No. 319121

WASHINGTON STATE COURT OF APPEALS
DIVISION III

STAR F. CRILL, individually,

Plaintiff/Appellant,

vs.

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

Defendants/Respondents.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Star Crill sued the Denny's restaurant in the Spokane Valley when she was allegedly struck or pushed during an altercation between customers. The undisputed evidence presented to the trial court was that the Spokane Valley Denny's had not previously had a customer assault on its premises. The undisputed evidence was also that the incident occurred within minutes of the people first encountering one another, and that the Denny's staff called the police, who quickly arrived and apprehended the customers involved.

Crill would like the law to be that a restaurant that is open 24-hours is liable for the criminal conduct of its customers, based on nationwide events and trends, and the potential that people frequenting a 24-hour restaurant have been drinking. However, this is not the law, nor should it be. Washington law imposes a duty on a proprietor to protect its customers from criminal activity when it is directly foreseeable, via evidence of similar events occurring on the premises. There is no free-floating assumption of a duty for a Spokane Valley restaurant to act as an insurer against the unexpected criminal activity of another simply because some of the patrons may be coming from bars, and because other restaurants in different cities and towns may have experienced lengthy histories of criminal conduct on their premises. The Denny's staff

complied with any duty it had by calling law enforcement, and no basis exists to reverse the trial court's grant of summary judgment.

II. STATEMENT OF THE CASE

Plaintiff Star Crill (Crill) sued WRBF, Inc. (WRBF)[1], which owns and operates a Denny's Restaurant franchise on Argonne in the Spokane Valley. Crill claimed that WRBF was liable because co-defendant Austin Garner, another patron at the Denny's, struck her, allegedly causing her injury. (CP 1-9)

WRBF moved for summary judgment to dismiss the action because the entirety of the evidence was undisputed that the Denny's restaurant in question had not previously had incidents of customer assaults on their premises, precluding the foreseeability necessary to establish a duty. (CP 10-22) Contrary to Crill's attempt on appeal to characterize the testimony of WRBF's employees as establishing foreseeable assaults from the "bar rush," the actual testimony from all witnesses remained that there had been no previous customer assaults at the restaurant.

WRBF submitted affidavits which established the Denny's Restaurant on Argonne is considered by its longtime staff to be a well-run

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[1] All other defendants have previously been dismissed.

family restaurant, at which there were seldom problems with any type of disruptive patron. (CP 60-63, 64-68) Don Wold had been the manager of the Denny's Argonne since it opened, and testified that they seldom had experienced any criminal conduct; disruptive guests were generally limited to people unhappy with service, or those failing to pay bills. (CP 62) Specifically, an incident log kept in the 3-4 months prior to the incident with Crill showed zero incidents of assaults or fights. (CP 62) Mary Winter, a longtime employee, remembers only one fight for which they had to call the police prior to this incident, and that was in the parking lot of the Denny's. (CP 67)

Jason Liberg, an assistant manager for five years who worked night shifts at the Denny's on Argonne, testified:

> Q. Okay, so here's my question. At all the times you worked at that Denny's Restaurant prior to January 3, 2009, did you ever witness a physical altercation inside the store of any kind where a person struck another person or did anything like that?
>
> A. There was one incident. It was between two employees, and it was in '98, 1998. That is the only one I can remember.

(CP 509-510)

Larry Lovins, another assistant manager, testified:

Q. Okay. Do you - - did you ever witness any physical altercation of an assault by a customer on a customer at that Denny's Argonne store?

A. Nope.

Q. Have you ever heard of, in all the time you worked there, other than this incident, prior to January 3, 2009, any assault incident within the restaurant, customer-on-customer?

