COURT OF APPEALS NO. 78788-8-I

SUPREME COURT OF THE STATE OF WASHINGTON

NO. 98664-9

LUCY CELES,

Petitioner,

vs.

LONE PINE APARTMENTS, LLC; TARGA REAL ESTATE SERVICES, INC.;

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioners are Lone Pine Apartments, LLC and Targa Real Estate Services, Inc. (collectively "Lone Pine"). They were defendants in the King County Superior Court proceeding and respondents in Division I of the Court of Appeals. Lone Pine respectfully seeks review and reversal of Division I's decision. Summary judgment should be reinstated.

II. CITATION TO COURT OF APPEALS DECISION

On June 6, 2018, the Honorable Regina Cahan granted Lone Pine's motion for summary judgment based upon the foreseeability standard articulated by this Court in *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 772, 344 P.3d 661 (2015). On May 18, 2020, Division I reversed. These decisions are attached as Appendices A and B.

III. INTRODUCTION

This is a case where the private lessor is being sued because a non-resident, in retaliation for a transaction that occurred off-site, showed up at the Lone Pine Apartment complex and set it on fire. A tenant jumped out the window to avoid the flames, and was injured. No one claims that Lone Pine was complicit in the transaction or crime. No one claims that Lone Pine had knowledge of prior arsons, or indeed, any prior violent crime. The Court of Appeals found legal foreseeability based upon a questionable sense of *dissimilar* conduct (petty drug use and loud arguments).

Simply stated, the issue in this case is whether a civilian property manager has a legal duty to anticipate and protect against all conceivable third party crime, by nonresidents, based upon a vague sense of petty and undisputedly, dissimilar conduct. This Court said no in *McKown*, and the trial court here correctly applied the holding in *McKown*, not only based on precedent, but also acknowledging the broad public policy consequences of mandating that un-trained citizens stereotype their tenants, or worse, abandon underserved communities altogether.

Division I gutted that holding and reinjected the very "notice" standard that this Court specifically rejected in this particular context. *Compare* Op. at 8 ("the harm fell into a general field of danger that [Lone Pine] should have anticipated") *with McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 772, 344 P.3d 661 (2015) (rejecting "a broad notice rule" which "would become an all-expansive standard for imposing a duty on a business to protect invitees from criminal assaults of third parties on the business premises [and] improperly shift the duty to protect the public against crime from the government to private businesses").

This can only be described as a stark departure from precedent that throws this area of tort law into disarray. Division I's opinion not only renders large portions of *McKown* logically superfluous, but also will leave the very populations this jurisprudence was intended to empower *worse off*.

Ultimately, Division I's decision directly conflicts with this Court's prior holdings and presents an issue of substantial public importance.

IV. ISSUE PRESENTED FOR REVIEW

Precedent holds that a criminal act is only legally foreseeable when prior incidents are "sufficiently similar in nature and location to the prior acts of violence, sufficiently close in time to the act in question, and sufficiently numerous." This Court specifically rejected "a broad notice rule" or a "general field of danger" test. The question presented in this case is whether Division I erred when it applied a "general field of danger" test to find a factual issue with respect to whether Lone Pine owed a legal duty to Celes, on the basis of nonspecific "past experience" of the landlord.

V. STATEMENT OF CASE

A. One Non-Tenant Sets Lone Pine Apartments On Fire Following A Dispute With Another Non-Tenant

On September 5, 2014, Linwood Smith, also known as "Black," got into an argument with Roger Faleafine and Alicia Stephens near a bus stop on the corner of Chicago and Lincoln, in Lakewood. CP 25, ¶ 2; 90. None of them were tenants at Lone Pine. *Id.* According to the police report, Black pulled a gun, which Faleafine pushed away, before it went off and hit Stephens' bike. *Id.*

There is no allegation that any personnel from Lone Pine were involved in, or witness to, this event.

Still worked up from the incident, Faleafine and Stephens left the bus stop in search of gasoline. CP 25, ¶ 2; CP 91. They found a can and filled it up at a nearby Texaco. *Id.* Then, while Stephens stayed behind, Faleafine went out in search of Black. *Id.* With gas can in hand, Faleafine approached Lone Pine. *Id.* He "cut through and hopped the fence," before starting a fire near the apartment unit where he understood Black stayed from time to time. *Id.*

Lucy Celes, another resident of Lone Pine, lived in a second floor apartment near where the fire was started. CP 25, ¶ 2. She awoke and escaped the fire by jumping off her balcony, sustaining injuries from both the fire and fall. CP 25, ¶ 2; CP 195, ¶ 11.

Prior to September 5, 2014, no one had ever witnessed either Faleafine or Stephens at Lone Pine at any time. CP 26, ¶ 2.

B. Lone Pine's Knowledge of Drugs On the Property Was, At Best, Vague

This lawsuit followed. The primary allegation is that Lone Pine should have taken steps to somehow protect Celes from this random act of third party violence, which occurred in retribution for an event between two non-tenants that did not even occur at the complex. The premise is that there was some vague awareness of drugs, therefore a duty to protect against this arson arose.

A disciplined review of what Lone Pine actually knew is in order.

1. Black and Bermudez Were Known For Being Loud And Often Entertaining Visitors At Off-Hours

Although Black was not a tenant of Lone Pine, he was known by other residents to stay with his girlfriend, Tyronda Bermudez. CP 201, ¶ 6. Bermudez subleased through Metropolitan Development Council ("MDC"), which provides apartments to homeless and low income individuals. CP 38, ¶ ¶ 4, 7. Black and Bermudez had loud fights (CP 194, ¶ 7; CP 198, ¶ 6), as well as loud parties (CP 194, ¶¶ 5, 6). Residents also witnessed frequent visitors in and out of their unit. *Id.*

2. Celes Had Knowledge That Black and Bermudez Had Frequent Visitors, But Did Not Witness Drug Dealing

Celes never witnessed drug dealing out of Bermudez's unit. CP 194, ¶ 6. She formed that "belief," to be sure, but it was primarily based on "the constant stream of people coming and going from the unit [Unit 2]." *Id.* Many of the visitors were unfriendly and loud. CP 194, ¶ 5. Celes also pointed to statements made by some of the visitors to the effect of, "[h]ey, do you have that stuff!" *Ibid.*

Celes once also saw a woman fall asleep on the stairs, who she suspected wanted cash in order to buy drugs. CP 194, ¶ 5. The woman "had a suitcase with a faux fur coat, rings, bracelets, and clothes that she tried to sell to [Celes]." From this, Celes concluded that she wanted "cash for drugs." *Id.*

