**Defense of a Third-Party Criminal Act Case**

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**I. The World of *Carmichael***

**A. Reasonable Foreseeability of Third-Party Criminal Acts**

“Where an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe.” O.C.G.A. § 51-3-1. While a property owner is “bound to exercise ordinary care to protect the invitee from unreasonable risks” of which he has knowledge, he is not an insurer of an invitee’s safety.   
Georgia CVS Pharmacy, LLC v. Carmichael, 316 Ga. 718, 721 (2023) (citing   
Lau’s Corp. v. Haskins, 261 Ga. 491, 492 (1991)). “Moreover, the law recognizes that, where an invitee is injured by a third party’s intervening criminal act, the proprietor is generally insulated from liability; an exception to this general rule arises, however, where the proprietor had sufficient reason to anticipate such criminal conduct.” Id. (citing Martin v. Six Flags Over Georgia (II), L.P., 301 Ga. 323, 328 (2017)).

“As a general rule, in order to recover on a premises liability claim arising from third-party criminal conduct, a plaintiff must present evidence of a duty, a breach of that duty, causation, and damages.” Id. (citing Goldstein, Garber & Salama, LLC v. J.B., 300 Ga. 840, 841-42 (2017)). The “reasonable foreseeability of third-party criminal conduct is properly considered as part of a proprietor’s duty to exercise ordinary care in keeping the premises and approaches safe under O.C.G.A. § 51-3-1 although considerations of foreseeability also inform other elements of a premises liability claim…” Id. at 721-22.

Under longstanding precedent, “[i]f the proprietor has reason to anticipate a criminal act, he or she then has a duty to exercise ordinary care to guard against injury from dangerous characters.” Id. at 722 (quoting Lau’s Corp., 261 Ga. at 492). But “without foreseeability that a criminal act will occur, no duty on the part of the proprietor to exercise ordinary care to prevent that act arises.” Id. (quoting Days Inns of America v. Matt, 265 Ga. 235, 236 (1995)).

A “finding that third-party criminal conduct was reasonably foreseeable and thereby gave rise to a duty to protect invitees from that harm does not itself establish the proprietor’s liability for the plaintiff’s injury.” Id. at 723. “Instead, a factfinder must go on to address the next element of negligence: to determine whether the proprietor acted reasonably in the face of the particular foreseeable risk or whether the proprietor breached its duty to do so. So, foreseeability bears on this separate inquiry, too, but in a relative sense: for example, the factfinder must weigh the likelihood and severity of the foreseeable harm against the cost and feasibility of additional security measures in considering whether the duty owed was breached.” Id. “In such circumstances, a factfinder must decide whether the proprietor’s security measures were reasonable, even though the criminal act was reasonably foreseeable in the broad sense necessary to establish a duty. If the trier of fact deems the proprietor’s security measures reasonable in light of the circumstances, or if the plaintiff fails to present evidence that the security precautions employed to protect against the particular foreseeable risk of harm violated the applicable standard of care, then there was no breach of duty, and there can be no finding of negligence.” Id. (citations omitted).

Because “the question of whether a legal duty arises in a particular case turns on the presence of certain factual circumstances, the factfinder also has a role to play in determining whether a third party’s criminal attack was reasonably foreseeable. This determination will often turn on factual questions, such as the nature of the crimes, if any, that previously occurred on or near the premises, where and when those crimes happened, what information the proprietor knew about the crimes, and whether that information gave him reason to anticipate the harm that occurred.” Id. at 724-25 (citing Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 786 (1997)). For this reason, “the question of reasonable foreseeability in this context is generally a question for the jury to decide.” Id. at 725.

“Of course, as with any jury question, the trial court, in ‘plain and palpable cases,’ may resolve the question of reasonable foreseeability as a matter of law – that is, if the court concludes on summary judgment that no rational juror could resolve the issue in the non-moving party’s favor.” Id. (citing Lau’s Corp., 261 Ga. at 493). “But where the evidence is sufficient to create a genuine issue of material fact with respect to whether third-party criminal conduct was foreseeable under the facts of a given case, then the matter is for the jury to resolve.” Id. (citations omitted).

“The facts establishing foreseeability in a particular case may vary, but evidence of substantially similar prior criminal activity is typically central to the inquiry. As [the Supreme Court] has previously set forth, reasonable foreseeability can be established by evidence showing that the proprietor had knowledge of prior criminal activities that ‘occur[red] on or near the premises so that a reasonable person would take ordinary precautions to protect his or her customers or tenants against the risk posed by that type of activity.’” Id. at 727. “This reflects the commonsense notion that knowledge of past criminal conduct can give a proprietor ‘reason to anticipate’ – and thus protect against – future criminal conduct on the premises.” Id. “Whether knowledge of such past crimes in fact gave the proprietor reason to anticipate the criminal act in question – i.e., whether the act was reasonably foreseeable – depends on the ‘location, nature and extent of the prior criminal activities and their likeness, proximity or other relationship to the crime in question.’” Id. at 727-28. If “the past crimes in question (1) happened closer in proximity to the subject premises, (2) happened closer in time to the criminal conduct at issue, (3) happened more frequently, and (4) were more similar to the act that is the subject of the litigation, then all else equal, a proprietor will ordinarily have better and stronger reasons to anticipate that the particular criminal act could occur on the premises.”[[1]](#footnote-1) Id. at 728.

However, the Supreme Court rejected a reading of prior cases imposing a bright-line requirement that a plaintiff identify a substantially similar prior crime as an essential element of reasonable foreseeability. Id. at 730-32. The Court summed up its holding:

In the end, the relevant question here is the one our cases have asked for nearly 70 years: whether the totality of the circumstances establish reasonable foreseeability such that the proprietor has a duty to guard against that criminal activity. While evidence of substantially similar prior crimes – crimes with a likeness, proximity, or other relationship to the criminal act at issue that give a proprietor reason to anticipate such an act occurring on the premises – may often be one of the most probative considerations in answering that question, it is not a required consideration, and other circumstances may be relevant, too. And unless the court determines that no rational juror could disagree on the answer, that question is one for the jury.

Id. at 732.

