S. Ct. No. 92656-5

Court of Appeals Div. III, File No. 319121

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STAR F. CRILL, individually,

Plaintiff/Petitioner,

vs.

WRBF INC. d/b/a DENNY'S RESTAURANT; DEBRA FOUTS and JAC 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.

PETITION FOR REVIEW

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has approved Restatement (Second) of Torts § 344 and comment f (1965) as generally consistent with Washington law. *See McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 770, 344 P.3d 661 (2015). Restatement § 344 describes the duty owed by a public business to protect customers and holds such businesses liable 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.

Comment f provides further explanation:

> *f. Duty to police premises.* 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 and comment f contemplate "two kinds of situations that may give rise to a duty—the first is where the landowner knows or has reason to know of immediate or imminent harm, and the

second is where the possessor of land knows, or has reason to know, based on the *landowner's past experience,* the *place* of the business, or the *character* of the business, there is a likelihood that harmful conduct of third parties will occur on his premises." *McKown*, 182 Wn.2d at 768 (emphasis in original.) In *McKown,* the Court addressed the existence of a duty based on the landowner's past experience. *See id.* at 771-74. The Court specifically reserved ruling on the existence of a duty based on the character of the business. *See id.* at 770 n.6 & 774. The Court seemed to recognize, but did not otherwise address, the existence of a duty based on the imminence of harm. *See id.* at 768.

This case involves the existence of a duty based on character of the business and the imminence of harm, which were mentioned but not directly analyzed in *McKown.* Petitioner Star F. Crill (Crill) was assaulted and seriously injured by drunk patrons of a Denny's Restaurant located on Argonne Road in Spokane and operated by Respondent WRBF, Inc. (WRBF). Denny's is open 24 hours a day and caters to patrons of nearby bars after the bars close for the night. "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 11:00 p.m. and 4:00 a.m." CP 215. Staff and management at the Argonne Denny's were aware of the risk. CP 65, 369 &

382. Crill contends that this knowledge based on the character of the business should give rise to a duty to exercise reasonable care.

Crill also contends that a duty to exercise reasonable care should arise from knowledge of the imminence of harm, based on prior interactions between WRBF staff and the persons who assaulted Crill. This case does not involve a shocking and sudden event like an unpredictable racially motivated shooting; rather this case involves a risk of assault that emerged over the course of many minutes and several warnings prior to the actual assault.

However, the Court of Appeals below held that WRBF had no duty as a matter of law. *See Crill v. WRBF, Inc.*, *noted at* 189 Wn. App. 1052, *available at* 2015 WL 5166363 (Wn. App., Div. III, Sept. 3, 2015). In declining to recognize a duty based on the character of the business, the appellate court seemed to conflate the character of the business with the past experience of the business and the imminence of harm. *See Crill*, 2015 WL 5166363, at *16. With respect to the imminence of harm, the court did not view the facts in the light most favorable to Crill as the nonmoving party on summary judgment. *See id.* at *12-13. On both counts, the decision reveals a lack of clarity regarding character of the business and imminence of harm as bases for imposing a duty of reasonable care.

The decision below presents issues of substantial public interest that should be determined by this Court, warranting review under RAP 13.4(b)(4). Businesses deserve fair notice of the circumstances under which they have an obligation to protect customers from the risk of harm from third persons, and lower courts and counsel need guidance regarding the proper interpretation and application of the duty under Restatement § 344 and comment f.

II. IDENTITY OF PETITIONER

Petitioner Star F. Crill ("Crill") asks this court to accept review of the Court of Appeals decision terminating review designated below.

III. COURT OF APPEALS DECISION

A copy of the Court of Appeals decision, filed September 3, 2015, is reproduced in the Appendix to this Petition at pages A-1 to A-36.

IV. ISSUES PRESENTED FOR REVIEW

A. Can knowledge of the risk of harm based on the "character of a business" give rise to a duty to protect a business visitor from the risk of assault?

B. Can knowledge of the "imminence of harm" to customers give rise to a duty to protect those business visitors from the impending risk?

C. Did Crill present sufficient evidence to the trial court to require analysis of whether or not the character of defendant's business gave rise to a duty to protect her from the risk of assault?

D. Did Crill present sufficient evidence to the trial court to create a triable issue of fact concerning whether the defendant knew or should have known of immediate or imminent harm?

V. STATEMENT OF THE CASE

A. Background facts.

1. Knowledge of risk based on character of business

Denny's Restaurant on Argonne, one of several Denny's Restaurants owned by Defendant/Respondent WRBF, Inc., is located less than a half mile from Good Tymes Bar and Grill. The Argonne Denny's is open 24 hours per day. As such, the Argonne Denny's is subject to the "bar rush" phenomenon that results on weekend nights from the closure of a nearby bar and the stream of customers who then appear at the nearby Denny's. Lovins depo., CP 396:4-6. Not only are the employees and management aware of this phenomenon, but they discuss as part of their training how to handle disruptive customers. Liberg Depo., CP 369:17-21; CP 382:9-11; Winter declaration, CP 65:6-8. The more intoxicated the customers are, the more likely they are to "cause problems," including the potential for physical violence. Lovins Depo., CP 405:3-5; Declaration of Fred Del Marva, CP 216:12-18.

It is also well known to owners of restaurants in the Denny's "system" that remaining open during the late-night hours risks special security problems; they arise from the fact that "argumentative and assaultive conduct is a common occurrence and highly foreseeable when soliciting an after-bar clientele between the hours of 11:00 p.m. and 4:00 a.m." Del Marva Decl., CP 215:24-26. As a result, a prudent owner of a

restaurant such as the Argonne Denny's will employ a specially trained manager to be on duty during the late night hours in order to identify intoxicated customers at the time of entry and take appropriate measures to insure the safety of restaurant customers. Del Marva Decl., CP 216:28-217:2.

On the night of January 2, 2009 and the early morning hours of January 3, 2009 (Friday night/Saturday morning), the Argonne Denny's did not have a manager on duty.[1] Instead, one of the servers, Maryquince Winter, attempted to fulfill the role of acting manager while at the same time acting as a server. Winter Depo., CP 309:24-310:1.

2. Knowledge of risk based on imminence of harm

Austin Garner had been drinking at the Good Tymes Bar and Grill prior to its closing at 2 a.m. on January 3, 2009. Garner Depo., CP 204:10-12. He could not remember whether he had consumed between one and six alcoholic beverages. CP 204:10-12. A later arresting officer reported smelling the odor of alcoholic beverages on his person, and behavior consistent with someone under the influence of alcohol. CP 48. Another

[1] Maryquince Winter testified that on the night in question the manager who was scheduled did not come to work because of "an issue with flooding at his house." CP 65:14-15. There is no evidence that the Argonne Denny's made any effort to find a replacement for the manager, but simply expected Winter to "fill in as needed in a management role" while also fulfilling her duties as a server. CP 65:3-4.

person in Garner's party, Jackie D. Legere, was also "very drunk." Crill depo., CP 29:10-13.

Garner and his friends, slurring their words and cursing within five minutes of entering the restaurant, were seated in the restaurant in a booth immediately behind Crill and her friend Mario Diaz. Crill depo.,[2] CP 28-30. Although Crill and Diaz were speaking in a normal tone of voice about general topics, including politics, Garner's friend Legere spoke in a loud voice and repeatedly interfered with the conversation between Crill and Diaz telling them to "shut the f*** up." Crill depo., CP 30:5-6. Right after they were seated next to each other, a fellow server warned the server filling double duty as a server and manager, Maryquince Winter, that "there may be a problem with some patrons seated in booths along the windows." CP 65:17-18. Winter went to "observe the situation" but decided no action was needed after that first warning. CP 65:21. According to the police statement, Legere admitted telling the Crill booth during this confrontation "I don't want to hear about your n**ger way of life!" CP 49.[3] Later after

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[2] Star Crill was married to Slade Seehawer June 13, 2010. By the time of the deposition she had changed her name, but the lawsuit was initiated in her maiden name.

[3] Jason Liberg, WRBF manager in 2009, admitted their policy required WRBF staff to remove any person from the restaurant who was making racial epithets toward another customer. Liberg depo., CP 384. Larry Lovins, current and past manager of the WRBF restaurant, concurred

Winter heard their raised voices herself she "told them all to quiet down, and settle down, or leave." CP 66:5-6. Three to four minutes later, the Garner booth got progressively louder in confronting Crill and her friend. CP 30-31. After leaving the area to seat some other customers once more another server warned Winter that the Garner party had been cursing at someone in the Crill party and that someone at the tables was no longer seated but was standing up. CP 66:7-8; CP 324:5-6. Winter now acknowledged that "there was a situation" but instead of separating the tables or asking either party to leave Winter merely warned the Garner booth, "I can tell from your tone, I'm going to have to ask you to leave." CP 324. Winter then left again to resume waiting on other tables. CP 311-12. For two more minutes the confrontation escalates. Crill looked around for help, while Winter was on the other side of the restaurant. CP 318-19. Winter returned to the Garner booth a third time and told them to leave. She then left the Crill party alone with Garner and his friends while she went to call 911. CP 312. While Winter was calling 911, Garner assaulted Crill. CP 49. Garner had punched Crill in the back of the neck at the base of the skull that caused a "knot on her head" (CP 52) resulting in permanent injuries, including psychological and cognitive deficits. CP 8-9.

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racial slurs between customers would "immediately" be a problem. Lovins depo., CP 405.

B. Procedural history.

Crill timely filed a complaint for damages on December 13, 2011. CP 3-9. On May 8, 2013 defendant WRBF filed a motion for summary judgment, contending that WRBF had no prior knowledge of criminal conduct at the Argonne Denny's and that the complaint should be dismissed as a matter of law. CP 21:4-5. In support of its motion, WRBF submitted the Declaration of Don Wold, the General Manager at the Argonne Denny's, who described a "manager's log" that would contain reports of incidents relating to fights or assaults in the restaurant. CP 62:5-8. He testified that there were no incidents relating to fights or assaults between late September 2008 and the first of January, 2009. CP 62:5-8.

In response, plaintiff submitted a brief in opposition to summary judgment, including the declaration of Fred Del Marva, an expert qualified to testify concerning the restaurant industry generally, and the policies followed by Denny's Restaurants in particular. In his declaration Del Marva described the "completely different crowd" that patronizes a late-night restaurant and the security measures that the Denny's "system" recognizes must be employed in order to ensure the safety of their customers. CP 215:24-216:25. In his expert testimony Del Marva referenced an article from the *Restaurant News* dated December 2, 2007, which was entitled "Restaurants open themselves up to greater risks with

later hours." CP 231-37. The article was attached with his declaration as Exhibit 8 (and is reproduced in the appendix to this brief). *Id.* It included a report of the fatal stabbing of a Denny's waitress in Florida, and a statement by Mike Jank, the vice president of risk management for the 520 Denny's company stores and 947 franchised restaurants, stating "I just hope operators realize they are going to have problems if they don't keep in mind that the security issues you have in the daytime are far different at night." Del Marva cited this statement in support of his conclusion that those who were in the Denny's "system" were well aware of the special dangers posed by operating a late-night restaurant. CP 216:8-11.

WRBF moved to strike the *Restaurant News* article attached to Del Marva's declaration, contending that it was hearsay. CP 253-55. The trial court granted WRBF's motion, and struck the article on grounds of hearsay. CP 258:2. After oral argument the trial court issued a written opinion granting WRBF's motion to dismiss the case on summary judgment. CP 272. The trial court's review of relevant case law led her to the conclusion that "past criminal behavior on a premises does not provide reasonable foreseeability of future crimes unless such future crimes are of the exact nature of the past criminal behavior." CP 271 (emphasis supplied). The opinion also relied upon the evidence of the lack of previous recorded incidents in the manager's log submitted by Don Wold: "The

empty incident log kept by WRBF shows this restaurant is not accustomed to altercations on its premises." CP 273.

The plaintiff moved for reconsideration of its opinion, based on two grounds: (1) the evidence presented at the time of summary judgment was misleading in light of evidence available as a result of depositions that were taken after the summary judgment materials had been filed;[4] and (2) the trial court had misapplied the standard for what was reasonably foreseeable: instead of requiring that the plaintiff establish that a previous incident of the "exact nature" had previously occurred on the premises, the plaintiff need only show that "the actual harm fell within a general field of danger which should have been anticipated." CP 287:7-8. The trial court denied the motion for reconsideration. CP 557.

Crill timely appealed the trial court's dismissal. Crill made three assignments of error. The first was to the trial court's exclusion of the article in *Restaurant News* that demonstrated the awareness by Denny's of the higher risk of assaultive behavior that all-night restaurants face. The second issue was whether or not previous incidents of criminal conduct were required to establish that the defendant owed a duty of care to prevent

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[4] In particular, the "incident log" upon which WRBF argued that it had no prior history of altercations was shown to be unreliable (CP 279-281); and Maryquince Winter testified in her deposition to notice at the time of the incident that a physical altercation was foreseeable.

business visitors from being assaulted. The third issue was whether or not the defendant had intervened in such a way as to create justifiable reliance on the part of Crill that she would be protected.

The Court of Appeals did not request oral argument, but after briefing of the case was complete, the Court of Appeals entered an order staying proceedings pending the decision in the *McKown* case. On April 10, 2015 the stay was lifted and the Court of Appeals requested supplemental briefing in light of the decision in the *McKown* case. Both parties filed supplemental briefs.

On September 3, 2015 the Court of Appeals issued an unpublished opinion expressing no opinion as to whether Exhibit 8, the article from *Restaurant News,* should have been admitted, but affirmed the trial court's dismissal of the claim, summarizing its analysis as follows:

> We conclude that, as a matter of law, the Argonne Denny's should not have reasonably foreseen the attack on Star Crill for several legal reasons. First, evidence of the antisocial, unruly, or even hostile behavior of Jackie Legere is insufficient to establish that the Argonne Denny's should have reasonably anticipated a more serious misdeed. Second, no case has held that drunkenness alone creates a duty to remove one from business premises. Third, the only history of any fights at Argonne Denny's was an altercation in the parking lot, about which we have no details. Fourth, Crill's argument that a manager experienced in handling drunk customers is similar in nature to the contention that a business must hire a security guard, an argument already rejected by Washington courts. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d at 205-06 (1997); *Raider v. Greyhound Lines, Inc.*, 94 Wn. App. at 819 (1999). Fifth, for

> public policy reasons, the law should reluctantly impose on a business the duty of police protection for its patrons.