Celes brought a few of these suspicions to Lone Pine. CP 194, ¶ 7. She referred to "frightening arguments," as well as "[foot] traffic, conversations suggestive of transactions, noise, and partying." *Id.* She also told the Lone Pine property manager that she thought tenants should be screened better. *Id.* But she never told Lone Pine that she witnessed drug dealing (and certainly not "violent crime"), because she herself did not. *Id.*

3. The Onsite Maintenance Man Never Witnessed Drug Dealing

Ignacio Agbanlog lived and worked as a maintenance man at Lone Pine during the time of the fire. CP 201, ¶ 1. Similar to Celes, Agbanlog never witnessed drug dealing at Lone Pine. CP 201, ¶ 7. Though he "suspected drug dealing was going on," he admitted that he "never saw Black or Ty [Bermudez] dealing drugs." *Id.*

His suspicions were also based on the fact that Black and Bermudez had "strange visitors... at odd hours" and "loud arguments." CP 201, ¶ 6. Like other personnel at Lone Pine, he had generalized beliefs, but no proof. *See* CP 205, ¶ 12.

4. Other Lone Pine Tenants Only Suspected Drug Dealing Because of Frequent Visitors and Apartment Gossip

The other Lone Pine tenants knew little more.

Beverly Susuico, a resident at the time of the fire, suspected Black and Bermudez were selling drugs because "people would come and go to

that apartment in the evening and early morning. They would show up at the apartment, go inside, and then leave immediately." CP 330, ¶ 3.

Jonica Babauta, similarly, based her opinion on the fact that she saw "lots of people coming and going to Unit 2" and hearsay from others. CP 293, ¶ 3. She did not report any of this to Lone Pine. CP 293, ¶5.

The same is true for resident Veronica Francisco. She witnessed people "coming to the [apartment] complex [at] all hours of the day. They would either arrive on foot or drive into the lot. They were not tenants." CP 198, ¶ 2. While Francisco did witness at least one person using drugs at the apartment complex, she did not witness this near Unit 2 (in fact, she stated she saw an unknown "female sitting on the steps of Unit 19, snorting and shooting up"), and did not report this Lone Pine anyway. CP 198, ¶ 3; CP 199, ¶ 11.

Lastly, James Rasmussen, stated that he suspected drug dealing, and did share his suspicions with Michelle Riles, the apartment manager, who shared the concern—but (like Rasmussen) stated that she did not have proof of it. CP 205, ¶ 12. She only knew that Unit 2 "had a lot of visitors." *Id.*

And Riles was correct about the number of visitors, according to the American Apartment Owners Association, cited by Celes. Of the Five Signs of drug dealing, the only one even cited is the number of visitors. And the document itself confirms that "short visits are not reason alone to believe

that your tenants are dealing drugs"; "if your rental is getting twenty visitors every evening (late into the night)," then a "closer look" may be warranted. *See* CP 348.

C. There Is No Evidence That The Argument Which Led to the Arson Was Drug Related In Any Way

While there was concrete proof Black and Bermudez were loud, cantankerous[1] and entertained visitors at odd hours, there was no known track record of violent crime.[2] Nor was there any discernible evidence connecting drugs in Bermudez's unit (which no one saw) to anything meaningful—especially arson or other violent crime. CP 26; CP 195 ¶ 13; CP 767.

Also worthwhile noting, the arson that *did* occur was itself not even drug-related. CP 26. A few individuals heard yelling to the effect of "you'll regret this!" and "[d]on't worry, I get you, I got you, I'll be back!" CP 201, ¶ 4; CP 293, ¶ 4. But no one cited anything about drugs being involved. Even the police report lacks any information suggesting that the off-property dispute was drug-related. CP 90-91.

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[1] At one point, the police responded to a domestic violence call that Bermudez made about Black. No one was physically injured, and Black was not there. Bermudez indicated that they had broken up, and no arrests were made. CP 766-67. There is no evidence that Lone Pine was made aware of this incident or given this report.

[2] Celes pointed to completely unrelated issues, which Lone Pine would have no reason to know about, such as Black being stopped for riding his bike without a helmet and found with a knife and drugs. CP 300-01. It is unclear how this puts Lone Pine on notice of anything.

D. No Arson Previously Took Place On The Property

The fire on September, 5, 2014 was the first arson that occurred on the Property during Lone Pine's ownership and management *Id.* 26. And while it is true that Lone Pine was aware of other instances where the police were called to the Property, none of these incidents involved arson, and none involved drug related activity. *Id.* 195, ¶ 13; 767.

VI. AUTHORITY AND ARGUMENT

Virtually everything is foreseeable in the broadest sense of the word. The word is bounded only by the imagination of the foreseer. But it does not follow that lessors are liable for everything imaginable. The opposite is, in fact, true. Until 30 days ago, a duty to protect others from the criminality of third parties was the exception rather than the rule. And those limited exceptions usually lived in the realm of special relationships and conduct *by the defendant* that increased the risk of harm to the plaintiff. Neither instance is alleged here.

In the context of landowners, courts have always treaded carefully—limiting duty, based upon foreseeability, to dangers that the defendant had reason to know of based upon a track record of incidents that are sufficiently similar in nature, timing, location, and numerosity. *McKown*, 182 Wn.2d at 772. Absent this, "the act is likely unforeseeable as a matter of law under the prior similar incidents test." *Id.* The arson was preceded by zero

substantially similar incidents, and only vague allegations of drug-dealing, many of which were not even conveyed to Lone Pine. Not only is it fundamentally unfair to hold Lone Pine liable under these facts for the conduct of a criminal arsonist, but also this outcome implicates serious public policy concerns. Lessors would be encouraged, if not required, to displace people for minor infractions. Or worse, this unique and unwieldy duty will simply make housing in certain communities cost-prohibitive—which is precisely the adverse outcome Judge Cahan cited. CP 1077 (citing *Hutchins v. 1001 Fourth Avenue Assoc.*, 116 Wn.2d 217, 236, 802 P.2d 1360 (1991)).

Division I rewrote this carefully-crafted standard, upending both precedent and crucial policy considerations. That holding should be reviewed.

A. Standard of Review and The Existence Of A Legal Duty

The Court reviews summary judgment *de novo*, and engages in the same inquiry as the trial court. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993).

