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IN THE SUPREME COURT OF THE STATE OF WASHINGTON  
ON CERTIFICATION FROM THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

BRENDAN MCKOWN, a single individual,

Appellant,

v.

SIMON PROPERTY GROUP, INC., a Delaware corporation doing  
business as Tacoma Mall, and IPC INTERNATIONAL CORPORATION,  
an Illinois corporation,

Appellees.

BRIEF OF *AMICUS CURIAE*  
ASSOCIATION OF WASHINGTON BUSINESS

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 ORIGINAL

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## I. INTRODUCTION

This amicus brief is respectfully submitted by the Association of Washington Business (“AWB”), the state’s chamber of commerce and principal institutional representative of the business community in Washington. As the Ninth Circuit correctly observed in its certification order, the unsettled questions of law here raise “significant policy implications.” *McKown v. Simon Property Group, Inc.*, 689 F.3d 1086, 1091 (9<sup>th</sup> Cir. 2012) (quoting *Perez-Farias v. Global Horizons, Inc.*, 668 F.3d 588, 593 (9<sup>th</sup> Cir. 2011)). These policy implications affect businesses as well as individuals in Washington.

To be sure, the random act of horrible violence at the heart of this case defies understanding, and the suffering of McKown and the other victims of the shooter is real and substantial. Whether Simon Property Group (“Simon”), the owner of the Tacoma Mall, bears liability for breaching a duty to protect McKown from this criminal conduct depends principally upon whether the conduct was reasonably foreseeable. McKown argues for a particular conception of the Restatement standard of care discussed in *Nivens v. 7–11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997), a conception that is broad and difficult to limit in future cases. Simon urges the foreseeability inquiry refined and applied since *Nivens* in the Courts of Appeal, and followed by the U.S. District Court in

this matter. As amicus, AWB asks the court to remain mindful of the strong public policies against rules that impose expansive liability on business owners for criminal acts of third parties. Instead, in response to the Ninth Circuit, the court should approve a fair, predictable, and appropriately limited foreseeability inquiry. AWB believes the framework adopted by the appellate courts post-*Nivens* best accomplishes those goals.<sup>1</sup>

## II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

AWB, Washington's chamber of commerce, is the state's oldest and largest general business membership federation, representing the interests of over 8,000 Washington companies who in turn employ over 650,000 employees, approximately one-quarter of the state's workforce. AWB members are located in all areas of Washington, represent a broad array of industries, and range from sole proprietors and very small employers to the large, iconic, Washington-based corporations who do business across the country and around the world.

AWB represents these interests in the legislative, regulatory, and judicial fora of the state, and frequently appears as amicus curiae before this court in legal and policy issues of importance to its membership.

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<sup>1</sup> In this brief, AWB's focus is on the standard of foreseeability to be adopted by the court, which is a purely legal question, not necessarily the application of that standard to the specific facts of this case on summary judgment.

As merchants and premises owners, AWB members have a natural and obvious interest in the rules governing the standard of care owed to business invitees with respect to protection from the reasonably foreseeable criminal conduct of third parties.

### III. ISSUES OF CONCERN TO *AMICUS CURIAE*

AWB is interested in the resolution of each certified question:

1. Does Washington adopt Restatement (Second) of Torts § 344 (1965), including comments d and f, as controlling law? *See Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997).
2. To create a genuine issue of material fact as to the foreseeability of the harm resulting from a third party's criminal act when the defendant did not know of the dangerous propensities of the individual responsible for the criminal act, must a plaintiff show previous acts of similar violence on the premises, or can the plaintiff establish reasonably foreseeable harm through other evidence? *See Wilbert v. Metro. Park Dist. of Tacoma*, 90 Wn. App. 304, 950 P.2d 522 (1998); *see also Fuentes v. Port of Seattle*, 119 Wn. App. 864, 82 P.3d 1175 (2004); *Craig v. Wash. Trust Bank*, 94 Wn. App. 820, 976 P.2d 126 (1999); *Raider v. Greyhound Lines, Inc.*, 94 Wn. App. 816, 975 P.2d 518 (1999); *cf. Nivens*, 133 Wn.2d 192; *Christen v. Lee*, 113 Wn.2d 479, 780 P.2d 1307 (1989); *Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 758 P.2d 524 (1988), *rev. denied*, 112 Wn.2d

1001, (1989); *Miller v. Staton*, 58 Wn.2d 879, 365 P.2d 333 (1961).