Appendix, at A-33. Crill filed a motion requesting publication of the opinion, which was denied on November 24, 2015.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) lists the four reasons which will justify acceptance by the Supreme Court of a petition for review. Of those four, two apply to this case. First, under RAP 13.4(b)(4), this case presents important issues of law reserved and unanswered in *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 344 P.3d 661 (2015), citing *Restatement (Second) of Torts* § 344 (1965), comment f. Although there is reference in the Court of Appeals opinion to *McKown* and to § 344, comment f, the analysis quoted above demonstrates that the Court of Appeals did not fully consider whether the "place or character of the business" was sufficient to create a duty of care, which is to some extent understandable given the absence of controlling Washington authority on this issue.

There is a substantial public interest in determining the circumstances under which the "place or character of the business" or "immediate or imminent harm" can give rise to a duty of care. The Court of Appeals acknowledged that *McKown* "left for an appropriate future case any inquiry concerning the circumstances under which the 'place or character' of a business can give rise to a duty to protect invitees against

third party criminal conduct." (Appendix, at A-30-31.) However, the Court of Appeals failed to recognize that the case it was deciding was such an "appropriate future case," and it failed to address the separate basis for liability recognized by *McKown.*

And second, while the Court of Appeals did consider whether a duty of care arose because the defendant had "reason to know of immediate or imminent harm" (*McKown*, 182 Wn.2d at 768, 344 P.3d at 667), the Court of Appeals failed to recognize that there was a triable issue of fact that made summary judgment inappropriate. This failure to observe the well-accepted standard of review that all evidence must be reviewed on summary judgment in favor of the non-moving party is in conflict with existing law and provides the second basis for review under RAP 13.4(b)(1).

A. RAP 13.4(b)(4): This case presents two issues of substantial public interest that should be determined by the Supreme Court—the existence of a duty owed by Washington businesses to reasonably protect their customers from risks known by the "character" of the business or based on the risk of "imminent harm" to its customers.

Many assaults occur on the premises of Washington businesses. In *McKown* this court recognized that there are circumstances under which a business owner may be liable for failing to take reasonable care to prevent an assault that occurs on the business premises. However, after recognizing that, even if no prior similar incidents have taken place, the place or character of the business may give rise to liability, the *McKown* court left

for a future case the determination of the type of evidence that would be sufficient to trigger such a duty. The instant case presents an ideal vehicle for answering the question that *McKown* left open.

1. *McKown* recognized two distinct bases for establishing a duty under § 344: immediate or imminent harm to customers, and history or experience showing the risk of harm to customers.

While the *McKown* decision found that § 344, comment f did not apply to the facts of that case, it plainly recognized that § 344 comment f was a part of the law of Washington:

> Thus, comment f, like section 344 itself, contemplates two kinds of situations that may give rise to a duty--the first is where the landowner knows or has reason to know of immediate or imminent harm, and the second is where the possessor of land knows, or has reason to know, based on the *landowner's past experience,* the *place* of the business, or the *character* of the business, there is a likelihood that harmful conduct of third parties will occur on his premises.

McKown, 182 Wn.2d at 768, 344 P.3d at 667.

Significantly, both bases for imposing a duty of care are present in this case: First, with respect to the imminence of harm, Fred Del Marva testified that, according to the accounts of the employees on duty the night of the attack, there was ample warning of an imminent attack. CP 447. Second, ample evidence, including the Del Marva testimony concerning the risks of operating an all-night restaurant catering to the "bar rush" crowd,

established that the character of the business gave rise to a duty to reduce the risk of harm to business visitors. CP 216.

2. Business owners deserve fair notice of when they will be expected to protect their customers from the risk of criminal assault, and injured customers should know when those same businesses owed a duty to protect them from the injuries suffered.

Having recognized that there are circumstances under which a business owner could be subjected to liability for criminal assaults that occur on the owner's premises, the court would promote the public interest by providing guidance as to the circumstances under which such a duty could be imposed. Moreover, the public would benefit from clarification of the relationship between the imposition of a duty and the evidence necessary to establish a breach of that duty. For example, in the instant case, the trier of fact might very well conclude that, although the Argonne Denny's was under a duty to take reasonable precautions to deal with the possibility of disruptive or violent behavior from the "bar-rush" clientele, its duty did not extend to providing full-time security personnel. The duty could be satisfied by insuring that someone on staff during the late night hours was prepared to deal with intoxicated or potentially violent customers. To hold that the foreseeability of assault created a duty of care is not to say that any assaults that occur on the premises will result in liability. However, some simple precautions, commensurate with the risk to be perceived, could be

imposed on certain types of businesses, so long as a reasonable person would recognize the need.

As long as no case such as this one is decided by the Washington Supreme Court, Washington business owners will face uncertain liability and either fail to take precautions that would avoid unnecessary harm, or else waste resources taking precautions that the law does not require.

In its opinion the Court of Appeals also recognized that "no Washington decision discusses liability based on 'imminent criminal harm.'" Appendix, at A-24. Both of the bases recognized in Restatement § 344 comment f are presented in this case and provide the Washington Supreme Court with an opportunity to clarify the boundaries of a business owner's duty of care.

3. The unpublished appellate opinion created confusion, rather than clarity, regarding the status of Restatement § 344, comment f, and injured potential plaintiffs should be provided guidance on the proper application of this rule.

Attorneys seeking guidance as to the proper incorporation of Restatement § 344 comment f will find the opinion of the Court of Appeals in this case a stumbling block rather than an aid to understanding. Had the Court of Appeals published the opinion, it could be cited for its value—rightly or wrongly—in defining the prerequisites for a case alleging a duty of care arising out of the "place or character" of a business. However,

because the opinion is unpublished, it will be reviewed as one of the few cases that addresses the post-*McKown* application of Restatement § 344 comment f, but without providing the guidance that might reasonably be expected. As the previous sections of this brief detail, the opinion does not address the threshold at which evidence of the character of a business will be sufficient to survive summary judgment. Only a decision by this Court can clarify the applicable standard.

B. RAP 13.4(b)(1): The Court of Appeals decision conflicts with well accepted law governing the standard of review on summary judgment requiring evidence be viewed in the light most favorable to the non-moving party.

"On review of a summary judgment, an appellate court must consider the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party." *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 234, 770 P.2d 182, 192 (1989) (citation omitted). But the Court of Appeals failed to recognize that whether the defendant knew or should have known of an imminent attack was a question of fact for the jury given the disputed evidence in this case.

One of the two bases for imposing a duty of care under Restatement § 344, comment f is the situation where the defendant "knows or has reason to know of immediate or imminent harm." *McKown*, 182 Wn.2d at 768, 344 P.3d at 667. The Court of Appeals recognized the legal basis for such a claim in its opinion. Appendix, at A-24-25. The Court of Appeals further

recognized that "no Washington decision discusses liability based on 'imminent criminal harm.'" *Id.* After recognizing the legal basis for imposing such a duty, however, the Court of Appeals improperly resolved what should be a factual question for the jury:

> We are unable to find the assault as imminent, however. A companion's rudeness and obscene words does not qualify one's sudden and irrational assault, even if one is intoxicated, as predictable. Under the law, Jackie Legere's comments did not portend an assault by Austin Garner.

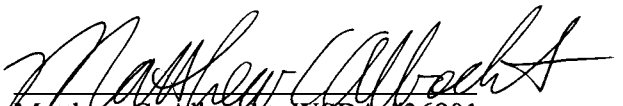
Appendix, at A-25. This conclusion ignores or fails to view in the light most favorable to Crill the testimony of Fred Del Marva, who testified that, based on the testimony of the employees themselves who were dealing with Garner and Legere just before the attack, there was a recognition that this situation had escalated beyond the point where it could be expected to die down of its own accord. Instead, according to Del Marva, WRBF staff should have called the police once they were aware of the pending altercation between the inebriated members of the Garner booth and the Crill party which would have most likely prevented the actual violence. *See* Del Marva depo., CP 61-62. Additionally, Del Marva testified that all-night restaurants faced a higher risk of assaultive behavior and for that reason was on higher notice of danger should take steps to reduce the likelihood of such incidents.

Under Rule 56, the moving party is only entitled to summary judgment where there no genuine issue of material fact is presented. Garner's assault of Crill did not happen in a vacuum. It was preceded by a slow build-up of hostility in which the staff recognized that there was "trouble" brewing, and had time to consider how they should handle it. Fred Del Marva testified that when the Denny's employees were called back repeatedly to deal with aggressive behavior by Garner and Legere, they knew or should have known that an attack was imminent, and that steps needed to be taken to avert such an incident. Whether in fact the attack was imminent is not a question of law for the court to resolve on summary judgment; it requires evaluation by the trier of fact.

VII. CONCLUSION

Crill asks the Court to reverse the Court of Appeals and the Superior Court, to vacate the summary judgment dismissal entered in favor of WRBF, and to remand this case for trial on the disputed facts and the law as clarified to govern cases of this type.

Respectfully submitted this 24th day of December, 2015.



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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington that on the date shown below I served the document to which this is annexed as shown below:

By email and personal delivery as follows:

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Signed on December 24, 2015 at Spokane, Washington.

Melanie A. Evans

FILED
SEPT. 3, 2015
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

STAR CRILL, Appellant, v. WRBF, Inc. d/b/a DENNY'S RESTAURANT, DEBRA FOUTS and JACK 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, Respondents.	)	No. 31912-1-III UNPUBLISHED OPINION

FEARING, J. —

On a clear day, we can foresee forever. Paraphrase of *Thing v. La Chusa*, 48 Cal. 3d 644, 668, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

We address a recurring issue: when is a business liable for injuries caused by one customer assaulting another customer? Star Crill sues a Denny's Restaurant after another diner, Austin Garner, assaulted her in the restaurant. The trial court dismissed Crill's

claim on summary judgment, while ruling that a lack of similar prior incidents rendered the assault unforeseeable as a matter of law and thus the restaurant possessed no duty to prevent the attack. We affirm. In affirming, we review the Washington Supreme Court's recent decision of *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 344 P.3d 661 (2015).

FACTS

Because Star Crill appeals 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. At 2:08 a.m. on Saturday morning, January 3, 2009, an intoxicated Austin Garner struck Star Crill inside a Denny's Restaurant, owned by WRBF, Inc., on Argonne Road, in Spokane Valley. Crill sued WRBF, Denny's, Inc., Austin Garner, and Garner's companion Jackie Legere. Denny's, Inc., is the franchisor of ubiquitous Denny's restaurants. WRBF is the owner of the Argonne Road Denny's restaurant and other Denny's in the Spokane area. The only defendant on appeal is WRBF and we will refer to it as the Argonne Denny's or Denny's. Crill sues the Argonne Denny's for negligence in failing to prevent the misbehavior of Garner.

We begin with the practices of the Argonne Denny's restaurant. The Argonne restaurant is open twenty-four hours a day. Denny's home office typically requires that its franchisees remain open twenty-four hours a day, seven days a week.

On weekends, after nearby bars cease serving alcohol at 2:00 a.m., the Argonne Denny's serves a gaggle of drunk customers. Denny's server Mary Winter testified: "Where a bar closes, they close down for the night and everybody leaves, either they go home or usually a lot of people when they're drinking, they need food. Either they go home and eat or they come to the restaurant and eat. So they call it the bar crowd because it's after the bar closes." Clerk's Papers (CP) at 329. The Argonne Denny's does not sell alcohol.

Fred Del Marva, a security expert for Star Crill, declared that "[i]t 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 11:00 p.m. and 4:00 a.m." CP at 215. Denny's manager Larry Lovins testified to the obvious that "a person that's more intoxicated probably is more likely to cause problems than a person that's not." CP at 405. Denny's server Debbie Fuentes described the bar rush as "[a] lot of drunk, obnoxious people" who might "turn on you in a heartbeat." CP at 160. According to Fuentes, the majority of patrons during these early morning hours are intoxicated.

The Argonne Denny's General Manager Don Wold testified: "While we are open 24 hours, we seldom have experienced any issues of criminal conduct by patrons. Disruptive guests are usually limited to people that are either unhappy with service, or do not pay their bill." CP at 62. Manager Larry Lovins, who has worked at the Argonne

Denny's for eleven years, testified: "We generally at Denny's didn't have any issues. The location that we're at is a pretty calm restaurant. I've never had any situations where I had, you know, somebody beat up or anything like that." CP at 398. Lovins noted a shoving incident that occurred in a Shari's parking lot, and commented that the bar rush for the Denny's on North Division "was kind of tough at times." CP at 401. Argonne Denny's manager Jason Liberg saw the occasional argument, but never had "one on one of [his] shifts that resulted in actual physical violence." CP at 348. Server Debbie Fuentes mentioned a "fight" that occurred in the Argonne Denny's parking lot.

The Argonne Denny's maintains no written procedure regarding managing troublesome patrons. The restaurant, however, trains its staff on handling disruptive guests, which "generally include any patron that is being loud, unmanageable, aggressive with any of his own party, aggressive with anybody else in the restaurant, including other patrons or staff, complaining loudly, or any variety of circumstances that would generally disrupt other patrons' enjoyment." CP at 61. The restaurant instructs its staff to exercise three steps: first, ask the troublesome guest to calm down and cease the disorderly activity; second, if the disruption persists, ask the patron to leave; and last, if the disorderly guest refuses to leave, phone police. This same approach applies to drunk customers. The Argonne Denny's instructs its staff not to intervene physically with a difficult guest.

The Argonne Denny's maintains a log of significant events in order to foster institutional knowledge. Argonne Denny's General Manager Don Wold declared that he reviewed the log covering September 2008 to January 2009 and discovered no incidents of assaults or fights at the restaurant during this window of time.

Service coordinators do not have access to the Argonne Denny's significant events logbook. Nevertheless, service coordinators sometimes substitute as managers. The restaurant cross trains its service coordinators in every job, including cook, hostess, and server to better understand the restaurant's operation.