Plaintiff James Carmichael was shot during an armed robbery in the parking lot of a CVS store, and he brought a premises liability case against CVS, alleging that it failed to implement adequate security measures to protect its customers. Id. At trial, employees who worked at the store at which Carmichael was injured testified that the store was located in a high-crime area and that the employees and managers considered the parking lot unsafe. Id. The employees further testified that female employees were regularly escorted to their vehicles and that employees parked near the building because of the poor lighting in the parking lot. CVS had previously employed a security guard, and evidence showed that after CVS discharged the security guard, three crimes occurred at the premises prior to the shooting at issue in this case – two armed robberies of employees inside the store (one of which occurred fewer than thirty days before the crime at issue, and the other of which occurred about two years earlier) and one robbery of a customer in the parking lot (approximately six months before the crime at issue).

On appeal, CVS argued that the three prior crimes were not substantially similar to the one at issue in the underlying case. Specifically, with respect to the two in-store robberies, CVS attempted to distinguish the crimes on the bases that they occurred in the store rather than in the parking lot, were committed against employees rather than customers, and did not involve the discharge of a firearm. As for the parking lot robbery, CVS argued that the crime did not involve the use of a weapon and resulted in a less severe injury. Id. at 733.

The Supreme Court rejected these arguments because prior “crimes need not be identical to the crime in question to be relevant evidence bearing on foreseeability.” Id. Accordingly, the facts that the two armed robberies were committed in the store (as opposed to in the parking lot), were committed against employees (as opposed to customers), and did not involve the discharge of a weapon did not, as a matter of law, establish that they were so dissimilar or so remote as to make them improper for consideration with respect to the proprietor’s duty. Viewed as part of the totality of the circumstances, the proximity, timing, frequency, and similarity of the prior acts all informed the question of reasonable foreseeability of the crime at issue. Id. The in-store crimes and the parking lot robbery of a customer all involved confrontational attacks on persons, and a jury could rationally conclude that they were “sufficient to attract the [proprietor’s] attention to the dangerous condition which resulted in the litigated incident,” and were of the sort that could have prompted a “reasonable person [to] take ordinary precautions to protect his or her customers ... against the risk posed by that type of activity.” Id. (citing Sturbridge, 267 Ga. at 786). And taking into account the totality of the circumstances, the jury was authorized to consider evidence that female employees were regularly escorted to their vehicles, that the store was in a high-crime area, and that employees considered the parking lot dangerous demonstrated CVS’s knowledge of the hazardous conditions in assessing whether the attack was reasonably foreseeable. Id. Therefore, the Court could not say that “no rational juror could find that these prior crimes gave the proprietor reason to anticipate a criminal attack like the one that occurred constituted a risk that the proprietor had a duty to account for.” Id.

**B. Cases Following *Carmichael***

In Suresh & Durga, Inc. v. Doe, 369 Ga. App. 787 (2023), the defendant, owner of the America’s Best Inn & Suites motel in Decatur (“ABIS”), appealed from the trial court’s denial of its motion for summary judgment in the plaintiff Doe’s action for negligence and premises liability based on crimes committed against her on the motel’s premises. The plaintiff, while 17 years old, was brought to ABIS by Bryant Owens and ordered to sell herself for sex; she walked to a nearby gas station and found a man willing to pay her $50 in exchange for sex. Id. at 788. The plaintiff came back to the motel room to complete the transaction, resulting in illegal sex trafficking of a minor. Id.

“Before Doe could dress herself, Owens and a female accomplice came into the room. The woman physically assaulted Doe and stole her clothes and phone, while Owens took the money Doe had earned in the sex transaction. They left Doe naked in the motel room.” Id. “Doe wrapped herself in a comforter and went to the motel office for help. Initially, ABIS employees would not call the police for Doe, instead laughing at her ‘like they see this all the time.’ However, she eventually pulled a fire alarm and was allowed to use the phone to call law enforcement.” Id.

Doe asserted that Defendant knew or should have known that dangerous and violent activities (including prostitution, drug crimes, and sex trafficking) were taking place and likely to recur on its premises, and should have taken steps “to prevent the motel from being used as a venue for [Doe’s] minor sex trafficking.” Id. at 790. Doe alleged that the danger to those on its premises was foreseeable to Defendant due in part to a long history of prior criminal activity on the property, including crimes similar to the one perpetrated against Doe. Id. Doe cited 45 offenses committed at ABIS prior to her visit to the motel that she claimed were at least investigated by the police. Id. Dozens of police reports appeared in the record documenting investigations of crimes that took place at ABIS in the few years before Doe’s incident, with witness/complainant documentation and officer narratives regarding police interactions with ABIS employees. Id. An officer who worked with the Internet Crimes Against Children (“ICAC”) unit of the DeKalb County Police Department testified that ABIS was “a hotel we went to frequently” to investigate sex trafficking against minors. She interacted with hotel employees during these investigations to obtain records and surveillance videos, and to question if they witnessed any criminal activity. Id. at 791.

Doe deposed four women who testified to being trafficked for sex at ABIS. One of these women testified that an ABIS employee purchased sex from her while she was being trafficked at the property. Id. Another woman testified that her trafficker specifically chose ABIS because “ABIS didn’t care if pimps were selling girls for sex — they were fine with that” and another testified that, due to the manager’s reputation for purchasing sex, the traffickers believed he would not report anything to the police. Id.

The trial court found that Doe had met her burden of establishing that a reasonable juror could find that she had met the elements of her premises liability claim because the evidence showed that there was a dispute of material fact as to the foreseeability of the crime committed against her. Id. at 792. On appeal, the defendant argued that prior crimes committed on the ABIS property, or at least the ones it knew about, were not substantially similar enough to the unique crime of sex trafficking to render Doe’s injuries foreseeable. Id.

Relying on Carmichael, the Court of Appeals agreed with the trial court that, under the totality of the circumstances test, there were disputed questions of fact concerning whether the crime committed against Doe was reasonably foreseeable to Defendant. Id. at 793. Doe presented evidence that could allow a rational juror to find in her favor, including the history of crime at ABIS, testimony concerning the open and obvious nature of the criminal activity, the multiple security cameras allowing employees to witness the activity, and allegations of motel employees’ interactions with victims. Id.