3. If proof of previous acts of similar violence is required, what are the characteristics which determine whether the previous acts are indeed similar?

#### IV. STATEMENT OF THE CASE

For the sake of brevity, AWB adopts the statement of the case set forth by the Ninth Circuit in its order on certification. *McKown*, 689 F.3d at 1088-91.

#### V. ARGUMENT

##### **A. IF THE COURT ADOPTS THE RESTATEMENT, IT SHOULD LIMIT FORESEEABILITY TO THE “PAST EXPERIENCE” OF THE BUSINESS.**

Does Washington adopt the Restatement (Second) of Torts § 344, including comments d and f, with respect to third party criminal conduct on the business premises? At least with respect to foreseeability, the answer is not as unambiguously affirmative as *McKown* suggests, *Br. of App.* at 15, else the Ninth Circuit would not have had to ask. *McKown*, 689 F.3d at 1091 (“... the scope of the foreseeability inquiry under Washington law is not sufficiently clear to us.”). The *Nivens* court did “expressly adopt [§ 344] for a business owner and business invitees,” with favorable quotation to comments d and f to “describe the limit of the duty owed.” *Nivens*, 133 Wn.2d at 204-05. *McKown* is correct that the court’s

lengthy exposition was obviously intended to be didactic, *Br. of App.* at 16, but Simon is also correct that the *Nivens* court's explanation was unnecessary to resolve the precise issue before the court, which was whether a business owed a specific duty to provide on-premises security personnel to protect invitees from third party crime. *Nivens*, 133 Wn.2d at 194; *Br. of Appellee* at 9. Indeed, after describing the general duty, the *Nivens* court acknowledged that “[n]o duty arises unless the harm to the invitee by third persons is foreseeable[.]” 133 Wn.2d at 205, and then expressly declined to “undertake an analysis of the foreseeability of *Nivens*' injury here because *Nivens* did not base his case on a general duty of a business invitee.” *Id.* Foreseeability is the central issue evoked by this case, and *Nivens*' evident adoption of § 344 is not determinative in resolving it.

Dicta or not, later courts and litigants were left with perhaps only a hint of what the court intended to express in its adoption of § 344 and comments d and f. While quoting the comments, including the “place or character of his business” phrase McKown emphasizes, the court chose to add emphasis to only one passage in the comments:

*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.*

133 Wn.2d at 204-05 (quoting Restatement (Second) of Torts § 344 (1965), comment f) (emphasis in original)). *Nivens* specifically emphasized the “past experience” passage of comment f, and not any other language, including the “place or character” of the business phrase. This was not lost on the Ninth Circuit, which noted the particular emphasis *Nivens* gave to “past experience” in particular, and described this as one of a number of “clues to the foreseeability inquiry” left for later decisions. *McKown*, 689 F.3d at 1092.

Picking up where *Nivens* left off, the court may understandably answer the first certified question in the affirmative, but AWB urges further explanation as to how § 344 and comments d and f apply specifically to foreseeability. In this regard, the “prior similar acts” approach urged by Simon, followed by the Courts of Appeal post-*Nivens* and U.S. District Court on reconsideration here, is a good approach and entirely consistent with *Nivens*, as well as the emphasis the court placed on comment f’s discussion of the “past experience” of a business owner.

**B. THE COURT SHOULD REQUIRE PROOF OF PREVIOUS SIMILAR ACTS ON THE PREMISES TO ESTABLISH FORESEEABILITY OF THIRD PARTY CRIMINAL CONDUCT.**

Answering the second certified question by approving the prior similar acts rule not only accords with the post-*Nivens* work on foreseeability in the lower courts, but is consistent with an appropriately limited understanding of the *Nivens* adoption of § 344.<sup>2</sup> In cases where, as here, the foreseeability of third party criminal conduct was actually at issue, the Courts of Appeal clearly have believed themselves to be following *Nivens* while holding plaintiffs to a showing of previous similar acts of violence on the premises – the “past experience” of § 344, comment f.

