

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES CARMICHAEL,)
)
Plaintiff,)
) CIVIL ACTION
v.) FILE NO. 16EV005617
)
GEORGIA CVS PHARMACY, L.L.C.,)
)
Defendant.)

CONSOLIDATED PRE-TRIAL ORDER

The following constitutes the Proposed Consolidated Pre-Trial Order of the parties in the above-styled case:

1.

The name, address and phone number of the attorneys who will conduct the trial are as follows:

Plaintiff: **Peter A. Law, Esq.**
 Brian C. Kaplan, Esq.
 Law & Moran
 563 Spring Street, N.W.
 Atlanta, Georgia 30308
 Phone: (404) 814-3700
 Fax: (404) 842-7710

James A. Rice, Esq.
Andrew J. Brandt, Esq.
James A. Rice, Jr., P.C.
563 Spring Street, N.W.
Atlanta, Georgia 30308
Phone: (404) 255-4448

Defendants: **Brian D. Trulock, Esq.**
 Carrie A. Moss, Esq.
 Bendin Sumrall & Ladner LLC
 One Midtown Plaza, Suite 800
 1360 Peachtree Street, N.E.
 Atlanta, GA 30309

2.

Plaintiff:

The estimated time required for trial is:

4 days.

Defendants:

The estimated time required for trial is:

4-5 days.

3.

There are no motions or other matters pending for consideration by the Court except as follows:

Plaintiff:

Plaintiff previously filed his response opposing to Defendants' Motion to Secure Presence of Prisoner/Witness Frankie Gray.

Plaintiff previously filed his Response Brief in Opposition to Defendant's Motion for Reconsideration of Order Denying Defendants' Motion to Exclude the Testimony and Opinions of John Villines.

Plaintiff will file Motions in Limine prior to trial as well as any response in opposition to Defendants' Motion in Limine as directed by the Court.

Plaintiff has corrected the style reflecting that no John Doe CVS Manager was served or added.

Defendants:

1. Defendants' Motions in Limine.
2. Defendants' Motion to Secure Presence of Prisoner/Witness Frankie Gray

3. Defendants' Motion for Reconsideration of Order Denying Defendants' Motion to Exclude the Testimony and Opinions of John Villines.

4. Defendants' objections to Plaintiff's deposition designations for witnesses Roger Francis and Paul Lehman.

4.

The jury will be qualified as to relationship with the following:

Plaintiff:

1. James Carmichael;
2. Peter A. Law, Esq.;
3. James A. Rice, Jr., P.C. ;
4. CVS Health Corporation, its officers, employees, directors, and shareholders;
5. CVS Caremark Corporation, its officers, employees, directors, and shareholders;
6. Georgia CVS Pharmacy, L.L.C., its officers, employees, directors, and shareholders;
7. Aetna Insurance Company, its officers, employees, directors, and shareholders;
8. Chartis Insurance Company, its officers, directors and shareholders (insurer for Defendants);
9. AIG Property Casualty Insurance Company, its officers, directors and shareholders (insurer for Defendants);
10. ACE Group Insurance Company, its officers, directors and shareholders (insurer for Defendants);
11. Chubb Limited Insurance Company, its officers, directors and shareholders (insurer for Defendants)

12. Any other applicable insurance company, including any underlying umbrella or excess policies, for Defendants, its officers, directors and shareholders.
 - a. Plaintiff requests the jury be qualified as to all applicable insurer policy in open court pursuant to Mordecai v. Cain, 338 Ga. App. 526 (2016).
 - b. Plaintiff requests the jury be qualified as to every applicable insurer, not just underlying liability carrier, pursuant to Ford Motor Co. v. Conley et. al., 294 Ga. 530 (2014).

Defendants:

- 1) James Carmichael;
- 2) Any attorney with a monetary interest in the outcome of the litigation.

Plaintiff and Defendants reserve the right to conduct group and individual *voir dire*.

Defendant objects to the qualification of Aetna. Aetna does not have a financial interest in this litigation.

5.

a. All discovery has been completed, unless otherwise noted, and the court will not consider any further motions to compel discovery except for good cause shown. The parties, however, shall be permitted to take depositions of any person(s) for the preservation of evidence for use at trial. The parties will continue to work together to take any use-in-evidence depositions necessary prior to trial.

b. Unless otherwise noted, the names of the parties as shown in the caption to this order are correct and complete and there is no question by any party as to the misjoinder or nonjoinder of any parties.

6.