Defendant also argued that Doe failed to establish whether it breached its duty of care by failing to take adequate security measures, and in turn whether that breach led to Doe’s injuries. According to Defendant, Doe could not show that the additional security measures she alleged Defendant should have undertaken would have prevented the crimes against her. Defendant argues that its established security measures were within the level of ordinary care required to be exercised under the risks as they were known to Defendant. Id. at 794-95.

The Court of Appeals noted that plaintiff was required to show that breaches by the defendant led to her injuries. Id. at 795. “If ‘a jury would have to speculate’ that the ordinary care measures the plaintiff is alleging were required would have prevented the third-party criminal actor from completing the crime, then ‘[t]he causal connection between the [defendant’s] conduct and [the plaintiff’s] injury is simply too remote for the law to permit a recovery,’ as “[s]peculation that raises a mere conjecture or possibility is not sufficient to create even an inference of fact for consideration on summary judgment.” Id. (quoting Johns v. Housing Auth. for City of Douglas, 297 Ga. App. 869, 871-72 (2009)). For “purposes of determining foreseeability in the proximate causation (as opposed to duty) context, the relevant question is whether, assuming the proprietor had and breached a duty to protect against certain criminal conduct, the kind of harm that occurred was a foreseeable result, or a ‘probable or natural consequence of,’ that breach.” Id. (quoting Carmichael, 316 Ga. at 734).

The Court of Appels held that Doe had established a jury question on breach and causation. Doe presented the testimony of a security expert, John Villines, who also prepared a lengthy written report on his analysis of the adequacy of the security measures used by ABIS. Id. Villines opined that ABIS failed to meet “the ordinary standard of care for the security profession” by failing to: assess security vulnerabilities at the site; conduct reasonable inspections to discover dangerous conditions; create a written, site-specific security plan; train staff on security in general and specific to sex trafficking; report criminal incidents; adequately monitor cameras; or engage security guards on the premises. Id. He opined that these failures contributed to an environment wherein the risks of prostitution and human trafficking were not adequately identified or addressed. Id. Defendant argued that his opinion was speculative, but the manager of ABIS also testified that motels should train their staff on identifying suspicious activity regarding prostitution or sex trafficking, but ABIS employees testified that they received no such training. Id. at 795-96. Further, witnesses testified that ABIS had a reputation as a safe haven for sex crimes and that criminal traffickers chose locations to victimize women based on this type of reputation. Id.at 796. Also, there was at least some evidence that the motel may have been reluctant or negligent in calling the police and/or reporting incidents, as allegedly happened when Doe sought help from ABIS’s staff.” Id. Given the summary judgment standard and the evidence in the record, Doe “raised a triable issue of fact regarding a possible causal connection between Defendant’s failure to implement and follow security measures and Doe’s injuries.” Id. (citing FPI Atlanta v. Seaton, 240 Ga. App. 880, 883-84 (1999)).

In Pappas Restaurant, Inc. v. Welch, 371 Ga. App. 614 (2024), Cynthia Welch was injured and her husband Anthony was killed in a shooting in the parking lot of Pappadeaux Restaurant, and she sued Pappas Restaurant, Inc., which owned the property. The trial court denied Pappas’s motion for summary judgment, and the Court of Appeals reversed. The Georgia Supreme Court granted certiorari, consolidated the case with Carmichael, and reversed the Court of Appeals opinion in part, vacated it in part, and remanded for further consideration. Id. On remand, the Court of Appeals concluded that the trial court properly denied the motion for summary judgment because issued of fact remained that must be resolved by a jury. Id. at 615.

The record evidence in the case showed that Pappas owned Pappadeaux and another restaurant on the same property on Windy Hill Road, with parking lots for each and a lower lot for overflow parking. Id. The parking lots are well-lit, and there are surveillance cameras throughout the area. Id. To patrol the grounds, Pappas hired Tactical Security Group, LLC to provide unarmed, uniformed security guards to deter crime such as automobile break-ins and loitering, and to assist with traffic issues. Id. On Friday nights, two guards were assigned to patrol the lots, and a third guard was stationed in the fire lane in front of Pappadeaux to monitor traffic. Id. The guards patrolled the lots on foot or in marked security cars with flashing lights. Id.

On October 7, 2016, Welch and her husband went to dinner at Pappadeaux and parked in the lower lot. Id. Because the restaurants were extremely crowded that night, with customers waiting over an hour to be seated, there were many people in the parking lot area. Id. Although there were three guards on site most of that evening, one guard left at 10:00 p.m. Id. After that, one of Tactical’s guards patrolled the parking lot while the second guard remained stationed in the fire lane. Id. Shortly after 10:00 p.m., as the Welches walked through the parking lot back to their car, a man stepped in front of them, demanded their belongings, and then shot both of them. Id. at 615-16. Anthony was killed. Id. at 616. The shooter and his accomplices were later captured and convicted of murder. Id. Welch sued Pappas and Tactical for premises liability, negligence, and wrongful death. Id.

The Court of Appeals determined that the evidence showed that Pappas knew that a substantial number of car break-ins and property crimes had occurred on its property and in the surrounding area. Id. at 616-17. Welch’s expert opined that the prior criminal activity in the parking lot and nearby put Pappas on notice, especially in light of deficiencies in Pappas’s security plans. Id. at 617. And Tactical suggested to Pappas that it increase security coverage because visible guards act as a deterrent. Id. Therefore, the court concluded under the totality of the circumstances that the facts raised a jury question on the issue of reasonable foreseeability of the criminal act. Id.

Welch argued in the trial court, and Pappas did not appear to dispute on appeal, that Pappas breached its duty by failing to give Tactical guards written policies and procedures, to monitor and supervise the guards, to require the guards to be properly trained and supervised, and to give Tactical’s guards access to surveillance cameras. Id. at 617 n.4. Since Pappas did not argue that it acted reasonably in the face of the foreseeable risk of third-party criminal conduct, the Court of Appeals assumed that its conduct breached its duty and moved on to consider whether Welch could show that the breach was the proximate cause of Anthony’s death. Id. at 617.

