IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

[redacted]	:	
Plaintiffs,	:	CIVIL FILE ACTION NO.: 16A62361
vs.	:	
CREEKSIDE BY TAG, LLC; T.A.G ACQUISITIONS, LTD; CHESTER MEISELS SMJ CONSTRUCTION SERVICES, LLC, JOSEPH GONZALEZ; AND JOHN DOES #3-5	:	**JURY TRIAL DEMANDED**
Defendants.	:	

PLAINTIFFS' RESPONSE TO THE CREEKSIDE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Creekside Forest Apartments was crawling with crime. The companies that owned Creekside Forest, the companies that were supposed to provide security at Creekside Forest, and the people who ran those companies ("Defendants") knew about the criminal activity. They also knew that the crime put tenants and their guests in danger.

Defendants ignored that danger. Despite repeated warnings from tenants and even their own employees, Defendants failed to implement basic security measures. Crime worsened. In the words of the man in charge of Creekside Forest's security, the condition of the apartment complex told criminals that if you were at Creekside Forest, "[y]ou're a sitting duck." Gonzalez Indiv. Dep. 39:24-40:24 (Ex. A).

As a result, on January 6, 2016, when a criminal actor decided that he wanted to rob someone, he chose Creekside Forest Apartments as his destination. He drove to Creekside Forest, drove past the empty and dilapidated guard shack, drove across the broken security gate into the complex, and cruised around inside until he found his targets. Then he drove back out of the complex across another broken security gate and set up his ambush a short distance from the property line. In the robbery that followed, 15-year-old [redacted] lost his life and 27-year-old [redacted] was shot multiple times.

Although the Creekside Defendants now move for summary judgment, the evidence of their liability in this case is overwhelming. Even in an ordinary negligence case, deciding "as a matter of law questions of the plaintiff's and defendant's negligence" should be an "an *unusual* circumstance in tort law." *Robinson v. Kroger Co.*, 268 Ga. 735, 739 (1997) (emphasis added). But this admonition is *especially* true in this case, where Defendant Creekside's former employees admit that Creekside had actual knowledge of a dangerous condition, that Creekside

consciously chose not to take steps to address that condition, and that it specifically contributed to this shooting. For the reasons set forth below, this Court should deny the Creekside Defendants' motion for summary judgment.

STATEMENT OF FACTS

Creekside Forest Apartments ("the property") was owned by Cheskel "Chester" Meisels through his companies Creekside by TAG, LLC and T.A.G. Acquisitions, Ltd. (collectively, "the Creekside Defendants").[1] Security on the property was supposed to be provided by Joseph "Joe" Gonzalez through his company, SMJ Construction Services LLC (collectively, "the SMJ Defendants").[2]

Meisels, Gonzalez, and their companies (collectively, "Defendants") knew that there were "lots of drug sales, gang activity, and crime on the property."[3] They knew that criminals had set fire to the leasing office and a car parked outside it,[4] that children were being attacked on the property,[5] that gunshots were going off day and night,[6] that robberies were occurring,[7] that gangs were active,[8] that there had been "many shootings on the property,"[9] that vandalism was common,[10] and that their own employees were being threatened.[11] Residents frequently warned Meisels, Gonzalez, and their companies about the need for better security.[12] Meisels's and Gonzalez's own employees repeatedly warned them about the need for security—including an

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[1] Meisels Indiv. Dep. 7:07-8:18 (Ex. B).
[2] *Id.* at 20:14-21:14. This statement by Meisels about what Gonzalez told him is admissible as the statement of a party opponent under O.C.G.A. § 24-8-801(d)(2)(A).
[3] [redacted] ¶ 13(b) (Ex. C). [redacted]. ¶ 7-9, 20-21 (Ex. D); [redacted] ¶ 9 (Ex. E); [redacted] ¶¶ 9-10, 20-23, 28, 41 (Ex. F).
[4] [redacted] ¶¶ 11-12; [redacted] ¶ 5.
[5] [redacted] ¶¶ 7, 11 (Ex. G); [redacted] ¶ 13.
[6] [redacted] ¶ 13(a).
[7] *Id.* at ¶ 13(b). *See also id.* at ¶ 15(b); [redacted] ¶ 16.
[8] [redacted] ¶ 13(a)-(c); [redacted] ¶ 9; [redacted] ¶ 11; [redacted]. ¶ 9; [redacted] ¶¶ 28, 42.
[9] [redacted] ¶ 17.
[10] [redacted] ¶ 19.
[11] [redacted] ¶¶ 15, 18; [redacted] ¶ 15(c), (e).
[12] [redacted] ¶ 17(d). *See also id.* at ¶ 17(a), (e); [redacted] ¶ 4; T. [redacted] ¶¶ 10, 13.

email from the property manager, [redacted], to Meisels stating: "I need se[redacted] immediately especially after it starts to get dark. IMMEDIATELY."[13]

Defendants ignored these warnings. When Defendants took over the apartment complex, "there were essentially no security features there."[14] After taking over, Defendants "did not fix any of the security features, and they stopped the off-duty police patrols at the property."[15] Defendants did not fix the gates to the property, which never worked while Defendants owned and operated the complex.[16] Although the previous owner of the apartment complex had stationed a security guard in a guard shack near the entrance, the Defendants would not pay to keep a guard there.[17] The guard shack fell into disrepair with the window glass broken and the door sitting off the hinges.[18] It sat empty.[19] Many of the lights did not work.[20] There were no working security cameras.[21] There were "lots of vacant and boarded-up apartments where criminals could hide out."[22]

Defendants promised to fix these problems—then broke their promises. "Joe [Gonzalez] and Chester [Meisels] would tell residents that they would fix the security problems—but [Creekside Forest] did not fix the security problems."[23] When Meisels and his companies first

[13] [redacted] ¶ 34-35. *Accord id.* at ¶ 18, 20-21, 39; [redacted] ¶ 17(a).
[14] Gonzalez Indiv. Dep. 11:10-13.
[15] [redacted] ¶ 23.
[16] [redacted] ¶ 17(g), 18(c); [redacted] ¶ 26; Gonzalez Indiv. Dep. 11:15-17, 12:05-06.
[17] [redacted]. ¶ 19, 31.
[18] [redacted] ¶ 15; [redacted] ¶ 43; Gonzalez Indiv. Dep. 36:13-18, 37:11-39:02. (Note that although in the original transcript of the Gonzalez deposition, the answer on line 39:02 is written as "No, sir," the video of the deposition shows that the witness's *actual* response was "Yes, sir." The court reporter has corrected this transcription error with an official "Affidavit of Correction," which was filed with the Court on August 14, 2018 along with Plaintiff's "Notice of Filing Deposition Transcripts." An additional copy of that Affidavit of Correction is attached as Ex. A.1).
[19] [redacted] ¶ 13.
[20] [redacted] ¶ 10; [redacted] ¶ 17(b); Gonzalez Indiv. Dep. 11:18-20, 12:16-17.
[21] Creekside by TAG 30(b)(6) Dep. 78:07-10 (Ex. H).
[22] Gonzalez Indiv. Dep. 15:03-06. *Accord* [redacted]. ¶ 20(b) ("there were lots of vagrants / squatters in the apartments").
[23] *E.g.*, [redacted] ¶ 17(h).

bought Creekside Forest, [redacted] was working there as a property manager.[24] Meisels had started looking at and visiting the property in August or September of 2015 and had walked the property "[h]undreds of times" with Gonzalez.[25] Meisels met and spoke with [redacted]. Meisels "made lots of promises about things he was going to fix and ways he was going to improve security."[26] Because of his promises, [redacted] stayed on and worked for Meisels and his companies.[27] But Meisels and the other Defendants soon made clear that those promises would be broken—Meisels "had claimed that he would do all sorts of things to upgrade the property and make it more secure, but he did none of them."[28] Instead, Defendants *stopped* taking some of the security measures that the previous owners had taken, such as stationing a guard in the guard shack by the entrance, even though some of those measures had been effective.[29] Crime got worse.[30] In sum, "Chester and his companies did not live up to their word. They did not fix any of the security features, and they stopped the off-duty police patrols at the property."[31]

When Defendants *did* hire security guards, Defendants did not pay them what Defendants had promised.[32] Defendants paid with checks that bounced.[33] As a result, the security guards would quit.[34] In fact, "[t]he shooting on 01/06/16 happened not long after some of the security

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[24] [redacted] ¶ 1. (Due to a typographical error, the enumerated paragraphs in the [redacted] affidavit go 1, 2, 1, 2, 3, 4 . . . In other words, there are two paragraphs numbered 1, and two paragraphs numbered 2, but the other paragraphs are numbered correctly. This citation refers to the second paragraph that is numbered "1.")
[25] Creekside by TAG 30(b)(6) Dep. 45:02-17 (first visit to property); Gonzalez Indiv. Dep. 41:23-42:04 ("Hundreds of times.").
[26] [redacted] ¶ 3.
[27] *Id.* at ¶ 4.
[28] *Id.* at ¶ 5.
[29] *Id.* at ¶ 19, 32.
[30] *Id.* at ¶ 38.
[31] *Id.* at ¶ 23.
[32] [redacted] ¶ 24; [redacted] ¶ 14.
[33] *Id.* at ¶ 12; [redacted] ¶ 9.
[34] [redacted] ¶ 24.

guards who Chester & Joe had not paid as promised quit because they were not getting paid."[35] Far from ending crime, some of the security guards employed by Defendants were *profiting* from crime on the property by "*taking half of the money that changed hands* in drug deals on the property."[36]

In sum, if you lived at Creekside Forest or visited there, then—in the words of Joseph Gonzalez, the head of security at the complex—criminals saw you as "a sitting duck."[37]

On January 6, 2016, a criminal actor in DeKalb County decided to "go rob somebody."[38] The criminal actor, Bruce Howard, and his associates chose Creekside Forest as the place to commit the crime.[39] They drove past an empty guard shack, through a broken gate, and into Creekside Forest.[40] "There were no security personnel on duty, nobody at [Creekside Forest's] office, and nobody in the guard shack near the broken gates."[41]

Plaintiff [redacted] lived at Creekside Forest, and on that day, [redacted] and [redacted] brother, [redacted] were visiting [redacted].[42] As [redacted], [redacted], and [redacted] walked through Creekside Forest on their way to a store on Ember Drive, the criminal actors drove past them and spotted them.[43] Not realizing that the people in the car were armed and

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[35] [redacted]. ¶ 19.

