IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

[redacted].	:	NO.: 16A62361
Plaintiffs,	:	
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 SMJ DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

James E. Butler, III
Ga. Bar No. 116955
Alyssa Baskam
Ga. Bar No. 776157
BUTLER TOBIN
10 Lenox Pointe
Atlanta, GA 30324
Tel: 404-587-8423
jeb@butlertobin.com
darren@butlertobin.com
alyssa@butlertobin.com

Matthew B. Stoddard
Ga. Bar No. 558215
THE STODDARD FIRM
5447 Roswell Rd Ste 204
Atlanta, GA 30342
Tel: 404-593-2695
matt@thestoddardfirm.com

TABLE OF CONTENTS

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.

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"

[1] Meisels Indiv. Dep. 7:07-8:18 (Ex. B).

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 email from the property manager, [redacted], to Meisels stating: "I need security 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

---

[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). *Accord* [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; [redacted] ¶¶ 10, 13.
[13] [redacted] ¶ 34-35. *Accord id.* at ¶¶ 18, 20-21, 39; [redacted] ¶ 17(a).
[14] Gonzalez Indiv. Dep. 11:10-13.
[15] [redacted] ¶ 23.

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 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

---

[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 Exhibit 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).
[24] [redacted] ¶ 1. (Due to a typographical error, the enumerated paragraphs in the [redacted] 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.

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 secur[redacted] 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 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]

---

[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.
[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

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], [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 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.

---

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]).

[44] *Id.* at 71:02-17.

