IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO. S19C0919

SHIRLEY BOLTON, as Surviving Parent and Heir, and SHIRLEY BOLTON, as Administrator of the Estate of SHANEKU MCCURTY, deceased,

Petitioner,

v.

GOLDEN BUSINESS, INC.,

Respondent.

AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION IN OPPOSITION OF GRANTING THE PETITION FOR CERTIORARI

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SHIRLEY BOLTON, as Surviving Parent and Heir, and SHIRLEY BOLTON, as Administrator of the Estate of SHANEKU MCCURTY, deceased, Petitioner, **v.** **GOLDEN BUSINESS, INC.,** Respondent.	**Case no. S19C0919**

AMICUS CURIAE BRIEF OF
THE GEORGIA DEFENSE LAWYERS ASSOCIATION

COMES NOW the Georgia Defense Lawyers Association ("GDLA") and files this Brief as *amicus curiae* in the above-styled appeal, showing this honorable Court as follows:

I. INTRODUCTION

In this case involving a shooting on Respondent's premises, Petitioner seeks certiorari from this Court on an issue on which Georgia law is well established. Contrary to Petitioner's contentions, there is no confusion on the relevant issue of law. This Court held nearly twenty-five years ago in *SunTrust Banks v. Killebrew* that:

> There is no authority in this State imposing a duty upon a property owner to investigate police files to determine whether criminal activities have occurred on its premises, and the testimony by the [property owner's employee or agent] did not establish that its duty to investigate crimes on its property encompassed seeking out police reports of incidents not reported to the [property owner].

266 Ga. 109, 109-10 (1995). This Court's decision in *Killebrew* has repeatedly been followed by the Georgia Court of Appeals in subsequent cases.

In this case, the trial court and the Court of Appeals correctly relied on and applied this Court's holding in *Killebrew* and correctly rejected Petitioner's attempts to present evidence of police reports relating to crimes which undisputedly were not known to the Respondent. If the property owner does not have actual knowledge of such police reports or the crimes related thereto and there is no independent, affirmative duty on the part of a property owner to seek out and search through such police reports, then those reports cannot be used to demonstrate a property owner's constructive knowledge of a unreasonable risk of harm to its invitees. Petitioner's assertions to the contrary would have this Court dispose of long-standing precedent requiring a showing of a property owner's actual knowledge of prior criminal acts before such acts could be considered by a factfinder. Further, contrary to *Killebrew*, Petitioner's approach would, in fact, impose an affirmative duty on property owners to search police reports for criminal activity that was not reported to the property owner. Since the Court of Appeals properly followed existing Georgia law in this case, there is no reason for this Court to grant *certiorari*.

II. STATEMENT OF INTEREST

The GDLA is an association of more than 900 Georgia lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, primarily for defendants in civil lawsuits. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise promoting improvements in the administration of justice. The GDLA's members include numerous attorneys who represent landowners and business owners.

The GDLA and its members hope to ensure that clear, basic, and well-settled principles of Georgia tort law are consistently applied and that they are not eroded or muddied by misapplication or misconstruction. Further, when such principles are correctly applied by the trial court and Court of Appeals, the GDLA and its members have an interest in ensuring that those rulings are upheld.

In this case, the Court of Appeals correctly affirmed the trial court's grant of summary judgment in favor of Golden Business, Inc. ("Golden"). In regard to Petitioner's premises liability claim, the Court of Appeals correctly held that although Petitioner presented evidence of other violent crimes at or around the subject convenience store and that the store was located in a high-crime area, the

property owner, Golden, was entitled to summary judgment where the record was devoid of any evidence that Golden knew about such criminal activity. (Ct. App. Op. at 6-7.) In doing so, the Court of Appeals relied upon well-established jurisprudence of this Court and the Court of Appeals recognizing that the existence of prior similar criminal acts alone is insufficient to create a genuine issue of material fact as to whether the property owner exercised ordinary care to protect its invitee from unreasonable risks. (*Id.* at p. 6.) Rather, as the Court of Appeals correctly noted, the threshold question for the inquiry "is the landowner's superior knowledge of the criminal activity." (*Id.* at p. 4 (emphasis supplied)).