The following is the **Plaintiff's** brief and succinct outline of the case and contentions:

On December 20, 2012 Plaintiff James Carmichael was shot multiple times in the parking lot of Defendant CVS's Moreland Avenue store. As a result, Plaintiff spent over thirty days hospitalized, was in a comatose state for nearly a month, underwent multiple surgeries and incurred over \$725,800.46 in medical bills while continuing to suffer with his injuries through the present time.

Despite extensive prior crime at the premises, no security guard was present at the property on the date of the incident, and Defendants failed to take other reasonable measures to prevent violent crimes against invitees like Plaintiff. In fact, CVS's District Manager and its corporate representative admitted that a security guard should have been present at the time of the shooting. Although the store has previously utilized security guards, CVS removed the security guards from the Moreland Avenue store in 2010.

Prior to the shooting, Defendants' employees feared for their safety in the dark parking lot littered with drug dealers and loiterers. The employees' fears were well founded given the multiple violent crimes at the premises, including several violent crimes against CVS employees. For example, just three weeks before the incident, CVS employee Holly White was robbed at gunpoint. About six months before the incident, a criminal struck a customer in the head and snatched her purse. The victim told Defendants' manager about the incident. In another violent incident, a CVS employee was robbed at gun point and told, "Give me all of the money or I'll f--ing kill you." The employee reported the armed robbery to Defendants' District Manager.

The employees were so afraid of the conditions in the parking lot that they frequently requested that CVS hire security guards to reduce crime. Multiple employees made multiple requests. CVS rejected each request, and repeatedly told the employees that security "wasn't in the budget." In fact, Ms. White requested security after she was robbed at gunpoint only three

weeks before Mr. Carmichael was shot, but CVS denied her request.

District manager Bob Johnson testified that he requested security following the armed robberies committed before the incident. Johnson also testified unequivocally that there is no reason he would not want to have security guards at the premises for at least a month following an incident like the one involving Ms. White. If Defendants had followed its District Manager's recommendations, common sense, and its employees' repeated security requests, a security guard would have been present at and before Mr. Carmichael was shot. Instead, Defendants rejected the recommendations and requests, and as a result, Mr. Carmichael was shot and nearly died. This is a clear liability case.

At the time of the shooting, Defendants had ownership, managerial, and other similar responsibilities and duties, via statute and/or contract, which included maintenance, security, repairs, and inspection of the Premises in ensuring that it was maintained in a safe condition for use by persons and invitees, including Plaintiff. Defendants' duties included ensuring the Premises remained in a safe condition even if Defendants were not physically present on the Premises. Defendants' duties included assurance the Premises remained in a safe condition for Plaintiff pursuant to O.C.G.A. §51-3-1 by their control, occupancy, or management or delegation thereof.

Plaintiff exercised ordinary care and diligence at all times herein and under the circumstances then existing.

Defendants breached their duty owed to Plaintiff by failing to exercise ordinary care to keep the Premises safe.

Prior to and on December 20, 2012, the Premises was negligently repaired, maintained, inspected, secured, patrolled and managed. Defendants had knowledge, both actual and

constructive, of the need to properly repair, maintain, secure, inspect, patrol and manage Defendants' Premises, but failed to exercise ordinary care in doing so.

Defendants were negligent and said negligence proximately caused Plaintiff's injuries and damages in the following ways, to-wit:

- a) Violation of O.C.G.A. § 51-3-1 by failing to use ordinary care to keep the Premises safe;
- b) Violation of O.C.G.A. § 44-7-13;
- c) In failing to properly inspect, repair, and maintain the Premises;
- d) In failing to warn of the latent dangers on the Premises;
- e) In failing to properly train and supervise their employees or independent guards in regard to the maintenance and safety of said Premises, as well as the appropriate responses to emergent situations; and
- f) In failing to properly retain, entrust, hire, train and supervise said employees.

Because Defendants had knowledge of, or in the exercise of reasonable care should have had knowledge of the dangerous environment of Defendants' Premises, Defendants are liable for the negligent supervision, hiring, training, and retention of their employees and the entrustment of said Premises to their agents and employees. Said negligence was the proximate cause of the injuries and damages of Plaintiff.

The injuries and damages sustained by Plaintiff were the direct and proximate result of the negligence and/or breaches of Defendants. But for said negligence and/or breaches, Plaintiff would not have suffered serious injury, physical pain, mental and psychological suffering, death and other injuries as will be proven at the trial of this matter. Defendants are liable for Plaintiff's injuries sustained, pain and suffering, and all other elements of damages allowed under the laws

of the State of Georgia. Defendants are liable to Plaintiff directly, as well as under theories of *respondeat superior* and agency principles.