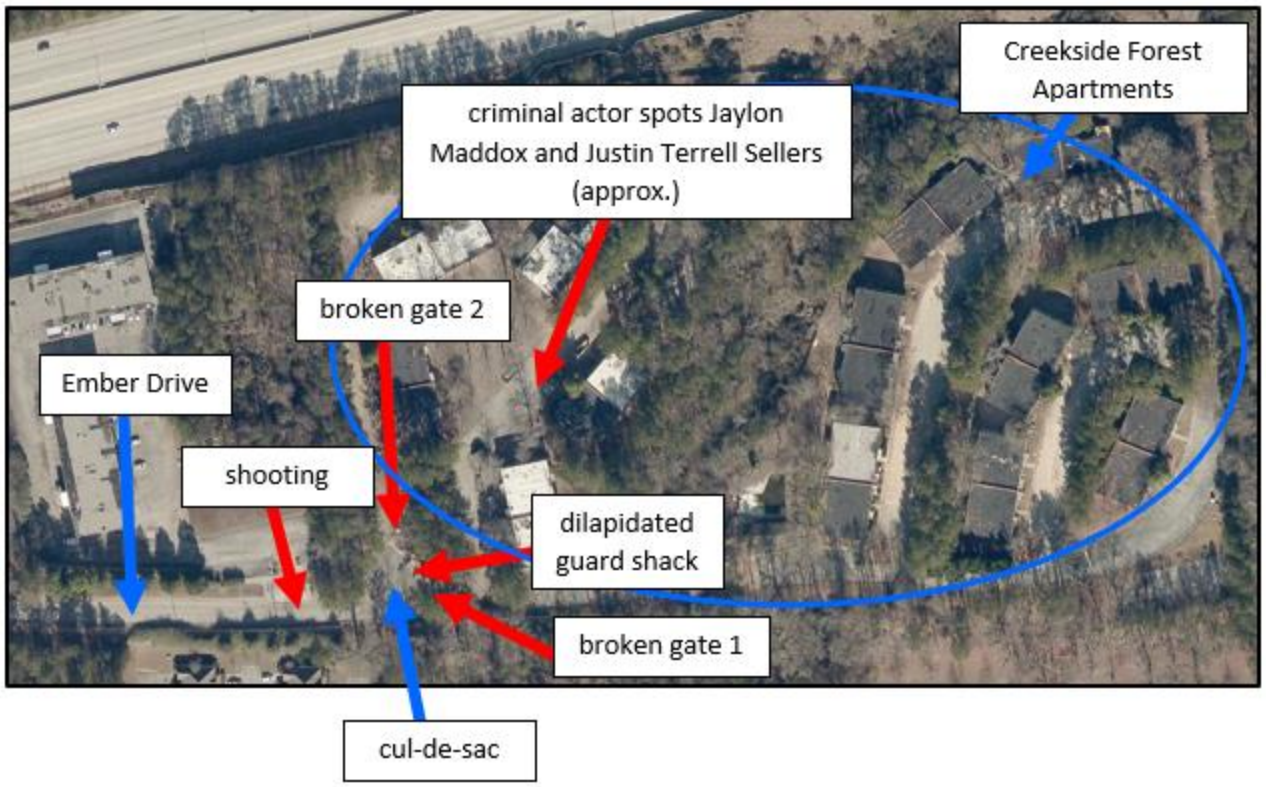
[45] *Id.*

[46] *Id.*

[47] *Id.* at 71:08-17, 84:08-85:08.

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]

[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] Lewis Dep. 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

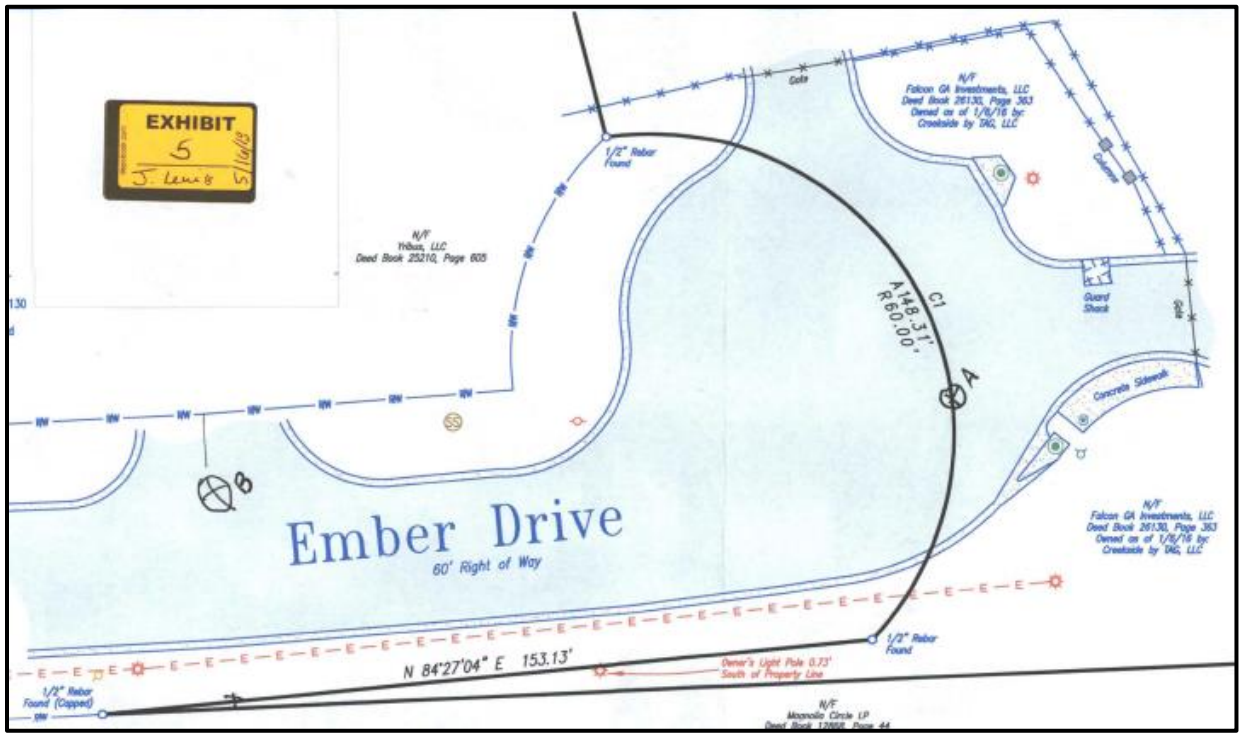


EXHIBIT
5
Ember Drive
60' Right of Way
N 84°27'04" E 153.13'
R=60.00'
A=148.31'
C1
1/2" Rebar Found
1/2" Rebar Found (Capped)
Guard Shack
Gate
Concrete Sidewalk
Owner's Light Pole 0.73' South of Property Line

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

---

[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.").