In analyzing proximate cause, “the relevant question is whether, assuming the proprietor had and breached a duty to protect against certain criminal conduct, the kind of harm that occurred was a foreseeable result, or a ‘probable or natural consequence[ ]’ of, that breach.” Id. (quoting Carmichael, 316 Ga. at 734). “But ‘probable, in the rule as to causation, does not mean ‘more likely than not,’ but rather ‘not unlikely’; or, more  definitely, such a chance of harm as would induce a prudent man not to run the risk; such a chance of harmful result that a prudent man would foresee an appreciable risk that some harm would happen.’” Id. at 617-18 (quoting Paradise Ent. Group v. Favors, 363 Ga. App. 636. 639 (2022)).

The requirement of proximate cause constitutes a limit on legal liability; it is a policy decision that, for a variety of reasons, e.g., intervening act, the defendant’s conduct and the plaintiff’s injury are too remote for the law to countenance recovery. And, a general rule of proximate cause is that a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience.

Id. at 618 (quoting Goldstein, Garber & Salama v. J.B., 300 Ga. 840, 842 (2017)). “Evidence seeking to establish causation cannot be speculative or too uncertain.” Id.

Welch presented evidence including video surveillance from the night of the shooting that showed two guards located in the fire lane, when one should have been patrolling the lower lot. Video also showed Tactical guards talking with Pappas employees, giving customers a ride from the parking area, and smoking. Id. Pappas’s head of security, Scott Heenan, testified that he made the decision to hire security, and there were two guards assigned to the Pappadeaux’s lot, one of whom remained in the fire lane, and one guard assigned to the Pappasito’s lot. Id. The guards were there to provide a visible deterrent to crime by patrolling the parking area. Id. Heenan’s testimony confirmed that Pappas was aware of, and took action to stop, property crimes such as break-ins of unattended cars, and that they had been successful in deterring property crimes in the parking lot. Id. Heenan expected the guards to be patrolling during their shift, and not sitting together in cars for prolonged periods. Id.

Joann Altman, one of Pappas’s security managers, acknowledged that Pappas had a responsibility to oversee the security company and guards used at the property. Id. at 618-19. According to Altman, Pappas gave Tactical post orders for the guards to follow and offered training programs that overlapped with those orders. Id. at 619. The guards assigned to the lots were supposed to patrol and be visible. Id.

The week before the shooting occurred, Tactical advised Pappas of an increase in crime in the “area.” Id. And, a few days before the incident, Tactical notified Altman that there had been 69 car break-ins in “the Atlanta area” in the past week, and that it was “a professional crew that [had] the police baffled.” Id.

Tactical security guard Jerry McRae, who was stationed in the fire lane the night of the shooting, explained that one guard would be stationed in the fire lane to prevent anyone from parking there, and the other two would patrol the upper and lower lots. Id. McRae admitted that it would be problematic if the video showed that the guards did not patrol several times an hour. Id. He also agreed that there was no need for two guards to be parked in the fire lane. Id.

One of Tactical’s former security guards, Patrick Cormier, testified that he was generally aware of car break-ins on the property, but had not been told of an increase in incidents in the weeks leading up to the shooting. Id. Cormier opined that it would have been important to know this so that the guards could adjust accordingly. Id. Cormier would expect the guards on duty to patrol at least three times an hour, and he noted that it was difficult to control people loitering because the restaurants were busy and people often had to wait. Id. at 619-20. Cormier admitted that on the night of the shooting, one of the guards left at 10:00 p.m.; the second guard did not patrol according to schedule; and the third guard on patrol was distracted by customers and transporting women in his security vehicle. Id. at 620.

Welch also submitted testimony from security expert John Villines, who opined that the security was deficient in numerous ways. Id. According to Villines, Pappas (1) failed to assess areas of vulnerability; (2) was deficient in its record keeping and training, which led to uninformed decisions about security measures; (3) did not have a written security plan or post orders and/or failed to inform Tactical of such orders; (4) failed to properly use video surveillance; and (5) failed to supervise its security services. Id. Villines further opined that Tactical failed to screen, train, and supervise its security guards. Id. As to the specific attack, Villines asserted that Tactical failed to adequately patrol the lots that evening. Id.

Villines explained that the failure to provide more security in the face of increasing criminal activity enabled Anthony’s killers to access the parking lot, loiter for several minutes undetected, commit the crime, and escape. Id. He stated that the assailants were likely “deterrable,” and that the presence of attentive security guards probably would have prevented the crime. Id.

Pappas argued that the evidence was purely speculative as to whether increased security would have prevented the murder, but the court concluded that the evidence was sufficient to raise a factual question as to causation. Id. There was testimony from Pappas and Tactical employees that security had reduced crime on the property, leading to the conclusion that Welch has offered more evidence than speculative expert testimony. Id. at 620-21. There was also testimony that only two guards were on duty that night, instead of three, and the video surveillance showed the guards stationed in the fire lane and distracted by customers. Id. at 621. There was also evidence that Pappas was aware of an increase in crime in the area in the weeks before the murder, and that Tactical had recommended additional security. Id. Thus, it was for the jury to weigh the evidence and determine if Pappas’s conduct was the proximate cause of Anthony’s murder. Id. (citations omitted).

In Wiltse v. Wal-Mart Stores, East, L.P., 720 F. Supp.3d 1313 (N.D. Ga. 2024), the plaintiff was shot in a Wal-Mart parking lot. When Plaintiff arrived at Wal-Mart, she parked her car, entered the store, and shopped inside for about thirty minutes. Id. at 1316. While Plaintiff was in the store, a red pickup truck arrived in the parking lot and stopped briefly in at least one parking space before moving to the back, empty area of the parking lot. Id. at 1316-17. When plaintiff exited the store, she approached a Kia Soul, mistakenly believing it was her car. Id. at 1317. She did not have keys to the car in her purse, but Wal-Mart’s camera footage showed her standing near the Kia Soul for several minutes, attempting to enter the car and speaking to another patron in the parking lot. Id. While the plaintiff was near the Kia Soul, the red pickup truck moved closer to Plaintiff, and Plaintiff walked toward the truck and appeared to speak with the driver. Id. Simultaneously, the Kia Soul owner returned to the vehicle and began to back out of the parking spot. Id. Plaintiff believed someone was stealing her car, jumped toward the Kia Soul, rolled off the vehicle, and fell to the ground. Id.