In the first of the post-*Nivens* cases, *Wilbert*, Division II appropriately cited to *Nivens* for the latter’s holding on the existence of duty, but had to canvass prior Washington cases analyzing foreseeability because *Nivens* expressly did not analyze foreseeability. *Wilbert*, 90 Wn. App. at 309. Following those cases, principally *Christen v. Lee*, 113 Wn.2d 479, 496, 780 P.2d 1307 (1989), the court stated that the

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<sup>2</sup> This brief does not comment on foreseeability established when the premises owner “knows or has reason to know that the acts of the third person are occurring, or are about to occur.” Restatement (Second) of Torts § 344 (1965), comment f. The fact that criminal conduct has begun, or is imminent, may have bearing on what steps a premises owner should take to deflect it, but has little bearing on whether that conduct was reasonably foreseeable to begin with.

“prerequisites of foreseeability required by the Washington cases” are “specific evidence that the defendant knew of the dangerous propensities of the individual assailant or previous acts of similar violence on the premises.” *Wilbert*, 90 Wn. App. at 310.

Next, Division III in *Raider* and *Craig*, a pair of cases handed down on the same day, continued this development. *Raider*, while citing to *Nivens* for its specific holding that a business has no per se duty to provide on-site security personnel, went on to follow *Wilbert* and previous foreseeability cases, and very reasonably conclude that the law is “[w]here there is no evidence that the defendant knew of the dangerous propensities of the individual responsible for the crime and there is no history of such crimes on the premises, courts have held the criminal conduct unforeseeable as a matter of law.” *Raider*, 94 Wn. App. at 819.

While reaching the same conclusion, *Craig* is even more helpful in understanding the development of *Nivens* in the lower courts. *Craig* acknowledged the *Nivens* adoption of § 344, including comments d and f, going so far as to quote from the emphasized portions of the comments in *Nivens*. *Craig*, 94 Wn. App. at 828. The court then went on to say:

*Applying the rules and principles derived from Nivens*, the Bank did not know criminal acts had occurred as none was previously reported. Further, the Bank did not have reason to know that the criminal acts might occur simply because transients occasionally loitered near the Bank building. *Thus, the Bank did not have “past*

*experience” giving reason to know a likelihood of criminal conduct on the part of third persons in general....*

*Id.* (emphasis added).

Finally, rounding out the divisions, Division I in *Fuentes* cited *Nivens* specifically for the proposition that “[t]he kind of knowledge required before a duty to protect arises is knowledge from past experience that there is a likelihood of conduct which poses a danger to the safety of patrons.” *Fuentes*, 119 Wn. App. at 870 (citing *Nivens*, 133 Wn.2d at 204).

Other than giving emphasis to the “past experience” language of comment f, *Nivens* never explicitly explained how § 344 and comments d and f apply. It was an abstract discussion because the court did not have to apply § 344 or comments d or f to resolve the case before it. But by self-consciously employing the “rules and principles derived from *Nivens*” in subsequent foreseeability cases, the divisions have arrived at a fair and workable limiting principle that respects the duty of care owed to business invitees but keeps business premises owners from a more vague and potentially unlimited standard of liability by requiring a showing of previous similar acts of violence on the premises. “A negligent act should have some end to its legal consequences,” *Christen*, 113 Wn.2d at 492 (quoting *Hunsley v. Giard*, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976)),

and grounding foreseeability of criminal conduct in a business's past experience of previous similar acts on the premises is a common-sense sidebar to the otherwise potentially quite expansive duty of care described in comments d and f to § 344.