During a weekend bar rush, the Argonne Denny's typically serves thirty to forty customers between 1:30 and 3:30 a.m. On Friday night, January 2, 2009, two to three servers, a dishwasher who doubled as a host, and a cook that doubled as a security guard worked at the restaurant. No manager served only as manager. Security expert Fred Del Marva testified that, with the size of the premises, five or six servers, one cook, one busboy, one dishwasher, a host/cashier, and a manager that does nothing but manage should have been present.

On Friday, January 2, 2009, the scheduled manager's house flooded, and she could not work that night. After working a day shift, server Mary Winter returned that evening to work as acting manager. Winter worked for various Denny's restaurants for sixteen to seventeen years as a server, bar tender, and assistant manager. Winter was trained to handle disruptive guests using the three-step approach described above.

We have established the context in which Austin Garner assaulted Star Crill. We now describe the events leading to the attack.

On Friday, January 2, 2009, Austin Garner drank alcohol at Good Tymes Bar and Grill with friends. During his deposition, Garner could not remember the number of drinks he consumed at Good Tymes, but speculated he imbibed one to six drinks. From Good Tymes, Austin Garner, Jackie Legere, and two friends moved, during the early morning hours of January 3, to the Argonne Denny's. Garner and Legere were drunk. No Denny's employee asked Austin Garner and his friends whether they had been drinking.

A server at the Argonne Denny's sat Garner, Legere, and friends in a booth and promised to bring menus. Star Crill and friend Mario Diaz dined in the booth adjacent and behind the group. As they ate, Crill and Diaz discussed Diaz's family, his career choices, and politics. Jackie Legere turned toward the adjacent booth and told Crill and Diaz to shut up. Crill noticed Legere to be drunk, because the latter slurred his speech and his arm frequently fell from its resting ledge. Crill and Diaz heard Legere's comment but did not know if Legere addressed them.

A server, Charlotte Stemple, informed acting manager Mary Winter that: "there may be a problem with some patrons seated in booths along the windows." CP at 65. Winter declared:

> Because those booths were located behind a server island, I could not see the patrons, so I immediately grabbed some water and coffee and went to observe the situation. There were no issues or problems occurring at that time, and I asked a woman seated at one table with one other gentleman (who I later learned was named Star Crill, the plaintiff in this suit) if she wanted some water, and asked her if everything was OK, and she said "yes"—she did not report any problems to me.

CP at 65. Winter took water and coffee to the tables because she did not wish the customers at Austin Garner's table to believe she targeted them. According to Mary Winter, she spoke with Star Crill and then approached Garner's table. Crill denies that any Denny's employee spoke to her. Winter then went to the entrance of the restaurant to seat some customers.

Jackie Legere soon repeated louder his request to Star Crill and Mario Diaz to shut up. Diaz responded: "'Turn around and mind your own business.'" CP at 30. Three to four minutes later, Legere replied in an even louder tone, "'Hey, I said shut the fuck up.'" CP at 30.

Mary Winter heard loud voices at the two tables. Winter approached Jackie Legere and Austin Garner's table and asked if there was a problem. The three to four men said there was no problem. Winter directed the covey of men to hush or leave. They quieted. According to Winter, she asked Star Crill again if she was okay, and Crill stated there was no problem. Crill denies Winter speaking to her. Someone took food orders for those at Garner's table.

After Mary Winter left the area of the two tables, the situation escalated. Star Crill

stood but instructed Mario Diaz to remain seated. Crill told Diaz: "It's not worth it. Don't get in a fight. Don't waste your time on these guys. They are just drunk." CP at 36. Austin Garner stood. Crill looked around in hope and expectation that a Denny's employee would intervene. Charlotte Stemple, a server, stood at the service station across the aisle from the tables. Stemple gazed at Crill and walked to the kitchen to retrieve Mary Winter. With no Denny's employee in sight, Austin Garner hit Star Crill in the back of her head or her neck.

According to Austin Garner, he never struck Star Crill. Garner testified that Crill stood and fell into him because of her drunken state. He then brushed her pony tail with his hand, because the tail grazed his face. In her complaint, Star Crill alleges that Garner "unintentionally made bodily contact" with her. Crill sues Garner for negligence and recklessness, but not for assault.

Mary Winter returned to the tables after the assault. Winter testified:

> Q. And that night you were the manager; is that right?
> A. Yes.
> Q. And so, when Charlotte Stemple—am I right in assuming that when Charlotte thought there was a disruptive guest she came and notified you?
> A. She never said there was a disruptive guest.
> Q. So who was the person that determined that they were a disruptive guest?
> A. It was myself after I made—it was a third time I went through and then they was being disruptive. The second time when I walked over there they quieted down. They did exactly what I asked them to do. And they were okay.

Q. On the third time is when you determined they were disruptive guests?

A. And I asked them to leave and I was calling the cops.

CP at 331.

When Mary Winter returned to the booths, she saw and heard one man standing and talking loudly to the couple sitting at the adjoining booth. Austin Garner, Jackie Legere, and their two friends surrounded Winter and yelled at her. Winter squeezed through them, demanded the four leave, and went to call the police. While phoning police, Winter learned of the assault on Crill.

The responding law enforcement officer felt a knot forming on the back of Star Crill's head. According to the officer's report, multiple bystanders witnessed Austin Garner strike Star Crill. The officer smelled alcohol on Austin Garner and observed Garner acting intoxicated. Garner bragged about knowing attorneys who would successfully procure the dismissal of any criminal charges.

PROCEDURE

After Star Crill sued and on completion of discovery, Argonne Denny's moved for summary judgment. It argued that it had no duty to protect against Austin Garner's criminal conduct because no incidents of that exact nature previously occurred so as to render Garner's conduct foreseeable. Denny's also argued that its staff's response to Garner's conduct was reasonable as a matter of law. In response to the summary judgment motion, Star Crill argued that the incident and her resultant injuries occurred

due to Denny's failure to maintain safety and security procedures for its customers. She contended that Austin Garner's attack was foreseeable.

In response to the summary judgment motion, Star Crill relied, in part, on a December 3, 2007, Nation's Restaurant News article titled *Restaurants open themselves up to greater risks with later hours*. Crill's counsel attached the article to his declaration. The article recounts recent shootings and domestic violence incidents that occurred at restaurants nationwide. The article laments:

> While criminals prey on industry operations in the daytime, too, security experts note that the foodservice industry's high-turnover rate, which can result in poor employee training, and security systems focused more on preventing vandalism than robbery or assaults, are contributing to the spate of late-night crimes.

CP at 235.

The Nation's Restaurant News article mentions injuries and deaths to guests, but focuses on employee injuries and deaths. The article declares that injuries and deaths come most often from robberies or angry ex-spouses and jilted lovers. The article relates the tragic death of an Orlando Denny's restaurant employee who was stabbed to death at work by her estranged husband. The article quotes Mike Jank, vice president of risk management for Denny's customer stores:

> I just hope operators realize they are going to have problems if they don't keep in mind that the security issues you have in the daytime are far different at night.

CP at 232. Based in part on this article, Star Crill's expert witness Fred Del Marva

opined that "Denny's nationwide is known for late hour criminal activity such as shootings, stabbings, murders and assaults," and the Argonne Denny's failed to respond to this national trend. CP at 444.

The Nation's Restaurant News article does not mention alcohol or the bar rush phenomenon. The article does not warn of customers assaulting other customers.

Argonne Denny's moved to strike the Nation's Restaurant News article as irrelevant and hearsay. The trial court struck the article as hearsay.

Star Crill's expert witness Fred Del Marva submitted a declaration opposing Denny's summary judgment motion. In the declaration, Del Marva testified to his opinions regarding the standard of care for security in business premises based on his expertise and review of the circumstances of the assault on Crill. According to Del Marva, operators of Denny's restaurants know that argumentative and assaultive conduct is a common occurrence and highly foreseeable when soliciting an after-bar clientele between the hours of 11:00 p.m. and 4:00 a.m. In asserting this fact, Del Marva relied on a presentation given to the Denny's Board of Directors on this subject in 2007 and the December 3, 2007, restaurant industry journal Nation's Restaurant News.

Fred Del Marva also testified that Denny's restaurants target the after-bar clientele. In turn, these patrons have a high propensity for argumentative and disruptive behavior. This behavior can turn quickly into assaultive behavior or behavior that can lead to injuries.

The daytime clientele at Denny's is a completely different crowd and will portray different behaviors from nighttime clientele, according to Fred Del Marva. The daytime atmosphere at Denny's is a completely different scene than the atmosphere between the hours of 11:00 p.m. and 4:00 a.m. For this reason, a Denny's restaurant needs specific policies and procedures for a host or hostess to identify intoxicated customers at the time of entry. Training, policies, and procedures which prevent intoxicated individuals from entering the premises substantially reduce the likelihood of disruptive events, which may lead to assaults or injuries of other patrons. Del Marva posits that a Denny's must, without exception, have a specially trained manager who is experienced in dealing with the 11:00 p.m. to 4:00 a.m. clientele on shift between those hours.

Fred Del Marva faults the Argonne Denny's for allowing a server to perform the dual task of restaurant manager during the grave yard shift on January 2 to 3, 2009. Del Marva also blames the restaurant for allowing Mary Winters to work as the manager when she had no training to manage the restaurant during the night and early morning. Winters' inexperience and divided duties increased the risks from intoxicated patrons. A properly trained manager and one whose attention was not diverted by also serving would have smelled alcohol on Austin Garner as he entered the restaurant. The manager would have either refused to seat Garner or removed him at the first sign of boisterousness. The Argonne restaurant had the least experienced manager during a time that the best

manager should have been on duty. During the early morning hours of January 3, the Argonne Denny's improperly allowed any employee to seat customers.

Fred Del Marva concluded in his declaration:

> A restaurant which is open twenty four hours cannot operate on blind disregard of the need for extra security procedures and policies during late-night/early-morning hours. Based upon the depositions, there has been no active intent to discover what kinds of risks should be guarded against and what kinds of risks are being found in the industry. This creates a problem where management is not even evaluating the need for appropriate and reasonable security measures. This type of approach keeps management from evaluating and reasonably responding to changing security concerns. This is essentially, ignoring the problem and hoping customers don't get hurt. This is not accepted in the restaurant or hospitality industry as a responsible course of conduct.
>
> Denny's on Argonne could have taken several measures prior to the incident of January 3, 2009 to prevent injuries to its customers. These measures include working digital or video recordings, which allow the management to review interactions of employees with potentially disruptive customers, so that management can follow up with better training. There should be mandatory reporting of disruptive events, to allow for follow-up and training of employees, specifically the host/hostess. Having a security expert do an evaluation and security plan for the premises, to better inform the management of what procedures and or policies should be in place for the safety of the customers and staff. And specifically, at a minimum, a policy requiring that an experienced and well trained manager be onsite during the hours between 11:00 p.m. and 4:00 a.m. along with a host/hostess who is properly trained in identifying intoxicated persons and understands his/her role in preventing the seating of those customers.

CP at 219-20.

The trial court granted the Argonne Denny's summary judgment. In a written decision, the trial court observed that restaurants have a duty to use reasonable care to prevent harm to patrons by foreseeable criminal conduct. Nevertheless, according to the

trial court, Washington decisions hold that past criminal behavior on a premises renders future crimes reasonably foreseeable only if such future crimes are of the exact nature as the past criminal behavior. The trial court noted that no assaults previously occurred inside the Argonne Denny's. The trial court reasoned that Star Crill's offer of industry-wide standards did not create an issue of material fact.

Star Crill moved the trial court to reconsider. Crill argued that foreseeability does not require previous incidents of the "exact nature." CP at 286. Crill also argued that the Argonne Denny's foresaw the assault as imminent, intervened, but did so negligently. Finally, Crill maintained that Denny's flawed policy created a question of fact as to the reasonableness of the restaurant staff's response to the behavior of Jackie Legere and Austin Garner. The trial court denied reconsideration.

LAW AND ANALYSIS

On appeal, Star Crill contends that: (1) the trial court erred when it struck the Nation's Restaurant News article, (2) a genuine issue of material fact exists as to whether Austin Garner's assault of Crill was foreseeable and as to whether the Argonne Denny's breached its duty to her, and (3) the Argonne Denny's assumed a duty to protect Crill, which it then performed negligently. We address these assignments of error in order.

Issue 1: Did the trial court err when striking as evidence the Nation's Restaurant News article?

Answer 1: We need not and do not address this question.

Star Crill contends the trial court erred for two reasons when it struck the Nation's Restaurant News article. First, the article is not hearsay because it was offered to show knowledge of the Argonne Denny's of late night attacks. Second, even if hearsay, Fred Del Marva could rely on the article as an expert witness.

The Nation's Restaurant News article is cumulative of the testimony of Crill's expert witness, Fred Del Marva. Thus, the article adds nothing of significance to our analysis. We decline to resolve this assignment of error since its resolution does not impact our decision on the merits. Principles of judicial restraint dictate that if resolution of another issue effectively disposes of a case, we should resolve the case on that basis without reaching the first issue presented. *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 307, 174 P.3d 1142 (2007); *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 68, 1 P.3d 1167 (2000).

Issue 2: Did the Argonne Denny's hold a duty to protect Star Crill from an attack by Austin Garner? Stated differently, was the attack on Crill foreseeable under negligence law?

Answer 2: No.

We note an anomaly in the pleadings of Star Crill. Crill contends in her complaint that Austin Garner unintentionally harmed her. She alleges negligent conduct, not an assault, by Garner. Despite her complaint's allegation of negligence, Crill asked the trial court and asks this court to impose a duty on Argonne Denny's to protect her from an

assault or intentional conduct by another patron. The law generally imposes the same duty on a business in protecting a customer from acts of another customer regardless of whether the acts are careless or intentional. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 207, 943 P.2d 286 (1997); RESTATEMENT (SECOND) OF TORTS § 344 (1965). Therefore, we consider this anomaly irrelevant. Since the parties assume that Austin Garner assaulted Star Crill and rely on assault decisions, we do too.