Duty is the "threshold question" in any negligence case, *Kelly v. Falin*, 127 Wn.2d 31, 36, 896 P.2d 1245 (1995), and a question of law. *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). In the context of duty, foreseeability is for the court to decide. *McKown*, 182 Wn.2d at

757; *cf. Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 67, 124 P.3d 283 (2005) (existence of a legal duty is a question of law and depends on "mixed considerations of logic, common sense, justice, policy, and precedent").

"Washington courts have followed a careful course when considering imposing liability on landowners or possessors in general." DeWolf and Allen, 16 Washington Practice § 2:14 (4th ed. 2018) (quoting *McKown.*, 182 Wn.2d at 757). The courts do not "delegate complex policy decisions to a jury" or resign landowners to "unlimited liability" arising out of the acts of others. *See Younce v. Ferguson*, 106 Wn.2d 658, 666, 724 P.2d 991 (1986) (declining to abandon the traditional premises liability classifications). Thus, it is not a simple foreseeability analysis, nor a "factual issue" that can be propped up by a paid-expert. As *McKown* confirmed, it is a strict test in this context.

"The general rule at common law is that a private person does not have a duty to protect others from the criminal acts of third parties." *Nivens v. 7–11 Hoagy's Corner*, 133 Wn.2d 192, 199, 943 P.2d 286 (1997); *Folsom v. Burger King*, 135 Wn.2d 658, 674, 958 P.2d 301 (1998) (person generally has no duty to come to the aid of a stranger or protect others from the criminal acts of third persons).

There are exceptions, to be sure. For example, if the defendant somehow increased the risk to plaintiff vis-à-vis the criminal conduct, a duty is likely created. *See Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 175, 758 P.2d 524, 530 (1988) (finding liability when defendant "create[d] an unreasonable risk of causing such harm," while chasing a fleeing shoplifter, in order to defend[] property"). A duty may also be owed when a property owner has knowledge of "imminent harm from criminal conduct," or there is a "take charge" custodial relationship between the defendant and criminal. *See, e.g, Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) (psychotherapist—patient); *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 934, 653 P.2d 280 (1982) (customer—store owner). None of these exceptions apply.

The only exception Celes argued below was that Lone Pine had a duty to protect her from the arson by virtue of its awareness of drugs.

B. Division I Incorrectly Applied The "General Field of Danger" Test Which Conflicts With This Court's Prior Holding

In *McKown*, this Court answered questions certified by the Ninth Circuit, addressing the scope of a shopping mall owner's responsibility for harm that results when third parties commit criminal acts on the premises. 182 Wn.2d at 757. The plaintiff in *McKown* was shot and wounded after a man in a dark trench coat concealing a rifle and pistol opened fire on shoppers and employees. *Id.*

To be clear, the focus of this case was on proving duty based upon "acts of similar violence." Though the trial court acknowledged that this "is not the only way for a plaintiff to establish a duty... it is the one we focus on here because prior history of violence is really the only basis for liability that the parties meaningfully address and the only one that the Ninth Circuit has asked us to clarify." *Id.* at 774.

The same was true here, as Judge Cahan emphasized in her Order:

> Although other types of criminal acts had occurred in the area, were frequent and close in time to the arson, they were not sufficiently similar in nature to put Lone Pine and Targa on notice of the criminal act that resulted in injury to the plaintiff in this case.
>
> This does not end the inquiry, however, because *McKown* stated that a plaintiff may establish the duty through other methods. The Restatement of Torts also relied on location or the character of the business to establish a duty. ***Plaintiff [Celes] does not make any argument based on these factors.***

CP 1076-77 (emphasis added). Thus, the focus was on whether a duty is owed based upon acts of similar violence. No other avenue was argued or proven, nor should one have been entertained on appeal.

Division I was thus flatly incorrect when it suggested that "Celes did not attempt to establish a duty by only showing acts of similar violence. Instead, acknowledged by the trial court, she presented evidence of the landlords past experience, which included criminal activity on the premises." Opinion at 6. Under RAP 2.5(a), Division I erred right out of

the gate.[3] This laid the groundwork for injecting the "general field of danger" test, ostensibly based on Lone Pine's "past experience." *See id.* at 8.

This was error—and carries with it broad implications—for many reasons.

1. *McKown* Did Not "Broaden" Foreseeability In Any Way Relevant To This Case, Nor Grant License To Muddle The Different Avenues For Proving Foreseeability

To be fair, *McKown* did refer to other avenues for proving duty besides similar criminal acts, such as "location," "character" or "institutional knowledge." And, to be even more fair, the federal court eventually accepted one of them on remand from the certified question; namely, that the defendant's "institutional knowledge." It, arguably, formed a basis for legal duty based upon a unique and wholly inapplicable set of facts.

In *McKown*, unlike here, the Defendant—Simon Properties—was a national corporation with extensive institutional knowledge related to shootings. *McKown v. Simon Prop. Grp., Inc.*, 2018 WL 3971960, at *2

[3] *See also Martin v. Johnson*, 141 Wn. App. 611, 617, 170 P.3d 1198 (2007) (refusing to review issue that trial court did not have opportunity to rule on first); *Re v. Tenney*, 56 Wn. App. 394, 400, 783 P.2d 632 (1989) (same); *see also McPhail v. Municipality of Culebra*, 598 F.2d 603, 607 (1st Cir. 1979) ("party may not 'sandbag' his case by presenting one theory to the trial court and then arguing for another on appeal."). And this is hardly a technical foot-fault. Letting Celes change position on appeal deprived Lone Pine of any opportunity to develop a factual record below, and deprives the trial judge of an opportunity to weigh in in the first instance.

(W.D. Wash. Aug. 20, 2018). Mall of America, which Simon Properties owns, had an "active shooter plan" in its files, which, for unclear reasons, it did not mandate other properties utilize. *Id.* And there had actually been a fatal shooting at another of its malls, in Aurora Colorado, almost immediately prior to McKown's incident. *Id.*

Two observations are in order. ***One***, it is difficult to overstate how inapposite these facts are. Celes never suggested that Lone Pine had institutional knowledge of prior events, or some manner of "arson plan" in its files (much less, proved it). Lone Pine does not. The sweeping scope of knowledge (and identifiable prior incidents) that Simon Properties could be held to account for has no relation to a local lessor like Lone Pine. And ***two***, while *McKown* identified different avenues for establishing foreseeability, it *did not* give courts license to mix-and-match them. Contrary to Division I's decision, the analysis is *not* "totality of the circumstances" or a "general field of danger" test. *See McKown* 182 Wn.2d at 772. This Court was very clear that "a totality of the circumstances test would improperly shift the duty to protect the public against crime from the government to private businesses." And applying "past experience of the landlord" as Division I did is effectively the "broad notice standard" this Court disavowed.[4]

[4] By Division I's logic and application, it is difficult to conceive of an instance when "past experience" would not completely subsume "acts of similar violence." The first

Here, Celes did not suggest that the "location" or "character" of Lone Pine inured to a duty to protect against arson (or violent crime generally). Indeed, she disclaimed that argument on appeal. Her only claim was that the Court should muddle the factors and consider experts, location, prior different incidents, and everything else together, as a factual issue. This is exactly the opposite of what *McKown* holds.