INCORPORATION OF OTHER RESPONSE

As allowed by O.C.G.A. § 9-11-10(c), in order to avoid redundancy, Plaintiffs incorporates by reference its entire response to the Creekside Defendants Motion for Summary Judgment. In addition, Plaintiffs provide the following additional argument with factual support:

SUMMARY OF THE ARGUMENT

First, the SMJ Defendants owed Plaintiffs a duty of ordinary care under their repair and security contract, which was orally modified as being for the benefit of residents and guests. Second, the SMJ Defendants also owed a duty under Restatement § 324A (negligent or voluntary undertaking) because they assumed a duty to provide security for residents and guests and were obligated to do so non-negligently. Third, the SMJ Construction Defendants owed a duty under the premises statute because they ***operated*** the land where the incident arose.

The SMJ Defendants breached those duties. As described above, the SMJ Defendants were keenly aware of the property's crime problem. *See, e.g.*, [redacted] ¶ 13, 15; [redacted] ¶ 9; [redacted] ¶¶ 9, 17; [redacted] ¶¶ 11, 13. The SMJ Defendants breached their duty of ordinary care because they failed to take reasonable security measures, fix broken security

features, provide effective security patrols, or even show up for work on the night of the shooting.

The SMJ Defendants' misconduct proximately caused the death of [redacted] and the shooting of [redacted]. Proximate cause is generally a jury question in negligent security cases. As the Court of Appeals has written:

> The dissent by Judge Blackburn addresses the issue of whether Days Inn was negligent and it concludes that Days Inn cannot be liable in this case because it could not have prevented this crime. Issues of negligence, however, are for the jury, except in plain and palpable cases in which reasonable minds cannot differ. This is not such a case. Moreover, **this dissent takes an unreasonably restrictive view** of the measures an innkeeper might use to protect guests in its parking lot. First, a jury might find that an innkeeper 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 in the parking lot** (as Days Inns' own security procedures required) **could have prevented this robbery**...**a jury might also conclude that Days Inn was negligent in not installing a security gate that could have prevented this drive-through robbery attempt**.

Matt v. Days Inns of Am., 212 Ga. App. 792, 796 (1994) (*en banc*) (emphasis added and citations omitted).

ARGUMENT

A. The SMJ Defendants Owed Plaintiffs a Duty of Ordinary Care

For three independent reasons, the SMJ Defendants owed a duty of ordinary care to Plaintiffs. *First*, the SMJ Defendants owed a duty to Plaintiffs because their oral contract for security was intended to benefit residents and their guests. *Second*, the SMJ Defendants owed a duty of ordinary care because SMJ undertook to provide security to residents and guests. *See* Restatement 2d of Torts § 324A; *Monitronics Int'l, Inc. v. Veasley*, 323 Ga. App. 126, 131 (2013) (*en banc*) *cert denied at* 2013 Ga. LEXIS 914. *Third*, as an occupier of land, the SMJ Defendants owed a duty under the premises statute to keep the land and its approaches safe. *See* O.C.G.A. § 51-3-1.

1. The SMJ Defendants Owed a Duty Based on The Security Contract

"The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on the contract." O.C.G.A. § 9-2-20 (b); *see Starrett v. Commercial Bank*, 226 Ga. App. 598, 599 (1997) ("We have further defined a 'third-party beneficiary contract' as 'one in which the promisor engages to the promisee to render some performance to a third person.'"); *Plantation Pipe Line Co. v. 3-D Excavators, Inc.*, 160 Ga. App. 756, 758 (1981) ("It is not necessary that the plaintiff here be specifically named in the contract.").