The Kia Soul continued down the aisle, turned into the parallel aisle, and then paused directly across from the red pickup truck. Id. Plaintiff stood up and approached the driver’s window of the red pickup truck. Id. Someone in the red pickup truck then shot Plaintiff in the right shoulder. Id. Plaintiff fell to the ground, and the red pickup truck and the Kia Soul both drove away from the scene. Id. Plaintiff was treated at the hospital and discharged without surgery. Id. Plaintiff brought suit for failure to keep the premises safe under O.C.G.A. § 51-3-1. Id.

Wal-Mart argued that the plaintiff was only a licensee on its property at the time of her injury. Id. at 1318. The duty of a landowner to keep its premises safe for visitors “depends, to a certain extent, on whether the one entering the property is an invitee, a licensee or a trespasser.” Cham v. ECI Mgmt. Corp., 311 Ga. 170, 173 (2021) (quoting Lipham v. Federated Dep’t Stores, 263 Ga. 865, 865 (1994)). Landowners owe invitees a duty of ordinary care in keeping their premises safe. Id. (citing O.C.G.A. § 51-3-1). A person coming onto a landowner’s property is an invitee if the owner or occupant of the premises “will receive some benefit, real or supposed, or has some interest in the purpose of the visit.” Id. at 174 (quoting Anderson v. Cooper, 214 Ga. 164, 169 (1958)). A “person may be deemed an invitee if his presence on the property is of mutual benefit to both him and the landowner[.]” Id. (quoting Matlack v. Cobb Elec. Membership Corp., 289 Ga. App. 632, 634 (2008)).

Landowners owe a different and lower standard of care – liability only for “willful or wanton injury” – for visitors who are classified as licensees. Id. A licensee is a person who is “neither a customer, a servant, nor a trespasser,” “[d]oes not stand in any contractual relation with the owner of the premises,” and is “permitted, expressly or impliedly, to go on the premises merely for his own interests, convenience, or gratification.” Id. (quoting O.C.G.A. § 51-3-2). A licensee “falls between” an invitee and a trespasser.”[[2]](#footnote-2) Id.

Wal-Mart argued that because the plaintiff left its store without making a purchase, she was a licensee who was “no longer in any present, mutually beneficial, business relation with Walmart.” Wiltse, 720 F. Supp.3d at 1319. Wal-Mart focused on the plaintiff’s “actions after leaving the store, arguing that she was engaging with other patrons in the parking lot, which did not contribute to a beneficial relationship” with it. Id. The plaintiff, on the other hand, argued that the purpose of her visit controlled whether she was an invitee, and she visited Wal-Mart to shop, putting her in a mutually beneficial relationship with it. Id.

The court noted that where “there is conflicting evidence regarding one’s status on the premises, it is a question of fact left to the jury.” Id. (citing Ga. Dep’t of Corr. v. Couch, 312 Ga. App. 544 (2011)). “A rational juror could find that Plaintiff was an invitee at the time of the shooting. Plaintiff asserts that she went to Wal-Mart to shop, tried to make a purchase, and was a regular customer at the store.” Id. The court further noted that “when a plaintiff was originally an invitee on the premises, whether the plaintiff lost that status before the incident is also a question for the jury.” Id. at 1319-20 (citing Clark Atlanta Univ., Inc. v. Williams, 288 Ga. App. 180 (2007)).

Wal-Mart further argued that it did not owe the plaintiff a duty to protect her from the shooting because the incident was unforeseeable. Id. at 1320. Wal-Mart acknowledged that prior criminal incidents had happened at the store, including multiple shootings, but argued that the prior incidents were not substantially similar to the crime against Plaintiff, making the crime unforeseeable. Id. The plaintiff presented evidence of at least 10 prior crimes on the Wal-Mart property, including three shootings in the two years preceding her incident. Id. The court determined that based on the evidence, a rational juror could find that the crime against the plaintiff was reasonably foreseeable. Id.

Wal-Mart argued that its lack of parking lot security was not the proximate cause of the plaintiff’s injuries because speculation as to whether a security presence would have prevented a crime does not show proximate cause. Id. at 1323. The plaintiff contended that Wal-Mart’s security personnel had recommended increasing security coverage to promote safety at the store after multiple crimes occurred on the property in 2021, and one of Wal-Mart’s representatives acknowledged that parking lot security can be a deterrent to crime on the property. Id. at 1324. Plaintiff also showed that customers at that location were almost six times more likely to be a victim of a crime than at the average location in the United States. Id. The court therefore concluded that a rational juror could conclude that the shooter would have been deterred by a security presence in the parking lot and that given the violent crimes on the premises, Wal-Mart’s conduct caused the plaintiff’s injuries. Id.

In Villages of Cascade Homeowners Assoc., Inc. v. Edwards, 363 Ga. App. 307 (2022), the Villages of Cascade was a development of approximately 126 townhomes in Atlanta. The owners of the townhomes were members of a homeowners association, the Villages of Cascade Homeowners Association (“VCHOA”). Id. at 307. The VCHOA was responsible for maintaining common areas of the property, including the vehicle entrance and exit gates. Id. On September 10, 2015, residents of the Villages noticed that the vehicle exit gate was broken, and the VCHOA board president emailed Community Management Associates (“CMA”), the property management company, requesting that the gate be repaired. Id. CMA forwarded the email to Timothy Pfeiffer, the “gate repairman” for the Villages, approximately one minute later. Id. On September 12, Pfeiffer emailed a quote for repairing the gate to CMA and VCHOA, and VCHOA provided signed approval that day. Id. at 307-08. The gate repair was completed at or around the end of September, after the gate was refabricated. Id. at 308.

On September 14, 2015, the plaintiff Edwards was robbed of his keys, wallet, and phone and shot in the left hand; the two robbers then left the Villages through the broken exit gate. Id. Edwards presented evidence showing that his shooting was not the first criminal activity that had occurred at the Villages. Id. Since 2012, the Villages had experienced incidents of robbery, burglary, trespassing, and vandalism. Id. These crimes were often reported to residents via e-mails entitled “Crime Alert” from the VCHOA Board of Directors. Id. Edwards sued VCHOA and CMA asserting claims for negligence, nuisance, and premises liability. Id. VCHOA and CMA filed motions for summary judgment. Id. The trial court granted CMA’s motion in its entirety and granted VCHOA’s motion as to Edwards’s claim of negligence per se while denying it as to Edwards’s remaining claims. Id. The Court of Appeals granted VCHOA’s application for interlocutory appeal. Id.