In seeking review in this case, Petitioner contends that the Court of Appeals "upended long-settled law on constructive knowledge" and "created a categorical rule excluding police reports as evidence of what a premises owner should know." (Pet. Br. at 13, 19, 21-22.) But Petitioner's arguments misconstrue the holding of the Court of Appeals in this and other cases. In reality, Petitioner has asked the trial court and the Court of Appeals to misapply the applicable constructive knowledge inquiry in the case below, and Petitioner now asks this Court to change drastically the legal standard in premises liability cases involving third-party criminal acts. The trial court and the Court of Appeals correctly applied existing Georgia precedent in finding there was no issue of fact demonstrating Respondent's superior knowledge

of criminal activity. Accordingly, for the reasons set forth below, the petition for certiorari before the Court should be denied.

II. ARGUMENT AND CITATION OF AUTHORITY

A. BACKGROUND AND PROCEDURAL HISTORY

The subject property at 4091 Redan Road was purchased by Golden in 2000 and developed into a multi-tenant commercial shopping center which originally was home to a Chevron gas station/convenience store, a dry cleaner, hair salon, and takeout restaurant. (V2, R-1850, 1862-63.) Golden initially operated the Chevron for several months before selling the business to another owner, who later sold the business to Rikaz Food, Inc. ("Rikaz"). (V2, R-185.) Rikaz entered into a Commercial Lease Agreement with Golden for the property on April 1, 2013, and Rikaz owned and operated the Chevron on October 23, 2015. (V2, R-492-509.) As the owner/operator of the Chevron and lessee of the property, Rikaz had exclusive control of the premises, including its interior, exterior, security systems, parking lot, and other common areas. (*Id.*; V2, R-1880-1881.) Though Karim Aly, Golden's sole owner, would visit the Chevron routinely to inspect the property and speak with the owner and employees, Golden was not involved in, nor did it control, the operation of the Chevron or its premises. More importantly, Aly never received any concerns, notifications, or reports about crime or safety at the property from the Chevron's

owner, employees, the Chevron Corporation (which sometimes independently inspected the property), police, customers, or anyone else. (*See* V2, R-1983.)

Sadly, on October 23, 2015, Shaneku McCurty was shot and killed in the parking lot of the Chevron. (V2, R-1988.) Petitioner, as surviving parent and heir and administrator or McCurty's estate, brought suit against Golden and Rikaz, asserting claims of premises liability (negligent security) and nuisance, seeking compensatory and punitive damages as well as attorney's fees. (V2, R-94-107.) Though Petitioner presented prior police reports and crime grids as evidence of criminal activity at or near the Chevron, no evidence was presented showing that Golden was aware of such information. (V2, R-1831-32.) The trial court granted summary judgment to Golden, finding that Petitioner had failed to bring forth any admissible evidence demonstrating that Golden knew of prior substantially similar crime or a substantial risk of violent crime on its property. (V2, R-1828-33.) In reaching its decision in this case, the trial court relied on well-settled Georgia law that a property owner does not have a duty to affirmatively and independently seek out information regarding reports of crime on or near its premises. (V2, R-1831-32.)

The trial court's grant of summary judgment in favor of Golden was unanimously affirmed by the Court of Appeals. (Ct. App. Op. at 1-7.) In so doing, the Court of Appeals noted that a "landowner only has a duty to exercise ordinary care to guard against injury from dangerous characters when it has reason to

anticipate a criminal act." (Ct. App. Op. at 3, *citing Fair v. C V Underground*, 340 Ga. App. 790 (2017).) While evidence of prior similar crimes may be used to establish that a landowner had reason to anticipate a criminal act, the Court of Appeals correctly held that the threshold and "key question … is the landowner's superior knowledge of the criminal activity." (*Id.* at 4, *citing Fair*, 340 Ga. App. at 792-793.) Pointing out that Petitioner failed to present any evidence or otherwise demonstrate "that Golden knew about or was alerted to the possibility of prior crimes in Rikaz's convenience store, the store parking lot, or the surrounding area" or that "Golden knew or had grounds to know about problems in the parking lot that might have prompted further investigation," the Court of Appeals correctly found that Petitioner did not establish that McCurty's shooting was foreseeable to Golden. (Ct. App. Op. at 5-6.) Accordingly, the Court of Appeals affirmed the trial court's grant of summary judgment.