[36] [redacted] ¶ 13(e), (f) (emphasis in original). *See also* [redacted] ¶ 36 ("I told them that the residents they hired were drug dealers, but they hired and retained these persons anyway.")

[37] Gonzalez Indiv. Dep. 39:24-40:24. This quotation comes from Joseph Gonzalez, the president of the company charged with providing security at Creekside Forest. *Id.* at 9:23-10:14 (Gonzalez was President and sole owner of SMJ); Meisels Indiv. Dep. 20:14-21:14 (Gonzalez and SMJ were supposed to provide security). Meisels acknowledges that he chose Gonzalez to provide security for the property that he owned, that Gonzalez was "qualified to know when there was a security problem and when there wasn't," that Gonzalez was his "expert on security," and that he "would love to work with [Gonzalez] [again] when an opportunity would come." Meisels Indiv. Dep. 23:22-24:21.

[38] Crim. TT 217:07-10 (Ex. I).

[39] *Id.* at 469:17-22.

[40] [redacted] Dep. 71:02-72:20, Ex. 5 (describing the car driving inside Creekside Forest, which could only be entered by passing the guard shack and driving through the gate) (Ex. J).

[41] [redacted] ¶ 13.

[42] [redacted] ¶ 8; [redacted] Dep. 11:23-12:22 ([redacted] lived at Creekside Forest), 66:20-22 ([redacted], [redacted] and [redacted] decided to go from the basketball court back to [redacted] apartment).

[43] [redacted] Dep. 73:04-74:21 (shooter's car passed by [redacted], [redacted], and [redacted]).

intent on committing a robbery, the three kept walking, still inside the complex.[44] As the three passed through another broken gate on their way out, they saw the car pass them again—this time heading out of the apartment complex.[45] Unbeknownst to [redacted], [redacted], and [redacted], the occupants of the car that had just cruised through Creekside Forest had parked just outside the property to set up an ambush for them.[46] When the three walked past the parked car, the robbery and the shooting started.[47] [redacted] was killed and [redacted] was shot multiple times.

The shooting occurred on the eastern end of Ember Drive, which was a dead-end road that constituted the only way to enter or leave Creekside Forest, as shown in the DeKalb County GIS map below.[48] (The property lines are drawn in black on the survey that appears below the map.[49]) The shooting occurred on "an approach to the property," as Gonzalez has acknowledged.[50] It occurred in an area where Meisels and Gonzalez exercised control by telling their security employees to "maintain security" there and telling their maintenance employees to "pick[] up trash there."[51] At the time of the shooting, the victims were about 15 yards north of the Creekside Forest property line to the south and had walked about 45 yards from the property line to the east.[52]

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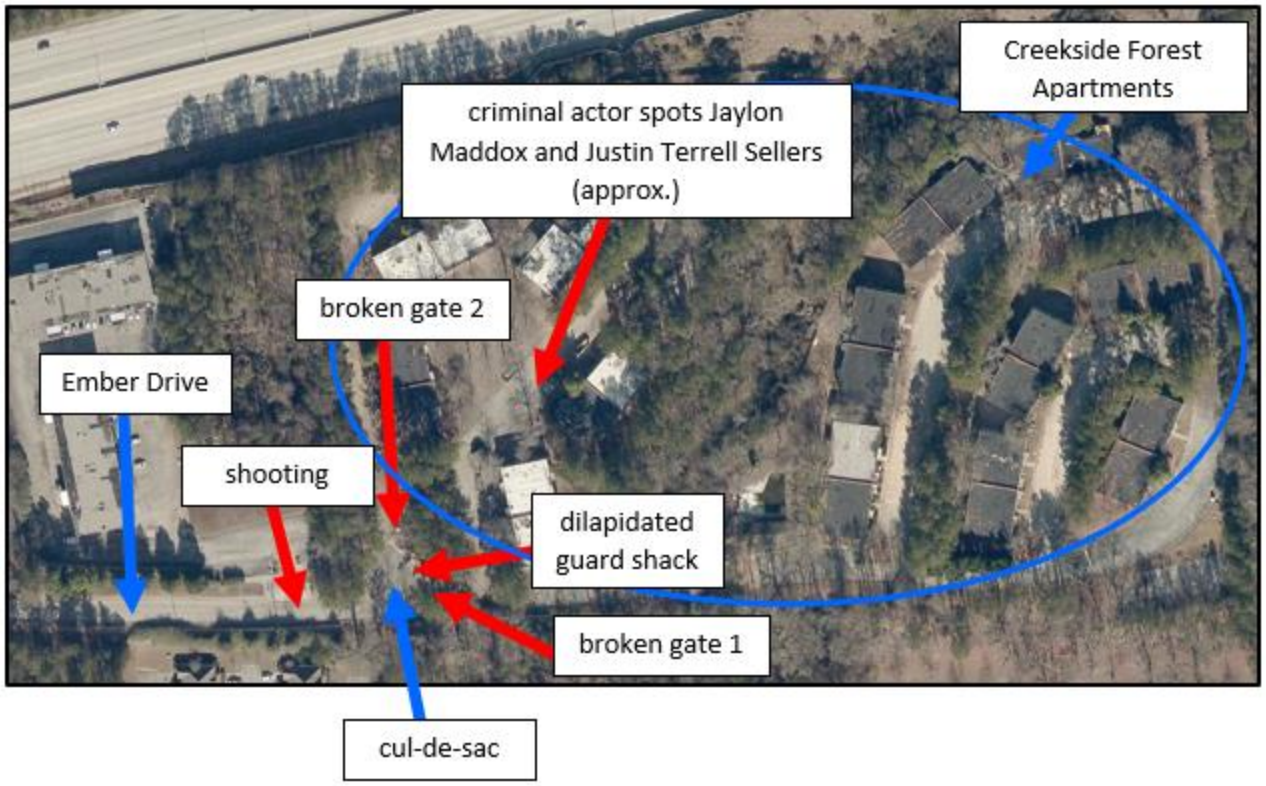
[44] *Id.* at 71:02-17.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 71:08-17, 84:08-85:08.
[48] *Available at* https://dekalbgis.maps.arcgis.com/home/webmap/viewer.html?useExisting=1. Search for the address "3000 Ember Dr, Decatur, GA, 30034, USA." The map is admissible as a public record published by a public office. O.C.G.A. §§ 24-9-902(5), 24-8-803(8).
[49] The survey was marked as Exhibit 5 to the deposition of Josh Lewis, a surveyor. *See* Lewis Dep. 117:18-23, Ex. 5 (Ex. K).
[50] Gonzalez Indiv. Dep. 68:21-25.
[51] [redacted] ¶ 21; [redacted] ¶ 16.
[52] [redacted] 106:17-107:18.


Creekside Forest Apartments
criminal actor spots Jaylon Maddox and Justin Terrell Sellers (approx.)
broken gate 2
Ember Drive
shooting
dilapidated guard shack
broken gate 1
cul-de-sac

