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.

RESPONDENT'S SUPPLEMENTAL BRIEF RE: MCKOWN DECISION

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I. Introduction.

The trial court granted summary judgment dismissing plaintiff's claim that Denny's Restaurant was liable for the injuries she allegedly sustained in an altercation with another patron at the restaurant. The trial court properly stated Washington law that a restaurant has a duty to use reasonable care to protect its patrons from the criminal conduct of others, but only if the criminal conduct was reasonably foreseeable. The trial court rejected plaintiff's claim that the assault was in a "general zone of danger" of which Denny's was aware based on nationwide restaurant industry statistics that indicated violent crimes are more likely to occur during a night shift; as the court noted, Appellant "offered no evidence relating specifically to the Denny's on Argonne Ave in Spokane, WA," and thus offered no proof that Denny's could reasonably foresee a third party assault on its premises. (CP 272)

Ms. Crill appealed, asserting that the court has erred in dismissing her claim because there existed a "general field of danger," and that Denny's had a duty to assume criminal conduct despite the complete lack of proof that the Denny's on Argonne had ever experienced similar criminal conduct on its premises, despite it hours of operation.

While this matter was pending, the Ninth Circuit certified certain questions to the Washington State Supreme Court in the case of McKown

v. Simon Properties Group, Inc.; that decision was issued on March 5, 2015, and this Court provided the parties with the opportunity for supplemental briefing on the potential impact of that decision. In McKown v. Simon Properties Group, Inc., 344 P.3d 661 (Wash., March 5, 2015), the Supreme Court was asked to determine whether Washington has adopted the Restatement (Second) of Torts, §344, and whether evidence of previous acts of similar violence was required to establish a duty to invitees harmed by criminal conduct, and if so, how similar the crimes must be. The majority opinion confirmed that the Restatement was consistent with Washington law, and confirmed that a when a claimant asserts that criminal conduct was foreseeable based on evidence of other violence, the claimant must present proof of prior acts "similar in nature and location" to that which injured plaintiff, which are "sufficiently close in time to the act in question, and sufficiently numerous to have put the business on notice that such an act was likely to occur." McKown, 344 P.3d at 671. Thus, the McKown decision does not change the Washington law on which Denny's (and the trial court) relied, and further provides support to affirm the summary dismissal.

1. **The McKown Court's answers to the certified questions do not alter the propriety of the summary judgment granted dismissing the Appellant's claims, but further confirm that evidence of nationwide events at other restaurants are insufficient to create an issue of fact to establish that Denny's had a duty to foresee the criminal conduct which Appellant claims injured her.**

In McKown, a plaintiff was injured by a gunman at the Tacoma Mall. The evidence against the mall primarily relied on evidence of other incidents of assault at the Mall, although they were largely unrelated to the mass shooting, and which had occurred between 5-13 years before the attack in question; the plaintiff relied on the previous incidents, and claimed that the Mall was an area that would be a "target" prone to such an event. The Washington Supreme Court noted that since the plaintiff had only offered evidence that the crime was foreseeable based on the previous incidents, that the court would primarily limit its discussion to what evidence was necessary in those circumstances. It declined to address what other evidence may be utilized if a party did not rely on past criminal behavior, although it answered the certified question that past criminal conduct was not the only method to prove a duty based on foreseeability. However, as to past experience of criminal behavior, it is now undisputed that Washington law requires that such incidents be similar to the event in question, close in time, and at the same location to impose a duty on a business owner. McKown, 344 P.3d at 671.

In so ruling, the Supreme Court relied on the same specific decisions cited to the trial court and outlined in the Respondent's brief. See, Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192, 943 P.2d 286 (1997); Wilbert v. Metro. Park Dist. of Tacoma, 90 Wn.App. 304, 950 P.2d 522 (1998); Fuentes v. Port of Seattle, 119 Wn.App. 864, 83 P.3d 1175 (2004); Raider v. Greyhound Lines, Inc., 94 Wn.App. 816, 975 P.2d 518 (1999); Tortes v. King County, 119 Wn.App. 1, 84 P.3d 252 (2003). Thus Appellant's claim that the trial court "misread Nivens and its progeny" is incorrect. (Appellant Brief, p. 12)