B. PETITIONER'S WRIT OF CERTIORARI SHOULD BE DENIED.

1. The Court Of Appeals Correctly Applied and Did Not Create Confusion as to the Legal Standard For Evaluating Premises Liability Claims Involving Third-Party Crime.

A review on certiorari is not a right. GA. S. CT. R. 40. Generally, the Supreme Court will not review the decisions of the Court of Appeals; this Court may choose to review cases, however, which present matters of "great concern, gravity, and importance to the public." *Id.*; *Sharp v. Dept. of Transportation*, 267 Ga. 267, 270

(1996). This Court also may grant certiorari to correct the misapplication of a legal standard by the lower courts and prevent confusion as to the application in the future. *Weekes v. Fuller*, 218 Ga. 515, 128 S.E.2d 715 (1962). Otherwise, the judgments of the Court of Appeals are final and will not be disturbed by this Court.

A party's mere dissatisfaction with existing Georgia law is not a basis for a grant of certiorari by this Court. In this case, in seeking certiorari, Petitioner asserts only one claim of error: that the Court of Appeals incorrectly imposed an actual knowledge standard, ignoring the concept of constructive notice, in determining that Golden was entitled to summary judgment with respect to liability for McCurty's death. Petitioner claims that, by its ruling, the Court of Appeals has clouded and created confusion as to the law of constructive notice in premises liability cases. Petitioner further contends that the Court of Appeals "has perhaps created a new an unusual rule of evidence" that "police reports are not admissible in any way for the constructive knowledge inquiry … ." (Pet. Br., p. 2, 6)

But the briefest examination of the case below reveals that in actuality, the trial court and Court of Appeals simply followed existing, clear Georgia law. As explained below, the GDLA submits that the Court of Appeals correctly applied the well-established legal standard for evaluating premises liability claims involving third-party crime, and the decision below does not create confusion or ambiguity in the law that would promote "litigation over the existence of 'constructive

knowledge' in premises cases," as Petitioner alleges. Rather, it is Petitioner who attempts to misapply and confuse the long-recognized legal requirements at issue here. Because the opinion of the Court of Appeals correctly applies the law of Georgia with respect to premises liability involving third-party crime, Petitioner's grant of certiorari should be denied and the opinion of the Court of Appeals should be adopted and affirmed. *See White v. State*, 233 Ga. 593, 212 S.E.2d 777 (1975).

2. Georgia Law Requires a Showing of Actual Knowledge by the Defendant of Prior Crimes on the Premises Before Those Crimes May be Considered by the Jury.

This Court has recognized that there is a distinction in premises liability law between the more common "slip and fall" cases and other types of premises liability cases, including those involving third-party crimes. *See American Multi-Cinema, Inc. v. Brown*, 285 Ga. 442, 679 S.E.2d 25 (2009) (noting that for "slip and fall" cases, the Court has refined the test down to two elements). In regard to premises liability claims involving third-party crime and allegations of negligent security, this Court has held that the general rule is that a landowner has no duty to insure an invitee's safety against third-party criminal attacks. *Sturbridge Partners, Ltd. v. Walker*, 267 Ga. 785, 482 S.E.2d 339, 340 (1997). Rather, the landowner's duty is to exercise ordinary care to protect invitees against foreseeable criminal acts. *Days Inns of America, Inc. v. Matt*, 265 Ga. 235, 454 S.E.2d 507 (1995). By this standard, in order to hold a landowner liable for the criminal act of a third party, it must be

shown: (1) that the criminal act was foreseeable; and (2) if the criminal act was foreseeable, that the landowner did not exercise ordinary care to protect invitees. *Id.* ("Simply put, without foreseeability that a criminal act will occur, no duty on the part of the proprietor to prevent that act arises."); *Martin v. Six Flags Over Georgia II, L.P.*, 301 Ga. 323, 328, 801 S.E.2d 24, 30 (2017) (holding "landowner's duty extends *only* to *foreseeable* criminal acts") (emphasis in original); *Walker*, 267 Ga. at 785-786.

