No. 319121

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STAR F. CRILL, individually,

Plaintiff-Appellant,

vs.

WRBF INC. d/b/a DENNY'S RESTAURANT; DEBRA FOUTS and JACK DOE FOUTS, individually and as a marital community; JERRY FOUTS, and JANE DOE FOUTS, individually and as a marital community; DENNY'S INC., a California Corporation; JACKIE D. LEGERE, JR.; AUSTIN GARNER,

Defendants-Respondents.

REPLY BRIEF OF APPELLANT

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INTRODUCTION TO REPLY

The trial court granted summary judgment of dismissal based upon an erroneous standard – requiring that in order for a criminal assault to be reasonably foreseeable to the owner of a business premises, the owner must have had a similar occurrence of the exact nature as the one upon which plaintiff's claim is based. In doing so, the trial court made the further error of excluding an exhibit based upon an erroneous understanding of whether the exhibit constituted hearsay.

ARGUMENT IN REPLY

A. The Exclusion Of The Newspaper Exhibit Was Error.

1. Crill Made A Timely Objection To The Exclusion Of The Exhibit.

WRBF first offers a procedural defense of the trial court's exclusion of Exhibit 8, claiming that "Crill did not file an opposition to that motion . . ." (WRBF's Br. at 8.) However, it is clear from the record that the motion to strike Exhibit 8 was filed with WRBF's Reply Brief on June 17, only four days before the hearing on summary judgment. (CP 253). WRBF filed no motion to shorten time for the hearing of the motion. Written motions require at least five days' notice prior to hearing. CR 6(d). When the trial court heard the motion on June 21, Crill's attorney Brandon Casey objected to the motion to strike Exhibit 8, and explained why the exhibit was

admissible. (RP 3). Thus, the failure to file a *written* objection to the motion does not operate in any way to waive the right to claim error on the part of the trial judge in striking Exhibit 8.

2. The Exhibit Was Admissible.

WRBF justifies the trial court's decision to strike Exhibit 8 on several grounds. First, WRBF argues that Exhibit 8 was hearsay, since it was offered for the truth of the matter asserted. WRBF conflates the question of whether 24-hour restaurants are in fact dangerous from the question of whether WRBF had *notice* of the potential of 24-hour restaurants to be dangerous. Even if 24-hour restaurants were in fact no more dangerous than those with more limited operating hours, the *belief* that they are dangerous would still cause a reasonable person to exercise greater precautions to prevent criminal assault. Similarly, even if 24-hour restaurants in fact were *not* more dangerous, in the absence of notice to a reasonable person of the increased danger, no greater precautions would be required. Thus, the reason for admitting the article is not to establish the truth of the matter asserted in the article (that 24-hour restaurants are more dangerous), but rather the fact that restaurants such as WRBF had been told that they were. In particular, Jerry Fouts, President of WRBF, testified that he receives this publication and distributes it to his managers.

A similar issue was presented in *Price v. State*, 96 Wn.App. 604, 980 P.2d 302 (Div. 2 1999). The plaintiffs, adoptive parents, offered the declaration of their child's aunt to show that the State had notice of the birth mother's drug and alcohol abuse. In response, the State claimed that the aunt's statements were "rife with inadmissible hearsay . . ." 96 Wn.App. at 618, 980 P.2d at 311-12. The appeals court rejected this argument, holding that plaintiffs "are not offering them for the truth of the matter asserted but rather to establish that DSHS was on notice of the biological mother's possible drug and alcohol abuse . . . ." 96 Wn.App. at 618, 980 P.2d at 312. Similarly, here WRBF erroneously contends that the relevance of Exhibit 8 depends upon whether or not the statements contained therein were true or not; instead, the issue is whether or not they put WRBF on notice of the potential that 24-hour restaurants are more dangerous and require additional precautions beyond those without late night bar rush crowds.

3. The Exclusion Of The Exhibit Was Not Harmless.

In its last attempt to salvage the trial court's erroneous exclusion of Exhibit 8, WRBF argues that exclusion was harmless either (1) because it was irrelevant; (2) because the information was already before the court in the form of the expert's opinion; or (3) because the appellate court could consider it despite the trial court's exclusion. None of these self-contradicting reasons justify a conclusion that the exclusion was harmless.