We must repeat the familiar rules of summary judgment jurisprudence. This court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 683, 732 P.2d 510 (1987). Summary judgment is proper if the records on file with the trial court show "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c). This court, like the trial court, construes all evidence and reasonable inferences in the light most favorable to Star Crill, as the nonmoving party. *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 142, 500 P.2d 88 (1972); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

We later write that the dispositive question on appeal is whether the Argonne

Denny's held a legal duty to protect Star Crill from the blow to her head. In turn, the question of duty depends on the reasonable foreseeability of the attack. Foreseeability as a question of whether a duty is owed is ultimately for the court to decide. *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d at 762-64 (2015). The existence of a legal duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent. *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 67, 124 P.3d 283 (2005); *Snyder v. Med. Serv. Corp.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001); *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 474-75, 951 P.2d 749 (1998); *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994).

Isolating the key facts assists in our analysis. Crill underscores Austin Garner's crowd being boisterous and Mary Winter's previous request to the table to quieten. Austin Garner's companion, Jackie Legere, demanded that Crill and her companion "shut the fuck up." CP at 30. No evidence suggests that Austin Garner spoke any words to Star Crill or her companion before the assault.

Star Crill highlights the nature of Denny's restaurants business, which includes serving intoxicated patrons who exit taverns late at night or in the early morning to eat at Denny's. According to Crill, an experienced manager trained to deal with drunk customers should have been present at the Argonne Denny's during the morning of January 3. Mary Winter was an assistant manager who also worked as a server that morning. Also according to Crill, the manager should have smelled alcohol on Garner

and known him to be intoxicated. The manager should have never seated Garner or escorted him from the premises before his striking of Crill. At the same time, Crill must concede that neither Austin Garner nor any of his companions threatened to hurt anyone. Garner had no record of assaults or any known history at the Argonne Denny's.

The Argonne Denny's restaurant had never earlier encountered an assault inside the premises. An altercation occurred in the parking lot of the restaurant, but we know nothing about the details of the confrontation.

Star Crill challenges the credibility of Argonne Denny's witnesses who claim the business suffered no earlier assaults by a patron on an employee or another customer. Star Crill also suggests that other Denny's restaurants owned by WBRF, Inc., in the Spokane area, may have encountered assaults therein. Nevertheless, Crill provides no affirmative evidence of any earlier attacks at the Argonne location, let alone any other Spokane location.

Even though Austin Garner's conduct may have been intentional, Crill sues the Argonne Denny's in negligence. The essential elements of an action for negligence are: (1) the existence of a duty owed to the complaining party, (2) a breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury. *Christen v. Lee*, 113 Wn.2d 479, 488, 780 P.2d 1307 (1989). Not every negligent act leads to legal consequences. A defendant is not held at fault for hazards not expected to result from his or her behavior or inaction. When determining if a defendant owed any duty to the

plaintiff, courts consider whether the risk that caused plaintiff's injury or the harm was reasonably foreseeable to the defendant. "Reasonable foreseeability" is the dispositive locution for this appeal.

"Foreseeability" is a factor attached to negligence's first element of duty. *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d at 762-64 (2015); *Maltman v. Sauer*, 84 Wn.2d 975, 980, 530 P.2d 254 (1975). The hazard that caused or assisted in bringing about the injury to plaintiff must be among the hazards to be perceived reasonably and with respect to which defendant's conduct was negligent. *Maltman v. Sauer*, 84 Wn.2d at 980; *Rikstad v. Holmberg*, 76 Wn.2d 265, 268, 456 P.2d 355 (1969).

A defendant has no duty to prevent a criminal attack by a third person on another, even if the defendant reasonably anticipates the attack, unless a special relationship exists between the victim and the defendant. Generally, no person has a duty to come to the aid of a stranger or protect others from the criminal acts of third persons. *Folsom v. Burger King*, 135 Wn.2d 658, 674, 958 P.2d 301 (1998); *Craig v. Washington Trust Bank*, 94 Wn. App. 820, 826, 976 P.2d 126 (1999).

The parties agree that Star Crill was a business invitee at the Argonne Denny's. A business owner has a special relationship with its business invitees, creating a duty to protect those invitees from criminal conduct by third parties. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d at 205 (1997). A business invitee is owed a duty of reasonable care for reasonably foreseeable criminal conduct by third persons. *Nivens*, 133 Wn.2d at 205;

Fuentes v. Port of Seattle, 119 Wn. App. 864, 869-70, 82 P.3d 1175 (2003). No duty arises unless the harm to the invitee is foreseeable. *Nivens*, 133 Wn.2d at 205; *Wilbert v. Metro. Park Dist.*, 90 Wn. App. 304, 308, 950 P.2d 522 (1998).

The use of the word "foreseeability" in the context of imposing a duty is confusing because Washington courts also employ the term after a duty is established to determine the scope of the duty owed. *Schooley v. Pinch's Deli Market*, 134 Wn.2d at 477 (1998). Courts also utilize the concept of "foreseeability" when determining whether any fault on the part of the defendant was a proximate cause of the plaintiff's injuries. *Washburn v. City of Federal Way*, 178 Wn.2d 732, 761, 310 P.3d 1275 (2013).

Despite applying a foreseeability test in a premises liability case, our Supreme Court in its recent decision, *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752 (2015), questioned the fairness of such a test. Subjecting a merchant to liability solely on the basis of a foreseeability analysis is misbegotten, wrote the court. *McKown*, 182 Wn.2d at 771. Criminal activity is arbitrary, irrational, and unpredictable. Crime is invariably foreseeable everywhere, yet unforeseeable in any specific time and place. Even police, specially trained and equipped to anticipate and prevent crime, cannot universally foil it. Given these realities, it is unjustifiable to make merchants, who have much less experience than the police in dealing with criminal activity and who lack a community deputation to do so, vicariously liable for the criminal acts of third parties.

Courts, rather than juries, assessing foreseeability should also be criticized. Judges have no special training in determining when to expect the commission of a crime. Using foreseeability in a flexible, case-by-case analysis creates uncertainty by giving courts the power and method to decide cases without external restraint. *McKown*, 182 Wn.2d at 772 n.8.

Despite any unfairness, we remain tasked with answering whether, during the early morning of January 3, Argonne Denny's should have reasonably anticipated that Austin Garner would strike Star Crill in time to stop the assault. This question begs other questions. Is it probable that a quiet, drunk man, accompanied by a boisterous friend, at a Denny's restaurant in the early morning hours will hit another customer? Do we limit the question to Austin Garner being the attacker or should we ask if Argonne Denny's should have reasonably foreseen any one at the Garner table might hit Star Crill? Does the absence of any earlier assaults inside the restaurant preclude the Argonne Denny's from anticipating a physical attack? Is the character of Denny's restaurants a relevant factor in assessing the risk of an assault?

The test of reasonable foreseeability begs more elementary questions. The law quantifies reasonable probability as more than a fifty percent chance, or a 50.1 percent chance, of being correct. Is reasonable foreseeability a fifty percent chance that an event will occur? Should foreseeability be measured in time rather than in possibility? Is reasonable foreseeability the probability that some event will occur within one day, one

week, or one year? The law provides no answers to these questions and affords no mathematical formulation for determining reasonable foreseeability.

Washington decisions contain many statements and restatements of the foreseeability rule relevant to when a tort duty arises to protect another. Some of these pronouncements use vacuous phrases that sound good on paper but provide little assistance when reviewing concrete situations. Under many of these pronouncements, "reasonable foreseeability" lies in the subjective eyes of the individual foreseer.

A criminal act is "unforeseeable" as a matter of law if the criminal "occurrence is so highly extraordinary or improbable as to be wholly beyond the range of expectability." *Fuentes v. Port of Seattle*, 119 Wn. App. at 868 (2004); *Johnson v. State*, 77 Wn. App. 934, 942, 894 P.2d 1366 (1995). So from "reasonably unforeseeable" we move to the equally murky phrase "highly extraordinary."

The pertinent inquiry is not whether the actual harm was of a particular kind which was expected. *Wilbert v. Metro. Park Dist.*, 90 Wn. App. at 308. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated. *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953). If the damage complained of falls entirely outside the general threat of harm that the plaintiff claims makes a party's conduct negligent, there is no liability. *McLeod v. Grant County Sch. Dist.*, 42 Wn.2d at 321-22; *Fuentes v. Port of Seattle*, 119 Wn. App. at 870. Thus, foreseeability involves a general field of danger, but we may still wonder

what constitutes a general field of danger. This principle might lead to liability on the Argonne Denny's, if foreseeability were otherwise found, for an assault by Austin Garner even though Jackie Legere was the boisterous and harassing one, since there existed a general field of danger of an assault by someone at the adjoining table.

Two principles defining "foreseeability" may conflict. On the one hand, the unusualness of the act that resulted in injury to plaintiff is not the test of foreseeability, but whether the result of the act is within the ambit of the hazards covered by the duty imposed on a defendant. *Rikstad v. Holmberg*, 76 Wn.2d at 269 (1969). Thus, a bop on the head, rather than the typical punch in the face, may not shield one from liability, even though the location of the strike on the victim's body was unforeseeable. On the other hand, the specific act in question, rather than a broad array of possible criminal behavior, must be foreseeable to the business owner from past information. *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d at 769-70 (2015).

More precise rules facilitate resolving this appeal. A business has no per se duty to employ security personnel to protect business invitees. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d at 205-06 (1997); *Raider v. Greyhound Lines, Inc.*, 94 Wn. App. 816, 819, 975 P.2d 518 (1999). A rule of particular importance in this appeal is that evidence of antisocial, unruly, or even hostile behavior is generally insufficient to establish that a defendant with a supervisory duty should reasonably anticipate a more serious misdeed. *Moore v. Mayfair Tavern, Inc.*, 75 Wn.2d 401, 405-06, 451 P.2d 669 (1969); *J.N. v.*

Bellingham Sch. Dist. No. 501, 74 Wn. App. 49, 60, 871 P.2d 1106 (1994).

Certain factors may play a critical role in determining reasonable foreseeability of a criminal deed. These factors include: (1) the imminence of the attack, (2) the known criminal propensities of the attacker, (3) the neighborhood of the business, (4) the character of the defendant's business, and (5) the history of the business. *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d at 769-70 (2015). Analyzing each case with these factors in mind assists in an organized and intelligent resolution of cases.

Imminence of Attack

Under one version of the foreseeability test, a "business owes a duty to its invitees to protect them from imminent criminal harm and reasonably foreseeable criminal conduct by third persons." *Nivens*, 133 Wn.2d at 205 (1997). This rule suggests that the injury need not be the result of reasonably foreseeable criminal conduct if the criminal harm is imminent. In the recent Supreme Court decision, *McKown v. Simon Property Group, Inc.*, 182 Wn.2d at 769-70, the court noted that comment f, of *Restatement of Torts* § 344, recognizes a duty to protect when the landowner knows or has reason to know of immediate or imminent harm. But no Washington decision discusses liability based on "imminent criminal harm." Perhaps the imminence of the attack should render it reasonably foreseeable.

Star Crill may include the purported imminence of Austin Garner's assault as a factor in her calculus of foreseeability. She does not rely exclusively on this factor,

however. We are unable to find the assault as imminent, however. A companion's rudeness and obscene words does not qualify one's sudden and irrational assault, even if one is intoxicated, as predictable. Under the law, Jackie Legere's comments did not portend an assault by Austin Garner.

A parallel persuasive decision is *Veytsman v. New York Palace, Inc.*, 170 Md. App. 104, 906 A.2d 1028 (2006). Edward and Tatyana Veytsman ate dinner late one night at Baltimore's New York Palace. The restaurant also hosted a Ukrainian wedding reception that night, during which reception Ukrainian vodka flowed for more than six hours. When leaving the restaurant, several men in the wedding party assaulted the couple. The Veytsmans sued the restaurant and alleged that intoxication of the wedding party guests put the restaurant on notice that violence might occur. The Maryland appellate court affirmed summary judgment dismissal of the suit. Although the attackers engaged in an angry discussion, the restaurant was not on notice that the men endangered others or that others required "protection" from them.

In *Boone v. Martinez*, 567 N.W.2d 508 (Minn. 1997), a case involving a bar fight, the assailant hit the plaintiff over the head with a beer mug. Witnesses testified that the assailant looked obviously intoxicated and angry. One witness saw the attacker slam his beer on the table. The Minnesota Supreme Court dismissed the suit as a matter of law because the evidence was not sufficient to present the jury with a fact question of whether the bar was aware of an impending attack.

A case with the opposite outcome is *Mayflower Restaurant Co. v. Griego*, 741 P.2d 1106 (Wyo. 1987). The Wyoming Supreme Court upheld a jury verdict entered for the plaintiff who was assaulted in a bar after the aggressor approached him several times threatening him in a loud and vulgar manner. On one occasion the assailant grabbed the plaintiff's shirt. The court allowed the verdict to stand on the ground that the bar was on notice that the plaintiff was in imminent danger because the assailant was loud and vulgar so as to attract the attention of those in the bar and because people in the bar saw him grab the plaintiff's shirt. Neither of those factors are present in our appeal.

Mayflower illustrates the type of evidence needed to show the foreseeability of an imminent attack. Our appeal lacks this evidence. Neither Austin Garner nor Jackie Legere threatened Star Crill. Garner had not touched Crill before the blow.

Attacker's Criminal History

The facts on this appeal include no criminal history for Austin Garner, let alone the Argonne Denny's possessing knowledge of any felonious history.

Argonne Denny's History

The Argonne Denny's restaurant had no history of criminal acts therein. Testimony referred, however, to an altercation in the parking lot. Star Crill highlights this altercation.

Our Supreme Court, in *McKown v. Simon Property Group, Inc.*, 182 Wn.2d at 757 (2015), recently addressed how similar in nature a previous attack must be to establish

reasonable foreseeability of a later assault. Dominick Maldonado shot and injured Brendan McKown and six others in the Tacoma Mall, which Simon Property Group owned. McKown produced evidence of multiple prior shootings and other incidents involving guns occurring at the Tacoma Mall. All of these incidents occurred in the Tacoma Mall's parking lot except one, which occurred in the lobby of the Tacoma Mall's movie theater. The federal district court dismissed McKown's negligence claim against Simon Property Group for failure to submit competent evidence of similar random acts of indiscriminate shootings on Simon's premises. On appeal to the Ninth Circuit Court of Appeals, the circuit court certified questions for the Washington Supreme Court to answer concerning state law.

