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Court of Appeals No. 31912-1-III

SUPREME COURT OF THE STATE OF WASHINGTON

STAR F. CRILL, individually,

Plaintiff/Petitioner,

vs.

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

Defendants/Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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1. Identity of Respondent.

Respondent WRBF, Inc., d/b/a Denny's Restaurant (Denny's) asks this court to deny Star Crill's Petition for Review.

2. Introduction.

Petitioner Star Crill was involved in an altercation between patrons at Denny's Restaurant in the Spokane Valley, in which she alleges she was struck when her companion and other patrons from a nearby booth stood up to confront one another. The alleged perpetrator had been seated in the booth near Ms. Crill about 10 minutes prior to the altercation; Denny's personnel called the police as soon as the patrons stood up. A Denny's staff member was on the phone to the police when she was informed that Ms. Crill had apparently been struck in the back of the head. The police responded and arrested Austin Garner in the parking lot. The longtime and experienced staff at Denny's had never seen a fight at the restaurant before — the only other incident any of the staff could remember was a fight in the parking lot long before this incident.

Star Crill claimed that Denny's bore responsibility for Mr. Garner's alleged criminal conduct and believes this Court should review the summary dismissal which was affirmed by the Court of Appeals, apparently in order to offer advisory guidelines on when a business is liable for the criminal conduct of its patrons because of the "imminence of

attack" or the "character" of the Denny's. However, this case does not present the substantial public interest necessary for review because Ms. Crill presented no evidence that raises any duty for Denny's to have reasonably foreseen the altercation between patrons in its restaurant, sufficient to reverse the summary judgment.

While it is true that in McKown v. Simon Property Group, 182 Wn.2d 752, 344 P.3d 661 (2015), the Washington Supreme Court found it has not yet had the opportunity to consider the circumstances, if any, under which a business owner will be liable for the criminal conduct of another based on the "character" of the business, this case does not present the Court with that opportunity. The evidence offered here of "character" is no better than that of McKown, and would basically require an advisory opinion outside the very fact specific circumstances here.

Ms. Crill has offered only the declaration of Fred Del Marva, which the Court of Appeals closely analyzed and correctly assessed as failing to establish any evidence that the "character" of the Denny's gave rise to a duty to foresee criminal conduct of patrons who had been drinking at bars before being served at Denny's. Mr. Del Marva relies on a "Restaurant News" article which recounts shootings and domestic violence incidents that occurred at restaurants nationwide. That article declared that injuries and deaths arose most frequently from robberies or

angry ex-spouses; it does not mention alcohol, inter-customer assaults or bar-closure patrons. Mr. Del Marva also referred to a "presentation" given to the Denny's Board of Directors to claim that assaultive conduct is a "common occurrence" when a restaurant "solicits" an after-bar clientele. This evidence is no more than that proffered in McKown, i.e., that malls are "soft targets" for violent shooters, and the Court of Appeals properly found that the record reflected no basis to impose any duty under these fact specific circumstances.

Similarly, there was no sufficient evidence that Denny's had reason to know of "immediate or imminent harm" which created some duty to do something other than what its staff did: call the police when the two groups stood up to confront on another, all within 10 minutes of their entry into the restaurant. Denny's personnel had never seen a fight in the store before, the groups "snapped" into a physical confrontation unexpectedly within minutes, and there was no time for a "build up" towards an assault that would have required more.

The further discussion of a business' liability for criminal conduct must await an instance in which "character" or imminence of attack is truly at issue based on the evidence, and this Court should decline review.

3. Statement of the Case.

Contrary to Petitioner's theory, the Court of Appeals did accept all of the Petitioner's facts as true for the purposes of summary judgment, and those undisputed facts are as follows.