As a proximate and foreseeable result of Defendants' negligence and/or breaches, Plaintiff received serious injuries has and will continue to endure pain and suffering, mental anguish, loss of the enjoyment of life, lost wages, and suffered other damages as will be proven at trial and permitted under Georgia law. Plaintiff states his intention to seek all compensatory, special, economic, consequential, general, punitive, and all other damages permissible under Georgia Law, including, but not limited to:

- a) Personal injuries;
- b) Pain and suffering;
- c) Mental anguish;
- d) Loss of the enjoyment of life;
- e) Incidental expenses;
- f) Loss of earnings;
- g) Medical expenses; and
- h) Consequential damages to be proven at trial.

Plaintiff is entitled to an award of punitive damages, without limitation or cap, because the actions of Defendants and their employees were willful and wanton and showed an entire want of care, which would raise the presumption of a conscious indifference to consequences.

7.

The following is the **Defendants'** brief and succinct outline of the case and contentions:

Plaintiff James Carmichael, an Alabama resident, was visiting the Atlanta metro area to buy and sell refurbished electronic devices. On the last day of his trip, December 20, 2012, he

received a phone call from an individual named Frankie Gray. Plaintiff Carmichael met Mr. Gray during a previous transaction with other individuals that week. Mr. Gray told Plaintiff that he was interested in purchasing an iPad, and Plaintiff arranged to meet Mr. Gray in the parking lot of the CVS retail store #81, located at 1455 Moreland Avenue, SE, Atlanta, GA. This CVS store is operated by Defendant Georgia CVS Pharmacy, LLC. Mr. Carmichael drove around the CVS parking lot to make sure that it appeared safe and told Mr. Gray where to meet him. Mr. Gray arrived and the two had a discussion over the iPad in Plaintiff's vehicle. Mr. Carmichael and Mr. Gray were unable to reach an agreement and Mr. Gray exited the vehicle.

Immediately after Mr. Gray exited the vehicle, an unknown male entered the vehicle with a handgun and demanded Plaintiff's money and electronics. During the course of the robbery, Plaintiff was able to grab his handgun and fired two shots at the assailant before his weapon jammed. The assailant then returned fire multiple times, striking Plaintiff several times. Plaintiff was treated at Atlanta Medical Center and alleges near total disability of his left arm due to injuries from the shooting. Defendants contend that this robbery was a set-up orchestrated by Frankie Gray and the unknown assailant, and CVS did not have superior knowledge of the risk Plaintiff, Mr. Gray, and the unknown assailant were bringing to its premises.

Plaintiff brings a premises liability action against Georgia CVS Pharmacy, LLC, CVS Manager #1, and CVS Manager #2, contending that CVS was negligent in failing to maintain adequate security measures to protect Mr. Carmichael from this third-party criminal attack. CVS disputes liability on several grounds. First, Plaintiff is a trespasser to whom CVS only owed a duty to protect from willful and wanton injury. Second, even if Plaintiff is determined to be a licensee or invitee under Georgia law, this third-party criminal attack was not reasonably foreseeable. Thus, CVS owed no duty to Plaintiff to protect against this particular third-party criminal act. Third, this

incident is a “personal malice crime” which is not foreseeable as a matter of law, as Plaintiff had superior knowledge of the potential danger of meeting with Frankie Gray. Fourth, Plaintiff cannot prove proximate cause because it is merely speculation as to whether some enhanced security measures, such as a security guard, would have deterred this crime. Fifth, Plaintiff is not entitled to punitive damages because negligence, even gross negligence, cannot support an award of punitive damages under Georgia law.

Additionally, CVS has filed a Non-Party Notice of Fault with respect to Frankie Gray and the unknown assailant, John Doe, to allow the jury to apportion fault among these responsible non-parties.

8.

The issues for determination by the jury are as follows:

Plaintiff:

Negligence (duty, breach, causation and damages) and whether to award punitive damages.