First, WRBF repeatedly asserts that WRBF owed no duty to prevent the criminal assault upon Crill because such an attack was not reasonably foreseeable. It is highly probative of the existence of a duty on the part of WRBF if it had received notice that 24-hour restaurants, particularly those that serve as the landing point for a "bar rush" crowd from a nearby drinking establishment, pose a higher risk of criminal assault. Yet when asked to consider such evidence, the trial court held that it was inadmissible not only standing alone, but even as an adjunct to the expert's testimony. The trial court specifically stated, "It would be improper for the Court *to consider it* in a Summary Judgment motion . . . " (RP 5:11-12; emphasis added). This disposes of the second claim of harmless error – the trial court not only excluded it as stand-alone evidence, but refused to consider it altogether.

The third reason for claiming that exclusion was harmless error – that the appellate court could consider it notwithstanding the trial court's exclusion – fails to recognize that the trial court granted summary judgment based upon its determination that Crill had failed to provide evidence that criminal assault of the type she sustained was reasonably foreseeable. In fact such evidence *was* provided, but the trial court improperly excluded it, and once taken into account that evidence requires that summary judgment be denied.

B. WRBF Owed A Duty To Crill To Prevent Foreseeable Criminal Conduct.

WRBF's brief studiously avoids the standard actually applied by the trial court. Instead of the standard that the trial court used (whether there had been a previous incident of the "exact nature" as that which resulted in injury to the plaintiff), WRBF defends the trial court's grant of summary judgment by arguing that "WRBF breached no duty to Crill." (WRBF Br. at 11.). But this question of whether a duty was breached is a question of fact and was not the basis of the trial court's dismissal on summary judgment. Of course it is true that the appellate court may affirm on any ground established by the record below, even one that is different from the one relied upon by the trial court, but WRBF's shifting argument belies the weakness of its position objecting to the existence of any duty being owed.

1. "Foreseeability Of Criminal Conduct" Does Not Require An Act Of The "Exact Nature" As That Which Resulted In Plaintiff's Injury.

WRBF concedes that there *is* a duty of care to prevent criminal assault on a business visitor – so long as such an assault is reasonably foreseeable. However, WRBF repeats the trial court's error of insisting that reasonable foreseeability is synonymous with a previous attack of the "exact" (trial court's formulation) or "similar" (WRBF's position on appeal) nature. This would amount to a "one free bite" rule with respect to a business owner's duty to its invitees. The law in Washington is otherwise.

For example, in *Johnson v. State*, 77 Wn.App. 934, 894 P.2d 1366 (Div. 1 1995), a college student sued the state for negligently failing to prevent a rape that occurred while she was attempting to enter her college dormitory. The trial court dismissed the claim, finding no duty to prevent the crime. Division One reversed, finding that the student was an invitee, and that the rape that occurred was not unforeseeable. Nowhere did the court impose a requirement that the plaintiff establish that prior similar assaults had occurred as a basis for finding that the rape was foreseeable. "A criminal act may be considered foreseeable if the actual harm fell within a general field of danger which should have been anticipated. The court may determine a criminal act is unforeseeable as a matter of law only if the occurrence is so highly extraordinary or improbable as to be wholly beyond the range of expectability. Otherwise, the foreseeability of the criminal act is a question for the trier of fact." *Johnson*, 77 Wn.App. at 942, 894 P.2d at 1371.

Similarly, in *Shepard v. Mielke,* 75 Wn.App. 201, 877 P.2d 220 (Div. 3 1994), the plaintiff sued the nursing home in which she had been a resident for negligently permitting her to be sexually assaulted. The trial court dismissed the claim on summary judgment, but Division 3 reversed. Again, nowhere in the opinion is there a requirement that there had been evidence of previous sexual assaults in order to make such criminal conduct

foreseeable. "Considering the number of visitors who enter and leave nursing homes daily and the level of vulnerability found in many residents, it is not 'highly extraordinary' a resident shut away in a room by herself, whose screams are often ignored, could be victimized by a third party. Accordingly, the question of foreseeability should go to the jury." *Shepard*, 75 Wn.App. at 206, 877 P.2d at 223.