Star Crill sued Denny's Restaurant located on Argonne Road in the Spokane Valley, claiming that Denny's was liable to her when she was struck during an altercation between her companion at the restaurant, and other patrons sitting in a nearby booth. (CP 3-9)

The incident occurred sometime after 1:00 a.m. on Saturday morning, January 3, 2009, while Crill and a companion were eating at a Denny's Restaurant, when another group of patrons were seated at the adjacent booth. (CP 5-6) Crill alleged that the group in the adjacent booth engaged in verbal exchanges with them, which resulted in some members of that party, as well as her companion, standing up, and resulted in an alleged assault on her by Austin Garner. (CP 5-6) It is undisputed, and Crill admitted, that the incidents occurred very quickly; only 5 minutes passed from when the Austin Garner party was seated and the first verbal interaction occurred between the groups; less 3 to 4 minutes between various comments back and forth; and then less than a couple minutes during which the verbal comments escalated to some of the two parties standing up and the physical assault on Crill. (CP 28-29, 30-31, 35-37)

Mary Winter was the acting manager onsite that evening; she had worked in the restaurant industry for over 20 years, including as an assistant manager and bartender at a different Denny's location in Spokane; she would fill in as necessary as a manager based on her extensive experience. (CP 64-65) She had been trained as a manager previously. (CP 327) While the Petitioner apparently claims that the restaurant was understaffed, it offers no evidence as to the number of patrons at the time of the incident or the number of wait staff on duty.

Ms. Winter testified she had been informed of a potential problem with some patrons, but that there were no initial signs of any issues other than loudness and verbal exchange; it is undisputed that as soon as any of the individuals got up from the table, which was the first sign of any physical altercation, Ms. Winter called the police. (CP 66, 309-312)[1] Petitioner incorrectly asserts that Ms. Winter simply gave a "warning to the Garner party after they were standing, and resumed waiting on tables." (Petitioner's Brief, p. 8) No such evidence exists in the record; the evidence is undisputed that once the parties stood, Ms. Winter left to call

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[1] While Ms. Crill testified that one of the men in Mr. Garner's group used a racial epithet, there is no evidence this was reported to the Denny's staff, or that any staff person heard it; in fact the police report confirms that no other persons interviewed heard the statement. (CP 49) Thus, Petitioner's claim that any racial epithet was a basis to recognize a "problem" is irrelevant. See, Petition for Review, p. 7, n. 3.

the police. (CP 66, 309-312) Ms. Winter also confirms Crill's recollection that less than 10 minutes passed from the time the Garner party came in to the time Ms. Winter called the police. (CP 67) Ms. Crill in fact testified the Garner party did not initiate any verbal exchange until about 5 minutes after they were seated, reducing the entirety of the confrontation to approximately 5 minutes.[2] (CP 28-29) Ms. Winter was on the phone to the police when another staff member told her that Ms. Crill had apparently been struck in the back of the head. (CP 66, 312) The police arrived before the Garner party was even out of the restaurant parking lot. (CP 67)

Ms. Winter testified that she had never encountered a similar circumstance in all her time at the Denny's Restaurant, and that the Austin Garner group changed from respectable boys who quieted down to a group that "snapped" in an instant. (CP 338) The testimony was undisputed from Denny's staff that they seldom experienced any criminal conduct, but specifically, they had never witnessed any incidents of assaults or fights between patrons in the restaurant. (CP 60-63, 64-68, 509-510, 513-514)

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[2] While Petitioner claims Ms. Winter was "warned" of a problem with the Garner party "right after they were seated", the record does not reflect that. (See, Petition for Review, p. 7)

Based on the lack of a duty to prevent the criminal conduct of a third party on its premises, Denny's moved for summary judgment to dismiss the claim. In Crill's response, she submitted no evidence of any previous incidents at that Denny's location, nor any other evidence of any similar assaults at any 24-hour restaurants. She presented no evidence that Denny's "solicited" after bar closure patrons. She relied solely on the Declaration of Fred Del Marva, a claimed security expert, who asserted that "it is well known throughout the Denny's system that argumentative and assaultive conduct is a common occurrence and highly foreseeable when soliciting an after bar clientele between the hours of 11 pm and 4 am". (CP 215) The sole evidence on which Mr. Del Marva relied was an article in a publication called "Nations Restaurant News", and an assertion that he had witnessed a presentation given to the Denny's Board of Directors in 2007. (CP 215-216, 231-237)

