NO. 101768-5
[Court of Appeals No. 38449-7-III]

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

No. 384497
Spokane County Superior Court No. 19-2-04067-32

ALETA BRADY,

Petitioner/Plaintiff,

v.

WHITEWATER CREEK, INC., a foreign corporation;
SUMMIT RIDGE, LLC, a Washington corporation,

Respondents/Defendants.

PETITION FOR REVIEW

Lucas Garrett, WSBA #38452
Sergio A. Garcidueñas-Sease, WSBA #46958
SCHROETER, GOLDMARK & BENDER
401 Union Street, Suite 3400
Seattle, WA 98101
(206) 622-8000

Attorneys for Petitioner/Plaintiff

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Table of Authorities, continued **Page(s)**

Table of Authorities, continued **Page(s)**

Statutes

Rules

Other Authorities

Miscellaneous

I. INTRODUCTION

Plaintiff-Petitioner Aleta Brady lived in the Summit Ridge Apartments, which were owned by Defendant-Respondent Summit Ridge, LLC, and managed by Defendant-Respondent Whitewater Creek, Inc. From her apartment window, Ms. Brady saw LaJuane Roberson—a non-tenant who lived on the premises without Defendants' authorization—commit a disturbing attack on a young female. Ms. Brady reported the assault and the identity of the perpetrator to Defendants. Defendants took no action in response, and Ms. Brady was subsequently assaulted and raped by Roberson, the very man she had told Defendants was dangerous.

Longstanding Washington authority establishes that notice of Roberson's dangerous propensities is evidence of the foreseeability of Ms. Brady's injuries.[1] Nevertheless, in a

[1] *See, e.g.*, *La Lone v. Smith*, 39 Wn.2d 167, 169, 234 P.2d 893, 894-95 (1951) (concluding notice of prior assault by employee-janitor on another tenant was reason landlord could be liable for subsequent assault on plaintiff-tenant).

published opinion, the Court of Appeals "reject[ed] th[e] contention" that foreseeability could be premised on notice of Roberson's prior attack on another female, reasoning that the prior assault was "not sufficiently similar" to his attack on Ms. Brady. In applying a "similar incidents" foreseeability inquiry to this evidence rather than Washington's standard "general field of danger" test, the Court of Appeals's opinion conflicts with decisions of the Washington Supreme Court, as well as published decisions of the Court of Appeals.

The Court of Appeals further held that "one allegation of misdemeanor assault," at least in the absence of a criminal charge or conviction, cannot give rise to a duty on the part of a landlord to attempt to remove a non-tenant and unauthorized resident like Roberson so as to protect tenants. The Court of Appeals reached this conclusion as a matter of public policy, without regard for the applicable standard of care or even a landlord's own subjective beliefs about the import of the prior violent act. This holding, too, is incompatible with decisions of the Washington

Supreme Court, as well as published decisions of the Court of Appeals. Moreover, it removes issues traditionally entrusted to juries from their consideration, and, as a prospective rule, it is entirely unworkable.

These errors in the opinion below threaten to taint trial of Ms. Brady's claims. For example, Defendants will likely seek to preclude the jury from hearing that, after observing Roberson assault another woman, Ms. Brady specifically sought Defendants' protection from Roberson before he raped her.[2] What is more, these errors will assuredly further muddy a body of law that has already confused Washington courts.[3] Among

---

[2] *Accord Gurren v. Casperson*, 147 Wash. 257, 259, 265 P. 472, 473 (1928) (concluding hotel had a duty to protect plaintiff-guest from assault by another guest where plaintiff had asked for protection following prior interaction with attacker).

[3] *See Pacheco v. United States*, 200 Wn.2d 171, 190, 515 P.3d 510, 521 (2022) ("Foreseeability can play a confusing role in tort law."); *Meyers v. Ferndale Sch. Dist.*, 12 Wn. App. 2d 254, 262, 457 P.3d 483, 488 (2020), *aff'd but criticized on other grounds*, 197 Wn.2d 281, 481 P.3d 1084 (2021) ("The trial court herein misapplied this foreseeability standard by focusing on the specifics of the collision in this case, rather than on the general field of danger….").

other things, courts and litigants have struggled to assess foreseeability following this Court's decision in *McKown v. Simon Property Group*,[4] which elaborated on a "prior similar incidents" test that is applicable only in certain contexts. Despite the express limits of *McKown*'s holding, some lower courts have erroneously insisted that proof of prior similar acts is required to establish foreseeability in contexts where it is not.[5] Indeed, a concurrence in *McKown* predicted precisely this confusion,[6] and, if uncorrected, the opinion below will exacerbate that confusion. It is for these reasons that, despite generally prevailing in her

---

[4] 182 Wn.2d 752, 344 P.3d 661 (2015).

[5] *See, e.g., Celes v. Lone Pine Apartments, LLC*, 78788-8-I, 2020 WL 3265576, at *4 (Wash. Ct. App. May 18, 2020) (unpublished, cited per GR 14.1) (reversing summary judgment because trial court erroneously concluded proof of prior similar acts of violence was required to show foreseeability).

[6] *McKown*, 182 Wn.2d at 774-76 (Stephens, J., concurring) ("The majority does not clearly answer th[e] question [of whether foreseeability requires proof of prior similar acts of violence on the premises]. On the one hand, it says such evidence is not required. On the other hand,… the majority seems to endorse the strict prior similar acts test…." (citation omitted)).

appeal, Ms. Brady respectfully seeks review of these portions of the opinion of the Court of Appeals.

II. IDENTITY OF PETITIONER

Petitioner is Aleta Brady, who was Appellant in the Court of Appeals and Plaintiff in the Superior Court.

III. COURT OF APPEALS DECISION

The December 6, 2022 opinion of the Court of Appeals was selected for publication. *Brady v. Whitewater Creek, Inc.*, No. 38449-7-III, 2022 WL 17420727, 521 P.3d 236 (Wash. Ct. App. Dec. 6, 2022); *see also* PFR APX 001-28. On February 2, 2023, the Court of Appeals denied Ms. Brady's motion for reconsideration. PFR APX 029.

IV. ISSUES PRESENTED FOR REVIEW

In assessing the foreseeability of injuries caused by a third party, should evidence of notice of the third party's dangerous propensities be assessed via a general-field-of-danger test, as Washington appellate courts have repeatedly held?

Did the Court of Appeals err in announcing a blanket rule of public policy that notice of a third party's dangerous propensities in the form of uncharged conduct amounting to a misdemeanor is insufficient to impose a duty on a landlord to act for the protection of their invitees, regardless of the applicable standard of care, regardless of the landlord's own subjective beliefs about the import of that evidence, when no party sought such a rule, when no authority is cited for such a rule, and when that rule conflicts with prior Washington appellate decisions?

Is evidence of notice of Roberson's dangerous propensities relevant to the foreseeability of Ms. Brady's injuries?

Did the Court of Appeals err in denying Ms. Brady's motion for reconsideration?

V. STATEMENT OF THE CASE

The Summit Ridge Apartments are a 120-unit low-income apartment complex located in the South Hill neighborhood of Spokane, Washington. CP 23, 157-58. Ms. Brady moved into the

Summit Ridge Apartments in July 2015 with her 10-year-old son. She lived in a third-floor apartment in Building F. CP 170; APX 57.

Beginning in approximately November 2015, LaJuane Roberson also began living at the Summit Ridge Apartments, in Unit F-143. CP 246-47, 251-53, 273. Unlike Ms. Brady, Roberson was not a tenant, was not listed on any lease, had not been approved through Defendants' tenant screening process, and lived on the premises without authorization. CP 246-47, 251-53, 256-64, 273; APX 165-73. Ms. Brady recognized Roberson as a neighbor, APX 144-45, CP 209-10, and, through tips from tenants or maintenance persons, Defendants knew that an unauthorized resident—presumably Roberson—was living in Unit F-143. CP 240-241; APX 149-50. Consequently, during the time Roberson lived there, Defendants issued at least four separate notices to Unit F-143, each stating that an unauthorized guest was residing in the unit, that the occupants were in

violation of their lease, and that three such notices could result in eviction. CP 225-228.