According to the *McKown* court, in order to establish a genuine issue of material fact concerning a landowner's obligation to protect business invitees from third party criminal conduct under the prior similar incidents test, a plaintiff must generally show a history of prior similar incidents on the business premises within the prior experience of the possessor of the land. The 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, 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 v. Simon Prop. Grp., Inc.*, 182 Wn.2d at 757.

The *McKown* court did not address whether the prior acts asserted by Brendan McKown met the "similar incidents" test. Since the case came before the court on certified questions from a federal court, the Supreme Court did not need to resolve the merits of the suit.

Server Debbie Fuentes mentioned a "fight" that occurred in the Argonne Denny's parking lot. CP at 166. Even if the "fight" Debbie Fuentes referred to was physical, the record contains nothing to indicate the altercation began inside the restaurant or involved the bar rush crowd. We lack the details to determine if this prior incident was similar. Thus, we conclude that Star Crill did not produce evidence of prior acts of violence sufficiently similar in nature and location, sufficiently close in time, or sufficiently numerous to put Denny's on notice.

In *Wilbert v. Metropolitan Park District*, 90 Wn. App. at 308 (1998), the Metropolitan Park District (Metro) rented space to Ghetto Down Productions to perform a private dance. During the dance, two assailants shot and killed Derrick Wilbert. This court noted that Washington cases analyzing foreseeability focus on the history of violence known to the defendant. Evidence of multiple fights earlier that night and the congregation of "unruly, aggressive, vulgar young people at the dance" was insufficient to create a jury question, and the court thus ruled Wilbert's murder unforeseeable as a matter of law on summary judgment. *Wilbert*, 90 Wn. App. at 309.

Derrick Wilbert's family relied on Daniel Kennedy, an expert in security and crime prevention practices, who testified that the deadly event in question was foreseeable. Kennedy based this conclusion on the allegedly well-established theory of criminal victimization called the Lifestyle-Exposure Theory. This theory states that certain circumstances increase the risk of an assault by three to four times. The circumstances listed by Kennedy were groups of people 15 to 24 years of age in public places with strangers and with alcohol or drugs present and with inadequate supervision. Kennedy also opined that the risk of deadly violence was foreseeable to Metro because it provided a rental monitor and retained the authority to terminate the event for violations of the alcohol policy. This retention of authority, according to Kennedy, was a recognition on the part of Metro that there is the possibility of a loss of control at such events. This court rejected Kennedy's testimony since it conflicted with Washington law of foreseeability. We similarly reject the testimony of Fred Del Marva, Star Crill's expert, that the Argonne Denny's should have anticipated Austin Garner's behavior.

Neighborhood of Business

The neighborhood of the Argonne Denny's lacks any reputation or history as a high crime area. Also, as a policy matter, our Supreme Court rejected the idea that location of the premises in an urban area with a high incidence of crime favors imposing a duty. *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 236, 802 P.2d 1360 (1991). If the premises are located in an area where criminal assaults often occur,

imposition of a duty could result in the departure of businesses from urban core areas, an undesirable result. *Hutchins*, 116 Wn.2d at 236. Perhaps another undesirable result would be to impose liability on a business open late at night to provide intoxicated people a safe haven to regain sobriety. Assuming the restaurant shunned Austin Garner and Garner drove from the premises intoxicated, Garner could have caused greater injury while driving drunk.

Character of Business

In the case of the character of the business, if the owner 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. *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d at 769-70 (2015); RESTATEMENT OF TORTS § 344, comment f. In *McKown*, our high court noted that, although it rejected the location of a business within a high-crime urban area as imposing a duty to protect from third party criminal conduct, the court has not yet considered whether the character of a business or another location of a business, standing alone, could invoke such a duty. *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d at 769-70.

The *McKown* court did not decide the circumstances under which a duty would arise when the duty is based solely on the business's place or character. 182 Wn.2d at 757. The court left for an appropriate future case any inquiry concerning the

circumstances under which the "place or character" of a business can give rise to a duty to protect invitees against third party criminal conduct. *McKown*, 182 Wn.2d at 762. While Brendan McKown argued that consideration of the "place or character" of a business is a distinct, alternative method of establishing reasonable foreseeability of harm, he offered the court no test, criteria, or parameters regarding how "character" was to be established or assessed. He described the Tacoma Mall as a "soft target" whose place or character made the harm reasonably foreseeable. But aside from this bald assertion, he offered no explanation as to how or why the "character" of the mall necessarily made the mass shooting in the case "reasonably foreseeable."

Star Crill presents no decision that supports a ruling that an all-night restaurant or a restaurant that caters to drunk patrons, without a history of attacks, must anticipate criminal behavior and assume special precautions to protect its customers. In *Errico v. Southland Corp.*, 509 N.W.2d 585 (Minn. App. 1993), Juanita Errico made a purchase at an all-night convenience store after midnight. As she returned to her car, three men assaulted her. She sued Southland, alleging that the company owed a duty to provide for the safety and security of its patrons. The appellate court affirmed dismissal of the complaint, despite Errico's contention that such convenience stores are characteristically dangerous places with high risks of violent crime to employees and customers.

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 this death.

Star Crill's expert witness, Fred Del Marva, notes that Mike Jank, vice president of risk management for Denny's customer stores, declared that restaurants must consider that security issues present during the daytime are different from issues at night. Del Marva also opines that "Denny's nationwide is known for late hour criminal activity such as shootings, stabbings, murders and assaults." CP at 444. Del Marva provides no statistics or anecdotal evidence to support this assertion. He details no incident.

Our review of appellate decisions discovered only one reported case involving an attack at a Denny's restaurant. In *Basicker v. Denny's, Inc.*, 704 N.E.2d 1077 (Ind. Ct. App. 1999), restaurant patrons brought a personal injury action against the restaurant for injuries sustained when they were shot and taken hostage during a robbery attempt at the restaurant. The appellate court held that the robbers' attack on the patrons was not foreseeable. We find no similarity between the *Basicker* facts and our case on appeal. A 1999 robbery of an Indianapolis Denny's restaurant does not make predictable a 2009 assault by a patron on another patron at a Spokane Valley Denny's restaurant.

Star Crill emphasizes the fact that the Argonne Denny's had a policy of handling

disruptive patrons and thus the restaurant must have had notice that one patron might assault another patron. We have already concluded that disruptive customers do not portend an assault. *Moore v. Mayfair Tavern, Inc.*, 75 Wn.2d at 405-06 (1969); *J.N. v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. at 60 (1994); *Veytsman v. New York Palace, Inc.*, 170 Md. App. 104 (2006).

We conclude that, as a matter of law, the Argonne Denny's should not have reasonably foreseen the attack on Star Crill for several legal reasons. First, evidence of the antisocial, unruly, or even hostile behavior of Jackie Legere is insufficient to establish that the Argonne Denny's should have reasonably anticipated a more serious misdeed. Second, no case has held that drunkenness alone creates a duty to remove one from business premises. Third, the only history of any fights at Argonne Denny's was an altercation in the parking lot, about which we have no details. Fourth, Crill's argument that a manager experienced in handling drunk customers is similar in nature to the contention that a business must hire a security guard, an argument already rejected by Washington courts. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d at 205-06 (1997); *Raider v. Greyhound Lines, Inc.*, 94 Wn. App. at 819 (1999). Fifth, for public policy reasons, the law should reluctantly impose on a business the duty of police protection for its patrons.

On appeal, as she did below, Star Crill cites *N.K. v. Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 307 P.3d

730, *review denied*, 179 Wn.2d 1005 (2013), for the proposition that general trends may give rise to specific foreseeability. This may be true for a duty arising from a special protective relationship, such as the relationship between a child and a church sponsoring a club. In *N.K.*, a former scout who, as a child, had been molested by a volunteer scout leader with a church-sponsored Boy Scout troop brought a negligence action against the church for failing to protect him. Under Washington's current case law, the relationship between a business and its invitee is a special relationship, but not a special protective relationship.

Issue 3: Should this court entertain Star Crill's argument that Argonne Denny's assumed a higher duty when Mary Winter earlier spoke to Jackie Legere, Austin Garner, and friends?

Answer 3: Yes.

Star Crill also contends that the Argonne Denny's assumed a duty to protect her, which it then performed negligently. The trial court rejected this contention, in response to a motion for reconsideration, as untimely. Crill claims she made this argument at the original summary judgment hearing.

We do not resolve whether Star Crill asserted this additional argument during her initial summary judgment response. By bringing a motion for reconsideration under CR 59, a party may preserve an issue for appeal that is closely related to a position previously asserted and does not depend on new facts. *River House Dev. Inc. v. Integrus*

Architecture, PS, 167 Wn. App. 221, 231, 272 P.3d 289 (2012). The law provides no guidelines for determining whether a new position is "closely related" to a previous position, but all of Star Crill's contentions bear on the alleged negligence of the Argonne Denny's and the conduct of Mary Winter. The legal argument forwards no new facts. Entertaining this second argument does not prejudice the Argonne Denny's. We address the contention.

Issue 4: Did Argonne Denny's assume a higher duty when Mary Winter earlier spoke to Jackie Legere, Austin Garner, and friends?

Answer 4: No.

Star Crill cites *Folsom v. Burger King*, 135 Wn.2d at 676 (1998), to support the contention that the Argonne Denny's assumed a duty to protect her when Mary Winter came to the Austin Garner table in order to end the disruption. Crill argues that one of the bases for imposing a duty of care on one who has begun to help a plaintiff in peril is the situation when the defendant misleads the plaintiff into believing that the danger was being addressed.

Star Crill misstates the standard. The *Folsom* court noted:

> Typically, liability for attempting a voluntary rescue has been found when the defendant *makes the plaintiff's situation worse* by: (1) increasing the danger; (2) *misleading the plaintiff into believing the danger had been removed*; or (3) depriving the plaintiff of the possibility of help from other sources.

135 Wn.2d at 676 (emphasis added). Even if Crill could show Winter's conduct misled

her, she presents no facts that Winter's intervention created the harm, made the situation worse, or induced reliance.

CONCLUSION

We affirm the trial court's dismissal of Star Crill's lawsuit on summary judgment.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Siddoway, C.J.

Korsmo, J.

Restatement (Second) of Torts § 344 (1965)

Restatement of the Law - Torts

Database updated October 2015
Restatement (Second) of Torts

Division Two. Negligence

Chapter 13. Liability for Condition and Use of Land

Topic 1. Liability of Possessors of Land to Persons on the Land

Title E. Special Liability of Possessors of Land to Invitees

§ 344 Business Premises Open to Public: Acts of Third Persons or Animals

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.

See Reporter's Notes.

Comment:

a. Premises open to public for business purposes. A possessor of land is subject to liability, under the rule stated in this Section, only when he holds his land open to the public for entry for his business purposes, and then only to those who come upon the land for the purposes for which it is thus held open to the public. Such persons are commonly called business visitors. (See § 332, Comment *a.*) The rule stated here had its origin in cases of carriers who failed to protect their passengers against the acts of third persons. As it has developed, however, it is no longer limited to carriers, or other public utilities, and it applies to theatres, restaurants, shops and stores, business offices, and any other premises held open to the public for admission for the business purposes of the possessor.

The fact that the possessor is a public utility and the visitor is his patron may, however, be important in determining the care required of the possessor. See Comment *e.*

b. "*Third persons*" include all persons other than the possessor of the land, or his servants acting within the scope of their employment. It includes such servants when they are acting outside of the scope of their employment, as well as other invitees or licensees upon the premises, and also trespassers on the land, and even persons outside of the land whose acts endanger the safety of the visitor. The Section also applies to the acts of animals which so endanger his safety.

c. Independent contractors and concessionaires. The rule stated applies to the acts of independent contractors and concessionaires who are employed or permitted to carry on activities upon the land. The possessor is required to exercise reasonable care, for the protection of the public who enter, to supervise the activities of the contractor or concessionaire, including the original installation of his appliances and their operation, and his methods.

d. Reasonable care. A public utility or other 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, or the acts of animals. He is, however, under a duty to exercise reasonable care to give them protection. In many cases a warning is sufficient care if the possessor reasonably believes that it will be enough to enable the visitor to avoid the harm, or protect himself against it. There are, however, many situations in which the possessor cannot reasonably assume that a warning will be sufficient. He is then required to exercise reasonable care to use such means of protection as are available, or to provide such means in advance because of the likelihood that third persons, or animals, may conduct themselves in a manner which will endanger the safety of the visitor.

e. Public utilities. In determining whether the possessor has exercised reasonable care, the fact that the possessor is a public utility, and the visitor is his patron, must be taken into account. This Section should be read together with § 343A, under Subsection (2) of which the fact that the patron is entitled to make use of the facilities is a factor of importance to be considered in determining whether it may reasonably be anticipated that he will fail to avoid harm from dangers which are known or obvious to him. Thus it may reasonably be expected that a passenger on a bus will not leave the bus even though he is aware that his safety is endangered by another drunken passenger, and even though he could achieve complete safety by doing so. In such a case it may not be enough for the servants of the public utility to give a warning, which might be sufficient if it were merely a possessor holding its land open to the public for its private business purposes. The utility may then be required to take additional steps to control the conduct of the third person, or otherwise to protect the patron against it.

f. Duty to police premises. 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.

Illustrations:

1. At rush hours the passengers upon the A Street Railway Company are accustomed to crowd into the cars in a manner likely to cause injury to some one in the crowd. The A Company fails to provide a sufficient staff of guards to prevent this practice. B, a passenger, is hurt in such a rush, after a single guard has warned him of the danger. The A Company is subject to liability to B.

2. The A Railway Company, knowing that the students of a local college intend to welcome its victorious football team at the railway station, and knowing from previous experience of the boisterous character of such occasions, fails to assemble a sufficient number of its employees upon the platform to control the students. The students, in joke, hustle and injure B, a passenger who is awaiting his train. The A Company is subject to liability to B.

g. The rule stated in this Section applies not only to make it the possessor's duty to protect his visitors after they have entered the land, but also to warn them before their entry of any acts or threatened acts of third persons which may endanger them if they enter.