Where a landowner hires a contractor to carry out the landowner's duty to exercise ordinary care in keeping the premises and approaches safe, a third-party beneficiary of such a contract may also maintain an action in tort against the contractor. *See, e.g., R & S Farms, Inc. v. Butler*, 258 Ga. App. 784, 786 (2002) ("'[T]he duty imposed upon an owner or occupier of land by O.C.G.A. § 51-3-1 is inapplicable to an independent contractor.' Even so, when the law imposes a duty to the public, an independent contractor may contractually assume such duty, so that a breach of the contractual duties may give rise to damages for personal injury."); *Maddox v. Cumberland Distrib. Servs.*, 236 Ga. App. 170, 171 (1999) ("An independent contractor may be liable to a third party based on negligent performance of a contract.").

In this case, the SMJ Defendants admit that they contracted with Meisels to provide twenty-four-hour, seven-days-a-week property security. SMJ Br. at 2. They also admit the scope of that work included fixing the "fencing and gates." Gonzalez Dep. 42:22-45:07. Pursuant to this contract, the SMJ Defendants had a duty to actually provide twenty-four-hour, seven-days-a-week property security and to actually fix the broken security gates on the property. The SMJ Defendants did neither. *E.g.,* [redacted] ¶¶ 12, 13, 16.

The SMJ Defendants argue that they do not owe those duties *to Plaintiffs* because

according the SMJ Defendants "the contract in this case is silent as to whether it is intended to confer a benefit to" the Plaintiffs. SMJ Br. at 7. But SMJ Defendants omit something crucial: after the contract was signed, at a later date, the Creekside Defendants and the SMJ Defendants mutually departed from, amended, and altered the original agreement. The reformed contract *did* create a third-party beneficiary relationship and resulting duties to the Plaintiffs. Specifically, Defendant Creekside by TAG's owner, Defendant Chester Meisels testified as follows:

> Q: You said to Mr. Gonzalez, You are here to provide security for the residents?
>
> A: Specifically.
>
> Q: And Mr. Gonzalez said back to you, That's correct?
>
> A: Correct.
>
> Q: Mr. Gonzalez made it clear to you that he understood that he was supposed to be providing security for the residents at the property?
>
> A: Yes.
>
> Q: And that happened – that conversation happened prior to January 6, 2016, correct?
>
> A: Correct.

Creekside 30(b)(6) 70:13-71:02 (admissible against the SMJ Defendants as the statement of a party opponent pursuant to O.C.G.A. § 24-8-801(d)(2)(A)). *See also id.* at 162:09-20 (Gonzalez expressly agreed to provide security for people); Meisels Indiv. Dep. 20:14-21:14. The evidence shows not only that SMJ and Creekside *agreed* that SMJ would provide security for the people at Creekside Forest (as shown above), but also that SMJ actually undertook to *execute* that agreement to provide security for the people. [redacted] ¶ 19 ("[M]y job was to provide security for the people who lived at the apartment complex and their guests . . . . 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.").

"Where the parties, in the course of the execution of a contract, depart from its terms and

pay and receive money under such departure, reasonable notice must be given to the other of the intention to rely on the exact terms of the agreement." O.C.G.A. § 13-4-4. More plainly, "a contract provision may be waived by the conduct of both parties intended to result in the mutual disregard of, or mutual departure from the contract terms." *Hughes v. Great S. Midway*, 265 Ga. 94, 95 (1995). "[G]enerally, an alteration or modification of the contract is a question for the jury, that is, as to whether there has been a mutual departure from the terms thereof." *Norair Eng'g Corp. v. Porter Trucking Co.*, 163 Ga. App. 780, 784 (1982); *Kusuma v. Metametrix, Inc.*, 191 Ga. App. 255, 257 (1989) (". . . whether the parties' mutual conduct caused a waiver and effected a quasi-new agreement ordinarily is a question for the jury.")