Defendants:

- 1) Whether James Carmichael was a trespasser on property occupied by Defendant Georgia CVS Pharmacy, LLC, to whom Defendants owed no duty of care except to refrain from causing willful or wanton injury;
- 2) Whether James Carmichael was a licensee on property occupied by Defendant Georgia CVS Pharmacy, LLC, to whom Defendants owed a duty to refrain from causing willful or wanton injury;

- 3) Whether James Carmichael was an invitee on property occupied by Defendant Georgia CVS Pharmacy, LLC, to whom Defendants owed a duty of ordinary care in keeping the premises and approaches safe;
- 4) Whether there were prior crimes on the premises occupied by Georgia CVS Pharmacy, LLC that were substantially similar in nature to the alleged incident as to make the alleged incident reasonable foreseeable to Defendants, thus giving rise to a duty of Defendants to protect James Carmichael against the third-party criminal act;
- 5) Whether the alleged incident falls under the “personal malice” exception, which negates any duty of Defendants to protect against this particular incident;
- 6) Whether Defendants had superior knowledge of the alleged danger to James Carmichael;
- 7) Whether Defendants breached the applicable standard of care owed to James Carmichael, as either a trespasser, licensee, or invitee;
- 8) Whether any breach of the standard of care on the part of Defendants’ proximately caused damage to Plaintiff;
- 9) The amount of any damages caused by any breach of the standard of care on the part of Defendants;
- 10) Whether James Carmichael was contributorily negligent and, if so, the portion of fault attributable to Mr. Carmichael;
- 11) Whether non-party John Doe breached the standard of care owed to James Carmichael;

- 12) Whether any breach of the standard of care on the part of non-party John Doe proximately caused damage to Plaintiff;
- 13) The percentage of liability attributable to non-party John Doe due to the result of his breach of the standard of care owed to James Carmichael;
- 14) Whether non-party Frankie Gray breached the standard of care owed to James Carmichael;
- 15) Whether any breach of the standard of care on the part of non-party Frankie Gray proximately caused damage to Plaintiff;
- 16) The percentage of liability attributable to non-party Frankie Gray due to the result of his breach of the standard of care owed to James Carmichael;
- 17) Whether Plaintiff is entitled to punitive damages; and
- 18) Whether Plaintiff is entitled to punitive damages exceeding the statutory cap of \$250,000, pursuant to O.C.G.A. § 51-12-5.1(g).

9.

Specifications of negligence including applicable code sections are as follows:

Plaintiff:

1. O.C.G.A. § 51-3-1;
2. O.C.G.A. § 51-12-5.1; and
3. O.C.G.A. § 44-7-13.

Defendants:

1. O.C.G.A. § 51-3-1: Duty of owner or occupier of land to invitee;
2. O.C.G.A. § 51-3-2: Duty of owner of premises to licensee;
3. O.C.G.A. § 51-3-3: Lawful possessor of land owes no duty of care to trespasser;

4. O.C.G.A. § 51-12-33: Reduction and apportionment of award or bar of recovery according to percentage of fault of parties and non-parties;

5. O.C.G.A. § 51-12-5.1: Punitive damages;

10.

If the case is based on a contract, either oral or written, the terms of the contract are as follows (or, the contract is attached as an Exhibit to this order):

Not applicable.

11.

The types of damages and the applicable measure of those damages are stated as follows:

Plaintiff:

Plaintiff seeks all damages available under Georgia Law including physical pain and suffering, and all general, consequential, compensatory, economic, and special damages permitted under Georgia law and in the enlightened conscience of the jury. Plaintiff seeks punitive damages against the Defendants, as alleged in the Complaint. In further response:

EXPENSES

Entity	Dates of Service	Amount
Atlanta Medical Center	12/20/12-4/19/13	\$718,910.46
Diagnostic Imaging Specialists	12/20/12 – 4/19/13	\$ 6,890.00
TOTAL:		\$725,800.46

Defendant:

Defendant denies Plaintiff is entitled to any damages.

12.

If the case involves divorce, each party shall present to the Court at the pre-trial conference the affidavits required by Rule 24.2:

Not applicable.

13.

The following facts are stipulated:

Plaintiff proposes the following stipulations:

1. Defendant CVS managed and operated the store doing business as CVS located at 1455 Moreland Avenue SE, Atlanta, GA on December 20, 2012. (Defendant's Response to RFA no. 4, Defendant's Response to Plaintiff's First Interrogatory no. 2).
2. On December 20, 2012, Plaintiff was shot on property operated, managed, and in the control of Defendant CVS located at 1455 Moreland Avenue SE, Atlanta, GA. (CVS 30(b)(6) Depo., pp. 13-15).
3. CVS agrees there was not any independent person or entity performing security at the time of the incident at the subject CVS. (Defendant's Resp to Plaintiff's First Interrogatory no. 5).
4. On December 20, 2012, Defendant CVS was required to "operate, manage, equip, light, repair, and maintain" the common areas of the premises, including the parking area where Plaintiff was shot, and was further required "pay an costs and expenses of every kind and nature incurred with respect to the operation and maintenance of the Premises Common: Areas including. but not limited to: maintaining lighting fixtures. including the cost of light bulbs and electric current: costs and expenses of planting, maintaining, replanting and replacing flowers and other landscaping; mowing of grass; utilities; cleaning and sweeping, repairing, resurfacing, rewiring, re-striping, and resealing of the