In the spring or early summer of 2016, from her bedroom window, Ms. Brady saw Roberson "repeatedly hit and punch[]" a young woman or teenager as he "dragged [her] across the parking lot by pulling her hair, arms, and shirt." APX 144; CP 209. The young female "was screaming throughout the assault." *Id*. Indeed, the assault was loud enough to wake Ms. Brady's sleeping son. *Id*. Ms. Brady informed Defendants about Roberson's assault on the young woman, making a written report and discussing it with various property management employees on more than one occasion.[7] APX 144; CP 209. Subsequently, on September 23, 2016, Roberson strangled

[7] Ms. Brady identified Roberson to Defendants' employees in person, and Defendants' employees were familiar with Roberson and understood who she meant. APX 144-45, CP 209-10. However, Ms. Brady did not learn Roberson's name until after she was raped and DNA evidence identified him as her attacker—she only recognized him as a neighbor in the apartment complex.

Ms. Brady into unconsciousness and raped her, after accessing her apartment from the exterior balcony.

This action followed, and the trial court dismissed Ms. Brady's claims at summary judgment. CP 371-73. The Court of Appeals reversed, concluding that evidence Defendants had notice that intruders could access upper floor apartments via exterior balconies created a jury issue regarding the foreseeability of Ms. Brady's injuries.[8]

Despite resolving the appeal in this fashion, the Court of Appeals nevertheless considered and rejected alternative arguments made by Ms. Brady. Specifically, Ms. Brady had argued that Defendants' notice of Roberson's dangerous propensities, as evidenced by his prior assault, made Ms. Brady's injuries foreseeable. *See* Br. of Appellant at 5-7, 12, 27; Reply Br. of Appellant at 14-15. The Court of Appeals disagreed, stating as follows:

---

[8] The Court of Appeals also held that the trial court erred in striking the report of Ms. Brady's expert.

> We reject this contention as well. As noted above, there is no evidence that Roberson was charged or convicted of this misdemeanor assault. Regardless, the allegation is not sufficiently similar to give notice that Roberson was likely to access an upper-floor balcony five months later.

Brady v. Whitewater Creek, Inc., 38449-7-III, 2022 WL 17420727, at *9 (Wash. Ct. App. Dec. 6, 2022). Relatedly, the Court of Appeals declared that "public policy does not favor imposing a duty on a landlord to control its unauthorized tenant by evicting him for one allegation of misdemeanor assault." *Id.* at *7.

Ms. Brady moved for reconsideration of these portions of the opinion addressing notice of Roberson's dangerous propensities and declaring public-policy-based limits on landlords' duties. After soliciting further briefing, the Court of Appeals denied Plaintiff's motion without explanation. PFR APX 029.

VI. ARGUMENT

A. The Court of Appeals applied an incorrect test for foreseeability to evidence of Roberson's dangerous propensities.

Under Washington law, foreseeability turns on what an actor knew or should have known under the circumstances and on what a reasonable person would have anticipated. *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 764, 818 P.2d 1337 (1991). Washington courts have indicated a wide variety of evidence bears on whether an outcome is foreseeable, including prior experience with a problem, the existence of policies addressing a particular problem, legislative recognition of a particular problem, and expert opinion. *See, e.g.*, *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 50-51, 929 P.2d 420 (1997). Relevant evidence of the foreseeability of third-party criminal acts also includes notice of the dangerous propensities of the third-party perpetrator.[9]

---

[9] *See, e.g., Christen v. Lee*, 113 Wn.2d 479, 498, 780 P.2d 1307, 1316 (1989) (concluding "notice of the possibility of

In the typical case, the focus in assessing foreseeability is not on "the specific type of incident which here occurred" or "whether the actual harm was of a particular kind which was expectable." *McLeod v. Grant Cty. Sch. Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953). Instead, the inquiry is broader, focusing on "whether the actual harm fell within a *general field of danger* which should have been anticipated." *Id*. (emphasis added); *see also Quynn v. Bellevue Sch. Dist.*, 195 Wn. App. 627, 640, 383 P.3d 1053 (2016). Accordingly, the Supreme Court has stated:

> The sequence of events, of course, need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbable and

---

harm from prior actions of the person causing the injury, either on the occasion of the injury, or on previous occasions" is relevant to foreseeability); *Wilbert v. Metro. Park Dist. of Tacoma*, 90 Wn. App. 304, 309, 950 P.2d 522, 524 (1998) (stating evidence "the defendant knew of the dangerous propensities of the individual responsible" is "at least sufficient to create a jury question"); Restatement (Second) of Torts § 302B, cmt. f (1965) ("Factors to be considered [in assessing the foreseeability of intentional criminal conduct] are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm….").

> highly unexpectable, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability….

McLeod, 42 Wn.2d at 322.[10] As is pertinent here, "[i]ntentional or criminal conduct may be foreseeable unless it is so highly extraordinary or improbable as to be wholly beyond the range of expectability." *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 430, 378 P.3d 162 (2016) (quotation marks omitted).

When foreseeability is premised on notice of a third party's dangerous propensities, Washington courts employ the usual "general field of danger" inquiry. *See, e.g.*, *M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 193, 252 P.3d 914, 919-20 (2011) (finding jury issue on foreseeability under "general field of danger" test where the defendant Archdiocese had notice of priest's "dangerous propensities");

---

[10] *See also* Restatement (Second) of Torts § 435 (1965) ("If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.").

J.N. By & Through Hager v. Bellingham Sch. Dist. No. 501, 74 Wn. App. 49, 57-60, 871 P.2d 1106, 1111-12 (1994) (applying "general field of danger" test where the defendant school district had notice of student's "assaultive propensity").

Consequently, in such circumstances, Washington courts have held that injuries may be foreseeable even when they were brought about in a manner that does not closely track the specific ways in which the perpetrator was known to be dangerous. For example, notice of a student's "assaultive propensity" may make a subsequent sexual assault reasonably foreseeable even if no past assault had been sexual in nature. *See J.N.*, 74 Wn. App. at 60 ("The trial court mistakenly focused on the fact that A.B.'s prior behavior had never manifested itself as a sexual assault upon another student."). [11] And a priest's history of sexual

---

[11] *Accord Carlsen v. Wackenhut Corp.*, 73 Wn. App. 247, 256-57, 868 P.2d 882, 888 (1994) (suggesting a prior robbery may be "notice that the prospective employee had a propensity for violent behavior" and thereby make a later sexual assault foreseeable); *McLeod*, 42 Wn.2d at 321 ("It seems to us, however, that counsel unjustifiably restrict the issue when they

misconduct may make it foreseeable that the priest would facilitate sexual abuse of a child not by the priest himself or even in the priest's presence, but by a *different* unknown man at an unrelated location. *See M.H.*, 162 Wn. App. at 187, 193 (rejecting argument that "sexual abuse by an unknown third party over whom it had no authority was not foreseeable" where "the Archdiocese knew about the 'dangerous propensities' of Father Boyle and the risk of harm to children").

In contrast, an alternate test applies in cases where a plaintiff seeks to establish foreseeability via proof of prior similar acts of violence on the premises by persons other than the third-party perpetrator who caused the plaintiff's injuries. In *McKown v. Simon Property Group,* the Washington Supreme Court explained that, in such cases, "[t]he prior acts of violence on the business premises must have been sufficiently similar in nature and location to the criminal act that injured the plaintiff,

---

ask us to focus attention upon the specific type of incident which here occurred—forcible rape.").