While the SMJ Defendants can deny that this conversation modifying the contract actually took place, a jury must determine who to believe.

2. The SMJ Defendants Owed a Duty to Non-Negligently Perform a Voluntarily Assumed Duties

Even if the Plaintiffs were not intended beneficiaries of the orally modified security contract, the SMJ Defendants still owed the Plaintiffs a duty of ordinary care because they voluntarily assumed duties to provide security for tenants and their guests. Creekside 30(b)(6) Dep. 70:02-71:02; Meisels Indiv. Dep. 20:14-21:14; [redacted] ¶ 19. "[U]nder well-established Georgia law, a person may be held liable for the negligent performance of a voluntary undertaking." *Monitronics*, 323 Ga. App. at 131. "And whether such a relationship exists between the parties . . . is a question of fact to be resolved by a jury.". *Id.* Georgia has adopted the Restatement 2d Torts § 324A, which provides that:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm or (b) he has undertaken to

> perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Huggins v. Aetna Cas. & Surety Co., 245 Ga. 248, 249 (1980); Restatement 2d of Torts § 324A.

The SMJ Defendants voluntarily assumed a duty to provide security to residents and guests like the Plaintiffs in two ways.

First, the SMJ Defendants undertook to perform a duty owed by the Creekside Defendants to residents and guests. Meisels Indiv. Dep. 20:14-21:14; [redacted] ¶ 19. *See also* Restatement 2d of Torts § 324A, illustration 1.d. ("Even where the negligence of the actor does not create any new risk or increase an existing one, he is still subject to liability if, by his undertaking with the other, he has undertaken a duty which the other owes to the third person."), *id.* ("Such liability is in addition to that which he may have to the person to whom he has agreed to render the services."). *See also* Restatement 2d of Torts § 324A (providing in subsection (b) "he has undertaken to perform a duty owed by the other to the third person). Pursuant to O.C.G.A. § 51-3-1, the Creekside Defendants owed residents and guests a duty to "exercise ordinary care in keeping the premises and approaches safe." And the Creekside Defendants hired the SMJ Defendants to perform that duty. Meisels Indiv. Dep. 20:14-21:14; [redacted] ¶ 19. By entering into a contract with the Creekside Defendants to provide security services, the SMJ Defendants undertook to perform the duty owed by the Creekside Defendants, and can therefore be held liable.

Second, the Plaintiffs' injuries were suffered because the Creekside Defendants relied on the SMJ Defendants' voluntary undertaking. *See, e.g.*, *Huggins*, 245 Ga. at 249 ("It is thus clear that reliance by the employer . . . is sufficient to sustain a tort claim by the employee . . . and that *the employee himself need not have so relied*.") (emphasis added); Restatement 2d of Torts § 324A(c) ("the harm suffered is because of reliance of the other *or* the third person upon the

undertaking") (emphasis supplied). As described in the recitation of facts above, the Creekside Defendants relied on the SMJ Defendants to provide security services for the residents and their guests, and the SMJ Defendants understood that they were to provide security for the residents and their guests. Creekside 30(b)(6) at 70:13-71:02 (SMJ was to provide security for people), 153:12-19 (Creekside trusted Gonzalez), 156:08-13 ("[T]his is why we actually engaged with Mr. Gonzalez, to handle the security and the rest of the stuff."), 162:09-20 (Gonzalez expressly agreed to provide security for people); Meisels Indiv. Dep. 20:14-21:14 (SMJ was to provide security for people); 24:09-10 (Gonzalez was Creekside's "expert on security"). The SMJ Defendants accordingly assumed duties concerning the Plaintiffs, and thereby owed a duty to perform those duties non-negligently.

3. The SMJ Defendants Owed a Duty Based on Premises Law

Even if there was no contract at all, the SMJ Defendants would still owe a duty in this case because Georgia law creates a duty for both 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.