parking areas; repair of directional markers: repair of all curbing, sidewalks: removal of snow and ice, trash and debris, and provision of adequate lighting during all hours of darkness [CVS] shall be open for business. (Lease between Malon D. Mimms Family, L.P. and Georgia CVS Pharmacy LLC regarding 1455 Moreland Avenue, Atlanta, Georgia, P. 29).

5. The parties stipulate that Plaintiff's medical expenses were reasonable, necessary, and appropriate.
6. The parties stipulate that all named Defendants have been properly served in this action.
7. The parties stipulate that venue is proper.
8. The parties stipulate that jurisdiction is proper.
9. The parties stipulate that the names of all parties are proper.
10. The parties stipulate that the following witnesses are deemed unavailable for trial:
 - a. Frankie Gray
 - b. Defendant Georgia CVS Pharmacy, LLC corporate representative testifying on behalf of CVS pursuant to Rule 30(b)(6) (Andrew Edwards)
 - c. Roger Francis
 - d. Paul Lehman
 - e. Westerband Etienne
 - f. Dr. Eric Furie
 - g. Dr. Philip Ramsay, and
 - h. John Villines

Defendant is reviewing Plaintiff's proposed stipulations and will identify those in which it is in agreement no later than March 15, 2019.

The following is a list of all documentary and physical evidence that will be tendered at the trial by the Plaintiff or Defendants. Unless noted, the parties have stipulated as to the authenticity of the documents listed and the exhibits listed may be admitted without further proof of authenticity. All exhibits shall be marked by counsel prior to trial so as not to delay the trial before the jury:

Plaintiff:

These are the documents that are known to Plaintiff and were exchanged in discovery; however, as Plaintiff finishes his trial exhibit list that will actually be used at trial, he will discuss the same with defense counsel.

1. One-page summary of medical expenses;
2. 1949 Mortality Table;
3. All photographs and images of the CVS and parking lot;
4. All photographs and images of Plaintiff near entrance of CVS;
5. Atlanta PD Incident Report – February 26, 2010;
6. Atlanta PD Incident Report – February 26, 2010;
7. Atlanta PD Incident Report – February 12, 2011;
8. Atlanta PD Incident Report – February 13, 2011;
9. Atlanta PD Incident Report – February 16, 2012;
10. Atlanta PD Incident Report – June 25, 2012;
11. Atlanta PD Incident Report – July 17, 2012;
12. Atlanta PD Incident Report – November 24, 2012;
13. Atlanta PD Call for Service – December 20, 2012;

14. Photographs and images of handgun;
15. Photographs and images of CVS entrance;
16. Photographs and images of Plaintiff's vehicle in CVS parking lot;
17. Photographs and images of blood near CVS entrance;
18. Email – December 21, 2012;
19. Email – December 21, 2012;
20. Email – December 21, 2012;
21. Email – December 20, 2012;
22. Email – December 20, 2012;
23. Email – July 18, 2012;
24. Email – July 17, 2012;
25. Roger Francis LinkedIn;
26. Officers Guard Post Orders;
27. Security Guard Post Orders;
28. Incident Report – February 27, 2010;
29. Incident Report – July 1, 2015;
30. Incident Report – July 2, 2015;
31. Incident Report – July 2, 2015;
32. Incident Report – November 24, 2012;
33. Email from James Crispyn – December 20, 2012;
34. Email from James Crispyn – December 21, 2012;
35. Email from Dale Johnson – December 18, 2012;
36. Any and all photographs and images of the premises;

37. Photographs and images of Plaintiff's injuries;
38. Photographs and images of Plaintiff prior to incident;
39. Photographs and images of Plaintiff after the incident;
40. Plaintiff's medical bills for treatment related to the incident;
41. Crime grid/statistics of 1455 Moreland Avenue;
42. Any documents exchanged during discovery;
43. Any documents used as an exhibit to any pleading;
44. Any admissible pleadings of the parties;
45. Correspondence between the parties;
46. Correspondence updating the parties' discovery responses;
47. All pleadings and documents of record;
48. All deposition exhibits from any deposition taken in this case;
49. All documents exchanged between or produced by Plaintiff or Defendants;
50. All documents produced or listed by Defendants;
51. Crimes statistics for 1455 Moreland Avenue;
52. Crime statistics for businesses in the immediate neighborhood of the premises;
53. Photographs and images of the layout and neighborhood of the property at issue;
54. Any of the witnesses or documents identified in Plaintiff's interrogatory responses
55. Any documents on Defendant's exhibit list;
56. Any evidence and/or document necessary for impeachment, cross-examination, or rebuttal (*See Ballard v. Myers*, 275 Ga. 819 (2002));
57. Surveillance video of the shooting;
58. Plaintiff's radiological studies;