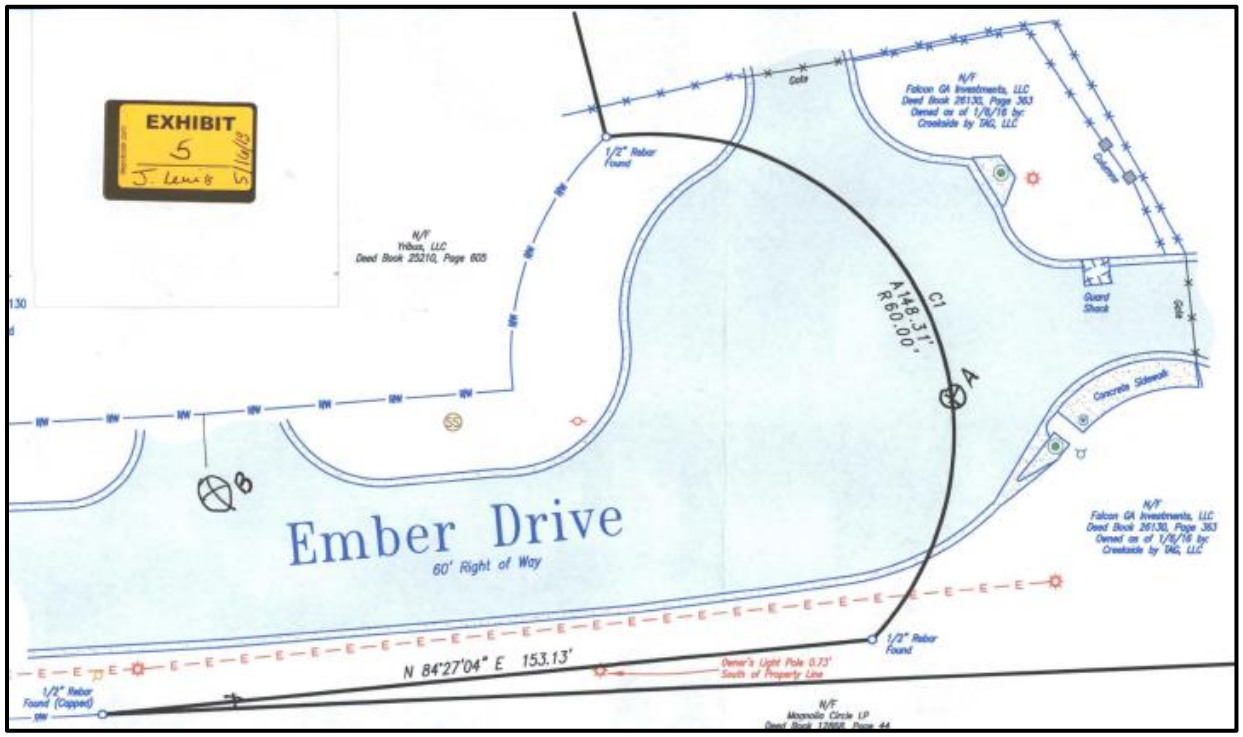


EXHIBIT
5
Ember Drive
60' Right of Way
N 84°27'04" E 153.13'
R=60.00'
1/2" Rebar Found
1/2" Rebar Found (Capped)
Concrete Sidewalk
Guard Shack
Gate

Before the shooting, the security personnel employed by Gonzalez were instructed to "provide security for the people who lived at the apartment complex and their guests (not just equipment)."[53] That made sense because Gonzalez had agreed with Meisels that his company, SMJ, would "provide security for the people who lived in the apartment complex and their guests."[54] Gonzalez and Meisels had even signed a contract under which SMJ was supposed to "provide twenty-four hour, seven day a week property security" and repair the gates.[55]

After the shooting, however, Gonzalez changed his tune. When deposed after the shooting, Gonzalez asserted that he was only providing security for "material and for my equipment" and that he did *not* "provide any security for the residents who lived at Creekside Forest."[56] In other words, he claimed to have protected only *things*, not *people*. The reason for Gonzalez's change of tune is unclear—unless it was to set up a defense in this litigation. *See* SMJ Br. at 5-8 (arguing that Plaintiffs were not third-party beneficiaries of SMJ's agreement with Meisels). At any rate, SMJ's change of position was abrupt. One of Gonzalez's security guards testified that:

> [*B*]*efore* the shooting of [redacted] and [redacted] . . . Joe told me that my job was to provide security for the people who worked in the leasing office and other people at the apartments . . . *After* the shooting of [redacted] and [redacted], Joe told me that my job was to protect equipment, not the people.[57]

The bottom line is this: Defendants absolutely knew that the people inside Creekside Forest were in danger. Tenants and their guests were "sitting duck[s]."[58] Yet Defendants

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[53] [redacted] ¶ 19 (parenthetical in original).
[54] Meisels Indiv. Dep. 21:08-14. This statement by Meisels about what Gonzalez told him is admissible as the statement of a party opponent under O.C.G.A. § 24-8-801(d)(2)(A). *Accord* Creekside by TAG 30(b)(6) Dep. 70:02-71:02.
[55] Gonzalez Indiv. Dep. 42:22-45:07; Contract at ¶ 1 (security), Ex. A to Contract (gates) (Ex. L).
[56] Gonzalez Indiv. Dep. 55:09-56:22.
[57] [redacted] ¶ 19-20 (emphasis in original).
[58] Gonzalez Indiv. Dep. 39:24-40:24.

warned nobody and did nothing to protect tenants and guests except use bouncing checks to hire security guards who were "taking half" on drug deals.[59]

LEGAL STANDARD

"On motion for summary judgment the evidence is viewed in a light most favorable to the respondent, and the respondent is given *the benefit of every doubt*. The movant has the burden to prove the non-existence of any genuine issue of material fact, and in so determining, the court will treat the respondent's paper with *considerable indulgence*." *Milestone v. David*, 251 Ga. App. 832, 832-33 (2001) (emphasis added).

As a result, "a court should not rely upon certain evidence merely because it is not specifically contradicted, while disregarding other relevant evidence." *Ogletree v. Navistar Int'l Transp. Corp.*, 271 Ga. 644, 646-47 (1999). "[E]ven if the facts in a case are entirely uncontradicted and uncontroverted, where 'there is room for difference of opinion between reasonable [persons] as to whether or not negligence should be inferred, the right to draw the inference is peculiarly within the *exclusive province of the jury*.'" *Id.* (emphasis added). "[A]ll doubts must be resolved in favor of the non-moving party." *Northside Bldg. Supply Co. v. Foures*, 201 Ga. App. 259 (1991)

These instructions have special importance in premises liability cases. As the Supreme Court has admonished:

> In sum, we remind members of the judiciary that the "routine" issues of premises liability, i.e., the negligence of the defendant and the plaintiff, and the plaintiff's lack of ordinary care for personal safety are generally not susceptible of summary adjudication, and that summary judgment is granted only when the evidence is plain, palpable, and undisputed.

Robinson, 268 Ga. at 748. This "admonition" to "members of the judiciary" is so important that

[59] Gonzalez Indiv. Dep. 62:21-24 (warned nobody); [redacted] ¶ 13(e), (f) (taking half).

the Supreme Court continues to repeat it:

> To put it in more concrete terms, this means that issues such as how closely a particular [owner] should monitor its premises and approaches, what [owners] should know about the property's condition at any given time, [and] how vigilant [invitees] must be for their own safety in various settings . . . must be answered by juries as a matter of fact rather than by judges as a matter of law.

Am. Multi-Cinema, Inc. v. Brown, 285 Ga. 442, 445 (2009); *see also Dickerson v. Guest Servs. Co. of Va.*, 282 Ga. 771, 771-72 (2007) ("Our review of the record in this case and the pertinent appellate decisions persuades us that the present case represents the sort of adjudication *Robinson* was intended to prevent.").

ARGUMENT

A. The Creekside Defendants Owed Plaintiffs A Duty of Ordinary Care

There are at least three distinct ways the Creekside Defendants owed Plaintiffs a duty—(1) the premises statute, (2) the landlord repair statute, and (3) nuisance law.

1. The Creekside Defendants Owed a Duty Based on Premises Law

Georgia law creates a duty for owners and occupiers of land:

> 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. It is undisputed that the Creekside Defendants owned Creekside Forest on January 6, 2016, and that Plaintiffs were induced to come upon the premises for a lawful purpose. Creekside by TAG 30(b)(6) 23:19-25; [redacted] Dep. 64:17-68:02; [redacted] Dep. 39:01-25 (Ex. M). Accordingly, these Defendants owed Plaintiffs a duty to keep the premises and approaches safe.

The premises statute applies in these matters for two reasons: (1) because this incident

arose from the Creekside Defendants failure to keep *the premises safe*, and (2) because this incident arose from Creekside Defendants failure to keep *their approaches* safe.

First, the Creekside Defendants owed a duty under the premises statute because this incident arose from the Creekside Defendants' failure to keep the premises safe. A jury will likely find that "on the evening of January 6, 2016, a group of assailants to include Bruce Howard . . . drove a white Pontiac from Candler Road, down Ember Drive, and into Creekside Forest complex where they began loitering in the common areas of the premises in search of victims that they intended to stalk and then rob at gunpoint." *See Compl.* ¶ 26. *See also* [redacted] Dep. 71:02-17. As described above, the evidence will authorize the jury to find that the assailants targeted Plaintiffs on premises, stalked Plaintiffs on premises, followed Plaintiffs while on the premises, and then moved their car just outside the premises to set up an ambush.

Specifically, as described above, [redacted], and [redacted] began walking from [redacted] apartment at Creekside Forest to a nearby convenience store, saw a white Pontiac enter and begin to circle the property, and then were confronted by the white Pontiac, which had parked just ahead to set up an ambush for them. Because Plaintiffs were on the premises when the assailants were loitering, when the assailants targeted and stalked [redacted] and [redacted], and when the assailants put their ambush plan into motion, the Creekside Defendants owed a duty of reasonable care to prevent a shooting that *arose* from this behavior whether the shooting occurred on the premises or not.

While the assailants and victims were not standing *on the premises* when the shot was fired, our Supreme Court has instructed that, "nothing in O.C.G.A. § 51-3-1 requires that the injuries . . . be inflicted within the four corners of a landowner's premises and approaches." *Martin v. Six Flags Over GA II, LP*, 31 Ga. 323, 329 (2017). Instead, our Georgia Supreme

Court said:

> We now expressly adopt this narrow principle, and hold that although the landowner's duty is to maintain safety and security within its premises and approaches, *liability may arise from a breach of that duty that proximately causes injuries even if the resulting injury ultimately is completed beyond that territorial sphere*.

Martin, 31 Ga. at 330 (emphasis added).