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

STAR F. CRILL, individually, Plaintiff, 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.	NO. 11-0205029-1 DECLARATION OF FRED DEL MARVA, PI, PPO

I am over the age of 18 years and if called as a witness herein I could competently testify, of my own personal knowledge, to the matters hereinafter stated.

I have been retained as a forensic security expert and a standard of care expert witness on behalf of the Plaintiff of this action and by Casey Law Offices, P.S. and asked to conduct an independent review of the facts and circumstances of the incident, which led to the injury of the Plaintiff, STAR CRILL, on or about January 3, 2009, at the Denny's Restaurant operated by WRBF, INC. at 2022 N. Argonne Road, Spokane Valley, Washington. Further, I have been

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retained to act as a forensic security expert and a standard of care expert witness on behalf of the Plaintiff in this action.

My review of this case has involved in general terms the foreseeability of malfeasance and adequacy of security at the subject Argonne Denny's restaurant. I have consulted with hundreds of businesses engaged in the restaurant and hospitality industry and investigated hundreds of bars and restaurants engaged in the restaurant and hospitality business with regards to security procedures. I have been retained in over nine hundred (900) cases to render opinions in matters involving premises liability, premises security, and dram shop cases in the hospitality industry and related businesses.

Specifically, I have rendered other opinions in cases regarding Denny's Restaurants, and premises security issues regarding those restaurants (i.e. the Kent, Washington Denny's shooting in January 2007). Because of my background and education I am asked to speak/teach premises security principles at various state restaurant associations' conferences including the State of Washington Restaurant Association (Seattle, Washington). My Curriculum Vitae is attached to this declaration as Exhibit "A" and is incorporated by reference herein.

This declaration contains my opinions and the basis of my opinions regarding how Defendant WRBF conducted its business prior to and including the time of the incident. My opinions are based upon a more probable than not basis within the standards my profession. In reviewing the police report, statements and sworn statements, and depositions I was able to evaluate Defendant WRBF's actions and omissions leading up to the date of the incident, including the date of the incident.

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I was able to evaluate whether the Defendant WRBF's practices, policies, procedures or systems were consistent with those of a reasonable and responsible owner/operator of similar establishments in attempting to discover whether the negligent or intentionally harmful acts were likely to cause physical harm to their customers patronizing its restaurant. I was also able to evaluate whether Defendant WRBF's practices, policies, procedures or systems were consistent with the types of actions reasonably likely to protect its customers with a safe and secure environment and or provide adequate warnings to prevent so that the invitees could protect themselves.

In determining whether Defendant WRBF's practices, policies, procedures, systems, or omissions violated any applicable industry standards of care and whether such contributed to the incident, which occurred on January 3, 2009. I have reviewed voluminous materials provided by Plaintiff's attorneys for the purpose of evaluating the action and/or inactions of the Defendant WRBF in this case. A description of those materials is attached to this declaration as Exhibit "B" and incorporated by reference herein.

I was asked to provide my opinion, based upon my experience, background, review and analysis of the materials provided to me on the following questions:

1) What is/was reasonably expected within the restaurant and hospitality industry on or about December 2008 through January 2009, with respect to the operational practices, policies, procedures or systems and level of security that should have been provided on or about the premises during the hours of 11:00 p.m. and 4:00 a.m. of restaurants such as the Argonne Denny's restaurant given the facts and circumstances? Generally the standard of reasonable care for restaurants operating

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between the hours of 11:00 p.m. and 4:00 a.m. differs significantly from the standard of care for daytime service to patrons of a Denny's restaurant.

2) Were the policies and procedures provided by Defendant WRBF sufficient to provide reasonable security and a reasonably safe environment for its customers at the Argonne Denny's restaurant and/or did those policies, procedures or systems meet the standards within the restaurant and hospitality industry at or about the time STAR CRILL was a patron of that restaurant on or about January 3, 2009.

3) Whether, given the facts and circumstances known or should have been known by Defendant WRBF, before and on or about January 3, 2009, Defendant WRBF should have implemented certain security measures, policies, procedures or systems such as installation of a video surveillance system, posting of warnings of the existence of a video surveillance system, particular staffing standards, or training of the host/hostesses regarding how to deal with intoxicated customers, specifically during the hours of 11:00 p.m. until 4:00 a.m.

After I reviewed the materials described above, I identified specific facts that, in my professional opinion, were of significance in rendering opinions in this case.

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 11:00 p.m. and 4:00 a.m.

Denny's former Vice President of Assets Protection and Risk Management gave a presentation to the Denny's Board of Directors regarding this problem in 2007. I am familiar with this information from working on previous cases regarding similar incidents at other

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Denny's Restaurants. Specifically, late-night hours between 11:00 p.m. and 4:00 a.m. on the weekends tends to be the most dangerous time frame at Denny's Restaurants.

This kind of information was reported in the restaurant industry journal Nation's Restaurant News, December 3, 2007, more than a year before the incident involved in this case. Mr. Jank, the vice president of risk management for the Denny's company owned stores specifically addressed this difference in clientele when he stated "I just hope operators realize they are going to have problems if they don't keep in mind that the security issues you have in the daytime are far different at night."

For example, disruptive patrons/clientele during late night hours are far more likely to be intoxicated. Denny's specifically targets the after-bar clientele. They directly solicit people leaving a bar after it closes to come in and dine. These individuals have a high propensity for argumentative and disruptive behavior. This behavior can turn quickly into assaultive behavior or behavior that can lead to injuries.

The daytime clientele at Denny's is a completely different crowd and different behaviors from clientele will be portrayed. The atmosphere at Denny's in the daytime is a completely different scene than the atmosphere between the hours of 11:00 p.m. and 4:00 a.m. For this reason it is very important to have specific policies and procedures for a host/hostess to identify intoxicated customers at the time of entry. Training, policies and procedures which prevent intoxicated individuals from entering the premises substantially reduces the likelihood of disruptive events, which may lead to assaults or injuries of other patrons. It is absolutely necessary for Denny's to have a very specifically trained manager who is experienced in

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dealing with the 11:00 p.m. to 4:00 a.m. clientele on shift between those hours, without exception.

Occasionally, a properly trained host/hostess will fail to catch such customers at the door, in which case a properly trained manager, onsite during late-night hours, becomes critical to preventing similar incidents. According to Ms. Winter's declaration, there was no manager on duty on January 2-3, 2009. Furthermore, the fact that Ms. Winter was filling in as manager during the time of the incident made it more likely for such an incident to occur. This is because the manager during late night hours must be dedicated to managing and monitoring the clientele to make sure that such incidents don't arise. By dual tasking a server as a manager, there was no person available to prevent or reduce these well-known risks. Aside from Ms. Winter's dual tasking, she was not properly trained to manage the restaurant between the hours of 11:00 p.m. and 4:00 a.m.

It also appears from the police report that the officers could smell alcohol on Mr. Garner's breath and they stated that he appeared intoxicated. According to Ms. Crill's deposition there was evidence that Mr. Legere was also intoxicated. A properly trained manager or host/hostess would have detected this from the beginning and either denied them entry or asked them to leave at the first incident. Ms. Winter probably did not assess the situation properly because her focus was split serving customers and filling in as a manager that evening.

Reviewing the Deposition of Mr. Wold made it clear that the Denny's on Argonne was set up for failure. Not only was the host/hostess not specifically trained to identify intoxicated persons, there is no particular person station to seat people. Since many of the "bar-rush"

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customers (to use Ms. Fuentes' term) can turn from compliant to threatening in a quick manner, the host/hostess must be trained to identify intoxicated persons immediately. The Denny's on Argonne allows any person, including table-bussers, to seat customers as long as that employee feels comfortable talking with the public.

The Denny's on Argonne also uses the night/early morning shift as the time to put its potential management or service coordinators into action. According to Mr. Wold, it is during the most dangerous time that Denny's on Argonne places its non-management trained personnel into the greatest responsibility. This is the opposite of taking reasonable measures to protect its customers against a clientele that is likely to become disruptive and dangerous.

Don Wold and Mary Winter refer to seeing few problems (still showing that there were problems) at the Argonne restaurant; however Debbie Sue Fuentes references make it appear that dealing with disruptive customers was more common. A restaurant that is open during 11:00 p.m. and 4:00 a.m. cannot rely on luck for the safety of its customers. One of the key problems is that there is no policy, procedure or system in place to track and train employees to prevent the entry of intoxicated persons. Additionally, there is no clear way to know how often these problems arise without a tracking system. There should be a mandatory policy with regards to the manager's log of logging every incident; however there was no mandatory procedure. There is no formal incident reporting procedure, which creates inability to discover whether additional security or training is needed.

It should also be noted that there are no formal policies (i.e. policies in writing) that give employees confidence to deal with disruptive customers. The verbal training provided by the management of WRBF is likely to create confusion and/or non-compliance. This is

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especially true give the fact that the written manual that employees receive instructs them to hand the matter over to management. The verbal instructions/training referred to by Mr. Wold are inadequate because they leave a lot of discretion to employees in situation where the employee may not feel fully in charge. This training also conflicts with a server's primary duty, which is to give the customer a good experience. There is a reason why management, solely dedicated to management, must be onsite during these hours. Management carries a presence of authority as opposed to a person who is a server filling in as management.

Lastly, the depositions and declarations reviewed show a general and consistently relaxed attitude towards the safety and security of customers during a time (11:00 p.m. to 4:00 a.m.) that needs the most vigilance. A restaurant which is open twenty four hours cannot operate on blind disregard of the need for extra security procedures and policies during late-night/early-morning hours. Based upon the depositions, there has been no active intent to discover what kinds of risks should be guarded against and what kinds of risks are being found in the industry. This creates a problem where management is not even evaluating the need for appropriate and reasonable security measures. This type of approach keeps management from evaluating and reasonably responding to changing security concerns. This is essentially, ignoring the problem and hoping customers don't get hurt. This is not accepted in the restaurant or hospitality industry as a responsible course of conduct.

Denny's on Argonne could have taken several measures prior to the incident of January 3, 2009 to prevent injuries to its customers. These measures include working digital or video recordings, which allow the management to review interactions of employees with potentially disruptive customers, so that management can follow up with better training. There should be

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mandatory reporting of disruptive events, to allow for follow-up and training of employees, specifically the host/hostess. Having a security expert do an evaluation and security plan for the premises, to better inform the management of what procedures and or policies should be in place for the safety of the customers and staff. And specifically, at a minimum, a policy requiring that an experienced and well trained manager be onsite during the hours between 11:00 p.m. and 4:00 a.m. along with a host/hostess who is properly trained in identifying intoxicated persons and understands his/her role in preventing the seating of those customers.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Glendale, Arizona this 5th day of May, 2013.

Fred Del Marva

Fred Del Marva, P.I. P.P.O.

CASEY LAW OFFICES, P.S.
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1318 West College
Spokane, WA 99201
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Exhibit A

CURRICULUM VITAE

Fred Del Marva, PI, PPO

Hospitality Industry Standard of Care Expert

Hotels, Casinos, Bars, Restaurants, Sports Complexes, Cruise Ships, etc.

Premises Liability, Premises Security and Liquor Liability

Industry Consultant, Legal Consultant and Testifying Expert

21666 North 58th Avenue
Arrowhead Lakes
Glendale, Arizona, 85308

Phone – 623-566-5300

Fax – 623 – 566-5354

E-Mail – liabilityexpert@cox.net

/

Fred Del Marva is a court qualified expert specializing in cases of "Acts of Violence," "Slips/Trips and Falls," "Liquor Liability," and "Overall Industry Standards Compliance" in the hospitality industry. During litigation, his opinions are used to determine the foreseeability of malfeasance and adequacy of security. Since 1986, he has been retained in over 900 cases (plaintiff & defense) in 48 of the contiguous states: Hawaii, Alaska, Jamaica, Dominican Republic, Puerto Rico, Grand Cayman, Canada , Nova Scotia, Mexico, Bahamas, St. Croix Virgin Islands, Pakistan, Saipan and Australia, and has been qualified in both state and federal courts.

His association with prominent law firms (Gerry Spence, Melvin Belli and Johnnie Cochran), his consulting as an expert in the Denny's shooting [46.4 million dollar verdict], Hilton Tailhook Case in Las Vegas, I Can't Believe It's Yogurt murders in Austin, Harris murder in Houston, Giants Stadium's Verni v. Aramark [135 million dollar dram shop verdict], Yosemite murders in California, "The McDonald Murders" in Nova Scotia and New York's Happy Land Fire have led to his appearances as an industry expert on numerous nationally syndicated and local television/radio shows (e.g. "Geraldo," "The Reporters," etc.).

He is a licensed private investigator, forensic investigator, legal consultant, security consultant, security guard company owner and operator, expert witness, and Chairman/CEO of Food and Beverage Investigations, Del Marva Investigative Group, Special Events Security, and Del Marva Corporation.

These companies are retained by the country's leading hotel and restaurant chains, and independent operators to perform a variety of surveys including "Safety & Security," "Quality Assurance," and "Foreseeability Planning for Liability Exposure". Properties are surveyed to determine whether they comply with corporate policies, procedures, and industry standards.

Mr. Del Marva is a lecturer, educator, and trainer. He is a nationally acclaimed industry expert and an acknowledged authority on standards of care, management training, guest security, responsible service of alcohol training, and policy and procedure development and implementation for hotels, discos, bars, restaurants, sport complexes, race tracks, casinos, convention facilities, and cruise ships.

He is certified in Security Professional Training Techniques by the National Association of Investigative Specialists; a previously certified TIPS trainer for the responsible service of alcohol; a "Neutral Evaluator" for a California Bar Association (ADR); and a past commissioner of a Drug and Alcohol Task Force. He served as an Executive Advisory Board Member at two distinguished colleges with Hotel & Restaurant Departments, and has been published in hospitality trade journals.

He has been in the hospitality industry for over 45 years. Twenty-five of those years as an employee, manager, 20 as an industry consultant, and over 20 years as a liability consultant and liability expert. Having owned and operated numerous businesses, the experiences he brings to his training programs, consulting and expert testimony are based on acceptable industry principles and methods needed to insure a safe and secure environment.

As part of his continuing efforts to educate, he conducts corporate and military club management training programs; lectures at colleges, universities, and hotel and restaurant associations in the United States and Canada. He discloses the mistakes and the successes he has encountered while dealing with the country's leading hotels and restaurant companies; and teaches attendees to develop proactive and reactive instincts that lead to the anticipation, recognition, and elimination of potential areas of liability.