- 59. Medical Illustrations;
- 60. CVS's security budgets and expenditures; and
- 61. Emails and documents regarding CAP score at CVS.

Defendants:

See attached exhibit list attached to this Order as EXHIBIT B. Defendants reserve the right to amend and/or supplement this list of documentary evidence and physical evidence upon giving reasonable advance notice prior to trial of such additional evidence to opposing counsel. Defendants reserve the right to amend and/or supplement this list of documentary evidence and physical evidence at any time to include any documents or physical evidence requested in discovery, but which have yet to be produced. Defendants also reserve the right to revise the order of trial exhibits listed in Exhibit B prior to or during trial.

Plaintiff objects to Defendants' request and/or reservation of the right supplement trial exhibits listed in Exhibit B prior to or during trial.

15.

Special authorities relied upon by **Plaintiff** relating to peculiar evidentiary or other legal questions are as follows:

O.C.G.A. § 51-3-1

O.C.G.A. § 44-7-13

O.C.G.A. § 51-12-5.1;

O.C.G.A. § 51-12-33; and

O.C.G.A. § 13-6-11.

Plaintiff objects to Defendants' paragraph no. 16 as merely restating Defendants' summary judgment arguments, which this court previously rejected.

Special authorities relied upon by **Defendants** relating to peculiar evidentiary or other legal questions are as follows:

1. **Trespasser**: According to O.C.G.A. 51-3-3, a trespasser “is one who, though peacefully or by mistake, wrongfully enters upon property owned or occupied by another.” Matlack v. Cobb Elec. Mbrshp. Corp., 289 Ga. App. 632, 633-34 (2008). “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). “[A]s a general rule, the owner of land is under no duty or obligation to keep the [premises] in a safe condition for the benefit of trespassers, intruders, idlers, bare licensees, or others who come upon it, not by any invitation express or implied, but for their own pleasure, or to gratify their curiosity.” Cook v. Southern R. Co., 53 Ga. App. 723, 724-725 (1936). If a plaintiff’s “use of the property was for anything other than an authorized purpose, it was wrongful, making him a trespasser.” Handberry v. Stuckey Timberland, Inc., 345 Ga. App. 191, 195 (2018) (citing Matlack v. Cobb Elec. Membership Corp., 289 Ga. App. 632, 633-634 (2008) (a trespasser is one who, even though peacefully or by mistake, wrongfully enters upon property owned or occupied by another). “And, generally, a landowner owes no duty to a trespasser except to avoid willfully or recklessly injuring him.” Id. Georgia Courts have declared that if a trespasser is considered a “criminal trespasser,” “he must assume the risk of the consequences.” Johnson v. Jackson, 140 Ga. App. 252, 259 (Ga. Ct. App. 1976) (“[O]ne who goes on the property of another with the intent of committing an imprudent and felonious act must assume the risk of the consequences.”). “One who violates the law must anticipate that all others may violate the law.” Johnson v. Jackson,

140 Ga. App. at 259. A criminal trespasser must “exercise the necessary ordinary care to avoid the consequences to himself caused by any negligence of the defendant.” Id.

Further, a criminal trespasser “who knowingly and voluntarily takes a risk of physical injury, the danger of which is so obvious that the act of taking such risk, in and of itself, amounts to a failure to exercise ordinary care and diligence for his own safety, cannot hold another liable for damages for the hurt thus occasioned, although the same may in part be attributable to the latter's negligence.” Id. at 258.