The case law recognizes that a duty under the premises liability statute applies even where *both* the attack and injuries occur off of the premises and approaches—so long as the injuries *arose* from activity that previously did happen on the premises and approaches. For example, in *Wilks v. Piggly Wiggly Southern, Inc*, Wilks was not mugged "on the 'premises and approaches,'" and "there was no evidence of affirmative acts taken by [Piggly Wiggly] in the area where the assault occurred which demonstrated [Piggly Wiggly's] control over the subject area or the premises immediately contiguous." 207 Ga. App. 842, 843 (1993). "After [Wilks] left [Piggly Wiggly's] premises, he walked past two other stores . . . and around the corner 20 or 25 yards . . . into an unlit vacant area where he was mugged by the men." *Id.* at 842. In short, Piggly Wiggly "was not the owner or in control of the area in which [Wilks] was attacked." *Id.* at 843.

The Court of Appeals held that Piggly Wiggly owed Wilks a duty under the premises statute. *Id.* at 842. "Based on [Piggly Wiggly's] knowledge of the prior assault . . . [Piggly Wiggly] knew there was a substantial risk to its customers at night and failed to exercise reasonable care to provide adequate security." *Id.* at 843. "[T]he attackers were permitted to *loiter* on [Piggly Wiggly's] premises, lying in wait for their victims," Piggly Wiggly's "employees appreciated the hazards of *allowing individuals to loiter* on its premises after dark," and "there is at least a jury question as to whether these steps taken by [Piggly Wiggly] were

reasonable to protect its customers against injury because despite [Piggly Wiggly's] efforts, *persons continued to loiter* on the premises after dark." *Id.* at 843-44 (emphasis added). Said differently, the attack in *Wilks arose* from assailants *loitering* on the premises, searching for a victim on the premises, and targeting that victim on the premises. And as a result, it did not matter that the assailants then followed the victim off the premises and approaches before actually mugging that victim, Piggly Wiggly was still liable.

As a second example, in *Martin v Six Flags*, the victim "exited the [Six Flags theme] park, walked to a nearby hotel to use the bathroom," and then walked to "an area adjacent to the park's main entrance . . . some 200 or so feet from the Six Flags property line." *Martin v. Six Flags Over GA II, LP*, 31 Ga. 323, 324-25 (2017). The victim next started walking towards a bus stop further away from the property line, and it was at this point that the assailant began beating him with brass knuckles. *Id.* at 326. The "site of the physical attack on Martin was undisputedly a public bus stop, serving county-owned buses, situated on a public road . . . that itself is not adjacent to any property owned or operated by Six Flags." *Id.* at 334. Instead, "South Service Road dead-ends into another public road . . . that ultimately leads onto Six Flags property." *Id.* at 334. "The bus stop is not contiguous with, adjacent to, or touching Six Flags property in any way." *Id.* at 334. Thus, the site of the attack was neither the premises or the approaches to the premises.

Despite these facts, a ***unanimous*** Supreme Court held that Six Flags owed a duty under the premises statute. They owed this duty because even though the physical attack on Martin took place off premises, the "injuries were the culmination of a continuous string of events that were planned on Six Flags property, were executed at least in part on Six Flags property, and were the result of a failure by Six Flags to 'exercise ordinary care to protect its invitee from

unreasonable risks.'" *Id.* at 328-29. Specifically, "a large group of...young men *approached the park gates* in a frenzy as the park closed, and . . . security *officers simply stood and watched this group exit* the main gates." *Id.* at 332 (emphasis added). The group had no interaction with Martin on the premises or approaches at all, but as they exited the park, they "knew they needed to fight somebody," "were actively planning a fight," and decided "to fight people at the bus stop." *Id.* at 326. Under these circumstances, "the victim's stepping over the property line does not and cannot insulate Six Flags from responsibility for an attack that began within its premises and that was the foreseeable result of the breach of its duty of care." *Id.* at 329.

The *Wilks* and *Martin* courts have rejected the rigid formulism of the Creekside Defendants' argument that they should escape liability because "there is no evidence whatsoever that the assailant began an attack on [Plaintiffs] or any of his companions until the moment [they] w[ere] encountered on Ember Drive." *See* Creekside Br. at 14. Said differently, the Creekside Defendants cannot escape liability *solely* because the guns were fired on the other side of the property line. What matters is whether the attack *arose* from activity on the premises or approaches—and here, it did. When assailants loiter on property, search for victims on property, and stalk victims on property, then set up an ambush just across the property line, then the off-property shooting has *arisen* from on-property actions. This is exactly what the Court said in both *Wilks* and *Martin*—cases where the assailant did NOT physically assault or verbally accost the plaintiff on the property or the approaches, but the premises owners were nevertheless liable (or could be liable as a matter of law notwithstanding those facts). In both *Wilks* and *Martin*, the circumstantial evidence was sufficient to allow a jury to conclude that the assailants were loitering on property in search of victims, and that the assailants perpetrated assaults by identifying victims who were either leaving or had just left the property.

In *Martin*, the unanimous Georgia Supreme Court cited with approval the following out of state decisions which further support the Creekside Defendants owing a duty:

> - Sports bar owner could be held liable in connection with attempted criminal attack on bar patron more than a mile away from bar if bartender knew of plan to sexually exploit the plaintiff off premises. *Reynolds v. CB Sports Bar*, 623 F.3d 1143, 1152 (7th Cir. 2010)
>
> - Hospital could be held liable for employee-invitee's injuries sustained when she was stabbed as she was entering an automobile on an adjacent street after leaving work. *Schneider v. Nectarine Ballroom*, 204 Mich. App. 1 (Mich. Ct. App. 1994)
>
> - Landlord could be liable for injuries sustained outside the premises if such injuries were reasonably foreseeable result of its negligence in operating the premises. *Udy v. Calvary Corp.*, 162 Ariz. 7 (Ariz. Ct. App. 1989)

Martin, 301 Ga. 323, fn. 5 (2017).

The Georgia Court of Appeals ruled similarly in *Confetti*, where it held that the dangerous condition is the "chain of events leading to the attack," not just the actual assault or the final gunshot:

> To focus on the instrumentality which caused [redacted] and [redacted]] injuries rather than the circumstances which set into motion *the chain of events leading to the attack* [] would require us to treat [the] attack on [redacted] and [redacted]] as an isolated criminal attack rather than the extension of an uncontained, uninterrupted [incident.]

Confetti Atlanta, Ltd. v. Gray, 202 Ga. App. 241, 243-44 (1991) (emphasis added). Thus, under firmly established Georgia law, the Creekside Defendants owe Plaintiffs a duty because the incident *arose* from activities that took place on the Creekside Defendants' property.

Second, the premises statute provides an additional, independent basis for the Creekside Defendants' duty under the premises statute. Even if the incident had not *arisen* from activity on the premises, the Creekside Defendants still owe a duty because Plaintiffs were on an *approach* to the premises when they were shot.

The premises statute provides that an owner or occupier must keep both "the premises and approaches safe," and "[u]nder the statute, premises and approaches are not the same, otherwise the language is redundant." *Todd v. F.W. Woolworth Co.*, 258 Ga. 194, 195-96 (1988). The Supreme Court has held that "approaches" generally "mean[s] that property directly contiguous, adjacent to, and touching those entryways to premises . . . through which the occupier could foresee a reasonable invitee would find it necessary or convenient to traverse," and "[b]y 'contiguous, adjacent to, and touching,' we mean that property within the last few steps." *Motel Props., Inc. v. Miller*, 263 Ga. 484, 486 (1993). The '*last few steps*' is not a literal concept though. Instead,

> The scope of the area encompassed in an approach necessarily depends upon the circumstances of a particular case – i.e., what constitutes the 'last few steps' on foot is necessarily a lesser measure of proximity to the premises than the law few steps taken in the context of a faster-moving automobile.

Martin, 301 Ga. at 333 *citing Combs v. Atlanta Auto Auction*, 287 Ga. App. 9 (2007). Thus, in cases involving motor vehicles, the inquiry is whether the property constitutes the *final* approach to the owner's premises. *Combs*, 287 Ga. App. at 15 (emphasis in original).

Lastly, and importantly, what constitutes an "approach" to a certain premise is **not** a question of law; instead, it is "a question with both factual and legal connotations." *Todd*, 258 Ga. at 196 (1988). *Compare with* Creekside Br. *at 9-10* (incorrectly stating that "the bounds of an approach is an issue of law.")

In this case, a jury could reasonably find that the place where the shooting occurred on Ember Drive was an approach to the Creekside Defendants' premises. Joseph Gonzalez, who was President of the company charged with providing security, has *testified* that the shooting occurred on "an approach to the property." Gonzalez Indiv. Dep. 68:21-25. Gonzalez was right about that—as the GIS map and survey shown above demonstrate, Ember Drive was the *only*

way to enter or leave Creekside Forest Apartments, and the area of the shooting was on the final approach to the premises. As a professional survey has demonstrated, the shooting occurred approximately 15 yards from the nearest Creekside Forest property line and approximately 45 yards from where [redacted] and [redacted] left the property. Lewis Dep. 106:17-107:18, Ex. 5. This was certainly the final approach taken by the assailants, who drove a vehicle to drive down Ember Drive into Creekside Forest, and then turned around to get in front of the victims and set an ambush. Crim. TT 469:17-22; [redacted] Dep. 71:02-72:20, 73:04-74:03, Ex. 5.

The evidence also shows that the Creekside Defendants exercised control over the area where the shooting occurred. Defendants exercised control over the area by telling their security employees to "maintain security" there and telling their maintenance employees to "pick[] up trash" there. [redacted] ¶ 21; [redacted] ¶ 16. Therefore, the Creekside Defendants' argument that "no duty exists because the Creekside Defendants did not *control* the public street where the incident occurred" misses the mark: whether the Creekside Defendants exercised control over this area is an *issue of fact*. *See* Creekside Br. at 10 (emphasis added).