Past history in a particular location is not the dispositive issue in determining whether or not criminal conduct is reasonably foreseeable, and thus a duty of care was owed.

a. The Location Of The Restaurant And The Hours It Is Open Are Relevant To The Question Of Reasonable Foreseeability.

WRBF offers the court two conflicting standards by which to judge reasonable foreseeability. On the one hand, WRBF maintains that the Argonne Denny's is a "family restaurant" where criminal assault would be less likely. (WRBF Br. at 3) On the other hand, WRBF claims that "Crill's case . . . rests on the argument that 24-hour restaurants, whether they be in North Dakota or inner-city Detroit, have the same exact duty to foresee criminal conduct based on occurrences across the globe." (WRBF Br. at 10). Contrary to this mischaracterization of Crill's argument, Crill proposes that in evaluating what is reasonably foreseeable in terms of the potential for criminal assault, the court must take into account the particular

characteristics of a business premises and the notice that a reasonable person had available (including information from other similar business establishments) with respect to the potential for criminal assault. As suggested in Crill's opening brief, if WRBF had experienced criminal assaults at six of its seven franchise locations in Spokane, it could reasonably foresee that a criminal assault could occur at the seventh location.[1]

Yet under the test followed by the trial court and urged by WRBF, that seventh location would owe no duty to protect the next victim until the exact same crime had happened at least once at that exact physical address, notwithstanding the broader corporate knowledge. Similarly, if the owner of one of the restaurants in a city knows that criminal assaults have taken place in the other nine restaurants, an assault in that owner's restaurant would be reasonably foreseeable, despite the fact that the owner had no experience of his own with respect to criminal assault. To hold that an owner of business premises owes no duty of care until a "similar" incident

[1] WRBF again attempts to rely on its "incident log" to prove the absence of prior incidents, but the credibility of this log is in serious doubt since both incident reports completed by WRBF servers for *this* incident went missing and nothing is in the log at all about the Crill injury, despite WRBF staff's admissions that it should be. Ms. Fuentes also testified that she filled out a written statement that night and gave it to "management" which should have been placed into the incident log, but which WRBF has never produced and claims was never put into the incident log. CP 165-67. Ms. Winter confirms she also left a written statement on the WRBF manager's desk, which she later discussed specifically with Mr. Wold, but which has never been produced and should have been but was not placed into the WRBF log book. CP 325-26, Liberg Depo, CP 377-78, Lovins Depo, CP 418-20.

had occurred on that exact location, regardless of the knowledge of the likelihood that such an assault *could* occur, would be to stand the law of foreseeability on its head. It would erase "foresee" entirely from the foreseeability test.

b. WRBF Not Only *Could Have* Foreseen The Potential For Criminal Assault; They Actually *Did Foresee* A Potential Criminal Assault.

Despite WRBF's assertion that the Argonne Denny's was a "family restaurant," they had policies in place for dealing with unruly and/or intoxicated customers. In fact, an assistant manager was scheduled for the very evening / early morning shift when Crill was assaulted. However, that manager was unable to report for work because of a plumbing emergency at home. WRBF chose not to fill that shift with another employee. Instead, they asked Maryquince Winter to serve as "acting assistant manager" at the same time that she performed her duties as a server. In effect, the position of assistant manager went unfilled.

It is clear from the record that the assistant manager was expected to identify customers who should be turned away rather than seated, and to address any security concerns that arose. (Wold Depo., CP 127-129, 134-35.). The potential for a criminal assault is not something beyond the realm of reasonable foreseeability – it is and was anticipated by Denny's franchise owners and reflected in the staffing, particularly late at night. Wold

describes the restaurant's policy and training on disruptive guests as having just two steps: first, any disruptive guest should be asked to "control themselves, quiet down," and second, "[i]f the guest does not comply with that request, they are asked to leave the restaurant immediately." (CP 61.). But in this case, with no manager on premises and only a server trying to fill both the duties of a manager and a server, the Garner party was given three chances, which was predictably one too many.