**C. PUBLIC POLICY SUPPORTS LIMITING FORESEEABILITY TO PRIOR SIMILAR ACTS ON THE PREMISES.**

Limiting a standard of care to conduct that is reasonably foreseeable is at its core a public policy determination, and a fair balance of the public policies at issue here further supports adoption of the previous similar acts rule. As *Nivens* pointed out, the duty of a business premises owner to its invitees, born of a special relationship, is an exception to the general common law rule that no duty is owed to protect others from the criminal acts of third parties. *Nivens*, 133 Wn.2d at 200-01. While the special relationship is grounded in the voluntary economic transaction between business and customer and the business's general control over the premises, the duty of the business to the customer is not unlimited. Otherwise, "the business could become the guarantor of the invitee's safety from all third party conduct on the business premises. This is too expansive a duty." *Nivens*, 133 Wn.2d at 203. For example, the duty is especially "too expansive" in instances where it's suggested that private security personnel is per se required on premises to protect customers. As

*Nivens* pointed out, such a view violates the public policy that police protection is a governmental, rather than private, function, “unfairly shift[ing] the responsibility for policing, and the attendant costs, from government to the private sector.” *Nivens*, 133 Wn.2d at 205-06. As the Ninth Circuit noted, such burden-shifting dissuades private investment and economic development, *McKown*, 689 F.3d at 1094, sometimes in areas like urban cores that need it the most. *See Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 236, 802 P.2d 1360 (1991) (“... imposition of a duty could result in the departure of businesses from urban core areas – an undesirable result.”).

Expanding the business owner’s liability for third party crime to conduct that is conceivable based upon the “place or character” of a business, under comment f, risks undermining these public policies by imposing “too expansive a duty.” The better, fairer, and more logical public policy approach is to require a business to foresee and protect against only criminal conduct it could foresee because acts similar to it have occurred on the premises in the past.

McKown’s primary objection to the previous similar acts rule is the hyperbolic contention that it immunizes a premises owner for the first assault, rape, or shooting on the premises. *See, e.g., Br. of App.* at 18-19. But this overwrought argument begs the question on foreseeability.

Holding a business owner liable for another's criminal conduct it could not have reasonably foreseen, because nothing like it had ever happened before on the premises, would violate the public policy against making premises owners insurers of public safety. But that's precisely what the "place" or "character" of the business tests supported by *McKown* could entail, imposing liability for acts that are "so highly extraordinary or improbable as to be wholly beyond the range of expectability," *McLeod v. Grant Cy. Sch. Dist.* 128, 42 Wn.2d 316, 323, 255 P.2d 360 (1953), merely because a business may be located in an urban area, or be open to large numbers of people.<sup>3</sup> Violent crime, especially the kind committed by deranged sociopaths like the shooter here, is inherently unpredictable and could happen anywhere open to the public, from shopping malls and farmers markets to churches, schools, or libraries. The difficulty of predicting and deflecting such madness should be inherent in the assessment of foreseeability. Indeed, as the *Nivens* court recognized, "Washington courts have been reluctant to find criminal conduct foreseeable." *Nivens*, 133 Wn.2d at 205 n. 3 (citations omitted). Yet unlike

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<sup>3</sup> While the court was considering an argument related to a special duty, as opposed to foreseeability, an interesting passage in *Craig* shows that the trial court and court of appeals both rejected a form of the "place or character" test for imposing liability. The court specifically rejected the notion that a bank by its nature is a magnet for criminals, especially in an urban core: "The mere fact that respondent is a bank located in the heart of a city is not out of the ordinary. Indeed, Ms. Craig could have been similarly accosted nearly any place or time if somebody chose to break the law." *Craig*, 94 Wn. App. at 827.

the fact of previous similar acts on the premises, which logically and obviously makes the occurrence of criminal conduct on the premises reasonably foreseeable, the fact of a business's "place" or "character" tell the premises owner very little about how to discharge its duty to protect invitees.