The Court of Appeals noted that the VCHOA was not a typical property owner but was composed of the individual homeowners themselves and was governed by covenants agreed to by the homeowners. Id. at 309. Its budget was limited to the dues paid by its members. Id. Beyond providing physical maintenance of common areas such as shared landscaping, private roadways, parking areas, and the entrance gates, the duties of the VCHOA outlined in the covenants did not include providing security. Id.

The Court of Appeals assumed that Edwards was an invitee, under which the standard of care owed by VCHOA was ordinary care, i.e., reasonableness. Id. “Exactly what constitutes ‘ordinary care’ varies with the circumstances and the magnitude of the danger to be guarded against.... But, to be negligent, the conduct must be unreasonable in light of the recognizable risk of harm.” Id. (quoting Lau’s Corp. v. Haskins, 261 Ga. 491, 493 (1991)). “This means that ‘[a]lthough a landowner has a duty to invitees to exercise ordinary care to keep its premises safe, the landowner is not an insurer of an invitee’s safety.’” Id. (quoting Agnes Scott College v. Clark, 273 Ga. App. 619. 621 (2005)).

“Here, when the VCHOA was notified of the broken gate, it initiated remedial action the same day and approved an estimate for the repair work two days later; the gate, which needed refabrication, was fully repaired a mere eleven days later. Edwards’s injury occurred four days after the gate was broken and only two days after the estimate was approved.” Id. at 309-10. Thus, the undisputed facts did not support an inference that VCHOA failed to meet its burden to act reasonably after being notified of the broken gate. Id. at 310. There was “no evidence that VCHOA could have gotten the repair done before Edwards was attacked, and to hold otherwise would be to put the VCHOA in the role of an insurer of the safety of anyone lawfully on the property. This is contrary to Georgia law and the covenants governing the Villages.” Id. VCHOA’s prompt remedial measures, which resulted in a successful repair, foreclosed liability “absent some unsupported conjecture that another reasonable course of conduct by the VCHOA would have prevented the crime in this case. But mere conjecture and possibility are insufficient grounds to avoid summary judgment.” Id. (citing George v. Hercules Real Estate Svcs., 339 Ga. App. 843, 846-47 (2016)). Therefore, the trial court erred in denying summary judgment on the premises liability claim. Id.

**II. Defending an Out-of-Possession Landlord**

“A landowner’s duty to visitors is imposed because the landowner has control over the property and is thus able to act in order to protect others from conditions on the property which might cause harm.’” Cham v. ECI Mgmt. Corp., 311 Ga. 170, 174-75 (2021) (quoting Lipham v. Federated Dept. Stores, 263 Ga. 865, 865 (1994)). “But when the landowner cedes possession of the property to a tenant, the landowner’s control over the property and the concomitant ability to make the property safe becomes limited.” Id. at 175 (citing Colquitt v. Rowland, 265 Ga. 905, 906 (1995)). “For this reason, Georgia law has long excepted landlords from general landowner liability with respect to premises possessed by tenants[.]” Id. This exception is codified in O.C.G.A. § 44-7-14, which governs the tort liability of out-of-possession landlords. Williams v. Kasulka Props., LP, 370 Ga. App. 653, 654 (2024) (citations omitted). Indeed, it is error to analyze an out-of-possession landlord’s liability using the principles of premises liability set forth in O.C.G.A. § 51-3-1. Id. at 655 (citing Martin v. Johnson-Lemon, 271 Ga. 120, 123 (1999)).

Under O.C.G.A. § 44-7-14:

Having fully parted with possession and the right of possession, the landlord is not responsible to third persons for damages resulting from the negligence or illegal use of the premises by the tenant; provided, however, the landlord is responsible for damages arising from defective construction or for damages arising from the failure to keep the premises in repair.

“Consequently, an out-of-possession landlord cannot be held liable for damages for a criminal assault on the leased premises, unless the assault was due to negligent construction or maintenance of the premises.” Williams, 370 Ga. App. at 655 (citations omitted).

“The rationale is that the use of the tenements really belongs to the tenant during the lease; they are his property to use for the term for which they are rented; and the landlord has no right to enter upon them, except by permission of the tenant, during the term for which they are rented. To rule otherwise, i.e., to impose liability on a landlord for the negligent acts of his tenant, would yield a harsh and unwanted rule.” Savannah State Univ. Found., Inc. v. Lewis, 370 Ga. App. 180, 182-83 (2023) (quoting Starks v. USG Real Estate Found. III, 361 Ga. App. 406, 410 (2021)).

The question of whether a landlord qualifies as an out-of-possession landlord turns on whether there is evidence of “such dominion and control of the premises [by the landlord] so as to vitiate the landlord’s limited liability imposed by O.C.G.A. § 44-7-14 and replace it with the liability imposed by O.C.G.A. § 51-3-1…” Williams, 370 Ga. App. at 655 (quoting Cowart v. Schevitz, 335 Ga. App. 715, 716 (2016)). Importantly, the Georgia Court of Appeals has held that “a landlord’s right to inspect is not the equivalent of the right to possess premises.” Savannah State Univ. Found,, 370 Ga. App. at 183. “Indeed, landlords still fully part with possession of leased premises when they retain limited entry or inspection rights for landlord-related purposes. This is so because a landlord’s retention of the right to enter the leased premises for landlord-related purposes does not evidence such dominion and control of the premises so as to vitiate the landlord’s limited liability imposed by O.C.G.A. § 44-7-14 and replace it with the liability imposed by O.C.G.A. § 51-3-1…” Id. (quoting Starks, 361 Ga. App. at 410). See also Williams, 370 Ga. App. at 656 (“For example, we have held that landlords were not in possession of premises despite having the right to enter the premises in an emergency, to inspect the premises for landlord-related purposes, to approve tenants’ construction of improvements to the premises, or to approve tenant insurance policies.”).