A. Nope.

(CP 513-514)

There was no other evidence of any previous incidents prior to January 3, 2009. On that night, Crill alleges that she was in the Denny's Restaurant on Argonne with a companion, and a group at a booth behind them engaged in verbal exchanges with them, which resulted in an alleged assault on her by one of that party, defendant Austin Garner. (CP 5-6) Crill admits that the incidents occurred very quickly; only five minutes passed from when the Austin Garner party was seated and the first verbal interaction occurred between the groups; less than 3-4 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 on site that evening. Ms. Winter 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 as needed, based on her extensive experience. (CP 64-65) She had been trained as a manager previously. (CP 327) Ms. Winter was informed of a potential problem with some patrons; she testifies that she monitored the groups, and there were no initial signs of any issues other than loudness; it is undisputed that as soon as any of the individuals got up from their table, which was the first sign of any physical altercation, Ms. Winter called the police. (CP 66, 309-312) While she was on the phone with 911, she was told the physical altercation had just occurred. (CP 66, 312)[2] Ms. Winter 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. Winter testified the Austin Garner group changed from respectable boys who quieted down when asked to a group that "snapped" in an instant. (CP 338) The police arrived before the Garner party was even out of the restaurant parking lot. (CP 67) The police report confirms that the officers responded to a call "at Denny's," and encountered Mr. Garner in the parking lot, and arrested him. (CP 45-59)

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[2] Ms. Crill has no knowledge or memory of who called the police, and cannot dispute that a Denny's employee did so, nor that the police quickly responded. (CP 38-40).

While the staff was trained in dealing with disruptive patrons, they were not instructed to intervene in a physical altercation or put themselves at risk. (CP 61) If there were physical altercations, they were instructed to call the police. (Id.; CP 65) The restaurant's "disruptive customer" training was simply a policy in place to proactively deal with all manner of potentials, including someone who disliked the service. (CP 61) There is no evidence in the record that the training was based on knowledge of criminal assaults.

Based on these undisputed facts, the trial court granted summary judgment. Crill moved to reconsider, claiming the evidence presented was "misleading," which Crill continues to assert on appeal. (Appellant's brief, pp. 7-8, fn. 4) Crill claims the "incident log" provided by manager Don Wold was "unreliable" and that Ms. Winter testified in her deposition the "physical altercation was foreseeable"; no citation to the record supports such claim. (Appellant's brief, p. 8, fn. 4) The trial court denied the motion for reconsideration, based on the continued lack of any evidence that there were previous incidents to put WRBF on notice of a criminal assault to establish a duty. (CP 557-561)

Crill appeals the trial court's interpretation of the law, asserting in the face of all authority to the contrary, that she created an issue of fact on the duty of WRBF by evidence that 24-hour restaurants serve people that

may be leaving bars, and that other establishments in different places across the country may have experienced difficulties. Crill also claims that once the altercation started, the Denny's staff had a duty to somehow intervene in a manner different than they did - - which was to call the police within minutes of the first contact between the various assailants. The trial court properly granted summary judgment on the undisputed facts.

III. ARGUMENT

The trial court's grant of summary judgment was properly based on undisputed facts and application of law; in Washington, the foreseeability of a criminal assault between patrons is dependent on evidence of previous incidents, and the undisputed evidence established that Denny's did not experience criminal assaults. Crill incorrectly wants to rely on nationwide events or trends, but such evidence does not create an issue as to the foreseeability in the Spokane Valley, and no law imposes a duty solely based on the hours of operation of a restaurant. While Crill asserts that the court improperly struck newspaper articles attached to its expert's affidavit relating to those unrelated nationwide trends, in reality they were attached to counsel's declaration, no objection was interposed, and they were properly stricken as hearsay. Irrespective of that, the evidence stricken was irrelevant to create an issue of fact for trial.

There also exists no evidence to create an issue of fact that the Denny's staff voluntarily assumed a duty, which it breached by calling the police within minutes of the parties being seated in the restaurant and at the first notice of an altercation. No basis exits to reverse the trial court's summary judgment.