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." 182 Wn.2d at 757. The rationale is that, when there is no reason to expect that a crime will occur other than the fact that crimes have been committed in that location in the past, sufficient similarity, numerosity, and temporal proximity are necessary to ensure that the crimes are in fact not random, and that instead the premises owner truly has reason to anticipate future harm and a meaningful opportunity to attempt to prevent it. *See id.* at 771-72. For example, a parking lot may not generally entail a particular risk of harm, but repeated muggings there might give notice that the lighting is inadequate to deter future muggings, though perhaps not notice of the risk of a car-bombing intended as a mafia assassination.[12]

Significantly, proof of prior similar acts of violence is not necessary—and the *McKown* test is inapplicable—when

---

[12] *Accord* Restatement (Second) of Torts § 344, illus. 1 & 2 (1965).

foreseeability is premised on notice of the third-party perpetrator's own dangerous propensities. Washington courts have characterized notice of dangerous propensities and notice of prior similar acts on the premises as *alternative* methods of demonstrating foreseeability, linking them by the disjunctive "or." [13] And the *McKown* opinion took pains to clarify—repeatedly—that its reasoning *only* applied when a plaintiff seeks to establish foreseeability via proof of prior similar acts of violence on the premises, and that foreseeability may be

---

[13] *E.g.*, *Wilbert*, 90 Wn. App. at 309 ("[W]here there is a history of similar violence on the premises *or* the defendant knew of the dangerous propensities of the individual responsible, foreseeability has been established, at least sufficient to create a jury question." (Emphasis added)); *Raider v. Greyhound Lines, Inc.*, 94 Wn. App. 816, 819, 975 P.2d 518, 519-20 (1999) ("[W]here there is a history of similar violence on the premises *or* the defendant knew that the third party was dangerous, foreseeability becomes a question for the jury." (Emphasis added)). Similarly, Washington courts have held that summary judgment on foreseeability grounds is appropriate only when evidence of *both* prior similar acts of violence and notice of dangerous propensities of the perpetrator are absent. *See, e.g.*, *Minahan v. W. Washington Fair Ass'n*, 117 Wn. App. 881, 895, 73 P.3d 1019, 1026 (2003).

demonstrated by other types of evidence.[14] Indeed, *McKown* explicitly addressed itself *only* to instances "*when the defendant did not know of the dangerous propensities of the individual responsible for the criminal act*."[15] 182 Wn.2d at 760 (emphasis added).

This makes sense. To begin with, there is no logical reason that a person's "dangerous propensities" must be evidenced by prior injurious acts at all, rather than by words or other conduct.[16]

---

[14] *See McKown*, 182 Wn.2d at 770 ("While proving acts of similar violence is not the only way for a plaintiff to establish a duty…, it is the one we focus on here because that is the only basis for liability that the parties meaningfully address and the only one that the Ninth Circuit has asked us to clarify."); Br. of Appellant at 29-30 (providing additional citations).

[15] *Accord* Restatement (Second) of Torts § 344, cmt. f (stating foreseeability considerations applicable when premises owner "has no reason to expect [dangerous conduct] on the part of any particular individual").

[16] *See Parrilla v. King Cnty.*, 138 Wn. App. 427, 440, 157 P.3d 879, 886 (2007) (concluding that injuries were foreseeable from third party's "tendency toward criminal conduct," which was evidenced by volatile behavior and refusal to heed bus driver's requests to leave the bus); Restatement (Second) of Torts § 302B, illus. 4 (1965) ("The A company operates a hotel, in which B is a guest. C, another guest, approaches B in the hotel lobby, threatening to knock him down. There are a

Nor is there any reason why evidence of a person's dangerous propensities should have anything to do with the location where a plaintiff was injured, as the *McKown* test contemplates. Perhaps more importantly, the concerns addressed by the *McKown* Court are not present when there is a specific, known source of danger. In such circumstances, the danger is by definition not random, and it is fair, in principle, to expect premises owners to take action with respect to a person they have reason to believe is dangerous, and to then hold them liable if they fail to act and the person known to be dangerous causes harm, even if that person does so in an unusual way.

Accordingly, by subjecting notice of Roberson's dangerous propensities to a similarity analysis apparently derived from *McKown*, the Court of Appeals's opinion applies the wrong test and conflicts with a plethora of Washington

---

number of hotel employees on the spot, but, although B appeals to them for protection, they do nothing, and C knocks B down. The A Company may be found to be negligent toward B.").

appellate authority. Such evidence is instead subject to a "general field of danger" analysis, whereby harm may be foreseeable even if it is brought about in an unusual or highly unexpected way so long as it falls within the general field of danger to be expected. Even Defendants, in their initial briefing, agreed.[17]

B. The Court of Appeals's conclusion that notice of uncharged conduct amounting to a misdemeanor is insufficient to impose a duty to act on a landlord conflicts with other Washington appellate authority.

In rejecting notice of Roberson's dangerous propensities as evidence of foreseeability, the Court of Appeals deemed it significant that Roberson's prior assault apparently constituted a misdemeanor and had not resulted in a criminal charge or conviction. *Brady*, 2022 WL 17420727, at *9. The Court of Appeals further declared that "public policy does not favor imposing a duty on a landlord to control its unauthorized tenant

---

[17] *See* Resp. Br. at 27 (stating "Defendants agree that the prior similar acts test is not the only test for foreseeability" and arguing instead that Plaintiff did not demonstrate the harm "'fell within a general field of danger which should have been anticipated'" (quoting *McLeod*, 42 Wn.2d at 321)).

by evicting him for one allegation of misdemeanor assault." *Id*. at *7.

The limitations adopted by the Court of Appeals are irreconcilable with Washington precedent. Washington courts have repeatedly found harms foreseeable based on notice of conduct that had not resulted in criminal charges or convictions. *See, e.g., N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 535-36, 307 P.3d 730 (2013) (treating reports of uncharged prior abuse as notice of "dangerous propensities"); *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 723, 726 n.14, 985 P.2d 262 (1999) (same).[18]

This remains true when the conduct at issue falls short of qualifying as a felony offense. *See, e.g., Parrilla*, 138 Wn. App. at 440 (indicating that third party's volatile, insubordinate, but

[18] *Accord McKown*, 182 Wn.2d at 786 (Stephens, J., concurring) ("[P]rior experiences that do not lead to criminal charges… *may* put a business on notice of the likelihood of criminal assaults at subsequent events.").

possibly non-criminal conduct contributed to foreseeability of subsequent injuries caused by third party); *Griffin v. W. RS, Inc.*, 97 Wn. App. 557, 567-68, 984 P.2d 1070, 1076 (1999), *rev'd on other grounds*, 143 Wn.2d 81, 18 P.3d 558 (2001) (indicating prior misdemeanor trespass into the plaintiff's apartment made subsequent assault foreseeable); *La Lone*, 39 Wn.2d at 169 (indicating prior assault—apparently a misdemeanor—was reason subsequent assault was foreseeable); *Gurren*, 147 Wash. at 257-59 (indicating third party's prior misdemeanor trespass into the plaintiff's hotel room contributed to foreseeability of subsequent assault).

Indeed, in assessing foreseeability, Washington precedent specifically entrusts consideration of "dangerous propensity" evidence to the jury. *See Wilbert*, 90 Wn. App. at 309 ("[W]here… the defendant knew of the dangerous propensities of the individual responsible, foreseeability has been established, at least sufficient to create a jury question."); *Raider*, 94 Wn. App. at 819 ("[W]here… the defendant knew that the third party

was dangerous, foreseeability becomes a question for the jury."). The opinion below conflicts with that precedent and invades the jury's province by proscribing limits on the types of evidence it can consider or the inferences it can draw.

Furthermore, a rule limiting consideration of uncharged and/or misdemeanor conduct would categorically reject the relevance of certain evidence of a third-party's dangerous propensities without regard to the applicable standard of care or even the subjective beliefs of a landowner-defendant about the import of such information. Such a rule would have the effect of granting defendants at least one "free" tort before liability could attach, no matter how clear the prior notice or how foreseeable the resulting injury in fact is, so long as foreseeability is based on prior conduct amounting to a misdemeanor. Washington courts have previously rejected such rules.[19] Here, for example,

---

[19] *See Quynn*, 195 Wn. App. at 641 (holding duty of a school to protect students does not arise only after tortious acts have occurred, and the law does not require "'one free rape'").

Defendants' own leases demonstrate that they believe it is proper to evict their own tenants[20] for a single uncharged act of violence committed by a tenant's guest, with the leases specifying that "proof of violation shall NOT require criminal conviction." CP 264.