The Restaurant News article[3] mentions injuries and death to guests, but focuses on employee injuries and deaths, and generally notes that the food services industries high turnover rate, which can lead to poor employee training and security systems, generally are contributing to a spate of late night crimes; it relates only a specific incident of a restaurant

employee in Florida who was stabbed to death by her estranged husband and declares that injuries and deaths come most often from robberies or angry ex-spouses and jilted lovers. (CP 2331-237) The article does **not** mention alcohol, incidents of customers assaulting other customers, or restaurants that may have a clientele that go to the restaurant after bars close for the night. Mr. Del Marva also claimed that a presentation to the Denny's Board of Directors represented that argumentative and assaultive conduct was a common occurrence and highly foreseeable when "soliciting" after bar clientele between the hours of 11:00 p.m. and 4:00 a.m. (CP 215) Again, no specific incidents were mentioned, no representative statistics were offered, no underlying facts, other than a bald conclusion that a restaurant that is open late will have clientele that may have come from bars, and faces a risk of assaultive behavior.

The trial court dismissed the action, and Division III of the State Court of Appeals affirmed that dismissal in an unpublished opinion. (Petitioner's App. 1-36) The Court of Appeals specifically stayed the appeal pending the Supreme Court's decision in McKown v. Simon Property Group, Inc., 182 Wn.2d 752, 344 P.3d 661 (2015), in order to

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[3] This article was stricken by the Superior Court as hearsay, but the Court of Appeals analyzed its contents, and still found it insufficient to establish any basis for Denny's duty to have foreseen the alleged assault between customers.

review its analysis on certified questions regarding the duty owed by a business owner for criminal conduct of third parties. The Court of Appeals also offered the parties an opportunity to supplement its briefing after the McKown decision was issued. In that supplemental briefing, and now in this Petition for Review to the Supreme Court, Ms. Crill asserts that the "character" of Denny's business imposes a duty of care because assaults are foreseeable based on Denny's hours of operation, and having an after bar clientele. Again, the evidence relied on was solely the Declaration of Fred Del Marva based on a claim that Denny's "business model" is to provide a venue where "a bar rush" crowd can come, rendering assaults between customers foreseeable.

In this Petition, Ms. Crill asserts that there exists a substantial issue of public importance which should give rise to this Court's review of the Court of Appeals' unpublished decision, to find that Denny's had a duty to Ms. Crill to protect her from assaults by co-patrons because of the character of its business, and the imminence of the assault.[4] Because no such evidence exists, this case in actuality offers no opportunity for the court to explore the basis for liability of a business owner based on character or imminence of events, and the court should decline review.

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[4] "Imminence" of attack is argued for the first time here.

4. Argument.

Ms. Crill's claim is that the dismissal of her lawsuit against Denny's raises an issue of substantial public interest because the Court of Appeals failed to properly analyze her evidence, and did not properly address the law. This is inaccurate. The Court of Appeals indeed thoroughly and properly applied the law relative to a business owner's liability for third party criminal conduct, including the guidance offered by McKown, and simply found that the conclusory evidence submitted was insufficient to establish any duty based solely on the fact that Denny's was open 24 hours, and may have customers that come after bars close. It also found that an assault that occurred quickly, and which was far outside the usual course of events for the experienced wait staff, had not put them on "notice" of an "imminent attack".

Moreover, Petitioner incorrectly claims that there is a conflict between the Court of Appeals' decision and other law necessitating review because Petitioner's facts were not correctly given "the benefit of the doubt." The relevant facts were reviewed in a light most favorable to Petitioner and the appropriate summary judgment standard was utilized, and no conflict exists to require review.

4.1 The evidence submitted created no basis to establish trial that Denny's had a duty to protect Ms. Crill from the criminal conduct of Austin Garner, based on the "character" of its business, or "imminence" of attack.