In regard to evaluating the foreseeability prong of the analysis, this Court established that a landowner must have a reason to anticipate a criminal act. *Matt*, 265 Ga. at 235, *citing Lau's Corp. v. Haskins*, 261 Ga. 491, 492, 405 S.E. 2d 474 (1991). While prior similar criminal acts on the defendant's premises, if known to the defendant, may create a reason for the defendant to anticipate a criminal act against its invitee, the threshold question is <u>whether the landowner had actual knowledge of such prior, similar criminal acts on its premises</u>. *Walker*, 267 Ga. at 787 ("The issue is not the foreseeability of the rape itself, *but whether Sturbridge had actual knowledge of the prior burglaries* and, because of that knowledge, should have reasonably anticipated the risk of personal harm to a tenant which might occur in the burglary of an occupied apartment"); *see also Savannah College of Art and Design, Inv. v. Roe*, 261 Ga. 764, 765 (1991) (*overruled on other grounds by Walker*, 267 Ga. at 786); *Lau's Corp.*, 261 Ga. at 492; *see also Sun Trust Banks, Inc. v.*

Killebrew, 266 Ga. 109, 114, 464 S.E.2d 207, 211 (1990) (J. Carley, concurring) (in cases of injury by a third-party criminal act, the proprietor does not have a duty, the breach of which is actionable under O.C.G.A. § 51-3-1, *unless* the proprietor had knowledge of an unreasonable risk of criminal attack.)

Therefore, the legal standard for evaluating a landowner's liability for third-party crime is: (1) whether the landowner had *actual knowledge of prior, similar criminal acts on the premises* or other information sufficient to *establish actual or constructive knowledge – or foreseeability – of a criminal act*; and (2) whether the landowner acted with reasonable care to prevent such act or abate the risk. *Walker*, 267 Ga. at 787. As set forth above, the application of a threshold requirement of landowner knowledge of prior similar criminal acts has been accepted repeatedly by this Court and has been applied consistently by the lower courts, such that it is now well-established in the jurisprudence of the State. *See, also Whitmore v. First Federal Sav. Bank of Brunswick*, 225 Ga. App. 768, 484 S.E.2d 708 (1997); *B-T Two, Inc. v. Bennett*, 307 Ga.App. 649, 706 S.E.2d 87 (2011); *Ratliff v. McDonald*, 326 Ga. App. 306, 756 S.E.2d 569 (2014).

Petitioner contends that the decision by the Court of Appeals in this case "gutted the constructive knowledge inquiry" in premises liability cases and improperly applied an actual knowledge standard. But the Court of Appeals did not dispose of the constructive knowledge inquiry at all. Instead, Petitioner simply

misconstrues or misunderstands when the constructive knowledge inquiry is undertaken and to what it applies.

As set forth above, the threshold issue is whether the landowner had actual knowledge of prior crimes or other information *that may indicate a risk* to its invitees. *See Walker*, 267 Ga. at 787. Then, the analysis turns to whether, based on that actual knowledge, the landowner had actual or constructive knowledge of an unreasonable or foreseeable risk to its invitees – i.e., whether, based on the information the landowner *actually* knew, the landowner *knew or should have known* of an unreasonable risk to it invitees. *Id.*

In this case, Petitioner misplaces the constructive knowledge inquiry and proposes that Golden should have known of the *prior criminal acts*. What Petitioner argues and proposes is a double constructive knowledge inquiry and directly contradicts longstanding Georgia precedent. Specifically, Petitioner seeks to hold Golden liable in this case under a theory that Golden should have had knowledge of the prior criminal acts and, because of such constructive knowledge of prior criminal acts, Golden should have then had constructive knowledge of an unreasonable risk to Bolton. That is not and has never been the law in Georgia.