The question of whether a Defendant is an "occupier of land" "depends on whether or not [the SMJ Defendants] had control of the property, whether or not [they] had title thereto and whether or not [they] had a superior right of possession of property which is in the possession or control of another." *Scheer v. Cliatt*, 133 Ga. App. 702, 704 (1975). Determinations of "control" are properly a jury consideration—"*Whether a particular appurtenance or instrumentality is under the control of an owner or occupant is usually a question of fact*." *Scheer*, 133 Ga. App. at 704 (emphasis supplied). A lease is not determinative as to control because

"there are many other factors which should be considered as evidence of control" including:

- Who managed the daily operations of the shop;
- Who had the right to admit or exclude customers; and
- Who maintained and repaired the premises.

Id. at 704.

Here, there is substantial evidence that the SMJ Defendants controlled the property and therefore occupied the land. Specifically, the SMJ Defendants:

- Had authority to collect rent on the property. [redacted] ¶ 10; [redacted] ¶ 17.
- Had authority to evict tenants from the property. [redacted] ¶ 10; [redacted] ¶ 17.
- "[R]epaired" "spackle[d]" "paint[ed]" and did "whatever needed to be done on the inside." SMJ 30(b)(6) 39:21-40:03 (Ex. M).
- "[P]aint[ed] the outside" of the buildings, "cut the grass" and "hired people to do electrical work." *Id.*at 45:03-19, 61:02.
- [H]ad an office "the same place that the business office for the complex would have been", and when "tenants came in and complained to" the property manager, the SMJ Defendants would respond by performing maintenance tasks for the tenants. *Id.* at 73:13-20, 76:16-23.
- "[P]rovided security for and on behalf of the residents" and "thr[e]w people off the property." *Id.* at 98:08-14; Creekside by TAG 30(b)(6) 70:02-23.
- Expected their employees to "maintain security in the area where [redacted] and [redacted] were shot." [redacted] ¶ 21.
- "Would tell residents that [they] would fix the security problems." [redacted] ¶ 17(h).

In *Georgia Building Services, Inc. v. Perry*, the Court of Appeals held that the trial court properly denied a motion for directed verdict to an office building tenant after a customer fell on a floor mat at the building entrance. 193 Ga. App. 288, 295-296 (1989). Under the lease agreement with the building owner, the office tenant had no responsibility to maintain the common area where the customer fell, but because the tenant rented the vast majority of the office building, its

employees warned others of the hazard after the incident, and its employees photographed the incident scene, the Court of Appeals held there was enough evidence to make the issue of control (i.e., who *occupied* the area) a jury question. *Id.* at 297.

In *Nair*, the Court of Appeals reversed summary judgment to a food company after a student fell from a broken picnic table in an outside courtyard at Emory. *Nair v. Aramark Food Srv Corp.*, 276 Ga. App. 793 (2005). The food company, which managed and operated Emory's food service program, argued it could not be liable because it neither owned nor occupied the outside courtyard. *Id.* at 793. However, after the incident, the food company first used caution signs and tape to block off the broken bench, and then later repaired the broken bench. *Id.* Even though the lease contract stated that Emory was responsible for proper maintenance and repair of the facilities, the Court of Appeals held the food company assumed control over a portion of the premises, and the issue of whether it assumed control over the table at issue—i.e., who *occupied* the relevant area—was a jury question. *Id.* at 795.

This dispute presents even stronger facts for letting a jury decide whether the SMJ Defendants *occupied* the area at issue. Like the defendants in *Georgia Building Services* and *Nair*, the SMJ Defendants attempted to fix things after the incident—installing lights, fixing the security cameras, and adding new security personnel. [redacted] ¶ 18; [redacted] ¶ 14-15, 17. These efforts by the SMJ Defendants show "control." Defendant SMJ's employees understood that they were "expected . . . to maintain security in the area where [redacted] and [redacted] were shot and where [redacted] died." [redacted] ¶ 21. The SMJ Defendants also had the authority to (and actually did) "throw people off the property." [redacted]. ¶ 10; [redacted] ¶ 37. Whether the SMJ Defendants occupied the property is an issue of fact.