2. The Broader *McLeod* Analysis Division I Applied Is Driven By Differing "Considerations of Logic, Common Sense, Justice, Policy, and Precedent"

Division I's application of the "general field of danger" standard for determining foreseeability in this context veers from well-reasoned precedent. The court relied upon the test as articulated in *McLeod v. Grant Cty School Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953), *Hendrickson v. Moses Lake Sch. Dist.*, 192 Wn.2d 269, 276, 428 P.3d 1197 (2018), and most recently, in *Meyers v. Ferndale Sch. Dist.*, 457 P.3d 483, 486 (Wash. Ct. App. 2020).

But again, this Court specifically held that a possessor of land has no duty as to all others under a generalized standard of reasonable care, or under all the circumstances. *McKown*, 182 Wn.2d at 766. And *McLeod*—

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purported avenue of proof (according to Division I) swallows the second. In this way, much of this Court's careful reasoning is rendered dead letter.

as well as *Hendrickson* and *Ferndale*—were driven by very different considerations unique to school districts.

McLeod involved a 12–year–old student who was forcibly raped by two 15–year–olds in a darkened room below the bleachers of the gymnasium. *McLeod*, 42 Wn.2d at 321. In analyzing the school's legal duty, this Court recognized that two factors bore on the school's duty: the first was the relationship between the school district and the 12–year–old plaintiff—a relationship in which "the protective custody of teachers is mandatorily substituted for that of the parent." *Id.* at 319. The second was the general nature of the risk. *Id.* Given the special relationship between the school district and the plaintiff, *McLeod* recognized that a heightened duty was owed. The Court found that the school district should have foreseen the risk of some acts of indecency by leaving teenaged students, of unascertained and presumably varying character, entirely unsupervised. *Id.* To this day, courts view foreseeability in this context through this special lens. *See, e.g., Hopkins v. Seattle Pub. Sch. Dist. No. 1*, 195 Wn. App. 96, 106, 380 P.3d 584 (2016) (characterizing "special relationship" based upon the school being "mandatorily substituted for that of the parent").

No case supports extending this "School District" lens to lessors, whose relationship is neither mandatory, nor meant to replace that of a parent. In fact, this Court specifically declined to take that step in *McKown*.

3. Finding A Legal Duty Based Upon Generalizations Only Encourages Landowners To Deal In Stereotypes And Vagaries

In addition to the sharp deviation from precedent, the standard articulated by Division I has very real social consequences. Perhaps most significant, it requires property owners to extrapolate minor incidents into heinous outcomes. If a lessor has a legal duty to suspect violent crime, on the basis of negligible conduct, it has no choice but to view all tenants with suspicion, and broadly stereotype their conduct.

There is no limit to the problematic outcomes Division I's mandate invites. Division I's opinion compels landowners to extrapolate beyond drug use altogether—to entirely different misconduct, by unknown people. Apart from engaging with stereotypes,[5] [6] [7] [8] landowners are ill-equipped for this task.

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[5] Though the statistics can certainly be argued, the President of the United States and his Department of Justice assert a connection between undocumented immigrants and violence. *See* Alien Incarceration Report, Fiscal year 2017 (4th Quarter). Is the landlord required to treat them as potentially violent criminals?

[6] What duties are owed by a landlord who witnesses a couple shoving one another angrily in a parking lot? What if they are not touching one another, but screaming at each other unintelligibly?

[7] Or consider a case of drugs, like ours, but with a slightly different fact pattern. The owner of an assisted care facility learns that an elderly man is sharing his opioids with neighbors. These drugs are responsible for perhaps even more harm in society. *See* United States Department of Health and Human Services, https://www.hhs.gov/opioids/about-the-epidemic/index.html (last visited June 16, 2020). Is this facility now on notice of all potential rape, murder, and violence?

[8] There are even closer calls than this, which would be virtually impossible to sort through. Marijuana is often sold in parks and hypodermic needles are often found in garbage cans. Does this put the landowner on notice of all future, violent crime?

Relegating (if not, mandating) private lessors to broad assumptions about the communities they serve does nothing more than erode the social fabric and further marginalize the underserved. *McKown* exists for good reason.

4. Judge Cahan's Concerns About Businesses Fleeing Underserved Communities Were Real, If Not, Understated

Judge Cahan was also exactly correct when she pointed out that, "[a]s a matter of public policy, it is not in the community's interest to impose an additional duty to landowners who are willing to provide housing to lower income and more vulnerable populations." CP at 996. Accordingly, the fact of operating in an allegedly high crime area is not a basis to establish a duty. *Hutchins*, 116 Wn.2d at 236 (rejecting the imposition of a higher duty on businesses willing to provide services to these communities); *see also Kim v. Budget Rent A Car Sys.*, 143 Wn.2d 190, 199, 15 P.3d 1283 (2001) ("this court has rejected utilization of high crime rates as a basis for imposing a tort duty"). Doing so discourages landowners from renting to organizations like MDC, which sublets to underserved communities. CP 38, ¶ 4.

Lone Pine agrees that it should operate under the same regulations as everyone else. But imposing added cost burdens, beyond that, by virtue

of simply being in a certain urban area, will render the enterprise cost-prohibitive. Additional costs will, as courts readily acknowledge, result in businesses leaving urban core areas in favor of markets with lower operational costs. *Hutchins*, 116 Wn.2d at 236 (citing *McNeal v. Henry*, 82 Mich.App. 88, 90 n. 1, 266 N.W.2d 469 (1978) (involving business and invitee); *Stafford v. Church's Fried Chicken, Inc.*, 629 F.Supp. 1109 (E.D.Mich.1986) (same)).

This is not a good or societally beneficial outcome.

VII. CONCLUSION

Judge Cahan was entirely correct to grant summary judgment in Lone Pine's favor. Division I's ruling to the contrary should be reviewed and reversed.