All of these cases rejected claims that a business establishment should have anticipated criminal violence without evidence of similar acts close in nature, location, and time to the event at issue. Thus, the McKown Court rejects the notion that this would give a business a "one bite" rule (an argument made in both McKown, and by Appellant here). Appellant here argued that it would be unfair to relieve Denny's of liability for criminal assault at the Argonne store, if it were aware of assaults or criminal conduct in the area, or at other Spokane locations, claiming in essence that this would relieve a business of a duty until after an assault actually occurred on its premises. (Appellant's Brief, pp. 14-15) Such an argument is now undisputedly not a basis on which a

business is deemed to have a duty to foresee criminal assault, and must be disregarded as an incorrect consideration under Washington law.

While the McKown Court did indicate that past criminal conduct was not the **only** means by which third party criminal assault could be foreseeable, it declined to explore any specifics of that issue, because the facts in the case before it limited its evidence to the criminal conduct at the mall. Thus, it left for future determination under what circumstances a business may be subject to a duty to protect an invitee based on the "character" of its business. However, the Supreme Court majority's opinion[1] continues to make clear that irrespective of what type of evidence is presented, it must be linked to the defendant's premises, and not some floating nationwide statistics on what has occurred elsewhere, or on a "general zone of danger," as argued by the Appellant here. See, McKown, 344 P.3d at 667 (noting that the Restatement §344, comment f, limits the rise of a duty to the "likelihood that harmful conduct of third parties will occur **on his premises**."). The McKown court also notes that the language of the Restatement requires a "narrow interpretation" of a landowner's potential duty to an inquiry as to:

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[1] It is the majority opinion that provides the precedent on which this court must rely. State v. Constantine, 182 Wn. App. 635, 649, 330 P.3d 226 (2014).

> 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, 344 P.3d at 667.

The McKown court specifically declined to adopt a "standard with no contours," and confirmed that a "possessor of land has no duty to all others under a generalized standard of reasonable care under all the circumstances." Id. at 665.

The McKown court also noted that it had rejected the claim that a business operating in an area with high crime statistics is under a duty to foresee criminal conduct at its location. Id. 344 P.3d at 667-68. The concurrence similarly found that such evidence is not of the type appropriate to create a foreseeable duty at a specific location:

> We have recognized that mere statistical evidence, such as a higher crime rate in a particular city or neighborhood, **or a higher crime rate among similar businesses nationwide or statewide**, is insufficient to support the imposition of a duty. (Emphasis added)

McKown, 344 P.3d at 676-677.

Here, as in McKown, the evidence on which the Appellant relied below here remains insufficient under the McKown analysis to create an issue of fact for trial that Denny's had a duty to foresee the criminal third party conduct that Appellant asserts caused her damage. It is undisputed

that she presented no evidence that there were any similar criminal assaults on the Denny's premises, leaving the only evidence of foreseeability that other assaults or criminal conduct occurred at other restaurants nationwide when they were open during late hours. However, the evidence of an "unruly" bar crowd is simply evidence of prior criminal conduct, and all claims of foreseeability based on a "bar rush" must be linked to prior experience of similar close in time events.

Here, there were no such events, which underscores the lack of foreseeability of the conduct sufficient to cause a duty. The argument is somewhat circular—Appellant argues that Denny's has a duty based on the obvious foreseeability of criminal conduct in the late evening, even though they had not had a similar incident although they had always been open at that time. Under the evidence presented here, neither McKown, the Restatement, or Washington law provides that there exists a duty for Denny's to have foreseen this event and protected plaintiff from it; summary judgment was proper as a matter of law.

2. The other issues which Appellant appeals were not addressed in McKown, and Respondent will not address them in this supplemental brief.

McKown has no impact on the evidentiary issues Appellant addresses, which remain within the proper exercise of the trial court's discretion, nor on the alleged breach of duty to protect the Appellant by

doing more than summoning the police once the incident started. These will not be addressed here.

DATED this 11th day of May, 2015.

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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 11th day of May, 2015, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

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DATED at Spokane, Washington, this 11th day of May, 2015.

Linda Lee

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