None of the cases cited by WRBF support the trial court's application of a requirement that there be previous incidents of the "exact nature" as that which injured plaintiff. In *Wilbert v. Metropolitan Park Dist. of Tacoma,* 90 Wn. App. 304, 950 P.2d 522 (Div. 2 1998), the expert suggested additional security measures beyond what the park district had in place, alleging these additional measures would have prevented a fatal shooting that occurred "minutes" after a fight broke out. Similarly, in *Tortes v. King County*, 119 Wn. App. 1, 84 P.3d 252 (Div. 1 2003), the plaintiff claimed that the Seattle Metro should have adopted security measures for its buses that would have prevented a passenger from murdering the driver, shooting himself, and causing the bus to plunge off a bridge. In *Raider v. Greyhound Lines, Inc.*, 94 Wn. App. 816, 975 P.2d 518 (Div. 3 1999), the court found that the shooting at a bus station was racially motivated and was unrelated to the risks of criminal conduct cited by the

plaintiff as a reason for enhanced security. Finally, in *Fuentes v. Port of Seattle*, 119 Wn. App. 864, 82 P.3d 1175 (Div. 1 2003), the plaintiff alleged that the airport security was inadequate to protect her from car-jacking, based upon the airport's experience with car prowling.

These cases share an additional common feature: in them the plaintiff did not allege that the defendant had already failed to follow its own procedures; the plaintiff claimed that additional security measures were necessary in light of the foreseeable risks. In the case at bar, by contrast, plaintiff's expert testified that Denny's practice of assigning an assistant manager to handle the "bar-rush" crowd was not followed. While it is important to distinguish the legal question of whether a duty of care is owed from the factual question of whether a duty of care has been breached, evidence that the defendant **already** adopted security measures in light of the potential for the type of injury that the plaintiff has suffered, coupled with proof that the defendant failed to follow such procedures, should be more than sufficient to establish that the risk was reasonably foreseeable.

c. Unless The Event Is "So Highly Extraordinary Or Improbable As To Be Wholly Beyond The Range Of Expectability," The Question Is For The Jury.

Reasonable minds could differ as to whether the risk of criminal assault was sufficiently foreseeable, and WRBF's policies sufficiently deficient, as to hold WRBF liable for Crill's injuries. The owner of business

premises is not an insurer of the safety of its customers; a customer can recover damages for criminal assault only if the customer shows that the business owner should have reasonably foreseen the risk of injury and then negligently failed to prevent it. But the law is also clear that ordinarily the question of foreseeability is one for the jury. The court should decide the question as a matter of law only if the injury "was the result of a succession of 'most unusual and unforeseen events' which, 'by no flight of the imagination,' could have been anticipated." *McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 316, 322, 255 P.2d 360, 364 (1953), quoting *Sitarek v. Montgomery,* 32 Wn.2d 794, 803, 203 P.2d 1062, 1067 (1949). Washington courts have repeatedly cited the standard adopted in the *McLeod* case as the one to be applied: "the test we applied was whether such occurrences are so highly extraordinary or improbable as to be wholly beyond the range of expectability." *McLeod*, 42 Wn.2d at 323, 255 P.2d at 364. *Kok v. Tacoma School Dist. No. 10,* 179 Wn.App. 10, 317 P.3d 481, 485 (Div. 2 2013) ("Intentional or criminal conduct may be foreseeable unless it is 'so highly extraordinary or improbable as to be wholly beyond the range of expectability'"); *N.K. v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 175 Wn.App. 517, 530, 307 P.3d 730, 737 (Div. 1 2013) ("Foreseeability is a question for the jury unless the circumstances of the injury are 'so highly extraordinary or improbable