2. **Licensee:** A licensee is a person who: (1) Is neither a customer, a servant, nor a trespasser; (2) Does not stand in any contractual relation with the owner of the premises; and (3) Is permitted, expressly or impliedly, to go on the premises merely for his own interests, convenience, or gratification. O.C.G.A. § 51-3-2(a). The owner of the premises is liable to a licensee only for willful or wanton injury. O.C.G.A. § 51-3-2(b). “An owner owes to a licensee no duty as to the condition of the premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril, or willfully cause him harm; while to one invited he is under obligation for reasonable security for the purposes of the invitation.” Mortgage Com. Servicing Corp. v. Brock, 60 Ga. App. 695, 699-700 (1939). “[A]n invitee who leaves such places for others on the premises not included in the invitation and disconnected with the objects of the invitation is, as to such parts of the premises, a mere licensee.” Augusta Amusements, Inc. v. Powell, 93 Ga. App. 752, 75 (1956). If an invitee does not go beyond that part of the premises to which, as it reasonably appears to him the invitation extends, he does not become a licensee. If, however, he does go beyond that part to which he is invited, he becomes a mere licensee. Atkins v. Tri-Cities Steel, Inc., 166 Ga. App. 349, 351 (1983). “The invitee may not

wander at will without further invitation to out-of-the-way and dangerous places on the premises; neither may he use parts of the premises for purposes wholly disconnected from and in no way pertaining to the business in hand or the objects of the invitation.” Scully v. Bd. of Regents of the Univ. Sys. of Ga., 332 Ga. App. 873, 876-877 (2015) (holding that plaintiff walking back to his dorm on a college campus was a licensee at the time of injury because he was walking behind another dormitory building on a college campus that was disconnected from his purpose). See also, In Bronesky v. Estech, Inc., 170 Ga. App. 724, 724-726 (1984); Wright v. Shoney's of Savannah, 141 Ga. App. 362, 362-363 (1977).

3. **Invitee**: “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. According to O.C.G.A 51-3-1, an invitee is a person who has been led by an owner or occupier to its premises for any lawful purpose. The owner or occupier owes an invitee a duty to exercise ordinary care to keep its “premises and approaches” safe for the invitee’s use. *Id.* “Generally, a person may be deemed an invitee if his presence on the property is one of mutual benefit to both him and the landowner.” Matlack v. Cobb Elec. Mbrshp. Corp., 289 Ga. App. 632, 633-34 (2008). The test for determining whether a person is an invitee or a licensee is: whether the injured person at the time of the injury had present business relations with the owner of the premises which would render his presence of mutual aid to both, or whether his presence on the premises was for his own convenience, or on business with others than the owner of the premises. In the absence of some relation which inures to the

benefit of the two, or to that of the owner, no invitation may be implied, and the injured person must be regarded as a licensee. Higginbotham v. Winborn, 135 Ga. App. 753, 755 (1975).

4. **Reasonable Foreseeability based on Substantially Similar Prior Crimes:** In the context of a premises liability claim, a property owner has a duty to invitees to exercise ordinary care to keep its premises safe. O.C.G.A. § 51-3-1 (2016). However, “a property owner is not an insurer of an invitee's safety, and an intervening criminal act by a third party generally insulates a proprietor from liability unless such criminal act was reasonably foreseeable.” Medical Ctr. Hosp. Auth. v. Cavender, 331 Ga. App. 469, 473 (2015). “If 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. Put simply, without foreseeability that a criminal act will occur, no duty on the part of the proprietor to exercise ordinary care to prevent that act arises.” Id. See also Woods v. Kim, 207 Ga. App. 910, 910-911 (1993). As explained by the Georgia Court of Appeals, [f]oreseeable consequences are those which are probable, according to ordinary and usual experience, or those which, because they happen so frequently, may be expected to happen again. One is not bound to anticipate or foresee and provide against that which is unusual or that which is only remotely and slightly probable. Boone v. Udoto, 323 Ga. App. 482, 485 (2013) (emphasis added). “Stated differently, the exercise of ordinary care simply does not create a duty to anticipate unlikely, remote, or slightly possible events.” Medical Ctr. Hosp. Auth., 331 Ga. App. at 474. Foreseeability may be determined by analyzing whether the property owner has notice of substantially similar prior criminal acts. In determining whether a given crime is “substantially similar,” a court must analyze the

“location, nature and extent of the prior criminal activities and their likeness, proximity or other relationship to the crime in question.” While the primary criminal activity must be substantially similar, it need not be identical; what is required is that the prior incident be sufficient to attract the [property owner's] attention to the dangerous condition which resulted in the litigated incident. Without a showing of substantial similarity, the evidence is irrelevant as a matter of law and there is nothing upon which the court's discretion can operate. In addition, it is the Plaintiffs' burden to establish that the property owner had knowledge of the previous substantially similar crimes on or near the premises upon which the plaintiffs rely to establish foreseeability. Medical Ctr. Hosp. Auth. v. Cavender, 331 Ga. App. 469, 473-474. See also Boone v. Udoto, 323 Ga. App. 482 (2013); Drayton v. Kroger Co., 297 Ga. App. 484 (2009); Baker v. Simon Prop. Group, Inc., 273 Ga. App. 406 (Ga. Ct. App. 2005); Doe v. Prudential–Bache/A.G. Spanos Realty Partners, 268 Ga. 604, 606 (1997).