In Boone v. Udoto, 323 Ga. App. 482 (2013), the plaintiff filed suit against a club’s owners and their landlord after the plaintiff was injured by another club patron who assaulted him in the parking lot. The club’s security officer ejected an unruly patron who retrieved a handgun from his vehicle, re-entered the club, and discharged the weapon several times. Id. at 483. The plaintiff decided to leave the club and encountered the unruly patron in the parking lot, where the latter struck the plaintiff in the eye with the handgun, causing the plaintiff to lose vision in his right eye. Id. at 483-84. The plaintiff filed claims against the club owners and the landlord, which he alleged were proximately caused by the defendants’ negligence. Id. at 484. The trial court granted summary judgment to both defendants. Id.

On appeal, the plaintiff argued that the trial court had erred by failing to find that a question of material fact existed as to whether the landlord was an out-of-possession landlord because he retained certain rights to the premises. Id. at 486. The Court of Appeals disagreed, finding that the club owners “were responsible for maintenance, repair, and replacement, and the landlord had no obligation to repair or maintain.” Id. at 487. The landlord did have the right to inspect and enter the premises and could, in its own discretion, increase security at the sole cost of the club owners, but “such limited rights” did not evidence “such dominion and control of the premises so as to vitiate the landlord’s limited liability imposed by O.C.G.A. § 44-7-14.” Id.

In Savannah State Univ. Found., Inc. v. Lewis, the victim died after he was shot while visiting friends in student housing known as the University Village on the Savannah State University (“SSU”) campus. 370 Ga. App. at 180. The victim’s mother sued defendants Savannah State University Foundation, Inc. (the “Foundation”), and Savannah State University Foundation Real Estate Ventures, LLC (the “LLC”). Id. The Foundation was the LLC’s only member. Id. The LLC leased the University Village buildings to the Board of Regents of the University System of Georgia, and SSU, a member of the Board of Regents, made rental payments to the LLC. Id. at 181. SSU has remained in possession of the property, and the LLC has no authority to control access to the University Village property. Id.

Following discovery, the defendants moved for summary judgment, contending primarily that they could not be liable for the victim’s death because neither defendant was in control or possession of the property where he was shot. The trial court denied the motion, and the Court of Appeals granted interlocutory review. Id.

The Court of Appeals agreed with defendants that the LLC could not be liable for the victim’s death because it was an out-of-possession landlord. Id. The relevant rental agreement (in which the LLC leases the property and buildings to the Board of Regents) expressly granted to the Board of Regents the right to “lawfully, quietly and peacefully have, hold, use, possess, enjoy, and occupy the Premises for the [rental term] without any suit, hindrance, interruption, inconvenience, eviction, ejection, or molestation by the [LLC] or by any other person or persons whatsoever.” Id. at 183. The agreement also gave the Board of Regents the right to terminate the lease if (a) it is deprived of its “right to lawfully, quietly and peacefully have, hold, use, possess, enjoy and occupy the Premises, for any reason whatever”; or (b) the LLC is “unable to deliver possession of the Premises” to the Board of Regents at the beginning of the lease term. Id. The agreement also required the Board of Regents to permit the LLC (or its agents or employees) to enter the property “at all reasonable times for the purpose of inspecting the Premises or ... maintaining or making repairs[,] alterations or additions” thereto. But that right of entry is limited, as it “shall not interfere with [the Board of Regents’] business or quiet use and enjoyment of the Premises.” Id.

The Court of Appeals concluded that under these provisions, there was “no evidence that [the LLC] contractually undertook to remain in possession of” any parts of the premises. Id. (quoting Lake v. APH Enterprises, 306 Ga. App. 317, 320 (2010)). Rather, “the use of the tenements really belongs to the tenant during the lease.” Id. (citation omitted). Further, the LLC’s “retention of the right to enter the leased premises for landlord-related purposes” — i.e., maintenance, repairs, alterations, or additions — does not establish a level of “dominion and control of the premises so as to vitiate the [LLC’s] limited liability imposed by O.C.G.A. § 44-7-14.” Id. The lease provisions instead showed that the LLC was an out-of-possession landlord that had “fully parted with possession and the right of possession.” Id. at 183-84.

The Court of Appeals concluded that “the trial court erroneously concluded that possession and control also may be shown by lease provisions requiring the LLC to provide janitorial, garbage removal, and pest control services; ‘keep and maintain in good order and repair’ the premises; and enter the premises at reasonable times to inspect and maintain the property; as well as a clause requiring the Board of Regents to obtain LLC approval for any improvements.” Id. at 184-85. “But those clauses — which relate to the provision of services and limitations targeted at protecting the LLC’s ownership interest (as distinguished from any potential possessory interests) — do not establish possession or control. And none are significantly different from provisions one would expect to see in many business leases, despite the landlord’s surrender of possession and control to the tenant. Id. at 185 (citing cases).

**III. Application of the Mutual Combat Doctrine**

When “a person is injured in the course of mutual combat, the combatants are deemed to have superior knowledge of the risk of harm, because by their voluntary participation, the combatants have selected the time, date, and place for the altercation. Mutual combat exists where there is a fight with dangerous or deadly weapons and when both parties are at fault and are willing to fight because of a sudden quarrel. In such a case, any injuries to the combatants resulted from their own conduct; under such circumstances, the existence of prior criminal acts on the premises is irrelevant and cannot form a basis for liability on the premises owner.” Jones v. Scarlett & Associates, Inc., 373 Ga. App. 349, 351-52 (2024) (quoting Fair v. CV Underground, LLC, 340 Ga. App. 790, 792-93 (2017)). See also   
Fagan v. Atnalta, Inc., 189 Ga. App. 460, 461 (1988) (“In the absence of anything to the contrary, every adult is presumed to possess such ordinary intelligence, judgment, and discretion as will enable him to appreciate obvious danger. Hence, an adult of ordinary intelligence will be held to be aware of manifest risk or danger of possible injury when he deliberately and voluntarily joins in an affray, as a matter of law.”).