To the contrary, this Court specifically held in *Killebrew* that "[t]here is no authority in this State imposing a duty upon a property owner to investigation police files to determine whether criminal activities have occurred on its premises."

Killebrew, 266 Ga. at 109. *See also Walker*, 267 Ga. at 787. Stated another way, "[t]he mere fact that crime has occurred [on the defendant's premises] does not establish liability as a property owner in this State is under no duty to cull police records to discover criminal conduct." *Luong v. Tran*, 280 Ga. App. 15, 18 (2) (2006). The Court of Appeals has repeated and followed that principle of law numerous times since *Killebrew* was decided. *See, e.g., Med. Ctr. Hosp. Auth. v. Cavender*, 331 Ga. App. 469, 477 (1)(b) (2015); *Wojcik v. Windmill Lake Apts., Inc.*, 284 Ga. App. 766, 769 (2007); *Luong*, 280 Ga. App. at 18 (2); *Baker v. Simon Prop. Group, Inc.*, 273 Ga. App. 406, 407 (1) (2005); *Dolphin Realty v. Headley*, 271 Ga. App. 479, 482 (1) (2005); *Habersham Venture v. Breedlove*, 244 Ga. App. 407, 410 (1) (2000); *Johnson v. Atlanta Hous. Auth.*, 243 Ga. App. 157, 159 (1) (2000); *Asbell v. BP Exploration & Oil, Inc.*, 230 Ga. App. 700, 705 (4) (1998); *Carlock v. Kmart Corp.*, 227 Ga. App. 356, 357-58 (1) (1997); *Whitmore v. First Fed. Sav. Bank*, 225 Ga. App. 768, 769 (1) (1997); *Scott v. Hous. Auth.*, 223 Ga. App. 216, 217 (1996). In at least six of those cases, this Court considered and rejected petitions for certiorari. *See Wojcik v. Windmill Lake Apts., Inc.*, 2007 Ga. LEXIS 637 (Case no. S07C1195) (Sep. 10, 2007); *Headley v. Dolphin Realty*, 2005 Ga. LEXIS 354 (Case no. S05C0937) (May 9, 2005); *Asbell v. BP Exploration & Oil, Inc.*, 1998 Ga. LEXIS 605 (Case no. S98C0879) (May 22, 1998); *Carlock v. Kmart Corp.*, 1998 Ga. LEXIS 115 (Case no. S97C1852) (Jan. 23, 1998); *Whitmore v. First Fed. Sav.*

Bank, 1997 Ga. LEXIS 765 (Case no. S97C1179) (Sep. 5, 1997); *Scott v. Glennville Hous. Auth.*, 1997 Ga. LEXIS 232 (Case no. S97C0269) (Feb. 14, 1997).

The argument posed in this case by Petitioner is not new or novel, and it is difficult to understand how Petitioner or any other litigant could be confused about the state of the law on this issue given that Georgia's appellate courts have given the same answer to this question at least 12 times since 1995. Rather, Petitioner has attempted to manufacture potential "confusion" in the law by rearguing the point in a confusing way. No issue of great importance to the public and no risk of confusion in the applicable law are posed by this case, and there is no reason for this Court to revisit its holding in *Killebrew*.

Petitioner argues that the Court of Appeals applied an "actual knowledge" requirement in its analysis, and that is true. However, contrary to Petitioner's position, the requirement was properly applied by the Court of Appeals as a threshold consideration of Golden's actual knowledge of prior crimes at or around the property. As set forth above, this has long been the legal standard applied by this Court and does not eliminate the constructive knowledge element from the premises liability analysis. *Killebrew,* 266 Ga. at 109; *Walker,* 267 Ga. at 787. If a plaintiff can demonstrate a landowner's actual knowledge of prior similar criminal conduct, then analysis as to whether such evidence created actual or constructive knowledge of a risk to the landowner's invitees is undertaken. *Id.* In this case, Petitioner never

provided evidence of Golden's actual knowledge of prior similar criminal acts or activity, so the court's inquiry properly ended there.