RESPECTFULLY SUBMITTED this 17th day of June, 2020.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 17th day of June, 2020, I caused a true and correct copy of the foregoing document, "PETITION FOR REVIEW to be delivered to the following counsel of record as indicated:

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Appendix A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

LUCY CELES, Plaintiff, vs. LONE PINE APARTMENTS, LLC.; TARGA REAL ESTATE SERVICES, INC., Defendants.	NO. 16-2-27532-0 SEA ORDER ON DEFENDANTS LONE PINE APARTMENTS AND TARGA REAL ESTATES' MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court on Defendants Lone Pine Apartments, LLC. and Targa Real Estate Services, Inc's Motion for Summary Judgment. The Court reviewed the following:

1. Defendants Lone Pine Apartments, LLC and Targa Real Estate Services, Inc's Motion for Summary Judgment;

2. Declaration of Debra Dickerson in support of defendants' motion for summary judgment, and exhibits attached thereto;

3. Plaintiff's Opposition to Defendants Lone Pine Apartments and Targa Real Estate Services' Motion for Summary Judgment;

4. Declaration of Lucas Garrett in support of Plaintiff's Oppositions to Defendants' Motion for Summary Judgment;

5. Supplemental Declaration of Sergeant Brandon James;

6. Praecipe re: Declaration of Debra Dickerson in support of defendants Lone Pine Apartments and Targa Real Estate Service's Motion for Summary Judgment;

7. Defendants Lone Pine Apartments and Targa Real Estate Service's Motion for Summary Judgment and Motion to Strike;

8. Declaration of Debra Dickerson in support of Defendants' reply to its motion for summary judgment, and exhibits thereto;

9. Supplemental Declaration of Lucas Garrett in Support of Plaintiff's Opposition to Defendants' Motions for Summary Judgment, and exhibit thereto.

A. Negligence Claim based on Whether There is a Duty for Criminal Acts by Third Parties

Defendant Lone Pine Apartments, LLC (hereafter "Lone Pine") is the premise owner and landlord of Lone Pine Apartments, where Plaintiff Lucy Celes resided in Unit 4 across from Ms. Bermudez in Unit 2. Defendant Targa Real Estate Services, Inc. (hereafter "Targa") is under contract by Lone Pine Apartments to manage the apartments, including handling tenant requests and complaints, collecting rent, and handling evictions. These defendants filed a Joint Motion for Summary Judgment.

Plaintiff was injured after jumping out of the second floor balcony of her burning apartment after a fire was intentionally started on the stairway leading up to her and Ms. Bermudez' apartments. In a Motion for Summary Judgment, the court must look at the evidence in the light most favorable to the non-moving party. Therefore, this court makes the following inferences based on the evidence: (1) Although not on the lease, Ms. Bermudez's boyfriend lived in Unit 2 and sold drugs in that apartment; and (2) Defendants Lone Pine and Targa had notice of this activity.

The pertinent issue is whether Defendants Lone Pine and Targa owed a duty to Plaintiff to protect her from criminal acts committed by third parties that caused her injuries. Given the

landlord-tenant relationship between the plaintiff and defendants, whether a duty exists is premised on whether the third party act was foreseeable. Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192, 205, 943 P.2d 286 (1997); Faulkner v. Racquetwood Condo, 106 Wn App 483, 486, 23 P.3d 1135 (2001); Griffin v. West RS, Inc., 97 Wn App 557, 18 P.3d 558 (1999), (rev'd on other grounds) 143 Wn.2d 81 (2001); McKown v. Simon Property Group, Inc. 182 Wn.2d 752, 344 P.3d 661 (2015).

The *McKown* court clarified that when foreseeability is a factor for determining whether a duty exists, it is a question of law for the court but when a duty clearly exists and foreseeability is a factor determining the scope of the duty, it is question of fact for the jury. The court explained in *McKown* that many courts have confused this issue but emphasized that in a negligence action, the determination of whether an actionable duty is owed to the plaintiff is a question of law to be decided by the court.

The issue facing the court in this case is a question of law: whether a duty exists between the defendants and the plaintiff for criminal acts of third parties. Generally there is no duty to protect others from criminal acts of third parties. However, when there is a special relationship between the parties—here landlord and tenant—there may be a duty.

Comment f of the Restatement of Torts explains the landowner is under no duty to exercise any care unless the: (1) landowner knows or has reason to know of immediate or imminent harm; or (2) landowner knows or has reason to know from landowner's past experience, place of business or character of business, that there is a likelihood that harmful conduct of third parties will occur on his premises. Parties did not argue that prong 1,

immediate or imminent harm, applied to this case. The focus of the parties' argument was on landowner's past experience.

Recently, the *McKown* court explained that when a landowner's obligation to protect business invitees from third party criminal conduct arises from past experience, the plaintiff must show history of prior similar incidents on the business premises within the prior experience of the landowner. In *McKown*, the court articulated a standard to determine whether the Tacoma Mall had a duty to protect business invites from a mass shooting when there had been other shootings at the mall. The court found the prior acts of violence must be sufficiently similar in nature and location to the criminal act that injured the plaintiff, sufficiently close in time to the act in question, and sufficiently numerous to have put the business on notice that such an act was likely to occur. McKown at 774.

Hence, the proper legal analysis here is whether the prior acts of violence are sufficiently similar in nature and location, sufficiently close in time, and sufficiently numerous to have put the business on notice. Here, for months several tenants believed there was drug activity out of apt #2 and they repeatedly informed the on-site manager. In June 2014, gunshots were fired from apt #2.[1] On September 5, 2014, Plaintiff was injured when third-party non-residents committed arson by starting a fire at the stairway leading up to apartments #2 and #4.[2] There are no prior acts of arson at the apartment complex. There are no prior

[1] There had also been two incidents of domestic violence between tenant of #2 and her boyfriend on 3/30/13 and 3/28/14.

[2] Neither party has claimed that Lone Pine or Targa had any knowledge of the witnesses' statements the morning of the fire. The fact of what happened the morning of the fire is not truly relevant to the foreseeability analysis because defendants had no knowledge of it and the issue is what type of harm the landlord could foresee. It would, however, be highly significant to causation, whether there was any nexus between the activities occurring in Apt #2 and the arson.

violent acts that are sufficiently similar to the act that caused harm to the plaintiff. The prior criminal acts of drug dealing are not sufficiently similar to arson. The prior violent act of shots fired was not sufficiently similar to arson.