Petitioner relies solely on one comment to the Restatement (Second) of Torts §344, to claim that review of the Court of Appeals opinion affirming summary dismissal of her claim was inappropriate. However, while the Supreme Court in McKown v. Simon Property Group, Inc., 182 Wn.2d 752, 344 P.3d 661 (2015) found that §344 is "generally consistent with Washington law," and that comments d and f "generally describe the contours of the duty owed," this is somewhat different than Petitioner's assertion that the court in McKown "plainly recognized" that "comment f was part of the law of Washington." (Petition for Review, p. 15) And Petitioner ignores much of the McKown opinion related to limited duty of business owners for the criminal conduct of others on their premises.

The McKown court, while recognizing §344 is generally consistent with Washington law, specifically noted "however, this court has followed a careful course when considering imposing liability on landowners or possessors in general" and continually cautions "against treating the business as a guarantor of the invitee's safety from all third-party conduct

on the business premises." McKown, 82 Wn.2d at 764, 766. Noting that any such duty is the exception and not the rule, it further stated:

> The court has continued to recognize under premises liability standards that the duty to protect invitees is not a broad duty but a limited one, in recognition that it is often unfair to place the burden of third-parties' criminal conduct on a business.

182 Wn.2d at 766.

Noting that the language of §344 "necessarily requires a narrow interpretation of a landowner's potential duty," the McKown court stated:

> This language narrows the duty inquiry to whether 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.

Comment d to §344 further clarifies that business owners are generally not responsible for the harm that results when strangers commit criminal acts on the business premises:

> A...possessor of land who holds it open to the public for entry for his business purposes is not an insurer of the safety of such visitors against the acts of third persons...

All of this analysis must be taken into consideration, although the Petitioner focuses solely on comment f to §344 of the Restatement to allege two situations which may give rise to a duty: (1) where the landowner knows or has reason to know of immediate or imminent harm;

and (2) where the possessor of land knows, or has reason to know, based on the landowner's past experiences, the place of the business, or the character of the business, that there is a likelihood that harmful conduct of third-parties will occur on his premises.[5]

Under this analysis, the Court of Appeals properly found that there was insufficient evidence to create a foreseeable duty by Denny's under either of these scenarios. Because this case was decided on its very specific and narrow facts, acceptance of review would require this Court to issue an advisory general opinion on what types of evidence (lacking here) would be necessary, or what the constructs of a duty would be under other circumstances.

a. Petitioner submits no evidence of "character" to create a duty by Denny's to protect patrons from co-customer assaults.

The Petitioner is incorrect that the Court of Appeals failed to properly analyze the potential the "character" of a business by improperly comingling the concepts of prior assaults at the Denny's at issue to determine "character." The Court of Appeals analyzed the McKown decision, and firmly stated the question on whether the character of Denny's Restaurants was a relevant factor in assessing the risk of assault

[5] The court in McKown, however, noted that Washington has rejected the "place" of the business as imposing a duty on business owners in urban areas of crime. See, Hutchins v. 1001 Fourth Ave. Ass., 116 Wn.2d 217, 802 P.2d 1360 (1991).

and analyzed each potential element outlined in the Restatement, and in the McKown case. (Petitioner's Appendix A-21, A-30 – A-33) The existence of a duty is an issue of law, and depends on mixed considerations of logic, common sense, justice, policy and precedent; foreseeability is a factor attached to whether a duty is owed and is also a question of law for the court. McKown, 182 Wn.2d at 762.

The Court of Appeals recognized that in the case of a "character" of a business, if the owner should reasonably anticipate careless or criminal conduct on the part of third persons, he may be under a duty to take precautions against it, citing McKown, 182 Wn.2d at 769-70; Restatement of Torts, §344 comment f. (Petitioner's Appendix A-30) The Court of Appeals recognized that the McKown court had not yet considered whether the character of a business standing alone could invoke such a duty, because the sole evidence it was offered regarding place or character was a description of the Tacoma Mall as a "soft target" whose place or character made the harm reasonably foreseeable.