For instance, where a fight broke out at Underground Atlanta and the decedent was shown on surveillance video throwing punches during that fight, the Court of Appeals affirmed the grant of summary judgment to the proprietor when the decedent was shot and killed on site some thirty seconds after the fight ended.   
CV Underground, 340 Ga. App. at 791, 793. Similarly, in Sailor, the Court of Appeals affirmed a grant of summary judgment to a proprietor where the plaintiff was stabbed in the parking lot of a bar while attempting to intervene in a fight between his friend and a group of strangers.   
217 Ga. App. at 811. The plaintiff’s voluntary participation in the fight and resulting injuries could not form the basis for liability of the proprietor. Id. at 813 (“The proprietor had no duty to protect the plaintiff from himself. In fact, it is the plaintiff who had a duty of ordinary care for his own safety.”). Similar results held where a dispute over a defective CD player escalated into a brawl ending with decedent’s violent beating in an apartment complex parking lot, and where a decedent attempted to intervene in an altercation in another apartment complex parking lot and was stabbed. See   
Porter v. Urban Residential Development Corp., 294 Ga. App. 828, 832 (2009);   
Hansen v. Etheridge, 232 Ga. App. 408, 410 (1998).

Ultimately, after entering or starting a fight, superior knowledge of the potential harm *always* remains with a combatant; “having inferior knowledge,” a property owner cannot be held liable.   
Hansen, 232 Ga. App. at 410. See also   
Rappenecker v. L.S.E., Inc., 236 Ga. App. 86, 88 (1999) (“Without question, [the injured plaintiff] had knowledge superior to that of [defendant landowner] of the possible risk of additional trouble with this perpetrator. It was [the plaintiff], not [the landowner], who initiated the unfortunate sequence of events. [Plaintiff] failed to offer any evidence that [the defendant] knew about his actions or those of the person he decided to confront.”).

In Jones v. Scarlett & Associates, Inc., in the early hours of January 3, 2021, a fight broke out in the parking lot of Sheba Ethiopian Restaurant (“Sheba”) in Brookhaven. 373 Ga. App. at 349. Mark Lincoln was working at Sheba as a security guard on the date in question. Id. Specifically, Sheba had contracted with Saint Security, LLC to provide security services, and Lincoln was working for Saint Security at the time of the incident at issue in this case. Id. When Lincoln arrived, a manager informed him that Sheba needed extra security because “a lot of different gang members” were going to be at the restaurant that night. Id. at 349-50.

Lincoln, a convicted felon, was prohibited by law from carrying a firearm, but he was armed on the night in question. Id. at 350. A bartender informed Lincoln that some men had stolen liquor and were attempting to leave without paying a $1,500 bar tab. Id. While Lincoln tried to find the men, he was “pushed” out into the parking lot area. Id. Once in the parking lot, Lincoln attempted to figure out who had “skipped out on the tab.” Id.

Surveillance footage depicts an unidentified man forcefully yanking Jones, who was at Sheba that night with friends, out of the door of the restaurant and onto the sidewalk, while Lincoln exits the building and stands by the door. Id. Surveillance footage later depicts Jones throwing a punch and hitting Lincoln in the face. Id. Lincoln then shoots Jones, who falls to the ground, and Lincoln and the remaining bystanders flee the scene. Id.

Jones filed suit against several defendants, including Scarlett & Associates, Inc. (“Scarlett”), the owner of the property where the shooting occurred ,and alleged that it breached its duty to protect the safety of Jones, its invitee. Id. Scarlett moved for summary judgment, arguing that Jones voluntarily engaged in combat with Lincoln, thereby establishing his superior knowledge of the risk and absolving Scarlett of liability. Id. Jones argued that the mutual combat doctrine was inapplicable because Lincoln had an employment relationship with Scarlett’s tenant, Sheba. Id. at 350-51. Jones also highlighted Lincoln’s status as a convicted felon who was prohibited from carrying a firearm, and argued that Scarlett had constructive knowledge of the risk faced by Jones, pointing to evidence that two prior incidents of violence had occurred on the premises. Id. at 351. The trial court granted Scarlett’s motion for summary judgment based on its determination that, as a matter of law, Jones was a mutual combatant in the incident that caused his injury and, therefore, had knowledge of the risk of harm that was superior to that of Scarlett. Id.

The Court of Appeals determined that “the record demonstrates that the mutual combatant doctrine applied as a matter of law. As described above, Jones had ample time to leave the scene and avoid the possibility of injury from the affray. Furthermore, Jones himself punched Lincoln in the face, and this act precipitated Lincoln’s shooting Jones.” Id. at 352. The Court of Appeals noted that “the application of the mutual combat doctrine is not precluded where a plaintiff lacks knowledge that one of the combatants is armed because ‘(a)n adult of ordinary intelligence will be held to be aware of manifest risk or danger of possible injury when he deliberately and voluntarily joins in an affray, as a matter of law.’” Id. at 353 (quoting Cornelius v. Morris Brown College, 299 Ga. App. 83, 86 (2009)).

The Court of Appeals also found no merit in Jones’s argument that a jury question remained as to Scarlett’s constructive knowledge. Id. In support of this argument, Jones pointed to complaints filed against Sheba in which the plaintiffs alleged that they suffered injuries as a result of third-party criminal attacks at the restaurant. Id. Although Scarlett disputed its knowledge of these alleged prior instances, where the plaintiff’s injuries arise from mutual combat, “the existence of prior criminal acts on the premises is irrelevant and cannot form a basis for liability on the premises owner.” Id. “Put another way, where, as here, the record establishes without dispute that Jones voluntarily engaged in the combat that led to his injuries, his knowledge is deemed superior to Scarlett’s “as a matter of law.” Id. (quoting Fair, 340 Ga. App. at 793).

1. Notably, the Georgia Supreme Court has held that no authority imposes a duty on a property owner to investigate police files to determine whether criminal activities have occurred on its premises. Carlock v. K-Mart Corp., 227 Ga. App. 356, 358 (1997) (citing Sun Trust Banks v. Killebrew, 266 Ga. 109, 109-10 (1995)). [↑](#footnote-ref-1)
2. “A lawful possessor of land owes no duty of care to a trespasser except to refrain from causing a willful or wanton injury.” O.C.G.A. § 51-3-3(b). [↑](#footnote-ref-2)