Even if there were *not* an issue of fact as to "control," the Supreme Court has already rejected the Creekside Defendants' argument that lack of "control" precludes liability. In *Todd*, the plaintiff suffered injuries when she slipped and fell on ice at a public plaza outside of Woolworth's department store in downtown Atlanta. 258 Ga. 194. "Woolworth conceded the place . . . was an approach to its premises. It contended, however, it had no duty to remove the ice nor to warn Todd of [the] danger because it had *no control* over the public plaza, part of which was the approach." *Todd*, 258 Ga. at 195 (emphasis added). The trial court agreed with Woolworth, basing "its judgment on the *absence of control* over the plaza by Woolworth." *Id.* (emphasis added).

The Supreme Court reversed, explaining that, "[i]f the approach is a public way [the owner or occupier's] duty under O.C.G.A. § 51-3-1 is to exercise due care within the confines of his right in the public way. His rights in the public way may be quite limited but nonetheless exist." *Id.* at 196; *Martin*, 301 Ga. at 333. *Compare* Creekside Br. at 10 (incorrectly citing multiple cases for the opposite proposition). The Supreme Court then held that, "[w]hile Woolworth *did not control* the approach as an owner, it had the right of any member of the public to remove the ice and had the right to give warning to its customers of the danger of the ice. *Whether it constituted negligence* not to do these things *was for the jury*." *Todd*, 258 Ga. at 197 (emphasis added).

The Creekside Defendants confusion about the relevance of *control* stems from their reliance on cases applying *exceptions* to the general rule "as to what physically constitutes the approach." *See generally, Todd*, 258 Ga. 194. Again, an "approach" generally means "that property directly contiguous, adjacent to, and touching those entryways to the premises...through which the occupier could foresee a reasonable invitee would find it necessary or convenient to traverse." *Motel Props., Inc. v. Miller*, 263 Ga. 484, 486 (1993). However, "there are exceptions to this general definition," one of which *extends* an approach beyond contiguous property where "the owner or occupier of land, for his own particular benefit, has affirmatively exerted *control* over a public way or another's property." *Id.*

In other words, an area constitutes an "approach" if it is contiguous to the premises at issue and a reasonable invitee would traverse it in order to reach the premises, *regardless* of whether the premises owner exercised "control" over that area. *Id.* That "approach" can be *extended* to an area beyond the concept's normal reach if the premises owner exercised "control" over the extended area. *Id.* Here, the part of Ember Drive where the shooting occurred

constituted an approach to Creekside Forest, regardless of whether the Creekside Defendants exercised "control" over it, because it was contiguous to Creekside Forest and a reasonable invitee would traverse it in order to reach the apartments. Moreover, even if "control" was required (and it is not), that would be an issue of fact, as noted above.

In the cases relied upon by the Creekside Defendants, the defendant disputed whether a particular area was an approach, the plaintiff's evidence did not meet the general rule, and the plaintiff had to show evidence of control to *extend* the approach beyond the general definition. *See, e.g.*, *Rischack v. City of Perry*, 223 Ga. App. 856, 857-58 (1996) ("The property where Rischack fell was not *directly contiguous* to the hotel property," and "[n]either did the property at issue fall under the . . . *alternative definition* of an 'approach,'" "[t]his latter definition *extends* what 'can be deemed an approach[.]'"); *Reed v. Ed Taylor Constr. Co.*, 198 Ga. App. 595, 597 (1991) ("It is clear that the public road *did not constitute an approach* to the construction site[.]"); *Hillcrest Foods, Inc. v. Kiritsy*, 227 Ga. App. 554, 557 (1997) ("[The] approaches . . . do[] not generally *extend* to the busy public thoroughfare . . . where the owner has no legal right to control such thoroughfare.") (emphasis altered or added in all). Those cases are inapposite here for two reasons: *first*, the area where this shooting occurred fits within the general, non-extended definition of an approach, and *second*, even if "control" were required, evidence before the Court shows that the Creekside Defendants *did* exercise control over the area of the shooting. [redacted] ¶ 21; [redacted]. ¶ 16.

In cases like *Combs*, *Todd* and the instant cases before this Court, Plaintiffs are not required to show evidence of control to meet the *general* definition of an "approach." Instead, plaintiffs must merely present evidence from which a jury could determine that incident area is "directly contiguous, adjacent to, and touching those entryways to the premises . . . through

which the occupier could foresee a reasonable invite would find it necessary or convenient to traverse." *Motel Props., Inc.*, 263 Ga. at 486. *See also Todd*, 258 Ga. at 197. (emphasis added). The Creekside Defendants' motion should be denied because that definition is satisfied and because even if it were not, an issue of fact exists as to whether the Creekside Defendants exercised "control" over the area where [redacted] and [redacted] were shot.

In sum, the Creekside Defendants' motion must be denied for two independent reasons under the premises liability statute: (1) a jury could reasonably conclude that the incident *arose* from activity on the premises, and (2) a jury could conclude that the shooting took place on an approach to the premises.

2. The Creekside Defendants Owed a Duty Pursuant to The Landlord Repair Statute

In addition to owing a duty under the premises statute, the Creekside Defendants also owed a duty under the landlord repair statute, which says that a "landlord is responsible for . . . damages arising from failure to keep the premises in repair." O.C.G.A. § 44-7-14; *see Compl.* at ¶ 44(b) (alleging that Defendants violated this statute). Importantly, and like the premises statute, *the landlord repair "statute does not limit a landlord's liability to injuries occurring on the premises*." *Matta-Troncoso v. Tyner*, 343 Ga. App. 63, 69 (2017) (emphasis added).

The Creekside Defendants failed to repair a broken security gate. Defendants were aware that both of their security gates were broken; they merely chose not to fix them. [redacted] ¶ 26, 43. This choice was negligent, because in failing to fix the gates the Creekside Defendants allowed the assailants to enter the property, hunt for victims, choose the Plaintiffs, stalk them, then quickly exit the property through another broken security gate to set an ambush. [redacted] Dep. 70:07-23, 71:02-17, 84:12-85:08; [redacted] Dep. 43:14-45:04, 45:15-51:03, 52:13-53:21, 55:01-58:06. If the security gates were working, the assailants could never have entered the

property to find the Plaintiffs. Defendants had a duty to keep those security gates in proper repair, because this incident clearly *arose* from the Creekside Defendants failure to fix those gates, Plaintiff has a valid claim under the landlord repair statute.

In *Matta-Troncoso v. Tyner*, "a few months after [a tenant] moved into [a rental] home, a lawn-care service provider broke the latch to the front gate of the fence." 343 Ga. App. 63, 64 (2017). The tenant informed the landlord within a few days, but the landlord never repaired the fence. *Id*. at 64. The tenant kept two pit bulls in the yard, and because the fence latch was broken, he "began securing the front gate by tightly tying a dog leash around the top posts of the gate." *Id*. at 64. A passerby was walking in the neighborhood one evening, and "the [tenant]s two dogs – who had obviously escaped from their back yard – raced towards her and began attacking . . . ." *Id*. at 64. The tenant later "arrived home, saw that the front gate to the fence was open, and that the dogs had escaped." *Id*. at 64.

The passerby sued the out-of-possession landlord arguing that the landlord, who did not own the dogs, was responsible because the landlord knew the gate latch was broken and did not fix it. *Id*. In response, the landlord argued "he owed no duty to the plaintiffs because O.C.G.A. § 44-7-14 only establishes landlord liability for injuries that occurred *on* the leased premises." *Id*. at 69. The trial court granted summary judgment.

Rejecting these arguments, the Court of Appeals reversed, holding that "*the statute does not limit a landlord's liability to injuries occurring on the premises*. Rather, it provides that the landlord is responsible for damages *arising* from the failure to keep the premises in repair." *Id*. at 69 (emphasis added). "Given that the plaintiff alleges [her] injuries were a result of the broken latch, which [the landlord] failed to repair, allowing the dogs to escape, [plaintiff's] injuries arguably *arose* from a duty [the landlord] owed to her but failed to fulfill." *Id*. at 70 (emphasis).

Here, just like in *Tyner*, security gates were broken, the Creekside Defendants knew that the gates were broken, the Creekside Defendants did not repair the gates, and because the gates were broken dangerous actors were able to pass through them and cause injury to the Plaintiffs. Plaintiffs' injuries *arose*, in part, from the Creekside Defendants' failure to make appropriate repairs, so the Creekside Defendants are liable to Plaintiffs under O.C.G.A. § 44-7-14.

3. The Creekside Defendants Owed a Duty Based on The Nuisance Statute

The Creekside Defendants also owed a duty under nuisance law because they "allowed the dangerous environment on the subject property to continue to exist unabated, thereby creating a nuisance." *See Compl.* at ¶ 37. "A nuisance is anything that causes hurt, inconvenience, or damage to another." O.C.G.A. § 41-1-1. "A private nuisance may injure either a person or property, or both, and for that injury a right of action accrues to the person who is injured." O.C.G.A. § 41-1-4. And because nuisance law applies to *any* condition "that causes hurt, inconvenience or damage to another," where the injuries or criminal attack occurs does not matter. *See Dillard v. H.J. Russell & Co.*, No. 12EV014965D, 2014 Ga. State Lexis 528, at *11 (Ga. State Ct. Apr. 23, 2014) (Edlein, Hon.) (applying nuisance liability even though "it is not even clear whether Briggs, whose body was found on a public sidewalk ever actually went on Boynton Village property on the night at issue").