**D. CALIFORNIA'S "BALANCING TEST" IS PROMISING BUT INFERIOR TO THE PRIOR SIMILAR ACTS RULE.**

A competing approach discussed with some degree of support by both McKown and Simon is the California "balancing test" that delimits the scope of a premises owner's duty to protecting against third party crime by balancing the foreseeability of the harm against the burden of the duty. *Br. of Appellee* at 39-41; *Reply Br. of App.* at 13-14; *see Ann M. v. Pacific Plaza Shopping Center*, 6 Cal.4th 666, 25 Cal.Rptr.2d 137, 863 P.2d 207 (1993), *disapproved on other grounds, Reid v. Google, Inc.*, 50 Cal.4th 512, 113 Cal.Rptr.3d 327, 235 P.3d 988 (2010). This balancing test could be promising, in that like the prior similar acts test, it also gives due regard to the competing policy goals of invitee protection while sparing businesses additional burden of exotic protective measures. Yet Simon persuasively points out, *Br. of Appellee* at 40-41, that the balancing test requires protective measures beyond the incidental only upon a showing of "heightened foreseeability," which according to the California

line of cases, must be established by prior similar incidents of violent crime on the landowner's premises or the premises of an immediately nearby similar business. *Ann M.*, 6. Cal. 4<sup>th</sup> at 679. Because of the similarity between the "heightened foreseeability" that any "burdensome" protective measures would require and the foreseeability inquiry developed post-*Nivens* by the Courts of Appeal, it makes more sense to simply adopt the prior similar acts rule. The existence of prior similar acts (or not) is relatively straightforward for a plaintiff or defendant to demonstrate to a court's satisfaction on summary judgment. But the multiple factors on either side of the balancing test are subjective, susceptible to variation from court to court, and likely to give rise to intricate questions of fact that obviate the gatekeeper role that foreseeability ought to play on summary judgment. The "balancing test" is superior to the "place" or "character" of the business inquiry of comment f to § 344, but given its potential for subjectivity and variability, is inferior to the prior similar acts test inherent in the "past experience" passage of comment f and deployed by the Courts of Appeal post-*Nivens*.

**E. APPROPRIATE CHARACTERISTICS OF PRIOR SIMILAR ACTS INCLUDE NUMEROSITY, PROXIMITY IN TIME AND LOCATION, AND RELATEDNESS OF THE CONDUCT.**

If the court approves the post-*Nivens* prior similar acts test, or fashions another framework that involves proof of prior similar acts, the third certified question asks which characteristics establish similarity. AWB urges the court to adopt the characteristics of (1) numerosity, (2) proximity in time, (3) proximity in location, and (4) related conduct. The boundary of each characteristic of past conduct should be established with the object of ensuring that the characteristic would put a reasonable business owner on notice of the likelihood of future similar conduct. For example, all of the cases discussing prior similar acts use the plural as if one prior act is insufficient to make a future act reasonably foreseeable. Similarly, a criminal act that may have happened on the premises many years ago, or in a different location on or around the premises, may be insufficient to trigger foreseeability. Finally, past conduct that is criminal in nature (say, graffiti vandalism) but unrelated to the present conduct (say, purse snatching) would not give rise to foreseeability. Beyond these general principles, AWB would note its agreement with the discussion of characteristics gleaned from recent case law in Simon's brief, *Br. of Appellees* at 53.

## VI. CONCLUSION

For the reasons set forth above, AWB urges the court to respond to the Ninth Circuit such that if the court follows *Nivens* and adopts Restatement (Second) of Torts § 344, including comments d and f, the court limit the foreseeability inquiry to what a business owner could have reasonably foreseen on the basis of past experience informed by previous similar acts on the premises. Such a rule is consistent with *Nivens* and the post-*Nivens* holdings of all three divisions of the Courts of Appeal, and best respects the competing public policies at stake when a business is sued for the criminal conduct of a third party on the premises. The court has a range of reasonable options for establishing the characteristics of similarity of past conduct, but should focus on the numerosity of acts, proximity in time and location, and how related the past acts are to the present conduct. In each inquiry, the court should remain grounded in the realization that, while the business-invitee relationship imposes a special duty of care, businesses cannot be made the insurers of public safety or take on the governmental role of providing police protection, for criminal conduct of others that by its very nature is unlawful, unpredictable and irrational.

Respectfully submitted this 22<sup>nd</sup> day of January, 2013.

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Kristopher I. Tefft, WSBA #29366

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