Plaintiff argues that the drug activity is enough to put the premise owner on notice of arson. Although Plaintiff hired an expert who claims arson is a foreseeable consequence of drug activity, this court must apply the prior similar incidents test and expert testimony cannot substitute for that analysis. Applying the rule as clearly explained in *McKown*, there were not sufficiently similar acts to put the premise owner or management company on notice that an arson committed by third parties was a reasonably foreseeable activity on the premises.[3] Put another way, just because drug activity occurred on the premises did not lead the premise owners to reasonably anticipate an arson. The *McKown* court emphasized that whether there is a duty should not be interpreted broadly in recognition that it is unfair to place the burden of third party criminal acts on a business.[4] *Id* at 766. Although other types of criminal acts had occurred in the area, were frequent and close in time to the arson, they were not sufficiently similar in nature to put Lone Pine and Targa on notice of the criminal act that resulted in injury to the plaintiff in this case.[5]

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[3] See Fuentes v. Port of Seattle, 119 Wn App 864,870-1, (2003)(Court found a history of car prowls at Sea-Tac Airport garage did not establish foreseeability of a carjacking at the airport pick-up drive.)

[4] The *McKown* court also specifically rejected a broad notice or totality of circumstances test because it would improperly shift the duty to protect the public against crime from the government to private business. *Id* at 772.

[5] Plaintiff argues the prior acts of violence do not need to be sufficiently similar but rather merely in the general field of danger. Quynn v. Bellevue School District, 195 Wn App 627, 383 P.3d 1053 (2016). Plaintiff's reliance on *Quynn* is misplaced because in that case, the court was discussing the scope of duty, not whether a duty existed. Additionally, the arguments plaintiff raised here are similar to what the plaintiffs raised in Grill v. WRBF Inc, 189 Wn App 1052 (2015) (Unpublished opinion) and the Court of Appeals rejected those arguments.

This does not end the inquiry, however, because *McKown* stated that a plaintiff may establish the duty through other methods. The Restatement of Torts also relied on location or the character of the business to establish a duty. Plaintiff does not make any argument based on these factors. Moreover, prior case law has found that the "place" of a business in an urban area with a high incident of crime is not a basis to establish a duty. Hutchins v. 1001 Fourth Avenue Associates, 116 Wn.2d 217, 236, 802 P.2d 1360 (1991). The court emphasized that it would be against public policy to impose a higher duty on businesses willing to provide their services in high crime areas.

Here, Ms. Bermudez was placed in Unit 2 through the Metropolitan Development Council[6] in an effort to help provide homes to those who were formerly homeless. As a matter of public policy, it is not in the community's interest to impose an additional duty to landowners who are willing to help provide housing to lower income and more vulnerable populations. There does not appear to be anything particularly compelling regarding the location or character of the apartment complex to warrant imposing a duty and the plaintiff has not argued otherwise.

In conclusion, Lone Pine and Targa do not have a duty based on their past experience because the drug activity was not sufficiently similar to the arson that caused the plaintiff's injuries. Plaintiff's negligence claim based on a breach of duties owed to the plaintiff as a tenant/invitee is DISMISSED.

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[6] The court has dismissed MDC as a defendant because MDC did not owe the plaintiff any legal duty and MDC had no notice of any alleged breach. Foreseeability was not at issue because no special relationship existed between MDC and the plaintiff.

B. Breach of Warranty of Safety and Habitability and Residential Landlord-Tenant Act

Plaintiff's claims based on the building code, breach of implied warranty of safety and habitability and Residential Landlord-Tenant Act, RCW 29.18 are subject to a different analysis because Defendants owed their tenant, the plaintiff, a duty for these claims. The issues for these claims are whether Defendants breached the duty and if so, whether the breach was a proximate cause for the injury. These are jury questions; these claims remain.

C. Motion to Strike

Defendants raised the following motions to strike and Plaintiff was given an opportunity to respond at oral argument. The Court ORDERS as follows:

1. Exhibit 1 to Lucas Garratt Decl—Celes Decl, paragraph 6:

   The following statements in paragraph 6 are STRICKEN because they are hearsay offered for the truth of the matter asserted. "I could hear the things the visitors to Unit 2 said like, "Hey, do you have that stuff?"...I also heard from other tenants that Black asked to buy prescription medications from an injured tenant. We figured he wanted to buy the drugs to sell...I heard Ty say to Black that the bikes were in exchange for stuff Black gave to the people who left them. Other tenants told me Ty and Black were selling drugs, and we talked about it amongst ourselves."

2. Exhibit 2 to Lucas Garratt Decl—Francisco Decl, paragraph 7: DENIED

   The following statement in paragraph 7: I heard Ray Ray say, "I'll be back. I got you!" is an exception to the hearsay rule pursuant to ER 803 (a)(3)

3. Exhibit 3 to Lucas Garratt Decl—Agbanlog Decl, paragraph 4:

   The following statements in paragraph 4 are STRICKEN because they are hearsay offered for the truth of the matter asserted or conclusory statement: I heard rumors about what caused the fire. I heard from Beth and Jerry in Unit 9, that Black in Unit 2 had an argument with a visitor. I heard about gunfire and that there was yelling, "I'll be back; you'll regret this!"

4. Exhibit 4 to Lucas Garratt Decl—Rasmussen Decl, paragraph 3 and 11:

   The following statement in paragraph 3 is STRICKEN because it is hearsay offered for the truth of the matter asserted: I understood the arsonist did not pay for drugs and Black shot at him.

   The following statements in paragraph 11 are STRICKEN because they are hearsay offered for the truth of the matter asserted: Afterward I heard that a girl had a problem with Black and Ty. I heard from other tenants that this girl and her Samoan friend stated the fire.

5. Plaintiff's exhibits 36, 46-49 – DENIED

6. Plaintiff's exhibit 40 is hearsay – GRANTED

7. Expert opinion from Sgt. James relating arson to drug dealing – DENIED.

ORDER

The Court HEREBY ORDERS that Defendants Lone Pine Apartments and Targa Real Estate's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART. Plaintiff's negligence claim based on a breach of duties owed to the plaintiff as a tenant/invitee is DISMISSED. Plaintiff's claims based on a breach of implied warranty of safety and habitability and Residential Landlord-Tenant Act, RCW 29.18 remain.

DATED this 6th day of June, 2018.