"[C]ourts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject." *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 937, 913 P.2d 377, 380 (1996) (quotation marks and citation omitted, emphasis removed). Indeed, judicial determinations of public policy are typically the subject of extended analysis. *See, e.g., Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 208-19, 193 P.3d 128 (2008) (surveying prior legislative, executive, constitutional, and judicial expressions of public policy at length). Here, the public-policy-based limitations on consideration of uncharged and/or

[20] Roberson, of course, was *not even a tenant* but rather an unauthorized resident.

misdemeanor conduct stated by the Court of Appeals are unsupported by any citation to authority. The issue was not briefed or argued by the parties. And Defendants did not ask the Court to make any such ruling.[21]

This case demonstrates why courts should make declarations of public policy with great care. A requirement that foreseeability be based on notice of conduct resulting in a criminal charge or conviction is ill-advised, given the fact that many crimes go unreported to law enforcement or take time to investigate and prosecute.[22] Similarly, a rule precluding consideration of conduct amounting to a misdemeanor would be a crude tool to cull meaningful evidence of foreseeability from

---

[21] *See* Resp. Br. at 34-36 (arguing only that public policy should not permit liability solely because a lease's guest policy was violated, not that premises owners may disregard prior assaults or notice of a third party's dangerous propensities).

[22] *See* Alexandra Thompson & Susannah N. Tapp, Ph.D., U.S. Dep't of Justice, *Criminal Victimization, 2021* 5 (Sept. 2022), https://bjs.ojp.gov/content/pub/pdf/cv21.pdf (finding less than half—46 percent—of violent crimes were reported to police in 2021).

evidence that is too tenuous to be relevant—it would be both under- and over-inclusive.[23] The practical difference between a misdemeanor and a felony may be—and often is—purely fortuitous. For example, it may depend on the degree of resulting injury rather than any true indicia of future dangerousness.[24]

And a rule distinguishing between felony and misdemeanor conduct would largely be unworkable in practice. The line between misdemeanor and felony is often unclear.[25] If a

---

[23] Such a rule would also appear to entirely preclude *non-criminal* evidence of a third-party's dangerous propensities, effectively limiting evidence of foreseeability solely to criminal acts. In this case, for example, Defendants may argue that the Court of Appeals's decision could be read as excluding all evidence of Ms. Brady's report of Roberson's prior assault, threatening to taint trial of her claim and potentially resulting in another round of appeals if not corrected.

[24] *Compare* RCW 9A.36.041(1) ("A person is guilty of [misdemeanor] assault in the fourth degree if… he or she assaults another."), *with* RCW 9A.36.021(1)(a) ("A person is guilty of [felony] assault in the second degree if he or she… [i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm….").

[25] This case is illustrative. Ms. Brady's account of Roberson's attack on the young female describes commission of unlawful imprisonment, a felony offense. *See* RCW 9A.40.040 ("A person is guilty of unlawful imprisonment if he

prior misdemeanor cannot be considered as evidence of foreseeability but the facts are disputed, presumably a civil jury would need to be instructed on the elements of pertinent criminal offenses and make appropriate findings before it could consider a third-party's past conduct. This procedure would be onerous and confusing.

The portions of the Court of Appeals's opinion limiting consideration of uncharged and/or misdemeanor conduct in foreseeability analysis are incompatible with Washington precedent. The opinion should be corrected both to harmonize it with the body of existing case law and because the principles it states are imprudent and impractical in their own right.

---

or she knowingly restrains another person."); *State v. Robinson*, 92 Wn.2d 357, 360, 597 P.2d 892, 893 (1979) (concluding evidence sufficient to sustain unlawful imprisonment conviction where defendant grabbed 15-year-old girl's arm and attempted to drag her towards his car, an "act [that] may have taken approximately one minute"). However, the Court of Appeals deemed the attack a misdemeanor.

VII. CONCLUSION

The Court of Appeals's opinion conflicts with prior Washington appellate authority and threatens to add confusion to an area of law that has already proven confusing to lower courts. Moreover, Ms. Brady anticipates it will be used in an attempt to keep evidence of Defendants' notice of Roberson's prior disturbing attack on a young woman from the jury. However, under established Washington law, the significance of notice of Mr. Roberson's dangerous propensities is for the finder of fact, following trial court evidentiary rulings, and should not be decided as a matter of law. If not clarified now, the decision will need to be clarified later, either in this case following trial or in a subsequent case. Accordingly, despite generally prevailing before the Court of Appeals, Ms. Brady respectfully asks this Court to grant her petition.

///
///

DATED this 2nd day of March, 2023.

I certify that this document contains **4979** words, in compliance with the RAP 18.17.

Respectfully submitted,

SCHROETER, GOLDMARK & BENDER

s/ Lucas Garrett

Lucas Garrett, WSBA #38452
Sergio A. Garcidueñas-Sease, WSBA #46958
401 Union Street, Suite 3400
Seattle, Washington 98101
(206) 622-8000
garrett@sgb-law.com
sergio@sgb-law.com

Attorneys for Petitioner/Plaintiff

CERTIFICATE OF SERVICE

I certify that I caused to be served in the manner noted below a copy of the foregoing on the following individual(s):

Counsel for Defendants
Alison M. Turnbull
Todd R. Startzel
Luke W. O'Bannan
Kirkpatrick & Startzel, P.S.
108 N. Washington Street, Ste 201
Spokane, WA 99201
tstartzel@ks-lawyers.com
aturnbull@ks-lawyers.com
lobannan@ks-lawyers.com

☐ Via Facsimile
☐ Via First Class Mail
☐ Via Email
☒ E-Service through the Electronic Portal

Counsel for Defendants
Michael A. Maurer
Lukins & Annis
717 W. Sprague Ave., Ste 1600
Spokane, WA 99201-0466
mmaurer@lukins.com
mlove@lukins.com

☐ Via Facsimile
☐ Via First Class Mail
☐ Via Email
☒ E-Service through the Electronic Portal

DATED: March 2, 2023, at Seattle, Washington.

Alison Mabbutt, Legal Assistant
Schroeter Goldmark & Bender
401 Union Street, Suite 3400
Seattle, WA 98101
(206) 622-8000
mabbutt@sgb-law.com

INDEX TO APPENDIX

Document Description	Appendix No.
Brady v. Whitewater Creek, Inc., No. 38449-7-III, 2022 WL 17420727, 521 P.3d 236 (Wash. Ct. App. Dec. 6, 2022)	PFR APX 001-28
Brady v. Whitewater Creek, Inc., No. 38449-7-III, Order Denying Motion for Reconsideration (Wash. Ct. App. Feb. 2, 2023)	PFR APX 029

FILED
DECEMBER 6, 2022
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

ALETA BRADY, an individual Appellant, v. WHITEWATER CREEK, INC., a foreign corporation; SUMMIT RIDGE, LLC, a Washington corporation, Respondents.	)	No. 38449-7-III PUBLISHED OPINION

STAAB, J. — Whitewater Creek, Inc. managed the Summit Ridge Apartments. Whitewater received a written tenant complaint that a man was observed attempting to access an upper-floor apartment balcony by scaling the exterior of the building. Two weeks later, Aleta Brady, a tenant at Summit Ridge, was raped in her apartment by a neighbor assailant. She believed he accessed her third-floor balcony and entered her apartment through the unlocked slider door. She sued Whitewater for failing to protect her from the risk that persons could access the upper-level balcony. Whitewater moved for summary judgment on the theory that it did not owe Brady a duty, and Brady could not produce evidence of breach or causation. Prior to granting Whitewater's summary

judgment motion, the trial court struck the untimely declaration of Brady's expert witness.

Procedurally, we find that the trial court abused its discretion in failing to conduct a *Burnet*[1] analysis on the record before striking the relevant declaration.

On the substantive issues, we reject Brady's contention that Whitewater had a special relationship with her attacker that required Whitewater to trespass or evict him. However, we hold that because Whitewater had a special relationship with Brady; it had a duty to protect her from the foreseeable criminal conduct of a third person. Whitewater's knowledge that a person was recently seen attempting to access an upper-level balcony at night was sufficient to create a duty for Whitewater to protect Brady from the foreseeable risk of someone accessing her upper-floor balcony. Additionally, sufficient evidence exists in the record to create a factual issue as to whether Whitewater breached its duty and whether the breach caused Brady's injuries. We therefore reverse and remand.

BACKGROUND

Because this issue was decided on summary judgment, the following facts are set forth in a light most favorable to the nonmoving party, Brady.

[1] *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

Summit Ridge Apartments are owned by Summit Ridge, LLC, and managed by Whitewater Creek, LLC. Maryann Prescott is the president of Whitewater. Whitewater constructed the Summit Ridge apartment complex and began accepting new tenants in 2015. The apartment complex consists of 6 buildings and a total of 120 apartments.