Hilton Hotel & Casinos, Isle of Capri, Grand Casino, Casino Magic, Sands Hotel & Casino, Caesar's Palace Hotel & Casino, Stardust Hotel & Casino, Sands Hotel & Casino, Trump Castle Hotel & Casino, Bally's Hotel & Casino, MGM Hotel & Casino, Resorts Hotel & Casino, Mirage Hotel & Casino, San Remo Hotel & Casino, Harrah's Casino, Golden Nugget Hotel & Casino, Marriott, Sheraton, Holiday Inn, Wyndham, Westin, Best Western, Radisson, Ramada, Embassy Suites, Doubletree, Taco Bell, McDonald's, Kentucky Fried Chicken, Burger King, Pizza Hut, I Can't Believe It's Yogurt, Sizzler, Denny's, Applebee's, Logan's, Tony Roma's, TGI Friday's, Outback, Chili's, Hard Rock Cafe, Marie Callendar's, 7 Eleven, Shell and Arco are only a few companies where Mr. Del Marva has consulted or rendered expert opinions in plaintiff and defense litigation./
/

2006 – PRESENT (Covert Investigations)

Arizona State licensed company specializing in civil and criminal sub-rosa investigations.

1985 – Present (Food and Beverage Investigations)

Owner of FBI, a California licensed investigative firm specializing in the food service and hospitality industries. Clients are bars, restaurants, hotels, casinos, sports complexes, convention centers, cruise ships, etc. The company provides spotting and shopping services, property safety surveys, quality assurance inspections, management training programs, security evaluations, beverage management training, and a variety of other industry related services. FBI is retained by its clients to insure that their property and staff are complying with and adhering to company policies, procedures, and industry standards.

1986 – 2006 (Del Marva Corporation) Presently Changed to Fred Del Marva P.I., PPO

President of DMC, a hotel and leisure time industry consulting firm providing a variety of services specializing in Quality Assurance Surveys, Safety and Security Inspections, Risk Management Workshops, Policy & Procedure Development, and Foreseeability Planning for Liability Exposure. DMC also provides legal consultation, and as President, Fred Del Marva provides expert testimony for premises liability, premises security and liquor liability litigation.

1996 to Present (Special Events Security)

SES is a state licensed private patrol company providing security guard services, security guard training, security program development, policy and procedure development, security guard training manual development, and security consulting.

1986 – Present (Del Marva Investigative Group)

DIG is state licensed private investigative firm providing general investigative services for a select group of attorneys in civil and criminal litigation. It also provides pre-employment screening and internal theft investigative services for the leisure time industry.

1980 – 1985 (Bottom Line Hospitality Consulting)

President/CEO, and Senior Consultant. Bottom Line provided a complete consulting service to hotels and restaurants specializing in management training (all levels), management/work manual development, departmental policy and procedure development, security evaluations, and hiring and firing procedures.

1971 to 1986 & 1993

Owned (operated and managed) numerous bars, lounges, restaurants, discos, and catering facilities: Turf Club, Jockey Club and Club House - 1993; La Scala Restaurant #3 - 1980 to 1985; La Scala Restaurant #2 - 1978 to 1980; Silver Rose Saloon - 1979 to 1980; La Scala Restaurant #1 - 1976 to 1980; Stage Delicatessen & Theatre Lounge - 1974 to 1976; Eatcetera - 1971 to 1974.

TELEVISION, RADIO & PRINT MEDIA (APPEARANCES & INTERVIEWS)

Geraldo Rivera Show –"Deadly Discos"
The Reporters – "Beware of Bouncers".
San Francisco Channel 2 Morning Talk and KSFO Talk Radio ("Hotel Security").
Wall Street Journal
Trade Publications
ABC News [drunk driving – Glenn Campbell incident]
Fox News [Chicago/Phoenix] "Hotel Security"
London Tribune [Casino Security]
Hotel security consultant for TV's CSI Miami and CNBC

MAJOR SPEAKING ENGAGEMENTS

Colleges & Universities

University of San Francisco
Washington State University
Golden Gate University
Diablo Valley College
San Francisco City College
California Culinary Academy

Major Hotel Corporations

Holiday Inn Corporation
Aircoa Hotel Corporation

Military

Department of Navy

Legal Associations

Association of Trial Lawyers of America (Premises Security, Casino Security & Liquor Liability)

State Restaurant & Hotel Associations

Virginia Hotel & Restaurant Association (Richmond)
California Restaurant Association (Los Angeles)
Colorado Hotel & Restaurant Association (Denver)
American Hotel & Motel Association (New York)
Wyoming Hotel & Restaurant Association
State of Washington Restaurant Association (Seattle)
California Restaurant Association (Newport Beach)
Canadian Hotel & Restaurant Association (Toronto)
Wisconsin Hotel & Restaurant Association (Madison)
Missouri Hotel & Restaurant Association (St. Louis)
California Restaurant Association (Sacramento)
National Restaurant Association (Chicago)
New Jersey Restaurant Association (Kearny)
Texas Restaurant Association (Dallas)
Michigan Restaurant Association (Detroit)
California Hotel & Motel Association (Sacramento)
Florida Restaurant Association (Orlando)
Mississippi Restaurant Association (Jackson)
Ohio Hotel & Restaurant Association (Columbus)
Missouri Restaurant Association (1996 St. Louis)
Ohio Restaurant Association (1996)

Security Associations

American Society for Industrial Security (lodging security)

LICENSES, PERMITS & CERTIFICATIONS

CA Licensed Private Investigator (Food & Beverage Investigations – 1986 to present)
CA Licensed Private Investigator (Del Marva Investigative Group – 1986 to present)
AZ Licensed Private Investigator (Del Marva Detective Agency – 1998 to 2001)
AZ Licensed Private Investigator (Covert Investigations – 2006 to present)
CA Licensed Security Guard (1986 to present)
CA Licensed Private Patrol Operator (Special Events Security – 1996 to present)
Certified TIPS Trainer (responsible service of alcohol) – 1994 to 1995
National Association of Investigative Service (Security Professional Training Techniques)
832 P.C. – Use of Force, Arrest and Firearms
Use of Deadly Force
California Concealed Weapons Permit (1979 to 2003)
Arizona Concealed Weapons Permit (2001 to present)

PROFESSIONAL MEMBERSHIPS AND AFFILIATIONS PAST AND PRESENT

Former Neutral Evaluator (Alternative Dispute Resolution Section) Marin County Bar Association
Commissioner, Novato Drug and Alcohol Commission
Chairman of the selection committee for the Hotel/Restaurant Department San Francisco City College
Executive Advisory Board Member (Hotel/Restaurant Department) SF City College
Advisory Board Member (Hotel/Restaurant Department) Diablo Valley College
National Association of Legal Investigators (NALI)
Registered Consultant -- Resolution Trust Corporation (RTC)
National Forensic Center
TASA Technical Advisor for Attorneys
National Expert Resources
DRI
American Trial Lawyers Association (ATLA Exchange)
California Trial Lawyers Association (CTLA Data Base)
Legal Research Network
Leisure Time Industries Litigation Consultants Exchange
National Restaurant Association
American Society for Industrial Security
California Association of Licensed Investigators (CALI)

EDUCATION

Northern California Criminal Justice Training and Educational System
(Santa Rosa Junior College – 1977) Use of Force, Arrest & Firearms
Northern California Criminal Justice Training and Educational System
(Santa Rosa Junior College – 1987) Use of Force, Arrest & Firearms
Anheuser-Busch (Health Educational Foundation) TIPS Program
"Training for the Intervention Procedures by Servers of Alcohol"
ATLA, College of Advocacy Seminar (Premises Liability & Premises Security)
ASIS, American Society for Industrial Security (Lodging Security Workshop)
National Rifle Association/AZ Dept. of Public Safety – Use of Deadly Force

ARTICLES & PUBLICATIONS

Pay Now or Pay Later; Preventing Liability Suits
Implementing Controls; the Secret to Success
Employee Theft, Drug Abuse Should Put Restaurateurs on Guard Theft;
The Skeleton in the Food-Service Industry's Closet
/

Exhibit B

Exhibit B
Material Description

1. **Police Report from January 3, 2009**
2. **Account of witness interview of David K. McCarrick, provided by G/T Investigations**
3. **Account of witness interview of Tammy Brown, provided by G/T Investigations**
4. **Witness Statement of Carole Gibson, provided by G/T Investigations**
5. **Deposition of Star Crill, with exhibit:**
   - **hand drawn map of Argonne Denny's floor plan and her seating arrangement**
6. **Deposition of Jerry Fouts with exhibits:**
   - **Franchise Manager in Training Workbook**
   - **Emergencies Procedure**
   - **WRBF, Inc. hourly Employee Manual**
   - **DFO, INC. Franchise Agreement**
7. **Deposition of Timothy Flemming with exhibits:**
   - **Denny's policy on Public Accommodation Laws, Food brought from outside or from other establishments and service animals. Service requirements under the non-discrimination policy, security guard training, enforcement, service policies, reporting discrimination**
   - **Shift supervision, shift ready checklist, peak business periods, manager interaction, unexpected business and buses**
   - **Grooming and attire standards for managers and employees**
   - **Guests first cycle standards**

- **Prevention Model and Managing Escalation Model**
- **Brand standards**
- **OSHA requirement for Safety Committee, Intervention Model**
- **News release concerning Denny's sales increase**
- **Nation's Restaurant News, December 3, 2007 article**

8. **Deposition of Debbie Sue Fuentes**
9. **Deposition of Don Wold**

NATION'S
Restaurant News
THE NEWS LEADER OF THE FOODSERVICE INDUSTRY • WWW.NRN.COM
PERIODICALS

Restaurants open themselves up to greater risks with later hours

BY MILFORD PREWITT

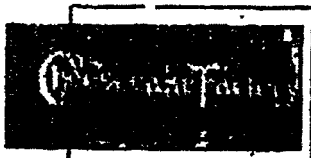
Many restaurateurs employ top-notch security systems, attend conferences, hire consultants and enforce rules to ensure a safe, crime-free workplace.

But despite that degree of investment and focus, horrific crimes are defeating their best systems — especially with the rollout of more 24-hour locations.

Since 2003, 241 restaurant employees and an unknown number of guests have been murdered on restaurant properties, according to the U.S. Bureau of Labor Statistics. Although the number of deaths fell more than 26 percent between 2003 and 2004, the number in bucked-north spots jumping nearly 31 percent, from 72 deaths in 2003 to 89 deaths in 2004.

In comparison, employee murders at retail stores dropped more than 12 percent, from 202 fatal assaults in 2003 to 185 in 2004, the BLS reported. The figure for food and beverage store workers fell 41 percent, from 46 killings in 2003 to 47 in 2004. Meanwhile, the number of murders at gasoline stations and convenience stores was unchanged, with 36 fatal assaults reported for both years.

(See RESTAURANTS, page 48)



A dispute between two developers in Los Angeles involved a location of The Cheesecake Factory.

Cheesecake gets caught in middle of mall developers' $89M legal battle

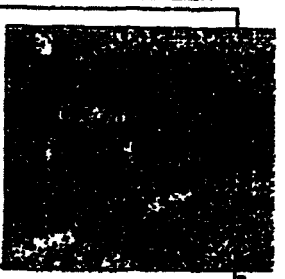
BY LISA JENNINGS

LOS ANGELES — A jury award exceeding $80 million in a conflict between two Los Angeles area shopping malls over The Cheesecake Factory may teach chains a lesson about the high stakes involved in some tenancy negotiations with large developers.

In November, a Los Angeles Superior Court jury awarded $35 million in punitive damages and $74.33 million in compensation to mall developer Caruso Affiliated Holdings, whose $969 million retail and residential center, called The Americana at Brand, is scheduled to open next year in the Los Angeles suburb of Glendale.

Company principal Rick Caruso now stands to reap both

(See CHEESECAKE, page 49)



The Coalition of Immokalee Workers advocates on behalf of tomato pickers in Florida.

BK refuses to pay penny surcharge for Fla. tomatoes

BY CATHERINE R. CORE

Miami — Burger King, which has been the target of protests at its headquarters and restaurants by a farmworkers advocacy group, is refusing to pursue the course taken by several quick-service peers of paying Florida laborers a penny more per pound for tomatoes.

McDonald's and Yum! Brands already agreed to the demands of the Coalition of Immokalee Workers, or CIW, an activist group crusading for better wages and working conditions for tomato pickers, to pay 1 cent per pound more to suppliers who then would pass it on to their workers. But no official at the No. 2 burger chain contends the problem is not about paying workers better wages but the legality of paying a group of workers it does not employ.

"We see no legal way of paying these workers," said Steve Grover, BK's vice president of foodservice quality assurance and regulatory compliance. "The CIW has gone after us because

(See BURGER KING, page 6)

Celebrity chefs get along famously as culinary brands

NRN SPECIAL REPORT

BY PAUL FRUMKIN

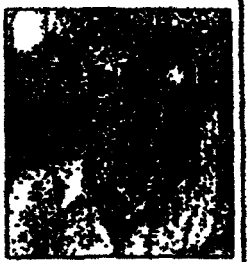
Lidia Bastianich remembers going north up Fifth Avenue and finding it empty of all traffic.

As grand marshal of New York's Columbus Day parade, Bastianich was set to lead more than 100 bands, dozens of floats and 35,000 marchers up Fifth Avenue from 44th Street to 79th Street, in a celebration of Italian-American culture. Millions of people around the world would be watching, along the parade route and on their televisions.

"I get to the starting point and laughed," recalls the well-known chef, restaurateur and cooking show host. "Usually, I have to dodge the traffic on Fifth. This time the street was all mine."

Only the third woman following actresses Sophia Loren and Susan Lucci to be named grand marshal of the annual parade, Bastianich was the first chef and restaurateur to be so honored. The distinction to subject her, she says, sends "a message about the importance of food culturally."

(See GETTING, page 33)



Lidia Bastianich is one of a number of chefs to garner celebrity status.