The case law confirms that, although a "single instance of criminal activity [is] insufficient to establish a claim of nuisance," "*repeated* instances" of criminal activity can establish a nuisance claim. *Bethany Group, LLC v. Grobman*, 315 Ga. App. 298, 302 (2012) (emphasis added). In *Bethany Group*, the Court of Appeals held that "[t]he record contains ample evidence of repeated instances of armed robberies at Alden Ridge [apartment complex], establishing a question of fact as to whether Bethany created or maintained a nuisance at the

complex." *Id.*; *see also Dillard*, 2014 Ga. State Lexis 528, at *18 ("[T]here is sufficient evidence in the record of ongoing violent criminal activity at Boynton Village to establish a question of fact as to whether Defendant created or maintained a nuisance[.]").

In this case, there is similar evidence of "repeated" and "ongoing violent criminal activity." *Bethany Group*, 315 Ga. App. at 302; *Dillard*, 2014 Ga. State Lexis 528, at *18. Among other evidence, the Creekside Defendants' first property manager [redacted] testified that Creekside Forest was located in a high crime area. [redacted] ¶ 9. During [redacted] time at the property, she was made aware of multiple shooting, arson, robberies, fights, rapes, and sexual assaults. *Id.* at ¶¶ 10-17, 29. While [redacted] does not remember the specifics of each reported crime, she has specific memories of the following allegations:

- The Creekside Forest office being set on fire;
- The Creekside Forest office being broken into on three or four occasions;
- A coworker's car being set on fire while they worked in the office;
- A young girl coming to the office to report to the staff that she had been attacked in one of the common areas of the complex;
- People calling the office to threaten her, saying "that white bitch in the office—I'm going to kick her ass"; and
- Being told by the police that there were many shootings on the property.

Id. at ¶¶ 10-17. [redacted] told the Creekside Defendants that she was often threatened with bodily harm. *Id.* at ¶ 18. She told them that there were gangs on the property. *Id.* at ¶ 28. She told them that "there was a crime problem at Creekside Forest" and that "loiterers who did not live there would visit the property to commit crimes." *Id.* at ¶ 42. "*They knew that there was a gang problem. Chester knew these things because I told him about them.*" *Id.* at ¶ 42 (emphasis added).

The evidence that the ongoing crime problem at Creekside Forest constituted a nuisance goes well beyond creating an issue of fact—the evidence is overwhelming. In addition to the

foregoing, the Creekside Defendants knew that "there was lots of drug activity (including drug sales), gang activity, and crime on the property." [redacted] ¶ 13(a). They knew that "tenants were complaining about a lack of security at [Creekside Forest] . . . all of the time." [redacted] ¶ 4. They knew that "[Creekside Forest] was a high-crime area where gangs were active." [redacted] ¶ 9. They knew about children being attacked on the property, robberies occurring, theft, drug sales, and gunfire. [redacted] ¶ 7, 11, 13.

While the law does not "require a complete lack of action on the party of a property owner in order to establish a nuisance" claim, the Creekside Defendants exhibited just that here. They were repeatedly told about a crime problem and did nothing to prevent that crime from flourishing. *Camelot Club Condo Ass'n v. Afari-Opoku*, 340 Ga. App. 618, 624 (2017) (affirming denial of directed verdict for nuisance claim in negligent security apartment case).

The Creekside Defendants knew that its security gates were broken, knew that its security lighting was burned out, knew that its security cameras were not functioning, and knew that its security guard shack was torn down. [redacted] ¶ 43. "*I saw as Chester personally observed these things. I mentioned all of them to Chester*." *Id.* (emphasis added). [redacted] told the Creekside Defendants that they needed to repair the security gates—they didn't. *Id.* at ¶ 20. [redacted] told them they needed to repair the lights—they didn't. *Id.* [redacted] told them they needed off-duty police patrols—they instead used drug dealers living on the premises. *Id.* at ¶ 21. Windows were left broken. Gang graffiti sprouted up. Loiterers, squatters, and gangs roamed freely. If you visited Creekside Forest "[y]ou were a sitting duck" for criminals. Gonzalez Indiv. Dep. 39:24-40:24. The Creekside Defendants are therefore liable for creating a nuisance, and summary judgment should be denied.

B. The Creekside Defendants' Lack of Ordinary Care Caused Plaintiffs' Injuries

1. The Criminal Activity That Caused Plaintiffs' Injuries Was Reasonably Foreseeable

Owners and occupiers of land are not insulated from liability when a third party criminal act is reasonably foreseeable. *Sturbridge Partners., Ltd. v. Walker*, 267 Ga. 785, 785-86 (1997). While "the question of reasonable foreseeability of a criminal attack is generally for a jury's determination," our Supreme Court has established some guideposts. *Sturbridge Partners, Ltd.*, 267 Ga. at 787; *Lay v. Munford*, 235 Ga. 340 (1975). Using those guideposts, there are at least three types of evidence from which a jury could find foreseeability in the present cases.

First, the jury could find this incident foreseeable based on evidence of substantially similar prior crime. Under this method of establishing foreseeability:

> The court must inquire into the *location*, *nature*, and *extent* of the prior criminal activities, and their *likeness*, *proximity* or *other relationship* to the crime in question. . . . [*T*]*hat does not mean identical*. What is required is that the prior incident be sufficient to *attract* the [owner or occupier's] *attention* to the dangerous condition which resulted in the litigated incident.

Sturbridge Partners, Ltd., 267 Ga. at 786 (emphasis added and citations omitted); *see also McNeal*, 230 Ga. App. at 787 ("The law does not require that the owner of premises must be able to 'expect' a certain incident to occur."); *Ga. Osteopathic Hosp. v. O'Neal*, 198 Ga. App. 770, 776 (1991) ("[I]t is not necessary that he should have been able to anticipate the particular consequences which ensued.").

In analyzing prior crime, the Supreme Court rejects "restrictive and inflexible approach[e]s [that] do[] not square with common sense or tort law." *Sturbridge*, 267 Ga. at 786. As such, courts should not "judge these cases on the basis of mere numbers or severity of prior criminal acts." *McNeal*, 230 Ga. App. at 789. Instead, all that the law requires is that "the prior criminal acts [be] similar [enough] to those at issue [in the present case], such that a reasonable

person would take precautions to protect his or her customers against the risk posed by that type of activity." *Martin*, 301 Ga. at 331.

Actual knowledge of the prior crime is not required. Instead, "constructive knowledge of [the] danger is sufficient." *Compare TGM Ashley Lakes, Inc. v. Jennings*, 264 Ga. App. 456, 462 (2003) (*en banc*) *with* Creekside Br. at 18-19; *see also Double View Ventures, LLC v. Polite*, 326 Ga. App. 555, 560 (2014) *overruled in part by Martin*, 301 Ga. at 341 ("Given that the incidents that occurred inside the store were reported to the police, as the dissent acknowledges, it strains credulity that the owners of the store were not aware of this criminal activity.").

Even though actual knowledge is not required to prove reasonable foreseeability, the Creekside Defendants did have actual knowledge of prior criminal acts—acts that made the loitering, stalking, robbery, assault, and shooting of [redacted] and [redacted] foreseeable. Specifically, the Creekside Defendants' property manager testified that she has specific memories of the following allegations:

- The Creekside Forest office being set on fire;
- The Creekside Forest office being broken into on three or four occasions;
- A coworker's car being set on fire while they worked in the office;
- A young girl coming to the office to report to the staff that she had been attacked in one of the common areas of the complex;
- People calling the office to threaten her, saying "that white bitch in the office—I'm going to kick her ass"; and
- Being told by the police that there were many shootings on the property.

[redacted] ¶¶ 10-17.

[redacted] further confirmed that while she does not remember every incident, she knows there were shootings, assaults, arson robberies, fights, rapes, sexual assaults, and other acts of violence at the property. *Id.* at ¶¶ 10-17, 29. This is why [redacted] wrote the following e-mail to upper management about one month before the incident: "I need security immediately especially

when it starts to get dark. IMMEDIATELY." *Id.* at 34. The prior crime and risk of criminal assault is also part of the reason that [redacted] quit working at the property. [redacted] feared for her own safety and for the safety of the residents while at Creekside Forest. *Id.* at at ¶¶ 39-40. *See Matt v. Days Inns of Am.*, 212 Ga. App. 792, 794 (1994) (*en banc*) ("Matt produced evidence from Days Inn's security guard that he did not feel safe patrolling the premises . . . .").

When the court evaluates the totality of these past crimes at Creekside Forest, there is clearly evidence from which a jury could find that dangerous criminal activity at Creekside Forest was foreseeable.

While prior crime evidence is one way to establish foreseeability—and prior crime evidence certainly exists in this matter—prior crime evidence is not the only way to establish foreseeability. *Wade v. Findlay Mgmt., Inc.*, 253 Ga. App. 688, 690 (2002) ("a showing of prior similar incidents is not always required to establish that a danger was reasonably foreseeable.") "An absolute requirement of this nature would create the equivalent of a 'one free bite rule' for premises liability, even if the proprietor knew that the danger existed." *Wade,* 253 Ga. App. at 690; *Wallace v. Boys Club of Albany,* 211 Ga. App. 534 fn2 (1993).

There are multiple ways to show that a property owner could have foreseen a violent crime, and adducing evidence of specific prior crimes is only *one* such method. Foreseeability may also be established through admissions of a defendant's employees or agents. For instance, in *Piggly Wiggly Southern, Inc. v. Snowden*, the Court of Appeals held that "[e]ven in the absence of prior similar crimes," testimony from former employees that the parking lot was unsafe, that a security guard was needed, that male employees should walk female employees to their cars at night, and that employees did "not allow [our] wives to go to the store alone" were sufficient to establish foreseeability. 219 Ga. App. 148, 149 (1995).