as to be wholly beyond the range of expectability'"); *M.H. v. Corporation of Catholic Archbishop of Seattle*, 162 Wn.App. 183, 193, 252 P.3d 914, 919 (Div. 1 2011) ("As a general rule, foreseeability is a question for the jury unless the circumstances of the inquiry are so highly extraordinary or improbable as to be wholly beyond the range of expectability") (internal quotes omitted); *Fuentes v. Port of Seattle*, 119 Wash.App. 864, 82 P.3d 1175 (Div. 1 2003) (same); *Tortes v. King County*, 119 Wn.App. 1, 84 P.3d 252 (Div. 1 2003) (same); *Estate of Jones v. State*, 107 Wn.App. 510, 15 P.3d 180 (Div. 1 2000) (same); *Raider v. Greyhound Lines, Inc.*, 94 Wn.App. 816, 975 P.2d 518 (Div. 3 1999) (same); *Wilbert v. Metropolitan Park Dist. of Tacoma,* 90 Wn.App. 304, 950 P.2d 522 (Div. 2 1998) (same); *Funkhouser v. Wilson*, 89 Wn.App. 644, 950 P.2d 501 (Div. 1 1998) (same); *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997) (same); *Johnson v. State*, 77 Wn.App. 934, 894 P.2d 1366 (Div. 1 1995).

Significantly, in each of the cases cited by WRBF for the proposition that a history of similar assaults is a necessary precondition for reasonable foreseeability, the court has repeated the same test: foreseeability is for the jury unless the circumstances are so highly extraordinary or improbable as to be wholly beyond the range of expectability.

2. WRBF Had Specific Notice Of Pending Danger, Recognized The Danger, Then Intervened; Whether WRBF's Partial Intervention Was Reasonable Is A Question of Fact.

To affirm the trial court's dismissal, WRBF must not only establish that there is no genuine issue as to whether WRBF could and should have reasonably foreseen the type of injury threatened by a loud, cursing altercation involving an apparently intoxicated patron during a bar rush; it must also establish that there is no genuine issue that its partial intervention attempt was completed with reasonable care. WRBF cannot satisfy this burden, since both are questions of fact with substantial evidence supporting Crill's claims.

a. The Events Of January 3, 2009 Gave Notice To WRBF Of The Criminal Harm About To Occur.

> The operator of a ____owes to a person who has an express or implied invitation to come upon the premises a duty to exercise ordinary care to protect the person from *[criminal harm that the operator knows or has reason to know is occurring or about to occur] [and] [reasonably foreseeable criminal conduct by third persons]*.

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 120.06.03 (6th ed.) (emphasis and brackets in original) (citing *Nivens* as authority for instruction). Early in the morning of January 3, 2009—regardless of whether the crimes of that night were foreseeable *before* that night—WRBF became aware of the imminent potential for a criminal assault before Ms.

Crill was smashed in the back of her head by another WRBF customer. At the moment WRBF had reason to know that criminal harm was "occurring or about to occur," it owed a duty to exercise ordinary care to protect Ms. Crill from the intoxicated, violent patrons WRBF had invited into the restaurant earlier that evening. This is true regardless of whether the potential that one patron could be harmed by another intoxicated, violent patron during the bar rush should have been foreseen by WRBF in the weeks, months, and years before Ms. Crill was assaulted and injured at Denny's. Once Maryquince Winter recognized that a verbal confrontation was escalating, and she began to intervene trying to de-escalate it, she had a duty to complete that intervention with reasonable care.

This timeline on the following table highlights the multiple times WRBF was put on notice of the impending danger that night.

Events of January 3, 2009, as told by key witnesses			
By Star Crill:	**By Mary Winter:**	**By Police:**	**Other on-duty Servers:**
Crill booth is sitting talking quietly finishing their meal. CP 28-29.	Normally a server, that night Winter is filling in as Manager. CP 65.		
Garner booth is "very drunk;" slurring words & begins cursing at Crill booth within 5	Winter gives Garner a 1st warning—"is there going to be a problem?" CP 310.	Called to Denny's at 2:08 a.m. for report of fight. CP 48.	Charlotte warns Winter "there was going to be a problem" with Garner booth. CP 310.