A. The exclusion of newspaper or magazine articles was not error.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). Here, Crill failed to file an objection to the motion to strike evidence, and the court acted within the proper scope of its discretion.

1. Crill failed to file an objection to the motion to strike the newspaper exhibit and cannot raise it on appeal.

Denny's moved to strike Exhibit 8 to the Declaration of Brandon Casey, which appeared to be copies of articles published in industry newspapers or magazines, or blogs. (CP 253-255) Crill did not file an opposition to that motion, and the court entered an order striking that exhibit on June 21, 2013. (CP 257-258) Nor did Crill include that order in her motion to reconsider the grant of summary judgment. (CP 277-289) Objection to evidentiary rulings cannot be raised for the first time on

appeal. Wilburn v. Pioneer Mutual Life Ins. Co., 8 Wn.App. 616, 508 P.2d 632 (1973).

2. The stricken exhibit was not an exhibit to an expert's affidavit, but was attached to counsel's affidavit, and constituted hearsay.

The newspaper/magazine/blog articles stricken by the trial court constituted hearsay because they were simply attached to counsel's declaration. (CP 83-85, 230-237) WRBF moved to strike the exhibit only from the Amended Declaration of Brandon Casey. (CP 253-256) The use to which that exhibit was put was to prove the truth of the matters asserted in the articles, i.e. that 24-hour restaurants are dangerous; without the truth of the matter asserted, notice of those matters would be wholly irrelevant. It makes little sense to suggest that if the information on "attacks" in the articles were untrue, the purpose of showing "notice" of the dangers of operating restaurants at night is still valid. (See, Appellant's brief, p. 9) Moreover, Crill's response to the summary judgment did not cite the articles as information on which its expert relied, but cited them directly as evidence. (CP 78-79) Such use establishes that the articles constituted "hearsay." ER 801. As a result, the trial court properly exercised its discretion to exclude the exhibit on the basis of hearsay. ER 802.

3. The excluded evidence was also wholly irrelevant, and any exclusion of the exhibit was harmless.

Crill's case, as outlined below, rests on the argument that 24-hour restaurants, whether they be in North Dakota or inner-city Detroit, have the same exact duty to foresee criminal conduct based on occurrences across the globe. This is not the law in Washington, and thus the facts in "Restaurant News" not only do not relate to this Denny's restaurant in question, but do not even relate to Spokane; as a result, such evidence was not probative of anything, and would be excludable based on irrelevance. ER 401, 402. Moreover, there was no evidence that WRBF management had seen those particular articles, even if they may have had access to the publications. (CP 192-197)

In addition, the information in the articles was referenced in the expert affidavit of Fred Del Marva, who testified from them; no portion of his affidavit was stricken, and the information was thus before the court. (CP 216) As a result, striking the exhibit was harmless. Mutual of Enumclaw Ins. Co. v. Gregg Roofing, Inc., ____ Wn.App. _____, 315 P.3d 1143 (Dec. 2013) (exclusion of cumulative similar evidence, if error at all, is harmless). Finally, the appellate court is also free to consider the evidence stricken by the trial court in reviewing a grant of summary judgment. Chadwick v. Northwest Airlines, Inc., 33 Wn.App. 297, 654

P.2d 1215 (1982). Such review will not impact the propriety of the summary judgment in this action as outlined below.

B. The trial court properly granted summary judgment because WRBF breached no duty to Crill.

The standard of review of the trial court's grant of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. Smith v. Safeco Ins. Co., 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). Summary judgment is proper if the pleadings, affidavits, depositions and admissions on file demonstrate there are no genuine issues of fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Once the moving party establishes the absence of an issue of fact, the non-moving party has the burden to rebut the moving party's contentions; the non-moving party may not rely on speculation or argumentative assertions to defeat summary judgment. Jackass Mt. Ranch, Inc. v. South Columbia Basin Irr. Dist., 175 Wn.App. 374, 388, 305 P.3d 1108 (2013). Crill has not met her burden to establish that an issue of fact exists and WRBF remains entitled to summary judgment.

