, but his opinions regarding the deterrability of this offender by reasonable security measures at this property are unreliable and not admissible. The trial court abused its discretion in allowing this testimony.

C. The Trial Court Erred in Ruling that Dr. Topalli Can Offer the Opinion that It Is Unlikely the Assault of Mr. Houston Was an Attempted Robbery.

The trial court also abused its discretion in allowing Dr. Topalli to testify that it is unlikely the assault was an attempted robbery (or in Dr. Topalli's words, it was an "atypical robbery"). (R1:V20, Depo – pp. 107-108, 122, & 150). Dr. Topalli explained that the significance of this opinion "has to do with … what kind of offenses would be expected at the property," which is a foreseeability opinion. (*Id*. at p. 122). As noted above, Defendants stated in their brief in response to

Plaintiffs' motion to exclude Dr. Topalli that they were not offering Dr. Topalli to provide opinions regarding foreseeability. (R1:V2 – 1972, footnote 2). Additionally, Dr. Topalli said his area of expertise is in the "decision making of offenders." (*Id*. at p. 131). He did not say it is in foreseeability of crime.

Dr. Topalli then used his "atypical robbery opinion" as a jumping off point to offer rank speculation and conjecture about what might have happened. Dr. Topalli testified that Mr. Houston and the perpetrator "could have" known each other and that "it is possible" they knew each other. (*Id*. at pp. 219-220). He even testified that "[i]t could be that [Houston] cut him off in traffic" or that "Mr. Houston had some relationship with the person," or "[i]t could be that it's a guy that he knew from someone else who was driving by and saw him and was angry at him or something like that." (*Id*. at p. 216). Dr. Topalli even said that he could not "rule out that [the attack] could have been just a personal beef that somebody had with [Mr. Houston] …." (R1:V20, Depo – p. 216).

This testimony is pure speculation bounded not at all by facts. It is an example of the most pernicious type of expert testimony – rank speculation by someone with the aura and credibility of an expert.

As further evidence of the unreliability of Dr. Topalli's opinions, he testified that one of the reasons he opined that it was an "atypical robbery" is because Mr. Houston testified that the perpetrator used brass knuckles. (R1:V20, Depo – pp.

113-114, 200-202, 209-210, 214-215, & 219). This is a mischaracterization of Mr. Houston's testimony.

Despite Mr. Houston's severely 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 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 clear answer, Dr. Topalli used Mr. Houston's impaired and confused testimony as a basis for his opinions and ignored Mr. Houston's clear answer that he does not know if the man hit him with brass knuckles.

"[W]hen the basis of his opinion … is wholly speculative of conjectural, it must follow that his opinion is without foundation and has no probative value." *Layfield v. Department of Transp.*, 280 Ga. 848, 850 (*quoting Bankers Health & Life Ins. Co. v. Fryhofer*, 114 Ga. App 107, 111 (1966)). Trial courts are required to "act as a gatekeeper to insure that speculative and unreliable opinions do not

reach the jury." *McClain v. Metabolife Intl., Inc.*, 401 F.3d 1233, 1237 (11th Cir. 2005). Dr. Topalli's speculative and unreliable testimony does not assist the jury, nor does the jury need this speculative testimony to resolve any issue. The trial court abused its discretion, and Plaintiffs respectfully ask this Court to exclude this this testimony and restrict the use of this type of speculative testimony by experts in these cases.

CONCLUSION

Given the testimony above and governing standards for abuse of discretion, the trial court's denial of the Plaintiffs' motion to exclude the above testimony was clear error and should be reversed.

This 24th day of May, 2019.

Respectfully submitted,

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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 3,649 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 24th day of May, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 24th day of May, 2019 filed a PDF copy of this **Cross-Appellants' Initial Brief** 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:

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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 24th day of May, 2019.

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