Judge Regina S. Cahan
King County Superior Court
516 Third Ave
Seattle, WA 98104

King County Superior Court
Judicial Electronic Signature Page

Case Number: 16-2-27532-0
Case Title: CELES VS LONE PINE APTS ET ANO

Document Title: ORDER ORDER ON SUMMARY JUDGMENT-LONE PINE

Signed by: Regina Cahan
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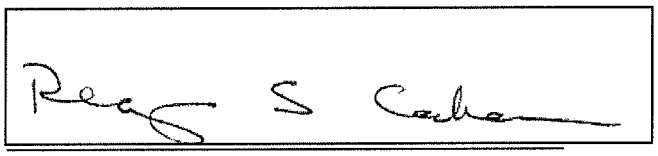

Judge/Commissioner: Regina Cahan

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Appendix B

FILED
5/18/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LUCY CELES, Petitioner, v. LONE PINE APARTMENTS, LLC; TARGA REAL ESTATE SERVICES, INC.; METROPOLITAN DEVELOPMENT COUNCIL, Respondents.	No. 78788-8-I DIVISION ONE UNPUBLISHED OPINION

LEACH, J. — This court granted Lucy Celes's request for discretionary review of the trial court's summary judgment order dismissing her negligence claim against Lone Pine Apartments, LLC and Targa Real Estate Services, Inc., based on her injuries caused by a fire intentionally set by her neighbor's visitor. Celes contends that Lone Pine and Targa breached their duty to exercise reasonable care to protect her from third party criminal conduct. Because Celes has demonstrated a genuine issue of material fact, we reverse and remand for further proceedings consistent with this opinion.

FACTS

Lucy Celes leased Unit 4, a second floor apartment in the Lone Pine Apartments, owned by Lone Pine and managed by Targa. Lone Pine participated in the City of Lakewood's "Crime Free Multi-Housing Program." To remain in that program, Lone Pine could not rent to felons or people with drug convictions.

When Lone Pine purchased the building, the Metropolitan Development Council (MDC) leased three apartment units in it, including Unit 2. MDC subleased these three units to low income and formerly homeless people. Unit 2 was across the stairwell from Unit 4. MDC, not Targa, ran background checks on the potential tenants for apartments they leased from Lone Pine.

Tyronda Bermudez subleased apartment unit number 2. Her boyfriend, Linwood Smith, who was not a party to the sublease, lived there and sold drugs from the unit. Both Bermudez and Smith had multiple prior felony convictions including drug-related convictions.

Lone Pine and Targa had notice that Linwood Smith lived in Unit 2 and sold drugs there. Celes and other tenants told the property manager, Michelle Riles, they were suspicious of the drug activity coming from Unit 2. Ignacio Agbanlog, the maintenance man, also suspected Unit 2's drug activity and said he and the tenants reported suspected drug activity to Riles.

In June 2014, Celes heard gunshots from Unit 2. She called Riles and 911. Police came and took pictures. Police responded to Unit 2 for a report of domestic violence on at least one other occasion when Smith threatened Bermudez with a knife.

On September 5, 2014, the residents of Unit 2 argued with a visitor, Roger Faleafine. Neighbors heard Faleafine yell, "I'll be back[,] I got you!"

The next morning, Faleafine returned and intentionally set fire to the common stairwell between Unit 2 and Celes's apartment. Celes woke up to the fire outside her apartment door. She never heard a fire alarm sound. The fire then entered her

apartment. To escape the fire, she jumped off her second story balcony onto the ground. She suffered serious injuries from the fire and from the fall.

Celes sued Lone Pine and Targa for negligence, breach of duties owed to Celes as a tenant/invitee, breach of implied warranty of safety and habitability, breach of the Residential Landlord-Tenant Act, and breach of contract.

Lone Pine and Targa asked the trial court for a summary judgment dismissing Celes's claims. After the trial court denied this request, they sought but were denied discretionary review. Lone Pine and Targa conducted additional discovery. They made a second request for a summary judgment dismissal. They argued, in part, that the undisputed facts did not support Celes's negligence claim, because they did not show that Lone Pine and Targa owed her a duty to protect her from arson committed by a third party.

The trial court granted a partial summary judgment dismissing Celes's negligence claim stating:

> The prior criminal acts of drug dealing are not sufficiently similar to arson.
> The prior violent act of shots fired was not sufficiently similar to arson.

At Celes' request, the trial court certified for immediate review under RAP 2.3(b)(4) the dismissal of her negligence claim for third party criminal conduct. We granted Celes request for discretionary review.

STANDARD OF REVIEW

Celes challenges an order granting partial summary judgment dismissing her claim that the respondents breached a duty to protect her from third party criminal

conduct. We review an order granting summary judgment de novo.[1] Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law."[2] We view the evidence in the light most favorable to the nonmoving party,[3] here being Celes.

ANALYSIS

Celes claims the trial court should not have dismissed her negligence claim on summary judgment because the record shows a material issue of fact about whether Lone Pine and Targa owed her a duty to protect her against harmful criminal acts by third parties. She first asserts the trial court did not use the correct test to determine whether Lone Pine and Targa owed her a duty. She also asserts that because respondents were aware of Unit 2's drug activities, they owed her a duty to protect her from third party criminal conduct.

To prevail on a negligence claim, a plaintiff must establish (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause.[4]

Common law, and as a general rule, states, "a private person does not have a duty to protect others from the criminal acts of third parties."[5] An exception to this rule

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[1] Loeffelholz v. University of Washington, 175 Wn.2d 264, 271, 285 P.3d 854 (2012).
[2] CR 56(c); Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).
[3] Loeffelholz, 175 Wn.2d at 271.
[4] Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 220, 802 P.2d 1360 (1991).
[5] Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192, 199, 943 P.2d 286 (1997) (quoting Hutchins, 116 Wn.2d at 223).

applies when a special relationship exists between the defendant and the victim.[6] One of those special relationships exists between a landlord and a tenant.[7]

First, Celes asserts that the trial court should not have required her to present evidence of sufficiently similar prior acts of violence in order to establish the duty to protect her from criminal acts. We agree.