1. Washington law requires evidence of the foreseeability of the criminal conduct of others to establish any duty on the part of a business proprietor; as a matter of law, this evidence must include prior similar occurrences.

The question of whether a duty exists in negligence is an issue of law. See, Hutchins v. 1001 Fourth Ave. Associates, 116 Wn.2d 217, 220,

802 P.2d 1360 (1991). The general rule is that a person owes no duty to others to prevent harm caused by the criminal acts of third persons. Id. at 223. In those limited situations in which Washington courts have imposed on defendants a duty to protect plaintiffs from the acts of third parties, the courts have limited the scope of the duty to those acts that are reasonably foreseeable. See, Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192, 205, n. 3, 943 P.2d 286 (1997).

A business, such as WRBF's Denny's Restaurant, is under a duty to exercise reasonable care to keep their premises free of dangerous conditions in which business invitees may be harmed by third parties. See, Nivens, 133 Wn.2d at 202-205. "Washington courts have been reluctant to find criminal conduct foreseeable." Nivens, 133 Wn.2d at 205, n. 3. However, a possessor of land that holds its premises open to the public is not an insurer of the safety of such visitors against the acts of third persons, but is instead under a duty to exercise "reasonable care." Id. **No duty arises unless the harm to the invitee by third persons is foreseeable.** Nivens, 133 Wn.2d at 203-205 (emphasis added).

Washington cites with approval Restatement (Second) of Torts, §344, comments (d) and (f) to outline the business owner's duty:

> ...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 that on the part of any particular individual. If the place or character of his business, or his past experience, is 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 to protect it, and to provide a reasonably sufficient number of service to afford a reasonable protection.

Nivens, 233 Wn.2d at 205. None of the circumstances here create any genuine issue of fact that WRBF knew or had reason to know that such conduct on the part of third persons was likely to occur.

In fact, Washington Courts of Appeal have affirmed summary judgment in favor of defendant business owners over and over again with evidence similar to the generalities presented by Crill here; those cases establish the controlling "pre-requisite" proof necessary to defeat summary judgment, and application of this law required dismissal here.

This "pre-requisite" proof has been well detailed. In Wilbert v. Metropolitan Park Dist. of Tacoma, 90 Wn.App. 304, 950 P.2d 522 (1998), a man was shot and killed at a dance in a community center; the Court of Appeals affirmed a grant of summary judgment for the community center. Plaintiffs argued that evidence of the presence of a "number of unruly, aggressive, vulgar young people" at the dance, as well

as several fights and other aggressive conduct at the center put the defendant on notice that a more serious assault might occur. Id. at 306-307. Plaintiffs also relied on the opinion testimony of a security expert that the fatal shooting was foreseeable; that expert based his opinion in part on what he considered to be the elevated risk of victimization when certain factors were present, such as: (1) patronage by groups of people between the ages of 18-24; (2) the presence of alcohol or drugs; and (3) inadequate supervision. Id. at 307-308. Despite such testimony, the court held the shooting was unforeseeable as a matter of law, and noted that the expert opinion was of no help to the plaintiffs, because "it does not supply the **pre-requisites** of foreseeability required by the Washington cases: **specific evidence that the defendant knew of the dangerous propensities of the individual assailant or previous acts of similar violence on the premises.**" Id. at 310. (Emphasis added)

Again, in Raider v. Greyhound Lines, Inc., 94 Wn.App. 816, 975 P.2d 518, rev. den. 138 Wn.2d 1011 (1999), the court found the evidence presented by the plaintiff insufficient to create a foreseeable duty to prevent a bus station shooting; the evidence presented included high criminal activity at the bus station, prostitution, drugs, and a shooting two years earlier. Id. at 818. The Court of Appeals held that such evidence did not establish any relationship or similarity to past crimes.