Plaintiffs have clearly adduced such evidence here—most of the affiants cited in this brief are former employees of Meisels *and* Gonzalez, and they have provided evidence far stronger than the evidence that established liability in *Piggly Wiggly Southern*. *See* [redacted] ¶ 1,[60] 4 (establishing employee status); [redacted] ¶ 7 (same); [redacted] ¶ 5-6 (same); [redacted] ¶ 4-5 (same). This jury could find this incident foreseeable because the Creekside Defendants' former employees and security contractors have testified that the apartment complex was unsafe and that the Creekside Defendants knew it. [redacted] ¶¶ 20-21, 39-43; [redacted] ¶ 9; [redacted] ¶¶ 9, 20-21; [redacted] ¶ 13. The owner of the new "security" company *agreed*, testifying that if you visited Creekside Forest, "[y]ou're a sitting duck" for criminals. Gonzalez Indiv. Dep. 39:24-40:24

At Creekside Forest, there was "a danger . . . so obvious [to the Defendants] that an issue for jury determination . . . exist[s] regarding . . . foreseeability [even in] the absence of a prior similar incident . . . [because] the Defendants' [former employees and paid security contractors have] acknowledged that [they] knew of the specific danger." *Wallace v. Boys Club*, 211 Ga. App. 534, fn2 (1993); *see also Shoney's, Inc. v. Hudson*, 218 Ga. App. 171, 175 (1995) ("there is other evidence of record that defendant had knowledge that its customers were in danger[:] testi[mony] acknowledg[ing] that there was a potential for attacks on customers in the restaurant parking lot. This testimony clearly presents an issue of material fact regarding whether the criminal attack on plaintiff was reasonably foreseeable.")

The jury could also find this shooting foreseeable because there is evidence that Creekside Forest is located in a high crime area, and "an establishment's location in a high crime area may also support the finding of a duty on the party of the landowner to guard against

[60] As discussed in fn. 24, a typographical error resulted in two paragraphs numbered 1 and two paragraphs numbered 2. This citation refers to the second paragraph that is numbered "1."

criminal attacks." *Martin*, 301 Ga. at 331 (*citing Lau's Corp. v. Haskins*, 261 Ga. 491, 492-93 (1991)). *See, e.g.*, [redacted] ¶ 8 ("high crime area").

In *Lau's Corp.*, the Plaintiffs "were robbed by two men in the parking lot adjoining the China King Restaurant," and "they alleged that the proprietor . . . knew that his patrons were in danger, but failed to . . . provide adequate security." 261 Ga. at 491. The proprietor claimed there was no evidence of foreseeability because he "was aware of only one other criminal incident" where "a woman's purse was snatched" and that other "woman was not injured." *Id*. at 491.

In response, the plaintiffs filed affidavits of "two local business people who stated that the neighborhood . . . is, in their opinion, a high crime area" and that "they have heard businesses in the area have experienced problems with robberies or burglaries." *Id*. at 492. Faced with these affidavits, a ***unanimous***[61] Georgia Supreme Court held that:

> Giving the plaintiffs the benefit of all reasonable inferences from the affidavits in the record, it is also possible that [the proprietor] knew that his business is located in a high crime area. We therefore conclude that, although plaintiffs' evidence as to the duty element of the tort claim is weak, it is sufficient to give rise to a triable issue as to whether Mr. Van had a duty to exercise ordinary care to guard his patrons against the risk posed by criminal activity.

Lau's Corp., 261 Ga. at 492-493.

In the cases currently before this Court, Plaintiffs have stronger evidence of "high crime" than the Court in *Lau's Corp.* Specifically, [redacted], [redacted], [redacted], and [redacted]—all of whom *worked for* Defendants— have testified that Creekside Forest was located in a high crime area. [redacted] ¶¶ 9, 20, 39, 42; [redacted] ¶ 9; [redacted] ¶ 9; [redacted] ¶ 13.

[61] One justice dissented from other divisions of the opinion, but this portion of the opinion was unanimous.

2. Creekside Could Have Prevented [redacted] and [redacted] Injuries With Ordinary Care

As with foreseeability, the Supreme Court has adopted a fact-dependent standard for deciding whether injuries could have been prevented with ordinary care:

> [Proximate cause] is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent . . . . It requires both factfinding in the "what happened" sense, and an evaluation of whether the facts measure up to the legal standard set by precedent. Ordinarily, both determinations are most appropriately made by a jury upon appropriate instructions from the judge. The decision may be made by the trial judge or appellate court only if reasonable persons could not differ as to both the relevant facts and the evaluative application of legal standards . . . to the facts.

Atlanta Obstetrics & Gynecology Group v. Coleman, 260 Ga. 569, 569-70 (1990).

In this case, there are several ways in which the Plaintiffs' injuries could have been prevented with ordinary care.

First, the Creekside Defendants could have controlled access to the property by fixing their broken security gates, fixing their falling down security guard shack at the front gate, stationing a security guard at the gate and shack, providing the security guard with a tenant list, and directing that guard to only allow tenants and authorized guests to enter the property. Had the Creekside Defendants taken these actions, the assailants would not have been able to enter Creekside Forest, search for an easy robbery target, locate the Plaintiffs, stalk them, and then set up an ambush.

The Creekside Defendants' former property manager confirms that these actions were an effective crime deterrent in the past. They successfully prevented loiterers from entering the property in the past and thereby reduced crime. [redacted] ¶¶ 30-32.

Second, if the Creekside Defendants had hired off-duty law enforcement to perform roaming patrols at night, then the presence of those uniformed officers could have deterred the assailants from choosing Creekside Forest as a good location to loiter, search for victims, stalk

the Plaintiffs, and prepare an ambush. [redacted] confirmed that when she had hired off-duty police to patrol the property and stationed guards at the security gates in the past, there was less loitering around the complex and were fewer complaints of violence. *Id.* at ¶¶ 30, 32. She also confirmed that when Defendants discontinued the off-duty police patrols, criminal activity got worse and accelerated to such a level that she no longer felt comfortable at the property and instead feared for her own safety. *Id.* at 36-39. *See Mason v. Chateau Cmtys., Inc.*, 280 Ga. App. 106, 109-11 (2006) (*en banc*) (relying on evidence that there had been "frequent police patrols at night," "the patrols stopped," there was an "increase in crime," which could have been "deterre[d]" by "an after-hours security presence" because, among other reasons, "security patrols increased the likelihood of discovery during a crime.").

Third, the Creekside Defendants had a number of other security options that could have prevented [redacted] and [redacted] injuries. Among other things, the Creekside Defendants could have ensured that their nighttime security lights were working, fixed their broken security cameras, posted notice on the property alerting all persons of the use of those security cameras, painted over the gang graffiti, and completed other good property management practices that would send a strong message to would be criminals—a message that the property is secure, well-maintained, and a poor place for a robbery. Instead of taking these steps, the Creekside Defendants chose to leave the property in a broken-down state and chose to send a different message to would be criminals—that the residents of the property are sitting ducks for criminals to assault and rob. Gonzalez Indiv. Dep. 39:24-40:24. *See, e.g.*, *Mason*, 280 Ga. App. at 111 ("[T]he best deterrent to crime is fear of detection.").

Fourth, the Creekside Defendants could have prevented Plaintiffs' injuries by sharing their knowledge of prior crimes and knowledge of ongoing security concerns with [redacted], [redacted]

and other residents and guests. Had the Creekside Defendants effectively informed their residents and guests of the dangers they faced, [redacted] and [redacted] and other residents could have taken extra precautions, like not walking to the store at night or simply choosing to live or visit elsewhere. *See, e.g.*, *Mason*, 280 Ga. App. at 111 ("The company could have told residents of the increase in crime and been proactive in advocating caution or even hypervigilance; [and] it could have aggressively addressed the issue of guests on the property, determined who they were, and limited their presence.")

If the Creekside Defendants had taken any or all of those steps, [redacted] and [redacted] injuries could have been prevented. In its brief, the Creekside Defendants addresses only *one* of the many options it could have chosen to protect its residents—security guards. The Creekside Defendants wrongly assert that "it would be entirely speculative to conclude that additional security would have prevented the assailant from firing the fatal shots." Creekside Br. at 22. This argument has been rejected by multiple <u>*en banc*</u> panels of the Court of Appeals. In *Matt v. Days Inn of America*, Richard Matt was staying at a Days Inn near the Atlanta airport, so that he and his newly married wife could "take a honeymoon flight to Mexico very early [in the] morning." 212 Ga. App. 792, 793 (1994) (*en banc*). While Matt "opened the trunk of his car to remove some luggage, another car came up behind him. When someone in the car demanded Matt's wallet and Matt did not comply immediately, he was shot. The car then sped away." *Id.*; *see also id.* at 799 (Blackburn, J., dissenting) (The perpetrator "shot the victim without getting out of the car," and it "happened very quickly[.]").