B. The Creekside Defendants' Negligence Caused Plaintiffs' Injuries

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

Under the premises statute, occupiers of property are not insulated from liability when an attack is reasonably foreseeable. *Sturbridge Partners., Ltd. v. Walker*, 267 Ga. 785, 785-86 (1997). "The question of reasonable foreseeability of a criminal attack is generally for a jury's determination." *Id.* at 787; *Lay v. Munford*, 235 Ga. 340 (1975). Here, the evidence shows that a serious crime of the type suffered by the Plaintiffs was reasonably foreseeable.

First, Defendant Joseph Gonzalez (President and sole owner of SMJ Construction Services) testified that based on the condition of the property, the people who were at Creekside Forest were "sitting duck[s]" for criminals. Gonzalez Indiv. Dep. 39:24-40:24.

Second, the SMJ Defendants absolutely knew about the ongoing crime problem at the property where they were supposed to provide security. They knew that "there was lots of drug activity (including drug sales), gang activity, and crime on the property." [redacted] ¶ 13(a). They knew that "there was lots of gang activity in the area of [Creekside Forest]." [redacted] ¶ 9. 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. They received complaints "about poor security and the lack of lights, working gates, and a real security presence." [redacted] ¶ 17(d).

Third, in response to repeated complaints about security, the SMJ Defendants *promised to fix the problem*. Specifically, "Joe and Chester would tell residents that they would fix the security problems—but [Creekside Forest] did not fix the security problems." [redacted] ¶ 17(h). Clearly, the President of SMJ would not promise to fix a problem if he did not know that

a problem existed *and* know that SMJ ought to fix it. The SMJ Defendants' unfulfilled promise to fix the problem proves that (1) there was a problem, (2) SMJ knew about the problem, and (3) SMJ was consciously indifferent to the problem.

With these facts, the jury could easily conclude that a serious criminal incident was foreseeable to the SMJ Defendants.

2. The SMJ Defendants Could Have Prevented [redacted] and [redacted] Injuries With Ordinary Care

The Supreme Court has explained that proximate cause is a highly fact-dependent question that depends on a number of factors and which ordinarily must be decided by a jury:

> [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 SMJ Defendants were a contributing cause of this incident, and had they exercised ordinary care, this incident could have been prevented.

First, the SMJ Defendants could have controlled access to the property by fixing the property's physical security features—e.g., the broken security gates, the broken security lighting, the broken security fencing, and the broken security cameras. The original security contract required the SMJ Defendants to fix at least some of these items, but SMJ fixed none of them. *E.g.*, Gonzalez Indiv. Dep. 11:10-12:19, 42:22-45:07; [redacted] ¶ 23.

Second, the SMJ Defendants could have stationed a security guard at the gate and shack,

provided the security guard with a tenant list, and directed that guard to only allow tenants and authorized guests to enter the property. Or even more basically, the SMJ Defendants could have paid their security guards so that they actually showed up for work and acted as a visual crime deterrent at the time of the incident. The modified security agreement required SMJ security guards to patrol the property for the benefit of the residents and guests, but ***on the night of the incident, there were no security guards on duty***. [redacted] ¶ 13.

In response to these facts, the SMJ Defendants makes arguments that have already been rejected by multiple *en banc* panels of the Court of Appeals. The Court of Appeals has held that "a jury might find that the visible presence of a security guard . . . could have prevented this [crime]." *Matt*, 212 Ga. App. at 796 (*en banc*). The Court of Appeals has also held that a jury might find defendants "negligent in not maintaining an armed security force"; or "negligent in not installing a security gate," especially where "these measures were recommended . . . but were then rejected." *Id*. Whether the SMJ Defendants' inactions could have prevented Plaintiffs' injuries is therefore a question for the jury.