Events of January 3, 2009, as told by key witnesses			
By Star Crill:	**By Mary Winter:**	**By Police:**	**Other on-duty Servers:**
minutes of being seated. CP 28-30.	Winter leaves to care for other customers. CP 311.	Legere admitted telling Crill "I don't want to hear about your nigg** way of life!" CP 49.	Charlotte finds Winter again warning Garner booth is cursing at other customers. CP 324.
Shortly after, Garner booth curses at Crill booth a 2nd time; Denny's waitress is taking Garner booth's order between 1st and 3rd incident. CP 29.	Winter is concerned "there was a situation" & warns Garner booth again "I can tell from your tone, I'm going to ask you to leave." CP 311-12.	The three men in the Garner booth were "very disorderly" in Denny's. CP 49.	D. Fuentes—it was "bar rush time" 2:15-2:30 a.m. when I saw two tables with yelling between them and I found Winter & warned her. CP 157.
3-4 minutes later, Garner booth gets progressively louder toward Crill booth—"Hey, I said shut the F**k up." CP 30-31.	Winter doesn't ask Garner booth to leave. Instead she leaves area again to give coffee to other tables. CP 311-12.	The three men in the Garner booth were "very disorderly" in Denny's. CP 49. Garner was apparently intoxicated and "extremely belligerent." CP 49.	D. Fuentes thought this was a "typical mouth altercation" because they were, "you know, loud, drunk." CP 162.
In the next 2 minutes, altercation steadily escalates. Crill looks around for help; sees a Denny's waitress who looks back at her but then leaves area. CP 37-38.	Winter can hear loud cursing from the other side of the restaurant. CP 318-19.		
	Winter knew which table had to leave because there was no noise from Star Crill's table. CP 321.	Knot felt forming on the back of Star Crill's head. CP 49.	
Left alone with Garner booth after Winter tells Garner to leave, Crill is punched in the back of her head. CP 49.	Winter returns a 3rd time to Garner booth and tells them to leave. Then she "squeezed out" to call 911. CP 312.	2:30 a.m. Garner arrested for 4th degree assault. CP 50.	

b. Even If WRBF Could Not Have Reasonably Foreseen The Potential For Criminal Assault As A General Risk Of Its Business, Once It Began Intervening It Had A Duty To Exercise Reasonable Care.

WRBF claims Crill is being "disingenuous" by pointing out that WRBF staff recognized the potential harm from the Garner group and voluntarily intervened, Resp. Br. 23. WRBF bases this argument on the inability of a woman who suffered a concussion and traumatic brain injury to remember every detail of the facts leading up to her injury. Ms. Crill also couldn't give a detailed timeline for the post-injury timespan: "I was more focused on not puking." (CP 44.). Meanwhile, the declarations submitted by WRBF and testimony of its employees and former employees confirms that they did, in fact, recognize the danger and that they made failed, partial attempts to intervene. (CP 317.). As the non-moving party, Ms. Crill is entitled to have all evidence and inferences viewed in her favor, even in cases where her memory is spotty and other witnesses can recall events in greater detail. The timeline table in the preceding section highlights sufficient evidence, viewed in a light most favorable to Crill, to establish a dispute of fact as to whether WRBF staff began intervene and caused Ms. Crill to look to them for help, which increased her risk of harm from the intoxicated violent patrons seated next to her.

CONCLUSION

The trial court erred in excluding evidence relevant to the determination of reasonable foreseeability, and in applying a test for foreseeability that would no longer require businesses to attempt to "foresee" anything that had not already happened at that exact business location in the very recent past. It also ignored evidence that WRBF attempted and failed to protect Crill from harm. The trial court's dismissal should thus be reversed and the case remanded for further proceedings.

Respectfully submitted this 23rd day of May, 2014.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On May 23, 2014, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

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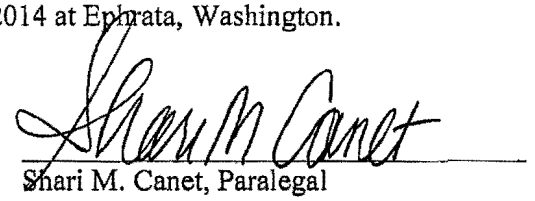
Signed on May 23, 2014 at Ephrata, Washington.



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