The Court of Appeals similarly noted that Star Crill presented no law and no evidence relative to the "character" of the Spokane Denny's on Argonne relative to customer assaults. Ms. Crill presented no decision that supported a ruling that an all night restaurant without a history of attacks should have anticipated criminal behavior:

> Star Crill may contend that assaults at any Denny's Restaurant in the world could be relevant to placing the Argonne Denny's on notice of the foreseeability of assaults on its premises. Nevertheless, Crill only provides evidence of the death of an Orlando Denny's Restaurant employee who was stabbed to death at work by her estranged husband. The nature of Denny's Restaurants business likely had no bearing on his death.

(Petitioner's Appendix A-32)

The Court of Appeals further noted that Ms. Crill's expert witness Fred Del Marva claimed that a Vice President of Risk Management for Denny's Customer Stores had stated restaurants must consider security issues present during the day time that are different from those issues at night, to opine that "Denny's nationwide is known for late hour criminal activities such as shootings, stabbings, murders and assaults"; however, there was no statistical evidence, no anecdotal evidence, or no details of a single incident. (Petitioner's Appendix, p. A-32)

Based on the complete lack of "character" evidence, (and not the lack of prior incidents), the Court of Appeals declined to find that there was a duty that Denny's should have foreseen a criminal assault between co-patrons.

The same lack of evidence can create no issue for this court to review as a matter of substantial public policy. While McKown recognized that there could be a future case in which the character evidence should be analyzed to determine the existence of a duty, this is

simply not it. The court is not required to accept baseless conclusions in analyzing the existence of a duty, absent evidence of some specificity regarding the character of a Denny's Restaurant other than a mere conclusion that it is open at a time when people attending it may have been drinking is simply insufficient under any standard, and creates no basis for this Court's review of these important issues.

b. No evidence exists to create a duty by Denny's to prevent an "attack" on the Petitioner that was "imminent."

The Court of Appeals also properly analyzed the claim that Denny's had notice that an attack on Ms. Crill was "imminent," and failed to intercede. The evidence was undisputed, that the Austin Garner party was seated next to Ms. Crill and her companion 10 minutes prior to the time when the assault occurred and the police were called. Five minutes passed after they were seated, and before some verbal exchanges occurred, further reducing any potential notice of an "imminent" attack. The Court of Appeals noted that some verbal exchange does not qualify as a predictor of an imminent assault, but Ms. Crill has no other evidence. The brief time that the parties even had near one another is not evidence that raises the issue of an imminent attack to the level that this Court should review it to establish any precedent. Instead it is very fact specific to this

instance, and is simply insufficient to the matter of law, leaving no basis for further review.

4.2 The Petitioner asks this court to render a general advisory opinion, to analyze facts and law not at issue here.

Petitioner asks this court to essentially accept review to offer clarification of the general circumstances under which a business order could be subjected to liability for criminal assaults based on the "character" of a business, or imminence of harm and provide "guidance" as to the circumstances under which a duty could be imposed. However, this particular case was analyzed and determined based on existing Washington law and the very limited evidence proffered by the Petitioner relative to why this particular Denny's should be liable for an assault occurring within minutes of two patrons encountering one another. The Supreme Court avoids expressing opinions which would be in the nature of an advisory opinion. Swift v. Island County, 87 Wn.2d 348, 552 P.2d 175 (1976).