C. The SMJ 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 SMJ Defendants make no genuine attempt to satisfy their burden for summary judgment as to punitive damages and expenses of litigation specifically. *See* SMJ Br. at 13-14. And as a result, 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 SMJ Defendants have not satisfied their burden for summary judgment as to Plaintiffs' negligence claims, it should similarly deny the SMJ 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 specifically at the evidence regarding the SMJ

Defendants' liability for punitive damages and expenses of litigation, it should easily conclude that there is sufficient evidence for a jury to reasonably find that the SMJ Defendants were consciously indifferent to the consequences. Among other things:

- The 'security' personnel hired by SMJ "did not stop the drug sales, and instead these people who were supposed to be providing security were *taking half of the money that changed hands* in drug deals on the property." [redacted] ¶ 13(e).

- Both Gonzalez and Meisels *knew* that the 'security' personnel were "taking half" on drug deals at the property. *Id.* at ¶ 13(f).

- The President of SMJ promised to fix the problems, but then broke that promise. [redacted] ¶ 17(h).

- "[A]t the time of the shooting on 01/06/16, there was no security personnel on duty, nobody at [Creekside Forests's] office, and nobody in the guard shack near the broken gates." [redacted] ¶ 13.

- SMJ Defendants' owner—Defendant Joseph Gonzalez—believed that if you visited Creekside Forest "[y]ou're a sitting duck" for criminals, but he did not fix the security gate, increase the patrol length, hire better trained officers, or do anything, really, to protect or warn residents and their guests of the danger. Gonzalez Dep. 39:24-40:24.

These facts provide more than enough basis for a jury to decide that these "circumstances . . . evince[s] an entire want of care and conscious indifference to consequences." *Battle*, 54 Ga. App. at 809; *see 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); *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 . . . gives rise to a jury issue as to an entire want of care, which gives

rise to a presumption of a conscious indifference") (emphasis added in all)

CONCLUSION

For the foregoing reasons, the Court should deny the SMJ Defendants' motion for summary judgment.

Respectfully submitted this 29th day of August, 2018.

THE STODDARD FIRM

/s/ Matthew B. Stoddard
Matthew B. Stoddard, Esq.
Georgia Bar No. 558215
Keith N. Evra, Esq.
Georgia Bar No. 810271
Attorneys for Plaintiff

THE STODDARD FIRM
5447 Roswell Road, Suite 204
Atlanta, GA 30342
P: 404-593-2695
F: 404-264-1149
matt@thestoddardfirm.com

BUTLER TOBIN LLC

/s/ James E. Butler III
James E. Butler III
Georgia Bar No. 116955
Darren M. Tobin
Georgia Bar No. 200383
Alyssa Baskam
Georgia Bar No. 776157
Attorneys for Plaintiff

BUTLER TOBIN LLC
10 Lenox Pointe
Atlanta, Georgia 30324
jeb@butlertobin.com
darren@butlertobin.com
alyssa@butlertobin.com
P: 404-587-8423
F: 404-581-5877

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:

Matthew Barr
Bryan Grantham
Hawkins, Parnell, Thackston & Young LLP
303 Peachtree Street NE, Suite 4000
Atlanta, Georgia 30308

Barbara A. Marschalk
John S. Stevens
Drew, Eckl & Farnham LLP
303 Peachtree Street NE, Suite 3500
Atlanta, Georgia 30308

and by depositing a true copy of same in the United States Mail with adequate postage affixed thereon and addressed as follows:

T.A.G. Acquisitions, Ltd
c/o Northwest Registered Agent Services, Inc.
Registered Agent
300 Colonial Center Parkway, Suite 100N
Roswell, Georgia 30076

Respectfully submitted this 29th day of August, 2018.

BUTLER TOBIN LLC

BY: */s/ James E. Butler, III*
JAMES E. BUTLER, III
Georgia Bar No. 116955
DARREN M. TOBIN
Georgia Bar No. 200383
ALYSSA BASKAM
Georgia Bar No. 776157

10 Lenox Pointe
Atlanta, Georgia 30324
jeb@butlertobin.com
darren@butlertobin.com
alyssa@butlertobin.com
(t) 404 587 8423
(f) 404 581 5877

ATTORNEYS FOR PLAINTIFF