Similar evidence was presented in Fuentes v. Port of Seattle, 119 Wn. App. 864, 82 P.3d 1175 (2003) rev. denied, 152 Wn.2d 1008 (2004), where a plaintiff was assaulted in the Seattle-Tacoma Airport drive through area. Plaintiff presented evidence of car prowling in the parking garage, evidence of a previous assault there, and a report stating that "a passenger at Seattle-Tacoma International Airport is more likely to be a victim of crime than at other comparable airports in the United States." Id. at 866-67. She also presented statistics documenting crimes at the Airport. The Court of Appeals upheld summary judgment for the Airport, again holding that plaintiff's injuries were unforeseeable as a matter of law.

In Tortes v. King County, 119 Wn. App. 1, 84 P.3d 252 (2003), a plaintiff injured in a city bus shooting claimed that there should have been better police protection, bus driver enclosures, and video surveillance cameras. The court rejected any such duties, noting the "evidence does not support the fact that there were similar crimes on other metro buses." Id. at 8. Plaintiff's evidence (much of which was stricken as irrelevant, not authenticated, or hearsay) included an article from a newspaper which was five years old and generally discussed assaults on buses, and a research paper from the Federal Transit Administration on "Improving Transit Security," along with an alleged security expert who testified on the foreseeability of the events. Absent the required specific evidence of past

incidents similar enough and relevant to the timeframe, the court dismissed the case on summary judgment. See also, Craig v. Washington Trust Bank, 94 Wn. App. 820, 976 P.2d 126 (1999), (evidence of a business' knowledge that transients loitered near a garbage receptacle insufficient to create an issue of fact on foreseeability of an assault near the receptacle).

The federal courts recognize the current status of Washington law. In McKown v. Simon Property Group, Inc., 689 F.3d 1086 (9th Cir. 2012), the Ninth Circuit considered a summary judgment granted by the Western District of Washington, dismissing a case against the Tacoma Mall for injuries resulting from a shooting incident. The District Court found that evidence presented of prior shooting incidents at the Mall which occurred years before the relevant incident, and which were different in nature and circumstance, did not rise to the level necessary to meet the "prior similar acts on the premises test set forth in multiple Washington appellate court cases." McKown, 2001 WL 1675032 at *2-4 (W.D. Wash. 2011), (finding that "there is an issue for the jury as to whether the third party's criminal conduct is reasonably foreseeable **only if** plaintiff presents competent evidence that similar criminal conduct has occurred on the premises in the past"). (Emphasis added) While the Ninth Circuit has not yet substantively ruled, it did recognize that Washington intermediate

appellate courts have "repeatedly applied" this test, which is the current status of Washington law. McKown, 689 F.3d at 1093.[3]

Crill ignores this necessary pre-requisite proof and asserts that the trial court misapplied Washington law by requiring it; however, she fails to explain now this clear precedent was not properly applied. Crill argues that the trial court's error is established by using a variety of hypotheticals of situations not in the record, such as whether an owner who had several restaurants that experienced criminal conduct would have a duty to foresee events in another particular location, or whether a prior stabbing could establish the foreseeability of a rape. (Appellant's brief, pp. 14-15) There was no evidence presented to the trial court of such occurrences, and how such facts may have altered the trial court's analysis here is simply irrelevant. Crill has failed to provide any evidence regarding events at the restaurant to establish foreseeability; her evidence here instead consisted of the similar types of evidence repeatedly rejected by Washington courts as creating any issue of fact. She relied on the declaration of Fred Del Marva, in which he testified primarily based on nationwide events, trends, and the generalized likelihood of intoxicated patrons at a 24-hour

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[3] The Ninth Circuit has certified issues relative to a mall shooting to the Washington State Supreme Court; any decision issued will return to the Ninth Circuit for final adjudication.

restaurant. (CP 212-220) It is undisputed Mr. Del Marva did not analyze any facts relative to assaults at the Argonne Denny's.