Here, as the Court of Appeals noted, the evidence of "character" is the opinion of Fred Del Marva that a restaurant is open for 24 hours will serve patrons coming from bar closures, which creates a likelihood of assaults. There was no evidence presented that the Spokane Valley Denny's "solicited" bar patrons at night or otherwise. There was no

evidence of prior assaults in the restaurant or in the area. There was no evidence that the restaurant was understaffed for the number of patrons. There was no evidence that the acting manager was untrained or inexperienced. There was no evidence that **any** Denny's experienced a high volume of crime after 11:00 p.m. There was no evidence that **any** Denny's experienced a high volume of assaults by co-patrons after 11:00 p.m. The only evidence the Petitioner proffered was that the Denny's was open between the hours of 11:00 p.m. and 4:00 a.m. From this fact, the Petitioner would like the court to offer an opinion generally discussing what types of evidence would be necessary to establish the existence of a duty to predict and protect against criminal assault between patrons.

Based on the complete lack of "character" evidence or evidence of imminent attack to establish that Denny's should have foreseen the harm occurring here, this Court has no need to review this decision because any "guidelines" will have to go so far afield from the actual facts of this case as to be wholly advisory.

4.3 The Court of Appeals specifically reviewed the facts in a light most favorable to Petitioner, and no conflict exists between its decision and settled law.

In her quest for some basis to require review, the Petitioner claims that the Court of Appeals decision conflicts with well accepted law

governing the standard of review on a summary judgment, claiming that the Court failed to review the evidence in a light most favorable to the non-moving party. However, the Court of Appeals specifically adopted that standard of review, noting "because Star Crill appealed the trial court's grant of summary judgment in favor of the Denny's restaurant, we write the facts in a light most favorable to her." (Petitioner's Appendix, p. A-2) It also specifically stated the appropriate standard of review to construe all evidence and inferences in Ms. Crill's favor. (Petitioner's Appendix, p. A-16)

In this regard, Petitioner apparently relies on a claim that the "imminence" of the physical altercation was a question of fact, but again bases that opinion only on Mr. Del Marva's conclusion that the staff should have called the police sooner than the 10 minute time frame of events, because they should have recognized the situation had escalated sooner.

However, Petitioner's "spin" of these facts as some type of "slow buildup" of hostilities in which the staff recognized that there was trouble brewing, and had time to consider how they should handle it is simply not in the record, and the Court of Appeals did not improperly analyze this to Ms. Crill's disadvantage. Instead, the Court of Appeals properly analyzed the foreseeability of an imminent attack, but found neither facts nor law to

support such a claim here. It recognized that the only evidence of "imminence" was a verbal exchange, that did not escalate to any physical confrontation or threats until the actual incident. (Petitioner's App. 25-26)

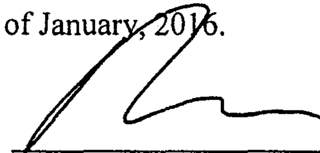
Just as with "character" as a basis for duty, foreseeability remains one of the "elements of negligence", attached to the issues of whether defendant owed plaintiff a duty as to the "imminence" of an attack. See, McKown, 182 Wn.2d 752, 763 [citing Maltman v. Sauer, 84 Wn.2d 975, 530 P.2d 254 (1975).]

The Petitioner failed to cite any law or facts establishing that such evidence created a foreseeable duty. In fact, Petitioner previously argued only the "rescue doctrine", and that Denny's intervention was negligent once undertaken, not that the imminence of attack created a duty. Thus, no court was offered any sufficient law or evidence on the basis of this duty, and nothing in the Court of Appeals analysis of the facts in the record, its standard of review on the summary judgment, or whether a duty or breach existed conflicts with Washington law. Thus, no basis for review exists under RAP 13.4(b)(1).

5. Conclusion.

For the foregoing reasons, the court should deny this Petition for Review.

DATED this 25TH day of January, 2016.



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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on the 25th day of January, 2016, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

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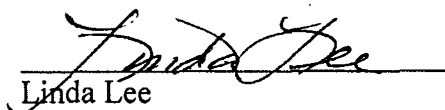

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Subject: Case No. 92656-5 / Crill v. WRBF, Inc. dba Denny's Restaurant

Crill v. WRBF, Inc. dba Denny's Restaurant
Washington State Supreme Court Case No. 92656-5

Attached for filing is Respondents' Answer to Petition for Review.

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L A W Y E R S

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