There is evidence in the record that Whitewater took steps to keep its tenants safe with regard to the security of the apartments. The tenant apartments had deadbolts and door-handle locks on the primary front doors. All the windows had locks. The apartment sliding-glass doors to the balconies had a switch-type lock on the door handle that could only be locked from the inside.

Casie Waholi handled leasing during the first six months after construction. She testified that Whitewater ran background checks for rental credit and criminal history on prospective tenants. At the time of this incident, most misdemeanors within three years and any felonies within seven years disqualified a potential tenant. A current tenant could be evicted if they were subsequently convicted of qualifying offenses, including sexual abuse, drug dealing, and charges involving guns.

Whitewater maintains incident reports, tenant complaint forms, and maintenance work forms for the property managers, maintenance personnel, and tenants to fill out in the office. If Whitewater became aware of criminal or suspicious activity, the policy was to provide tenants with safety notices in writing that are posted to the front door of every tenants apartment. Whitewater "rarely [has] major criminal issues that create tenant

dissatisfaction." When an incident occurs on the property, Whitewater would follow up by requesting a copy of the police report to check for any criminal arrest and would contact the police department to check on any convictions.

Under Whitewater's lease provisions, all persons living in a unit must be on the lease so tenants could be screened. When investigating unauthorized guests, Whitewater would speak to the tenant to confirm the guest and would send several notices to the tenant before turning the issue over to counsel. Under the lease, Whitewater could evict a tenant for lease violations but was not required to do so.

The plaintiff, Brady, lived in a third-floor apartment at Summit Ridge. The apartment had a balcony that was only accessible from inside the apartment. LaJuane Roberson was an unregistered tenant, living in an apartment on the other side of the common stairwell, which was to the left of Brady's apartment. Roberson is an 18-year-old male with a light build, standing 5'10" tall. He was described as fit, athletic and could climb through the window of his apartment. There is evidence in the record that Roberson was living at Summit Ridge from November 2015 until October 2016.

Although it is not clear if Whitewater knew of Roberson specifically, the company had received information that unauthorized guests were staying in the apartment on the other side of the common stairwell, which was to the left of Brady's apartment, for more than 14 days. In April and May 2016, Whitewater served four notices of violation on the

tenants living in the apartment for unauthorized guests staying more than 14 days. The record does not indicate what action was taken in response to these notices.

In April 2016, Brady witnessed Roberson in a physical altercation with a young female in the complex's parking lot. Brady called 911 to report that Roberson was assaulting the female, but there is no evidence that Roberson was charged with a crime for this incident. Brady filed a tenant complaint form in the manager's office. As she completed the form and verbally described what she witnessed, an employee told her to be quiet because the "neighbor" she reported had just walked in. Several days later, the maintenance worker asked Brady if Roberson was the person she saw in the parking lot. Brady responded yes. Roberson denied assaulting a female.

Several months later, another tenant at Summit Ridge, Olga Yurkova, witnessed a balcony trespass incident. While on her balcony at 4:00 a.m. she heard a noise and saw a male climbing the stairwell roof. He was trying to get into a second-floor balcony belonging to her neighbor. He was "dangling" and about to roll himself onto the balcony. He was "kind of pushing himself, but using his legs from the wall that he can roll over to the balcony." Clerk's Papers (CP) at 93. She also described the incident as "kinda like in a movie, he's ninja, and pushing himself by the feet" and getting his arms over the railing to pull up by the armpits. CP at 183. She asked the trespasser what he was doing, and he said he lived there. She told him that he did not. He then got back on the roof. She said without a doubt that had she not yelled at him, he would have been able to get up on the

balcony. She got scared and went back into her apartment and locked the door. She does not know how he left. She only saw him from the back and he was wearing a hoodie.

In the morning, Yurkova called the police to report the incident. The police report for the incident indicated that the man was skinny, blonde, and white, but Yurkova denied telling the police that he was blonde.

The following Monday, Yurkova and her neighbor reported the incident to the apartment manager at Summit Ridge. Yurkova filled out a complaint form: "I went on the balcony Saturday morning at 4:30 am. I saw a guy on the roof above the stairs and trying to climing [sic] to my neighbor balcony. I said him something and scared him so he run away." CP at 98. The form indicates that it will be part of Summit Ridge's records after submission and that should follow-up be required, they would contact Yurkova shortly.

Right after Yurkova's complaint, the maintenance person at Summit Ridge spoke to Yurkova and reported back to the president, Maryann Prescott. Prescott testified that they did not find any evidence to corroborate Yurkova's claim and did not believe that someone had attempted to access the balcony as she described.

Nevertheless, Prescott claims maintenance was instructed to go door to door and provide wooden dowels to tenants who were home and wanted one. While Prescott testified that all tenants were offered dowels for their sliding doors, she had no first-hand knowledge that this occurred, and the maintenance person was unavailable to testify.

Whitewater did not keep records as to which tenants were notified or accepted a dowel. There is no evidence that the other tenants were told about the balcony incident. Yurkova later testified that the "apartment complex did nothing to make the apartment's more safe" and she "had to make her own door block and add a stick on alarm to her slider." CP at 184.

Two weeks after the Yurkova incident, an intruder raped Brady in her apartment in the middle of the night. She believed the intruder entered her apartment through the sliding glass door on her balcony. Brady remembered locking her front door before going to bed and specifically remembered unlocking the front door for the police who arrived after the rape. But she did not lock the sliding door because she did not believe someone could scale the building and get to the balcony. Brady testified that if she had been told about the Yurkova balcony trespass incident prior to her assault, she would have locked the sliding door.

LaJuane Roberson was eventually charged and found guilty by a jury of first degree rape, first degree burglary with sexual motivation for the attack, and tampering with a witness.

After the assault, Whitewater put up flyers all over the complex warning tenants to lock doors and windows even if they lived up high. The flyer indicated "a couple disturbances in the area." It urged tenants to keep sliders locked, acknowledging that

"[t]he most common misconception for apartment living is that if you live on an upper floor you are safe from intrusions." CP at 206.[2]

Brady filed a personal injury suit against Whitewater Creek, Inc., and Summit Ridge, LLC, alleging that they breached their duty to her as an invitee tenant by failing to prevent the unreasonable danger of exterior access to balconies or warn tenants of the same.

Whitewater moved for summary judgment, arguing it owed no duty to protect Brady from the unforeseeable act of sexual assault by a third person, and Brady could not prove breach or causation. Whitewater conceded that tenant invitees are owed a duty of protection from hazards in common areas under *Restatement (Second) of Torts* § 315 (Am. L. Inst. 1965), but claimed that the sexual assault of Brady was not foreseeable. Whitewater specifically asserted that Brady could not prove that Whitewater knew of the danger because sexual assault and other similar violent criminal activity had not previously occurred on the property.

Whitewater also argued that Brady did not have evidence of causation. Whitewater reasoned that Brady's theory of how Roberson accessed her balcony was based on speculation, not direct evidence. Whitewater pointed to Prescott's deposition,

[2] While Whitewater suggests that several pieces of evidence submitted by Brady were inadmissible under the evidence rules, the evidence had not been struck from the record and was available to the trial court. *See* Br. of Resp't at 15.

where she testified that Brady's third-floor balcony is 45 to 60 feet up and accessing it from outside would be unlikely and dangerous.

One week before the scheduled summary judgment hearing, Brady filed and served the declaration of Russell Kolins in support of her response. The declaration established Kolins' qualifications as a security consultant with 52 years of experience in private practice. He conducted a site inspection of the Summit Ridge Apartment complex. He took measurements and photographs of the complex, including Brady's apartment, Yurkova's apartment, and the relevant balconies and stairwells. While much of his declaration contains legal conclusions, he dedicates a section to his observations and opinions. Specifically, Kolins testified:

> Based on my site inspection of the Summit Ridge Apartments conducted on March 15, 2021, in my professional opinion, it was foreseeable that an individual could climb from the stairwell roof onto the second floor balcony and then climb onto the third floor balcony of the Summit Ridge Apartments. Records indicate that Roberson was 5'9" tall, slender build and "incredibly strong." . . . I observed the following from my site inspection:
>
> a. Distance between the edge of the second floor balcony railing from the roof is approximately 5'4". The horizontal distance from the front edge of the roof to the balcony was 24". Mr. Roberson's height was documented to be 5'9", not including his reach which according to this writer's height (5"9') [sic] my sleeve length is 34' [sic] and hand length 8", Mr. Roberson and anyone of similar size would be able to extend in excess of that distance, not including however far he would be able to stretch.