Mr. Del Marva's testimony instead indicated that he evaluated practices, policies, procedures, or systems, of WRBF, to determine whether they attempted to discover whether intentionally harmful acts were likely to cause physical harm to their customers in patronizing the restaurant. (CP 214) He testified generally that restaurants that are open between the hours of 11 p.m. and 4 a.m. should implement security measures, policies, procedures or systems, including video surveillance, warning signs, and training issues. (CP 215) He testified that it is generally "well known" throughout the Denny's "system" that argumentative and assaultive conduct is a common occurrence when after bar clientele are served between the hours of 11 p.m. and 4 a.m. (CP 215) He cited National Restaurant News publications regarding the high propensity of clientele leaving a bar after it closes to be argumentative and disruptive. (CP 216) However, just as in Wilbert, supra, Mr. Del Marva did not base his opinion on the necessary evidence of specific similar conduct that has occurred at the Denny's on Argonne in Spokane, Washington in a relevant time period with relevant similarity, but instead basing it on assumptions regarding the type of patron that may have frequented Denny's.

Crill failed to present evidence of numbers of police calls or responses, arrests at the Denny's, numbers of incidents, types of incidents, or even one specific prior assault to create an issue of fact for trial here.[4] She did not present testimony from any employees of such prior incidents, because such evidence did not exist.

Crill fails to address or apply the relevant law to her facts, instead attempting to utilize inapplicable law to create a "general field of danger" concept. However, contrary to Crill's argument, the case N.K. v. Corporation of Presiding Bishop of Jesus Christ of Latter-Day Saints, 175 Wn.App. 517, 307 P.3d 730 (2013) does not apply to establish WRBF's duty here; in that case a boy scout sued the Boy Scouts of America and the Church of Latter-Day Saints after he was molested by a scout leader in a troop sponsored by the church. The court in N.K. does not address premises owner liability for third-party criminal conduct at all; it instead addresses the special duty to protect another from sexual assault when a "special protective relationship" exists, such as with children in schools or social clubs, churches, group homes, etc.

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[4] It is undisputed Crill did not provide the court with any police reports of past events at this Denny's, although she produced in discovery a mass of police reports she had obtained from public records requests. (See, CP 486, fn. 1)

For that duty to apply, there must be a "special protective" relationship between the defendant and the abuser, a "special" relationship between the defendant and the abused, and a causal connection between the abuser's position with the defendant, and the resulting harm. N.K, 175 Wn.App. at 525-536. The provision of the Restatement cited to establish the duty in N.K. is the duty to control the conduct of a third person to prevent him from harming others. 175 Wn.App. at 525-526; Restatement (Second) of Torts, §315. The "general field of danger" analysis discussed in N.K. is applied to a special group of individuals who should expect protection from any general danger which should have been anticipated, such as children or the elderly in group homes. 175 Wn.App. at 526.[5] Clearly, the issues of foreseeability and duty are completely different in such situations, and this case does not apply to alter the appropriate premises liability issues previously decided.

The law in Washington as to liability of a premises owner for criminal conduct of others is very clear, and Crill has not presented sufficient proof to meet her burden to establish foreseeability based on the

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[5] Ultimately, the court ruled that the Boy Scouts of America had no duty to the plaintiff because he was not in their custody, despite evidence that the Boy Scouts had expansive knowledge of the history of sexual abuse in scouting, but had no specific knowledge about the troop leader. The court did find the Church had a duty based on specific awareness of the troop leader's dangerous propensities. N.K., 175 Wn.App. at 534-536.

pre-requisites of prior similar conduct which is necessary under Washington law, and without which no duty exists. See e.g., Nivens, 133 Wn.2d at 203-205 (no duty arises unless the harm to the invitee to third persons is foreseeable). Summary judgment was properly granted.