In his concurrence in *Killebrew*, Justice Carley directly addressed the misconception that Petitioner has espoused here. 266 Ga. at 114. Justice Carley noted "the well established principle" that "any duty upon the proprietor is dependent upon evidence that the proprietor 'knew or should have known' that there was an unreasonable risk of criminal attack." *Id.* While "[t]he knowledge of the unreasonable risk of criminal attack may indeed be demonstrated by the occurrence of prior substantially similar incidents," Justice Carley explained it would be error to "equat[e] the proprietor's knowledge of the unreasonable risk, which may be either actual or constructive, with the proof of that knowledge by the showing the proprietor's knowledge of the occurrence of previous substantially similar criminal incidents." *Id.* Distilling this further, the "knowledge of any prior similar incidents must be actual, but if there is such actual knowledge, the proprietor still will not be liable unless, (1) he had actual or constructive knowledge of an unreasonable risk of criminal attack so as to impose upon him the duty to exercise ordinary care to prevent future attacks, and (2) the evidence shows a breach of that duty." *Id.*; *see also Walker*, 267 Ga. at 787.

The ruling by the Court of Appeals in this case does not create confusion as to the applicable legal standard for evaluating premises liability claims involving

third-party crime. Rather, the Court of Appeals correctly applied the legal standard long held by this Court. Though the Court of Appeals did not embark on a constructive knowledge analysis, such analysis was unnecessary because Petitioner failed to satisfy the threshold question of whether Golden had actual knowledge of prior similar criminal acts or activity.

Moreover, the ruling by the Court of Appeals does not, as Petitioner contends, create "a new an unusual rule of evidence" that "police reports are not admissible in any way for the constructive knowledge inquiry." This Court has been clear that reports of crime may be admissible and relevant in determining whether a landowner had constructive knowledge of an unreasonable risk to its invitees. *Walker,* 267 Ga. at 787. The decision by the Court of Appeals does not confuse that precedent. Rather, as already set forth, the Georgia law requires that before the constructive knowledge inquiry is examined and evidence, including police reports, of prior similar criminal conduct is considered, **it must be shown that the landowner had actual knowledge of such police reports or criminal conduct**. *Id.* Petitioner's conflation of these two questions in an attempt to confuse the true inquiry to be made at the summary judgment stage in this case failed in the trial court and the Court of Appeals, and this Court should also reject Petitioner's attempt to confuse the law. Because Petitioner presented no evidence that Golden had actual knowledge of prior criminal activity on or around the property or that Golden had actual or constructive

knowledge of an unreasonable risk of harm to the decedent at the time of the subject incident, the Court of Appeals properly found that Petitioner failed to establish that the attack on McCurty was foreseeable to Golden and that summary judgment was appropriate.

III. CONCLUSION

The trial court and Court of Appeals properly applied the legal standard for premises liability claims involving third-party crime and properly granted summary judgment to Golden, because Petitioner failed to present any evidence that Golden had actual knowledge of prior crimes or criminal activity on or around the property. Petitioner's request for *certiorari* is based, simply, upon a misapplication of the applicable legal standard. Georgia law does not and should not allow a factfinder to find a property owner liable for a third party's criminal act based on "constructive" knowledge of police reports as opposed to constructive knowledge of an unreasonable risk of harm, which is what the law actually requires. A grant of *certiorari* is unnecessary because there is no risk of confusion and no issue of great concern, gravity or importance to the public on what is a clearly-stated, well-established principle of law. Accordingly, *certiorari* in this case should be denied and the opinion of the Court of Appeals upheld.

Respectfully submitted this 26th day of August, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing **AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION** in the above-listed case on all parties by depositing a copy of same in the United States Mail with sufficient postage thereon to ensure delivery, addressed as follows:

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This 26th day of August, 2019.

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