"Whether a duty exists is a question of law for the court."[8] In determining duty, if the parties only show prior similar violent acts in order to establish duty (e.g. prior mall shootings) a court should only focus on the prior similar incidents test.[9] But, if a party offers evidence other than prior acts of similar violence, the trial court should not use the prior similar acts test to determine the existence of a duty.[10]

The trial court limited its analysis to a similar incidents test based on a case involving a mass shooting at a shopping mall where an employee, McKown, was shot.[11] McKown sued the landowner alleging that it failed to exercise reasonable care to protect him from foreseeable criminal harm.[12] In establishing whether the landowner had a duty to protect McKown from third party criminal behavior, the court considered "evidence of six other shootings and three other gun-related incidents" at the mall.[13] Here, the court explained that when a landowner's obligation to protect business invitees from third party criminal conduct arises from past experience, the plaintiff must

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[6] Nivens, 133 Wn.2d at 200.
[7] Griffin v. West RS, Inc., 97 Wn. App. 557, 984 P.2d 1070 (1999) (reversed on other grounds).
[8] N.L. v. Bethel School District, 186 Wn.2d 422, 430, 378 P.3d 162 (2016).
[9] McKown v. Simon Property Group, Inc., 182 Wn.2d 752, 770, 344 P.3d 661 (2015).
[10] McKown, 182 Wn.2d at 770.
[11] McKown, 182 Wn.2d at 758.
[12] McKown, 182 Wn.2d at 758.
[13] McKown, 182 Wn.2d at 759-60.

show history of prior similar incidents. Because Celes's legal "argument was on landowner's past experience", the trial court applied the prior similar incident test and required Celes to show that "prior acts of violence are sufficiently similar in nature and location, sufficiently close in time, and sufficiently numerous to have put the business on notice."

The court in McKown stated that it focused on prior similar acts because that was the only theory meaningfully addressed by the parties.[14] Here, Celes did not attempt to establish a duty by only showing acts of similar violence. Instead, as acknowledged by the trial court, she presented evidence of the landlords past experience, which included criminal activity on the premises.

Celes's evidence showed that Unit 2 had visitors coming and going through the stairwell, where the fire that caused her injuries occurred, "at all hours of the day and night, often staying for just a short time." Multiple tenants and the maintenance man had informed management of Unit 2's drug activity. Lone Pine participated in the "City of Lakewood's Crime Free Multi Housing program," which required Lone Pine to refrain from renting to felons or people with drug related convictions. It also required Lone Pine to conduct background checks on tenants, which it failed to do, because MDC agreed to do the background checks. The apartment complex also had signs posted stating, "We Have Joined The: LAKEWOOD CRIME FREE MULTI-HOUSING PROGRAM Keeping Illegal Activity Out Of Rental Property."

Unit 2's drug activity and associated frequent visitors created an unsafe condition in the common areas like the stairwell. And, Lone Pine did not comply with the

[14] McKown, 182 Wn.2d at 770.

requirements of a city program for which it advertised its participation. So, Celes showed more than mere "acts of prior similar violence." Because Celes did not attempt to establish the duty by only showing acts of similar violence, the trial court should not have used the prior similar incidents test.

Celes next claims that Lone Pine and Targa owed her a duty because the criminal act causing her injuries fell within the general field of danger foreseeable because of their knowledge of Unit 2's activities and their role as the landlords.

"The residential landlord owes its tenant a duty to protect the tenant from foreseeable criminal conduct of third persons on the premises. The landlord has the affirmative duty to take reasonable steps to protect the tenant from such conduct to satisfy its duty."[15] Landlords are "entrusted with the responsibility with managing the common areas."[16]

"Foreseeability is not measured against the specific sequence of events leading to harm or against the exact harm suffered."[17] "[T]he question is whether the actual harm fell within a general field of danger which should have been anticipated."[18]

We recently examined the issue of foreseeability in determining whether a duty exists in Meyers v. Ferndale School District.[19] We noted how the trial court "incorrectly focused its foreseeability analysis on the specific injury-causing event herein" and if one

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[15] Griffin, 97 Wn. App. at 570.
[16] Faulkner v. Racquetwood Vill. Condo. Ass'n, 106 Wn. App 483, 487, 23 P.3d 1135 (2001).
[17] Meyers v. Ferndale Sch. Dist., No. 79655-1-I, slip op. at 3, 457 P.3d 483 (Wash. Ct. App. Feb. 10, 2020), http://www.courts.wa.gov/opinions/pdf/796551.pdf.
[18] Hendrickson v. Moses Lake Sch. Dist., 192 Wn.2d 269, 276, 428 P.3d 1197 (2018) (quoting McLeod v. Grant County Sch. Dist. No. 128, 42 Wn.2d 316, 321, 255 P.2d 360 (1953).
[19] Meyers, slip op. No. 79655-1-I.

focused "on the more general field of danger," "there [was] a question of fact for the jury regarding whether the harm . . . was foreseeable."[20]

Here too, the harm fell into a general field of danger that respondents should have anticipated. Respondents had the duty to manage the common areas such as the stairwell.[21] The tenants of Lone Pine provided their landlord with notice of criminal activity associated with Unit 2 when they informed Riles about the drug sale suspicions and gunshots. Lone Pine also received notice when their employee Agbanlog reported Unit 2's suspected drug activity. So, Celes presented sufficient evidence to establish that criminal activity occurred in the common area outside her apartment that exposed tenants to danger. Lone Pine and Targa had a duty to protect tenants from this danger.

Lone Pine and Targa contend that the fire Faleafine set was not foreseeable and as a result they had no duty to protect Celes from it. Their argument conflates whether they had a duty and the scope of that duty. The record clearly establishes their duty to protect tenants from harm caused by ongoing criminal activity. They knew about the unsafe conditions that occurred in the common areas of their property. It was their duty to "deal with issues that arise from the landlord's control of the common areas of the premises."[22]

Their foreseeability argument raises the question of whether the fire in the stairwell outside Celes's apartment fell within the scope of their duty. "(W)hen foreseeability is a question of whether the harm is within the scope of the duty owed, it

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[20] Meyers, slip op. at 4.
[21] Griffin, 97 Wn. App. at 567.
[22] Griffin, 97 Wn. App. at 570.

is a question of fact for the jury."[23] Celes demonstrated a genuine issue of fact about foreseeability by submitting evidence showing the "well-known nexus between drugs or drug trafficking and violence" and that the arson was a consequence of the drug related criminal activity that occurred at Lone Pine.

Lone Pine and Targa had a duty to protect Celes from foreseeable third party criminal conduct. The trial court should not have decided as a matter of law whether the specific harm that injured Celes fell within the scope of that duty. Celes presented sufficient evidence to make that a question for a jury to decide.

CONCLUSION

We reverse and remand for further proceedings. Celes used evidence other than similar violent acts to establish a duty, so the similar prior incidents test used in McKown does not apply here. Celes showed that respondents owed her a duty as a tenant to protect her from foreseeable third party criminal conduct.

Leach, J.

WE CONCUR:

[23] McKown, 182 Wn.2d at 764.

WILLIAMS KASTNER

June 17, 2020 - 4:31 PM

Filing Petition for Review

Transmittal Information

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