> b. The distance from the second floor railing to the top of the third floor railing measured 65' which is 4" less than the height of Mr. Roberson, thus making it easy for the athletic rapist to access the Brady balcony.

CP at 319.

Whitewater moved to strike the declaration as untimely. Brady opposed the motion to strike, advising the court that Kolins could not sign his declaration any sooner due to his participation in a Florida trial, and that attorneys were not available to produce it sooner due to trial conflicts, vacations, and COVID-19 difficulties. Kolins' deposition was scheduled one day before the summary judgment hearing.

The trial court granted both the motion to strike Russell Kolins' declaration and Whitewater Creek and Summit Ridge's motion for summary judgment after taking both issues under advisement on August 27, 2021. The order to strike indicates that it was granted for "good cause." Brady timely appealed.

ANALYSIS

1. TRIAL COURT'S DECISION TO STRIKE UNTIMELY DECLARATION

In its summary judgment motion, Whitewater alleged that Brady could not produce evidence to create a material issue of fact on the element of causation. Five days before the summary judgment hearing, Brady submitted the declaration of Russell Kolins. On appeal, Brady assigns error to the trial court's decision to strike the untimely

declaration[3] and argues that it abused its discretion by failing to conduct a *Burnet* analysis before striking the declaration. Whitewater responds that Brady was required to move for a continuance before the *Burnet* factors became relevant. In the alternative, Whitewater contends the trial court conducted the analysis, and the declaration was properly struck. We agree that the court abused its discretion by failing to consider the *Burnet* factors on the record before striking Kolins' declaration.

"Before we can consider the evidence in this case, however, we need to determine what evidence is before us." *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015). When we review a summary judgment order, we must consider all evidence in favor of the nonmoving party. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). Admissible expert testimony on an ultimate issue of fact may be sufficient to create a dispute of material fact precluding summary judgment. *N.L. v. Bethel Sch. Dist.*, 187 Wn. App. 460, 468, 348 P.3d 1237 (2015).

This issue is clearly controlled by the Supreme Court's decision in *Keck*. There, the court held that a *Burnet* analysis is "appropriate when the trial court excludes untimely evidence submitted in response to a summary judgment motion." 189 Wn.2d at 369. The three *Burnett* factors include: "whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation

[3] CR 56(c) requires an adverse party to a motion for summary judgment to file and serve any opposing documentation no later than 11 calendar days before the hearing.

substantially prejudiced the opposing party." *Id*. at 369. The *Burnet* analysis promotes the purpose of summary judgment, which is to test the sufficiency of evidence before trial, not to cut litigants off from their right to a jury trial when they have evidence to present. *Id.* at 369.

Relying on our decision in *Boyer v. Morimoto*, 10 Wn. App. 2d 506, 449 P.3d 285 (2019), Whitewater argues that a trial court is not required to apply *Burnet* unless the party submitting the untimely declaration moves for a CR 56(f) continuance. *Boyer* is inapposite because the responding party filed a supplemental declaration after the trial court had issued its memorandum decision on summary judgment and did not urge the trial court to consider the *Burnet* factors or seek a continuance or reconsideration. *Id*. at 536.

Alternatively, Whitewater contends that the trial court did consider the *Burnet* factors when it allowed Brady to argue *Burnet* in response to the motion to strike. While Brady raised *Burnet* in her argument, the court made no findings on the factors or otherwise provided a *Burnet* analysis. In *Keck*, the Supreme Court found that the trial court's commenting on one *Burnet* factor without making findings on the other two factors was an insufficient analysis. 184 Wn.2d at 369. While explicit citation to *Burnet* is not dispositive, some discussion must take place to serve as a foundation for implicit findings. *Jones v. City of Seattle*, 179 Wn.2d 322, 344, 314 P.3d 380 (2013).

The trial court failed to make any required findings on the record or in its order. The finding of "good cause" without more is insufficient. *Id*. at 348. We decline to provide the missing analysis on appeal.

Finally, Whitewater argues that any error was harmless because Kolins' declaration lacked foundation, and was conclusory and speculative. *Jones*, 179 Wn.2d at 356 (*Burnet* violations found harmless where the excluded testimony was irrelevant). As we noted above, some of the testimony provided by Kolins was relevant and admissible. Kolins described the physical measurements of the balcony and stairs. The declaration also applied the physical attributes of Roberson to opine that exterior third floor balcony access was not only possible but foreseeable. The exclusion was not harmless.

2. WHETHER WHITEWATER OWED A DUTY TO PROTECT BRADY FROM THE FORESEEABLE CRIMINAL CONDUCT OF THIRD PERSONS

Brady contends that Whitewater owed her a duty to protect her from the risk that someone may access her upper-level balcony. She also contends that based on the allegations of a prior assault and Roberson's status as an unauthorized tenant, Whitewater knew of Roberson's dangerous propensities and had a duty to protect her from Roberson by trespassing or evicting him from the property. Whitewater denies any special relationship existed with Roberson but acknowledges that as a landlord it had a special relationship with its tenant. Nevertheless, Whitewater contends that it did not have a duty to protect her from Roberson's attack because it was not foreseeable.

We review an order dismissing a complaint on summary judgment de novo, undertaking the same inquiry as the trial court. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Summary judgment is appropriate when the record demonstrates no genuine issue of material fact. *Id*.; CR 56(c). On summary judgment, once a moving party establishes this initial burden, the nonmoving party must rebut the moving party's contentions by setting forth specific facts showing there is a genuine issue for trial. *Seven Gables Corp. v. MGM/UA Entm't Co*., 106 Wn.2d 1, 13, 721 P.2d 1 (1986); CR 56(e).

In order to prove negligence "a plaintiff must show (1) the existence of a duty to the plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4) the breach is a proximate cause of the injury." *Hurley v. Port Blakely Tree Farms L.P*., 182 Wn. App. 753, 773, 332 P.3d 469 (2014) (citing *Crowe v. Gaston*, 134 Wn.2d 509, 514, 951 P.2d 1118 (1998)). To defeat summary judgment, the nonmoving party must establish an issue of material fact as to each element of negligence. *Martini v. Post*, 178 Wn. App. 153, 164, 313 P.3d 473 (2013). The plaintiff's evidence is sufficient on summary judgment if it leads a reasonable person to conclude that harm, more probably than not, happened in such a way that the defendant should be held liable. *Id*. at 165. Facts and reasonable inferences are made in the light most favorable to the nonmoving party, here, Brady. *Hertog*, 138 Wn.2d at 275.

In this case, the parties dispute whether Whitewater had a duty to protect Brady. The existence of a duty is determined as a matter of law. *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 762, 344 P.3d 661 (2015). "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." *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 223, 802 P.2d 1360 (1991).

As an exception to this rule, "a duty may arise to protect others from third party criminal conduct if a special relationship exists between the defendant, the third party, or the third party's victim." *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 200, 943 P.2d 286 (1997) (citing *Hutchins*, 116 Wn.2d at 227-28). This special relationship arises in two situations:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Restatement § 315.

Brady contends that both exceptions apply in this case, but in making this argument, she conflates and comingles the separate exceptions. The exception provided under § 315(a) applies only when a special relationship exists between the actor (Whitewater) and the third person (Roberson). As § 315 cmt. c notes, examples of this relationship are set forth in §§ 316-319. They include the relationship between a parent

and child, employer and employee, possessor of land and their licensee, and one who takes charge or supervises a person with known dangerous propensities. Our Supreme Court has also held that a special relationship exists between psychiatrists and their inpatient and outpatient clients. *Petersen v. State*, 100 Wn.2d 421, 428, 671 P.2d 230 (1983); *Volk v. DeMeerleer*, 187 Wn.2d 241, 262-63, 386 P.3d 254 (2016).

For this exception to apply, Brady must demonstrate "a definite, established, and continuing relationship exists between the defendant and the third party." *Volk*, 187 Wn.2d at 256. Brady does not attempt to do so and instead, relies on *Restatement* § 318,[4] which recognizes that a special relationship may exist between a landowner and its licensee. Brady does not contend that Roberson was Whitewater's licensee. Nor are there any Washington cases that have applied this exception to find that a residential landlord has a duty to control its tenant so as to prevent the tenant from committing criminal acts on another.