2. Denny's personnel did not undertake a duty to "rescue" and had no duty to physically intervene in an altercation.

Crill asserts that the Denny's staff voluntarily assumed a duty to Crill once they "intervened," and that the assault which occurred in a 10-minute period after seating the Austin Garner party was "foreseeable," and should have been "prevented."

First, it is apparent that the argument is in reality just a restatement of the claim that a duty existed to foresee an assault. There is no duty to assume that customers are about to assault one another. Crill's argument in this regard relies again on the notion that "WRBF staff recognized the potential danger," "based on the disruptive guest" training (Appellant's brief, p. 18) For this to create an assumed duty to foresee the criminal conduct, it would basically require that the assumption exists that such conduct is foreseeable from the first service of customers, which is in turn the same argument that the "general field of danger" existed by serving the customers at all. This claim of "foreseeability" fails as outlined above.

Moreover, the "rescue doctrine" referenced in Folsom v. Burger King, 135 Wn.2d 658, 958 P.2d 301 (1998) is not applicable here to create a duty. Washington has recognized the "rescue doctrine"; when a person gratuitously undertakes to render aid to another, the rescuer may be liable if he or she fails to exercise reasonable care and (1) consequently increases the risk of harm to those she is trying to assist and (2) induces reliance and misleads the plaintiff into believing the danger has been removed, or (3) deprives plaintiff from seeking help elsewhere. Ganno v. Lanoga Corp., 119 Wn.App. 310, 316, 80 P.3d 180 (2003); see also, Folsom, supra.

The evidence remains undisputed that contrary to Crill's assertion on appeal, there is no evidence in the record that Ms. Winter "clearly recognized that there was a danger," thus undertaking a rescue by simply asking customers to quiet down. Denny's did not gratuitously undertake a duty to save Crill from an assault. Moreover, there is no evidence that the Denny's staff increased the risk of harm, misled Crill into believing there was no danger, or prevented her from avoiding the danger in some other way. The risk of harm arose from Crill intervening in an altercation with her friend. (CP 36) Denny's did not increase that risk, Crill did. Crill's claim that the intervention of WRBF employees was "ineffectual and accomplished little more than persuading Crill that the restaurant would be

controlling the situation" is disingenuous, since Crill actually testified no one from Denny's ever approached the table before the assault. (CP 93-94) She cannot establish any reliance on the Denny's personnel, or that she was "misled" since her testimony was there was no assistance. Irrespective of that however, there is no evidence that she relied on Denny's staff for protection, since again, she intervened in the situation; had she remained seated, she would have avoided danger. The rescue doctrine simply does not operate here to create a duty here.

Moreover, there is no question of fact on whether the Denny's staff "intervention attempts were reasonable." (Appellant's brief, p. 19) The law does not require Denny's staff to place themselves in the path of danger of third-party criminal conduct as a reasonable measure. See, Nivens, 133 Wn.2d at 203 n.2 [citing Southland Corp. v. Griffith, 633 A.2d 84 (Md. 1993)].[6] It is undisputed that Denny's staff was instructed not to intervene in fights or other criminal conduct, but to call the police and allow the appropriate authorities to deal with the criminal conduct of others. (CP 61) Ms. Winter called the police within 10-minutes of the Garner party being seated, and Crill's claim that Ms. Winter failed "to take

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[6] In Southland, 633 A.2d at 91, a 7-11 store clerk refused to telephone the police after repeatedly being asked to summon assistance because of an altercation in progress occurring on premises; the clerk breached a duty of care to call the police when requested. No such evidence exists here.

the appropriate steps to insure the disturbance ended peacefully" (Appellant's brief, p. 19) cannot create an issue of fact for trial without establishing a duty to physically intervene. Summary judgment was properly granted.

IV. CONCLUSION

For the foregoing reasons, WRBF, Inc. requests that the court affirm the summary judgment dismissing this action.

DATED this 23 day of April, 2014.

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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 23rd day of April, 2014, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

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