Restaurants open themselves up to greater risks with later hours

(Continued from page 1)

While criminals looking for quick cash have always viewed the restaurant industry as an easy target, the growing number of late-night operations is increasing that vulnerability.

"All the studies I've seen say that late-night retail and your business are the leading sites of employee homicides in the U.S., and it's the No. 1 place for male fatalities in the workplace," said Chris McGoey, head of Crime Doctor, a security consulting firm with offices in San Francisco and Los Angeles. "And as more chains open 24 hours, we will experience some workplace violence, serious injuries and death in your business, because I don't think your industry gets it."

Violent assaults at restaurants and bars reached such a state in the economically depressed city of Camden, N.J. — the fifth most dangerous city in the United States, according to the FBI — that officials ordered all eating places to close by 11 p.m. this summer.

In Seattle, Boston and Vancouver, British Columbia, a spate of shootings, armed robberies and street crime in or near Chinese restaurants is hurting business in those areas.

And few places have it as tough as the tourist hubs of Florida. From Miami to Orlando — the 13th most dangerous city in the U.S., according to national crime rankings — police agencies are working on or have solved at least 12 homicides of restaurant workers or guests, slain late at night or in the early morning, in the past year and a half.

In the most recent Florida case in September, a 43-year-old Denny's waitress [illegible] [illegible] by her estranged husband.

Experts say assaults by bitter ex-spouses or rejected lovers are almost as frequent as assaults from robberies, which was the motive behind the murder of Betty Jane Wise, a manager at a Checker's unit in Kissimmee, Fla., a year and a half ago. Although she followed the orders of a gunman who demanded cash from the walk-up window, he shot her dead in front of her co-workers. The killing took place about 11 p.m. on a weekday night.

Her killing was similar to the dual murder of Pizza Hut employees Patricia O'Grady, a unit manager, and Stephen Mitchelltree, a delivery driver, shot dead in an apparent robbery in Terrell, Texas, a Dallas suburb, just before midnight in January of this year.

Customers are hardly exempt from the carnage.

Just two months ago, 24-year-old Daron Dieter was robbed and shot in the neck at 11 p.m. as he returned to his car in the parking lot of a pub where he and his girlfriend had gone to pick up a carry-out meal. Police arrested a man in Georgia weeks later after identifying a suspect on the restaurant's outdoor surveillance cameras.

While criminals prey on industry operations in the daytime, too, security experts note that the foodservice industry's high-turnover rate, which can result in poor employee training, and [illegible] are contributing to the spate of late-night crimes.

In a study conducted at the request of Nation's Restaurant News, the BLS confirmed that eighteen [illegible] [illegible]. In [illegible] the [illegible] the BLS reported [illegible] of the 83 remaining cases, 53 occurred between 6 p.m. and 6 a.m., and 28 of those occurred between midnight and 6 a.m.

The pattern is similar when it comes to injuries attributable to a criminal act.

Some 800 foodservice workers were hurt in a violent encounter on the job in 2005, nearly three-quarters occurring at night, the BLS said.

Tallying up the number of homicides and violent attacks on restaurant customers is far more difficult. The National Crime Information Center, a bureau of

[illegible] more chains open 24 hours, we will experience [illegible] injuries and death.

— CHRIS McGOEY

the FBI that culls crime statistics from police agencies nationwide and releases annual and quarterly reports on all manner of crime trends and statistics, does not track crime by economic sectors.

The BLS derives its annual numbers primarily from individual state insurance regulators who demand employers to include all relevant details when filing workers' compensation claims. A murder on the job is a reportable workers' compensation case as well as a criminal case.

McGoey noted that 341 worker homicides since 2000 in an industry that employs 9.2 million people hardly represents a crisis. Nonetheless, he said, increased vigilance by operators could reduce that number even more.

"[Operators] are 20 years behind the times when it comes to late-night security," he said. "I [illegible] working with the [illegible] in the early '70s when they started going 24 hours, [illegible] [illegible] if it can [illegible] to a 24-hour operation without [illegible] the [illegible] at night."

McGoey noted the following missteps that can compromise employee and guest safety:

• Having drive-thru window lanes in which cars are hidden behind buildings for minutes on end and offer escape paths.

• Installing cameras over drive-thru menu boards not to deter robbery, but to prevent vandalism.

• Building parking lots behind units, where they cannot be seen by passersby.

• Leaving back doors or loading doors unlocked during clean up or while taking trash out.

• Failing to change security codes and other methods of employee access when workers are fired.

• Allowing people to remain in their cars on restaurant parking lots after the unit has closed.

• Not using bulletproof glass at the pass-through window.

Mike Jank, vice president of [illegible] [illegible] company [illegible] operations the company and its 94? franchised outlets have learned over time to [illegible] is [illegible].

But he rued the fact that sophisticated security measures could not save the life of Debra Cone, the 43-year-old waitress who was stabbed to death by her estranged husband.

"Frankly, I worry more about these domestic cases leading to violence than robbery at times," Jank said. "Because there is no way to prevent a customer with ill-will towards a former spouse or girlfriend from coming into your store, and the worse thing of it is your employees who are having these relationships with these kind of people are exposing your guests to harm, too."

Jank agreed with McGoey that [illegible] are [illegible] to 24-hour operations without [illegible] thought to the security risks.

"We are seeing more and more competition into night and early morning," Jank said. "I just hope operators realize they are going to have problems if they don't [illegible] you have in the daytime are far different at night."

Dave Ulmer, the owner of three supperclubs and nightclubs in Atlanta that close around 4 a.m. on weekends, carries a registered handgun 24 hours a day because of some of the violence that has visited his establishments during his 30-year foodservice career.

A former Bonanza unit manager who remembers when robbers killed seven of his colleagues in a rampage in Omaha, Neb., in the 1970s, Ulmer said he is bracing for an upswing in crime now that the holiday season has begun and so many Atlantans are out of work. ■

[illegible]

Chains planning aggressive growth rev up rebranding efforts

(Continued from page 4)

Now, however, "we've got an identity we never had before, and that's the key," he said.

Working with agency Elias/Savion of Pittsburgh, Buffalo Wings has revamped its logo and menu "to create this image we're looking for," David said.

The updated logo now sports a color combination of red, a black buffalo head, bright yellow and a

lies, which account for 70 percent of business, he said. Systemwide sales this year are expected to reach $25 million.

Culver's Franchising System Inc., based in Prairie du Sac, Wis., follows a program of "slow, steady growth" and expects to have about 400 units of its Culver's ButterBurgers and Frozen Custard brand open by the end of next year, said Chris Contino, the chain's vice

Contino said. Still, Culver's is in no hurry to grow.

"We never really have a goal," he said. "We don't have a plan to put so many here, so many there."

Culver's growth next year will be supported with an integrated campaign created by the Chicago office of MARC USA, which became agency of record in November. Culver's total marketing budget is $15 million.

platform will break after Easter next year.

The campaign will cover all 65 Culver's markets and include TV, radio, print, outdoor and online, focusing on the chain's service and "great food," which Contino said is Culver's competitive edge.

He added that while there was "nothing wrong" with the Culver's brand, the chain has to work

smarter, but with the emergence of interactive media "we need to take a new approach every day in how we communicate to our guests and remind them of who we are so that they'll visit us again," Contino said.

"We think, based on current trends out there for different portion sizes, different snacking occasions and what some of the hottest foods are, that we've got it

Restaurants open themselves up to greater risks with later hours

December 2, 2007 | By Milford Prewitt

Many restaurateurs employ top-notch security systems, attend conferences, hire consultants and enforce rules to ensure a safe, crime-free workplace.

But despite that degree of investment and focus, horrific crimes are defeating their best systems — especially with the rollout of more 24-hour locations.

Since 2003, 341 restaurant employees and an unknown number of guests have been murdered on restaurant properties, according to the U.S. Bureau of Labor Statistics. Although the number of deaths fell more than 25 percent between 2003 and 2004, the number is headed north again, jumping nearly 21 percent, from 73 deaths in 2005 to 88 deaths in 2006.

In comparison, employee murders at retail stores dropped more than 18 percent, from 202 fatal assaults in 2005 to 165 in 2006, the BLS reported. The figure for food and beverage store workers fell 41 percent, from 80 killings in 2005 to 47 in 2006. Meanwhile, the number of murders at gasoline stations and convenience stores was unchanged, with 35 fatal assaults reported for both years.

While criminals looking for quick cash have always viewed the restaurant industry as an easy target, the growing number of late-night operations is increasing that vulnerability.

"All the studies I've seen say that late-night retail and your business are the leading sites of employee homicides in the U.S., and it's the No. 1 place for male

fatalities in the workplace," said Chris McGoey, head of Crime Doctor, a security consulting firm with offices in San Francisco and Los Angeles. "And as more chains open 24 hours, we will experience more workplace violence, serious injuries and death in your business, because I don't think your industry gets it."

Violent assaults at restaurants and bars reached such a state in the economically depressed city of Camden, N.J. — the fifth most dangerous city in the United States, according to the FBI — that officials ordered all eating places to close by 11 p.m. this summer.

In Seattle, Boston and Vancouver, British Columbia, a spate of shootings, armed robberies and street crime in or near Chinese restaurants is hurting business in those areas.

And few places have it as tough as the tourists hubs of Florida. From Miami to Orlando — the 11th most dangerous city in the U.S., according to national crime rankings — police agencies are working on or have solved at least 13 homicides of restaurant workers or guests, slain late at night or in the early morning, in the past year and a half.

In the most recent Florida case in September, a 43-year-old Denny's waitress was repeatedly stabbed to death in the alcove of an Orlando unit just before 10 p.m. by her estranged husband.

Experts say assaults by bitter ex-spouses or rejected lovers are almost as frequent as assaults from robberies, which was the motive behind the murder of Betty Jane Wise, a manager at a Checker's unit in Kissimmee, Fla., a year and a half ago. Although she followed the orders of a gunman who demanded cash from the walk-up window, he shot her dead in front of her coworkers. The killing took place about 11 p.m. on a weekday night.

Her killing was similar to the dual murder of Pizza Hut employees Patricia Oferosky, a unit manager, and Stephen Mitchelltree, a delivery driver, shot dead in an apparent robbery in Terrell, Texas, a Dallas suburb, just before midnight in January of this year.

Customers are hardly exempt from the carnage.

Just two months ago, 24-year-old Daren Dieter was robbed and shot in the neck at 11 p.m. as he returned to his car in the parking lot of a pub where he and his girlfriend had gone to pick up a carry-out meal. Police arrested a man in Georgia weeks later after identifying a suspect on the restaurant's outdoor surveillance cameras.

While criminals prey on industry operations in the daytime, too, security experts note that the foodservice industry's high-turnover rate, which can result in poor employee training, and security systems focused more on preventing vandalism than robbery or assaults, are contributing to the spate of late-night crimes.

In a study conducted at the request of Nation's Restaurant News, the BLS confirmed that nighttime restaurant shifts could be dangerous. In studying the time of day that on-the-job violence occurred, the BLS reported that six cases out of 88 did not note the time of the incident. Of the 82 remaining cases, 58 occurred between 8 p.m. and 6 a.m., and 25 of those occurred between midnight and 6 a.m.

The pattern is similar when it comes to injuries attributable to a criminal act.

Some 990 foodservice workers were hurt in a violent encounter on the job in 2006, nearly three-quarters occurring at night, the BLS said.

Tallying up the number of homicides and violent attacks on restaurant customers is far more difficult. The National Crime Information Center, a bureau of the FBI that culls crime statistics from police agencies nationwide and releases annual and quarterly reports on all manner of crime trends and statistics, does not track crime by economic sectors.

The BLS derives its census numbers primarily from individual state insurance regulators who demand employers to include all relevant details when filing workers' compensation claims. A murder on the job is a reportable workers' compensation case as well as a criminal case.

McGoey noted that 341 worker homicides since 2003 in an industry that employs 9.2 million people hardly represents a crisis. Nonetheless, he said, increased vigilance by operators could reduce that number even more.

"[Operators] are 20 years behind the times when it comes to late-night security," he said. "I made my name working with the convenience store industry in the early '70s when they started going 24-hours, but they made the investment in systems to protect themselves. Your industry acts as if it can switch on a dime to a 24-hour operation without considering the risks at night."

McGoey noted the following missteps that can compromise employee and guest safety:

Having drive-thru window lanes in which cars are hidden behind buildings for minutes on end and offer escape paths.

Installing cameras over drive-thru menu boards not to deter robbery, but to prevent vandalism.

Building parking lots behind units, where they cannot be seen by passersby.

Leaving back doors or loading doors unlocked during clean up or while taking trash out.

Failing to change security codes and other methods of employee access when workers are fired.

Allowing people to remain in their cars on restaurant parking lots after the unit has closed.

Not using bulletproof glass at the pass-through window.

Mike Jank, vice president of risk management for the 520 company stores operated by Spartanburg, S.C.-based Denny's, said that as a pioneer of 24-hour operations the company and its 947 franchised outlets have learned over time to embrace state-of-the-art technology to secure its units.

But he rued the fact that sophisticated security measures could not save the life of Debra Caso, the 43-year-old waitress who was stabbed to death by her estranged husband.

"Frankly, I worry more about these domestic cases leading to violence than robbery at times," Jank said. "Because there is no way to prevent a customer with ill-will towards a former spouse or girlfriend from coming into your store, and the worse thing of it is your employees who are having these relationships with these kind of people are exposing your guests to harm, too."

Jank agreed with McGoey that too many industry players are making the switch to 24-hour operations without giving the requisite thought to the security risks.

"We are seeing more and more competition late night and early morning," Jank said. "I just hope operators realize they are going to have problems if they don't keep in mind that the security issues you have in the daytime are far different at night."

Dave Ulmer, the owner of three supperclubs and nightclubs in Atlanta that close around 4 a.m. on weekends, carries a registered handgun 24 hours a day because of some of the violence that has visited his establishments during his 30-year foodservice career.

A former Bonanza unit manager who remembers when robbers killed seven of his colleagues in a rampage in Omaha, Neb., in the 1970s, Ulmer said he is bracing for an upswing in crime now that the holiday season has begun and so many Atlantans are out of work.

Read more: http://nrn.com/article/restaurants-open-themselves-greater-risks-later-hours#ixzz2CDK4YpPX