---

[4] *Restatement* § 318 states:

> If the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor
> (a) knows or has reason to know that he has the ability to control the third person, and
> (b) knows or should know of the necessity and opportunity for exercising such control.

Even if we were to consider § 318, finding a duty under these circumstances would be contrary to public policy. The duty recognized in § 318 is imposed on a landowner who knows or has reason to know the need to exercise such control. Brady contends that Whitewater's knowledge of Roberson's involvement in a prior assault, along with actual or constructive knowledge of Roberson's unauthorized tenancy, provided notice of the need to control Roberson. Brady argues that, given this knowledge, Whitewater had a duty to evict or remove Roberson from the property.

From a policy standpoint, if we were to impose a duty upon a landlord to evict a tenant who is suspected–but not convicted–of a misdemeanor assault, it would significantly impact people's ability to obtain and retain housing. It is well established that "'[t]he concept of duty is a reflection of all those considerations of public policy which lead the law to conclude that a plaintiff's interests are entitled to legal protection against the defendant's conduct.'" *Volk*, 187 Wn.2d at 263 (quoting *Affiliated FM Ins. Co. v. LTK Consulting Srvs, Inc*., 170 Wn.2d 442, 450, 243 P.3d 521 (2010). Under these circumstances, public policy does not favor imposing a duty on a landlord to control its unauthorized tenant by evicting him for one allegation of misdemeanor assault.[5]

Having determined that the first exception in § 315 does not apply, we turn to the second exception. Under § 315(b), a special relationship exists between a business

[5] While the landlord may not have a duty to do so, it may nonetheless choose to evict a tenant under these circumstances if otherwise authorized by law.

(Whitewater) and an invitee (Brady) "because the invitee enters the business premises for the economic benefit of the business." *Nivens*, 133 Wn.2d at 202. Unlike the first exception, the second exception clearly applies to the special relationship between a landlord and tenant. *Griffin v. West RS, Inc*., 97 Wn. App. 557, 984 P.2d 1070 (1999), *rev'd on other grounds*, 143 Wn.2d 81 (2001). When this special relationship exists, "a business owes a duty to its invitees to protect them from 'reasonably foreseeable' criminal acts of third persons." *McKown*, 182 Wn.2d at 765. However, as we set forth below, this is only a "potential" duty and does not apply to a specific case unless the plaintiff can demonstrate that the specific criminal conduct in this case was foreseeable. *Id*. at 765 n.3 (citing *Nivens*, 133 Wn.2d at 205), 767.

While acknowledging the existence of a special relationship between a landlord and tenant, Whitewater argues that any duty only extends to dangerous conditions in the common areas of the complex. Whitewater reasons that since the special relationship that gives rise to a landlord's liability stems from the landlord's control of the common areas, its only duty is to protect Brady from dangerous or defective conditions in the common area, not inside her apartment. We reject this argument because it is not supported by case law or *Restatements*. Moreover, the stairwell, walls, and roof Roberson allegedly used to access Brady's balcony are considered common areas even if they are not open to the public. *See Griffin*, 97 Wn. App. at 568 (holding that common areas were not limited

to areas open to the public but included those areas controlled by the landlord, including the attic space over the apartment).

Washington has adopted a conservative view of a landowner's duty to protect against the criminal conduct of third persons. *See* 2 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 416, at 714 (2d ed. 2011). Under this approach, a landowner does not have a duty unless "the specific acts in question were foreseeable rather than whether the landowner should have anticipated any act from a broad array of possible criminal behavior or from past information from any source that some unspecified harm is likely." *McKown*, 182 Wn.2d at 767 (citing RESTATEMENT § 344). In other words, even when a special relationship exists, a landowner does not have a duty to protect against the criminal acts of another unless the landowner has notice. *See Hutchins*, 116 Wn.2d at 226.

While § 315 provides the exception, § 344 defines the contours of this duty. *McKown*, 182 Wn.2d at 766; *Nivens*, 133 Wn.2d at 202. *Restatement* § 344 provides:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
> (a) discover that such acts are being done or are likely to be done, or
> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Under this rule, a business has a duty to protect invitees "from imminent criminal harm and reasonably foreseeable criminal conduct by third persons." *Nivens*, 133 Wn.2d at 205. Here, Brady does not contend that Roberson's conduct was imminent. Instead, she argues that his criminal conduct was foreseeable.

When the question is whether a landowner is liable for the criminal acts of a third person, foreseeability defines the duty as well as the scope of the duty. *McKown*, 182 Wn.2d at 762. "[O]nce 'a duty is found to exist from the defendant to the plaintiff then concepts of foreseeability serve to define the scope of the duty owed.'" *Id*. at 763 (quoting *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 475, 951 P.2d 749 (1998)). On the other hand, if a particular criminal act is not reasonably foreseeable based on the circumstances described in § 344, then it is unnecessary to determine the scope of duty.

The circumstances a court can consider in determining whether a risk was foreseeable are set forth in *Restatement* § 344 cmt. f. The three circumstances that demonstrate when a landowner would have reason to anticipate specific criminal conduct include: past experience, the place of business, or the character of the business. *Id*. at 768. Specifically, the comment provides:

> Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason

> to expect it on the part of any particular individual. *If the place or character of his business, or his past experience*, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

RESTATEMENT § 344 cmt. f. (emphasis added).

When foreseeability is based on a business's past experience, a plaintiff must produce "specific evidence that the defendant knew of the dangerous propensities of the individual assailant or previous acts of similar violence on the premises." *Wilbert v. Metro. Park Dist. of Tacoma*, 90 Wn. App. 304, 310, 950 P.2d 522 (1998). "Where no evidence is presented that the defendant knew of the dangerous propensities of the individual responsible for the crime, and there is no history of such crimes occurring on the premises, the courts have held the criminal conduct unforeseeable as a matter of law." *Id*. at 309.

Brady argues that the term "past experience" is not restricted to previous acts of similar violence. In support of this position, she points out that in *McKown* the Supreme Court held that the foreseeability of criminal acts could be demonstrated through evidence other than prior similar acts. Br. of Appellant at 29 (citing *McKown*, 182 Wn.2d at 771). While this is true, the only other evidence that could establish foreseeability was evidence of the place or character of a business. *McKown*, at 768 (quoting RESTATEMENT § 344 cmt. f.) and 770 n.6. But "where a landowner's obligation

to protect business invitees from third party criminal conduct arises from past experience, the plaintiff must generally show a history of prior similar incidents on the business premises within the prior experience of the possessor of the land." *Id*. at 774.

Turning to the application of this rule, Brady contends that her evidence is sufficient to show that Roberson's acts were foreseeable. Brady points to three examples as evidence of foreseeability: the place and character of the business, Whitewater's knowledge of Roberson's dangerous propensities, and Yurkova's prior complaint of a person scaling the exterior walls to access an upper-floor balcony. We reject the first two circumstances. However, we find that Whitewater's knowledge of a person recently seen attempting to access an upper-floor balcony was sufficient to put Whitewater on notice and create a foreseeable risk that someone would gain unauthorized access to the upper floor balconies of its apartments.

Brady's first contention is that, given the place and character of the business as an apartment complex, Whitewater knew or should have known that upper-floor apartments were unsafe. Br. of Appellant at 26, 27. However, similar to the plaintiff in *McKown*, Brady fails to define these terms or offer a meaningful framework for evaluating when the place or character of a business would justify imposing a duty. *See McKown*, 182 Wn.2d at 761. Thus, we decline to consider this argument.

Second, Brady argues that Whitewater knew of Roberson's dangerous propensities based on his involvement in a physical altercation in the parking lot five months before

the rape. We reject this contention as well. As noted above, there is no evidence that Roberson was charged or convicted of this misdemeanor assault. Regardless, the allegation is not sufficiently similar to give notice that Roberson was likely to access an upper-floor balcony five months later.