The Court of Appeals rejected the argument that "Days Inn cannot be liable in this case because it could not have prevented this crime." *Id.* at 796. An *en banc* panel of the Court of Appeals instead found that the "dissent takes an *unreasonably restrictive* view of the measures

an [owner or occupier] might use to protect [invitees]." *Id.* "First, a jury might find that an [owner or occupier] is not limited to actions that might prevent guests from being injured *once a crime is in progress*. Thus, it is possible a jury might find that the visible presence of a security guard . . . could have prevented this [crime]." *Id.* "Further, a jury might also find negligence in that the *unarmed* security guard remained safely in his vehicle," and an owner or occupier "was negligent in not maintaining an armed security force"; or that "[an owner or occupier] was negligent in not installing a security gate," especially where "*these measures were recommended* . . . but were then rejected." *Id.* (emphasis added in all).

The Court of Appeals also rejected similar arguments in *Martin.* In *Martin*, Joshua Martin "was viciously attacked by gang members at a nearby bus stop that he used to access [Six Flags'] park." *Six Flags Over Georgia II, LP v. Martin*, 335 Ga. App. 350 (2015) (*en banc*). "Without any provocation, Martin was hit with brass knuckles and knocked to the ground. Martin attempted to escape, but he was repeatedly stomped on by various gang members, which caused him permanent and severe brain damage." *Id.* at 351-52. Just like the Creekside Defendants, "Six Flags contend[ed] that Martin's 'laundry list' of the missed security measures resulting in his attack [was] too 'speculative' to prove causation." *Id.* at 362.

The Court of Appeals rejected this argument as well. This time, an *en banc* panel of the Court of Appeals recognized that "there was evidence that Six Flags ignored . . . advice to provide security near the CCT bus stop during *all operating hours*" and "Six Flags was keenly aware of the serious gang problem and criminal activity that occurred in and around its premises." 335 Ga. App. at 362-63 (emphasis added). The Court of Appeals, therefore, concluded that "[t]he foregoing evidence of causation, then is specific and does not require speculation." *Id.*

In sum, a jury, not any court, must decide the issues, and "it cannot be inferred, from the failure of [the Creekside Defendants] to act, that nothing could have been done [to prevent [redacted] and [redacted] injuries]." *Good Ol' Days Downtown v. Yancey*, 209 Ga. App. 696, 698 (1993); *see also Six Flags Over Georgia II, LP v. Martin*, 335 Ga. App. 350 (2015) (*en banc*); *Mason v. Chateau Cmtys., Inc.*, 280 Ga. App. 106 (2006) (*en banc*); *Matt v. Days Inns of Am.*, 212 Ga. App. 792 (1994) (*en banc*).

C. The Creekside Defendants Are Liable For Punitive Damages And Expenses Of Litigation

A plaintiff may recover punitive damages "in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed . . . that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1 (b). A plaintiff may also recover "[t]he expenses of litigation" "where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense." O.C.G.A. § 13-6-11.

Claims for punitive damages and expenses of litigation may be analyzed at the same time because "the same evidence which authorize[s] the verdict for punitive damages also authorize[s] the jury to find the defendants acted in bad faith." *Windermere, Ltd. v. Bettes*, 211 Ga. App. 177, 179 (1993); *see also Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 343 (1984) ("[T]he same evidence which authorized the verdict for punitive damages . . . also authorized the jury to find that Ford acted in bad faith[.]").

The Creekside Defendants make no genuine attempt to satisfy their burden for summary judgment as to punitive damages and expenses of litigation, other than to simply repeat their arguments that they committed no negligence at all. *See, e.g.*, Creekside Br. at 26 and 30 ("the facts in the record do not support liability, let alone punitive damages"), 23 ("since the plaintiffs

are not entitled to recover on these claims as set forth above, they are not entitled to their attorney's fees incurred in the pursuit of a meritless claims.").

Because the Creekside Defendants have chosen not to make a separate case for summary judgment as to punitive damages and expenses of litigation, this Court should not do so on its own. *Cf. Pfeiffer v. Ga. Dep't of Transp.*, 275 Ga. 827, 828 (2002) ("Each party has a duty to present his best case on a motion for summary judgment."). If the Court concludes that the Creekside Defendants have not satisfied their burden for summary judgment as to Plaintiffs' negligence claims, it should similarly deny the Creekside Defendants' motion as to Plaintiffs' claims for punitive damages and expenses of litigation.

After all, "[i]t is not essential to a recovery for punitive damages that the person inflicting the damage was guilty of willful and intentional misconduct. It is sufficient that the act be done under such circumstances as evinces an entire want of care and a conscious indifference to consequences." *Battle v. Kilcrease*, 54 Ga. App. 808, 809 (1936); *see also Windermere*, 211 Ga. App. at 179 ("[T]he absence of an intentional tort is not fatal to appellees' claim for O.C.G.A. § 13-6-11 bad faith attorney fees."). And "a *jury* must determine whether a complainant is entitled to punitive damages and if so, the amount to be awarded." *Covington Square Assocs., LLC v. Ingles Mkts., Inc.*, 300 Ga. App. 740, 744-45 (2009) (emphasis added), *rev'd on other grounds*, 287 Ga. 445 (2010). "Although a trial court – and the appellate courts – must consider whether there is *any evidence* to support an award of punitive damages, the question of whether to impose such an award is for the *trier of fact*." *Id.* (emphasis added).

Of course, even if this Court were to look separately at the evidence for punitive damages and expenses of litigation, it would conclude that there is sufficient evidence for a jury to reasonably find that the Creekside Defendants were consciously indifferent to the consequences.

First, the Creekside Defendants had actual knowledge of the *specific dangerous condition* that caused the injuries, knew of solutions to that dangerous condition, and yet consciously chose not to exercise ordinary care. The Creekside Defendants knew that there was an obvious and overwhelming crime and security problem at their complex, knew that many non-resident loiterers would visit the property to commit crimes, knew that there was a gang problem at the complex, knew that its security gates were broken, knew that its security lighting was burned out, knew that its security cameras were not functioning, and knew that its security guard shack was torn down. [redacted] ¶¶ 42-43. They knew that their 'security guards' were "*taking half of the money that changed hands* in drug deals on the property." [redacted] ¶ 13 (e), (f). The Creekside Defendants also knew that when Creekside Forest previously employed off duty law enforcement for patrols and stationed a security guard at the working front security gate that those actions got the crime under control. [redacted] ¶ 32. The Creekside Defendants further knew that when the property security features were discontinued and deferred the crime level increased. *Id.* at ¶¶ 33-34, 38, 41-43. And lastly, the Creekside Defendants knew that residents and guests like [redacted] and [redacted] were "sitting ducks" from criminal assaults. Gonzalez Indiv. Dep. 39:24-40:24. Yet despite knowing all of these things, the Creekside Defendants consciously chose to fire the off-duty police officers and replace them with drug dealers, and leave all property security features in a non-working condition. [redacted] ¶¶ 33, 36, 41-43.

This evidence is similar to evidence in other cases where punitive damages were authorized based on the Defendants recognition of the danger. *See, e.g., Ford*, 171 Ga. App. at 343 ("Ford was shown to have *actual knowledge* before the sale of a defect in its product from which it could have reasonably foreseen injury of the *specific type* sustained here. Ford's *own*

documents disclosed its knowledge . . . [of] a strong probability of resulting injury to the occupants; nevertheless, Ford management decided not to correct this defect or warn the owners of the danger[.]") (emphasis added and citations omitted). The Creekside Defendants had actual notice of prior violent crimes on their premises, knew that security features helped to abate those crimes, recognized that resident safety was in jeopardy, but chose not to repair security features and not to maintain off duty police patrols. Because the Creekside Defendants did nothing despite recognizing the danger, a foreseeable injury occurred.

Second, the *consistent and repeated warnings* of a dangerous condition demonstrate that the Creekside Defendants were consciously indifferent to the consequences. This is not a case in which Defendants received a single warning. Instead, there were consistent and repeated warnings to the Creekside Defendants before purchasing the property, immediately after the purchase of the property, and in the weeks leading up to the incident.

Again, this evidence is similar to evidence in other cases, where punitive damages were authorized based on widespread evidence of prior crime. *See, e.g.*, *FPI Atlanta, L.P. v. Seaton*, 240 Ga. App. 880, 886 (1999) (physical precedent) (finding that, where "there was a high rate of violent crimes," "the failure to provide a real 'security patrol' for the apartment complex and to have a fenced and gated access gives rise to a jury issue as to an entire want of care, which gives rise to a presumption of a conscious indifference to the consequences for tenants").

CONCLUSION

The Creekside Defendants had actual knowledge that Creekside Forest exhibited signs of gang activity, suffered outbreaks of violent crime, that its security gate was broken, and that its street lights did not work. The Creekside Defendants were warned that private security patrols and functioning security features were necessary to deter gang activity and other violent crime.

The Creekside Defendants ignored their knowledge, ignored every warning, and ignored their duties to invitees. Because of their conscious decision not to act, the very harm they were warned of and could have prevented came to pass, resulting in injuries to [redacted] and the death of [redacted]. For these reasons, this Court should deny the Creekside Defendants' motion for summary judgment and proceed with a jury trial to decide Plaintiffs' claims.

Respectfully submitted this 29th day of August, 2018.

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IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

[redacted]	:	
Plaintiffs,	:	NO.: 16A62361
vs.	:	
CREEKSIDE BY TAG, LLC; T.A.G. ACQUISITIONS, LTD; CHESKEL MEISELS; SMJ CONSTRUCTION SERVICES, LLC; JOSEPH GONZALEZ; AND JOHN DOES #3-5	:	
Defendants.	:	

CERTIFICATE OF SERVICE

I hereby certify the foregoing was served upon all parties by e-filing same using the Odyssey eFileGA System which will automatically send email notification of said filing to the following attorneys of record:

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Respectfully submitted this 29th day of August, 2018.

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