5. **Superior Knowledge:** “The second principle is that, even when a criminal act is reasonably foreseeable, an owner or occupier is not liable for injuries resulting from the criminal act of a third party unless he had superior knowledge of the danger.” B-T Two, Inc. v. Bennett, 307 Ga. App. 649, 655 (Ga. Ct. App. 2011). “But even if the criminal act is foreseeable, it does not necessarily follow that the proprietor has superior knowledge, since the danger may be equally apparent to the plaintiff.” Whitmore v. First Fed. Sav. Bank, 225 Ga. App. 768, 770 (Ga. Ct. App. 1997).
6. **Personal Malice Exception:** The personal malice exception is based on the principle that in order to recover, a plaintiff must demonstrate that the premises owner had superior knowledge of the danger. Gordon v. Starwood Hotels & Resorts Worldwide, Inc., 821 F.

Supp. 2d 1308, 1315 (2011) (“[T]he true basis for an owner’s liability is his superior knowledge of the existence of a condition that could subject his invitees to an unreasonable risk of harm or injury. Under Georgia case law, if an invitee knows of a dangerous condition, there is no duty on the part of the proprietor to warn him and there is no liability for resulting injury because the invitee has as much knowledge of the danger as the proprietor.”); Griffin v. AAA Auto Club S., 221 Ga. App. 1, 3 (1996). See also Ratliff v. McDonald, 326 Ga. App. 306, 313 (Ga. Ct. App. 2014) (“But even if an intervening criminal act may have been reasonably foreseeable, the true ground of liability is the superior knowledge of the proprietor of the existence of a condition that may subject the invitee to an unreasonable risk of harm.”). “[I]n some cases foreseeability may be negated by the plaintiff’s superior knowledge, as when an assault is a result of a pre-existing personal animosity between the plaintiff and the attacker, or arises out of a pre-existing private relationship between the plaintiff and the attacker which was wholly unconnected with the premises. Likewise, if a plaintiff is an active participant in the series of events which left him injured, such as a brawl or mutual combat, he cannot recover from the premises owner for his injuries sustained thereby. Id. “Georgia courts have ruled as a matter of law that ‘personal malice’ crimes are not foreseeable even when they involve the same bad acts as previous crimes on the premises.” Robles v. QuikTrip Corp., 2017 U.S. Dist. LEXIS 207802 *21 (Dec. 19, 2017). See also Reid v. Augusta-Richmond County Coliseum Auth., 203 Ga. App. 235 (Ga. Ct. App. 1992); Adler’s Package Shop v. Parker, 190 GA. App. 68 (Ga. Ct. App. 1989); Shockley v. Zayre of Atlanta, Inc., 118 Ga. App. 672 (Ga. App. 1968),

7. **Proximate Cause**: A plaintiff must do more than speculate whether some enhanced security measures would have prevented an attack. Walker v. Aderhold Props., Inc., 303 Ga. App. 710, 714-15 (2010). The plaintiff is required to come forward with evidence sufficient for a reasonable jury to conclude that the owner failed to take reasonable steps to protect him against the injury.” Reid v. Augusta-Richmond County Coliseum Auth., 203 Ga. App. 235, 238 (Ga. Ct. App. 1992). Guesses or speculation that raise only a conjecture or possibility are not sufficient to create even an inference of fact for consideration on summary judgment. Walker, 303 Ga. App. 710, 715. Where the evidence is such that a jury would have to speculate that potential improvements to security would have prevented an assailant from an assault against the plaintiff, there can be no recovery by the plaintiff against the defendant property owner/proprietor. See Johns v. Housing Auth. for the City of Douglas, 297 Ga. App. 869, 871-72 (2009). See also Gordon v. Starwood Hotels & Resorts Worldwide, Inc., 821 F. Supp. 2d 1308, 1316 (N.D. Ga. 2011) (assertion that additional security would have prevented attack was speculative at best); Fallon v. Met. Life Ins. Co., 238 Ga. App. 156, 158-59 (1999).
8. **Apportionment of Liability**: O.C.G.A. § 51-12-33(a): Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault. (b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a