Finally, we consider whether Yurkova's complaint was a prior similar incident sufficient to put Whitewater on notice that it was likely that someone would try to access upper-floor balconies illegally. In *McKown*, the Court held that when foreseeability is based on past experience, the prior similar acts test requires evidence that the prior conduct was sufficiently similar in nature and location, sufficiently close in time, and sufficiently numerous that a business could anticipate that such a crime will happen again. 182 Wn.2d at 772.

Brady points to two factually similar cases to show that Yurkova's complaint was sufficient to put Whitewater on notice that scaling the exterior walls and roof to access an upper-floor balcony was foreseeable conduct. In *Griffin*, the tenant complained to her landlord after a neighbor broke through the attic crawl space wall between their apartments and entered Griffin's apartment. 97 Wn. App. at 560. The landlord screwed a piece of wood across the crawl space opening but took no further action. *Id.* Two weeks later, the neighbor reentered Griffin's apartment and assaulted her. *Id*. During the police investigation, it was learned that a hole in the sheetrock between the two apartments allowed the neighbor to enter Griffin's apartment through the crawl space

opening. *Id*. at 561. Under these circumstances, Division One held that the trial court committed reversible error in failing to instruct the jury that the landlord had a duty to protect Griffin from the foreseeable criminal conduct of a third person. *Id.* at 572.

In *Johnson v. State*, a college student alleged that the university failed to warn or protect her from the foreseeable rape by a third person. 77 Wn. App. 934, 894 P.2d 1366 (1995). After rejecting several other theories of liability, the court held that the student was an invitee, and evidence that the university was aware of several crimes on campus that year was sufficient to create a material issue of fact and foreseeability. *Id*. at 943 (cited with approval by *McKown*, 182 Wn.2d at 772).

On the other hand, in *McKown*, the court cited several cases which found that incidents were unforeseeable as a matter of law because they were dissimilar to prior incidents. In *Raider v. Greyhound Lines, Inc.*, the plaintiff was standing in a line at the bus station when a passenger randomly pulled out a gun and shot her multiple times. 94 Wn. App. 816, 818, 975 P.2d 518 (1999). Citing the prior similar incident test recognized in *Wilbert*, the court held that the assailant's actions were unforeseeable as a matter of law. *Id*. at 819-20. Notably, there was no evidence that Greyhound knew of particular dangerous propensities of this passenger. *Id*. at 820. And while there was evidence of prior crimes at the station, the attack on the plaintiff was not sufficiently similar to provide notice sufficient to raise a duty to protect the plaintiff. *Id*. (cited with approval by *McKown*, 182 Wn.2d at 773); *see also Tortes v. King County*, 119 Wn. App.

1, 6, 84 P.3d 252 (2003) (unforeseeable that passenger would shoot driver of bus when there was no evidence of prior similar crimes on other buses); *Fuentes v. Port of Seattle*, 119 Wn. App. 864, 82 P.3d 1175 (2003) (evidence of prior assault and car prowling was insufficient to establish foreseeability of carjacking).

We hold that *Griffin* and *Johnson* apply to this case. The complaint by Yurkova was sufficient to put Whitewater on notice of the foreseeable risk that someone would gain unauthorized access to upper-floor balconies. Yurkova told Whitewater that she watched a man scaling the exterior wall from the roof and attempting to access the second-floor balcony of her friend during the night. When she said something, the person left the area. Brady contends that her attacker must have accessed her third-floor balcony in the middle of the night and entered her apartment through the unlocked balcony door because her front door remained locked. Brady's expert testified that this was physically possible.

Yurkova's complaint made this conduct foreseeable. Yurkova's complaint was factually similar to Brady's allegation of criminal conduct. While there was only one complaint, it was close in time to Brady's attack. Moreover, Yurkova's complaint pointed out a significant security concern that was not obvious to tenants.

Whitewater characterizes the prior incident as an attempted trespass and contends that it does not establish the foreseeability of the rape. Brady was required to produce evidence of a prior similar act to show that the risk was foreseeable. This requirement is

different from showing that the harm is foreseeable. The risk is unauthorized access to her balcony. Whether burglary and rape are foreseeable harms from this risk is a question of fact for the jury.

We hold that Yurkova's complaint was a prior similar incident sufficient to put Whitewater on notice and create a duty to protect Brady from the foreseeable risk that someone may gain access to her upper-floor balcony.

3. WHETHER BRADY PRESENTED SUFFICIENT EVIDENCE OF A BREACH

Whitewater contends on appeal that dismissal of Brady's claims on summary judgment was appropriate because she failed to produce evidence that Whitewater breached any duty. We disagree.

Whitewater had a duty to protect Brady from the risk that someone would gain unauthorized access to her upper-floor balcony. The *Restatements* provide that, at the very least, when this duty exists, the landlord has a duty to "give a warning adequate to enable the [tenant] to avoid the harm." RESTATEMENT § 344(b). If it is reasonable to assume that a warning will not be sufficient, the landlord should use such means of protection as are available or provide the tenant with such means. RESTATEMENT § 344, cmt. d.

While Whitewater claims that it warned all the tenants who were home and provided them with wooden dowels to block their balcony doors, Brady disputes that she

received a warning or a dowel. Brady's evidence is sufficient to create a genuine issue of material fact on the element of breach.

4. WHETHER BRADY PRESENTED SUFFICIENT EVIDENCE OF CAUSATION

Finally, Whitewater argues that insufficient evidence supports a causation nexus between the breach of duty and the injury. It contends that even if it breached its duty, the breach was not a proximate cause of Brady's rape because her theory that Roberson entered her apartment by accessing her balcony is speculative and unlikely. Br. of Resp't at 37.

The plaintiff need not prove causation to an absolute certainty. *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564 (1947). Proximate cause is determined via examination of both "cause in fact" which arises from the nexus between an act and an injury. *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013). Legal causation rests on policy considerations of how far the consequences of a defendant's acts should extend. *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985).

Circumstantial evidence of negligence may be presented as long as it affords room for "'reasonable minds to conclude that there is a greater probability that the conduct relied upon was the [cause in fact] of the injury than there is that it was not.'" *Martini*, 178 Wn. App at 165 (quoting *Hernandez v. W. Farmers Ass'n*, 76 Wn.2d 422, 426, 456 P.2d 1020 (1969)).

Here, there is circumstantial evidence sufficient to create a reasonable inference that Roberson accessed Brady's apartment from the unlocked balcony. Brady testified that her front door remained locked prior to and after the assault, but she had not locked her balcony door. Brady also testified that she would have locked her balcony door had she been warned of the risk that someone was caught attempting to access an upper-level balcony. This evidence is sufficient to create a material issue of fact on the issue of causation.

We reverse the trial court's order dismissing Brady's claims on summary judgment and remand for further proceedings consistent with this opinion.

Staab, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Pennell, J.

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

ALETA BRADY, an individual Appellant, v. WHITEWATER CREEK, INC., a foreign corporation; SUMMIT RIDGE, LLC, a Washington corporation, Respondents.	)	No. 38449-7-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant Aleta Brady's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of December 6, 2022 is hereby denied.

PANEL: Judges Staab, Lawrence-Berrey, Pennell

FOR THE COURT:

Siddoway, C.J.

LAUREL SIDDOWAY
Chief Judge

SCHROETER GOLDMARK BENDER

March 02, 2023 - 3:24 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	38449-7
Appellate Court Case Title:	Aleta Brady v. Whitewater Creek, Inc., et al
Superior Court Case Number:	19-2-04067-4

The following documents have been uploaded:

- 384497_Petition_for_Review_20230302151922D3681900_3609.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Brady PFR 3.2.23.pdf

A copy of the uploaded files will be sent to:

- aturnbull@ks-lawyers.com
- jhartsell@ks-lawyers.com
- lobannan@ks-lawyers.com
- mabbutt@sgb-law.com
- mlove@lukins.com
- mmaurer@lukins.com
- sergio@sgb-law.com
- ssmith@ks-lawyers.com
- swiley@ks-lawyers.com
- tstartzel@ks-lawyers.com

Comments:

Sender Name: Alison Mabbutt - Email: mabbutt@sgb-law.com
Filing on Behalf of: Lucas William Hannum Garrett - Email: garrett@sgb-law.com (Alternate Email: SGBasbestos@sgb-law.com)

Address:
401 Union Street, Suite 3400
Seattle, WA, 98101
Phone: (206) 622-8000

Note: The Filing Id is 20230302151922D3681900