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SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT (Case No. 11-35461)
IN

BRENDAN MCKOWN, a single individual,

Appellant,

v.

SIMON PROPERTY GROUP, INC., et al.,

Appellees.

ANSWER OF APPELLANT BRENDAN MCKOWN
TO BRIEF OF AMICUS CURIAE BY THE ASSOCIATION OF
WASHINGTON BUSINESS

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I. ARGUMENT

A. Restatement (Second) of Torts § 344 Does Not Require Prior Similar Acts

AWB suggests a bright line test is needed to protect businesses from becoming the insurers of their invitees, but the two comments to section 344 that this Court adopted in *Nivens* to “describe the limit of the duty owed,” *Nivens v. 7-11 Hoagy’s Corner*, 133 Wn.2d 192, 205, 943 P.2d 286 (1997), repeatedly note that their factors are designed to address that concern.

First, comment d of section 344 is titled “Reasonable care,” and it starts by acknowledging AWB’s concern that a business owner “is not an insurer of the safety of such visitors against the acts of third persons...” Restatement (Second) of Torts § 344. But it does not stop there, as AWB encourages the Court to do. Instead, comment d goes on to state that a business owner owes its invitees “a duty to exercise reasonable care to give them protection” based on “the likelihood that third persons ... may conduct themselves in a manner which will endanger the safety of the visitor.” Restatement (Second) of Torts § 344.

Second, comment f of section 344 also starts by acknowledging AWB’s concern that a business owner “is not an insurer of the visitor’s safety,” but like comment d, it goes on to state an owner has a duty to protect his invitees from criminal acts that he knows are reasonably

foreseeable based on *either* “the place or character of his business” or “his past experience.” Restatement (Second) of Torts § 344.

McKown respectfully requests the Court decline AWB’s invitation to narrow the scope of a business owner’s duty under section 344 because the rule intentionally strikes the appropriate balance between protecting business owners and protecting their invitees.

B. *Nivens* Expanded *Christen v. Lee* and *Wilbert and Raider* Erroneously Relied on *Christen* Without Any Acknowledgment of *Nivens*

The bulk of AWB’s legal arguments rely on *Christen v. Lee*, 113 Wn.2d 479, 780 P.2d 1307 (1989), and a few lower appellate court cases, such as *Wilbert* and *Raider*, that it acknowledges “principally” relied on *Christen*. AWB’s brief at 7.

The problem with AWB’s reliance on *Christen*, decided in 1989, is that *Christen* was expanded eight years later by this Court’s decision in *Nivens*. As McKown noted previously, nowhere in *Christen* did this Court analyze whether a business owner has a duty to protect its invitees from dangers that are reasonably foreseeable based on the nature or character of the business, including the relevant industry standard. Instead, *Christen* was narrowly focused on the question of “[i]s a criminal assault a foreseeable result of furnishing intoxicating liquor to an obviously intoxicated person?” 113 Wn.2d at 487. In *Nivens*, on the other hand, this

Court addressed the much broader question of whether “a business owes a duty to its invitees to protect them from criminal acts by third persons on the business premises,” and after answering that question in the affirmative, it adopted Restatement (Second) of Torts § 344, including comments d and f, to “describe the limit of the duty owed.” 133 Wn.2d at 205.

It is worth noting that Justice Utter’s concurring opinion in *Christen* foresaw the concerns that led to this Court’s adoption of section 344 in *Nivens* and its implicit rejection of the bright line rule advanced by AWB. He observed that such a rule takes the question of reasonable foreseeability away from the jury, which conflicts with this Court’s long history of holding that foreseeability is almost always a question for the jury, particularly where reasonable minds could differ on the general field of danger that should have been anticipated by the defendant. *Id.* at 511-14. Justice Utter noted that no Washington case had ever required prior similar acts as the sole means of establishing reasonable foreseeability, a concept that would deprive a jury from deciding foreseeability based on societal norms and industry knowledge of the general field of danger, *id.* at 517-20, and he cautioned that such a bright line rule would erode the underpinnings of tort liability and the concept of requiring owners to act with reasonable care:

Prosser's guidance bears repeating: "As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution."

Id. at 520 (internal citation and quotations omitted).

Although Justice Utter was the concurrence in *Christen*, his concerns were addressed eight years later by the majority in *Nivens*. The Court should reject AWB's reliance on *Christen* and its progeny. To the extent *Christen* is inconsistent with *Nivens*, and to the extent its progeny failed to take *Nivens* into account, this Court should make clear that those cases are overruled.

C. The Facts of this Case Illustrate Why Prior Similar Acts are Not Required

This case illustrates why reasonably foreseeable harm under section 344 is not limited to prior similar acts and why a business owner must account for the nature and character of his business, including industry standards.

Although there had never been a prior active shooting in the Tacoma Mall, Simon knew it needed to do more to protect its invitees from the intentional acts of third parties, including a surveillance system and off-duty police officers. Moreover, even though there had never been a prior active shooting in the Tacoma Mall, Simon knew an attack on the mall might start in a vacant hallway and warned its managers and employees to keep a look-out for "anyone suspicious in the back

hallways” and to “notify mall security ... right away” because “[w]e all play an equal part in keeping the mall safe for our employees and customers.” And even though there had never been a prior active shooting in the Tacoma Mall, Simon knew that its invitees would rely upon the mall to safely evacuate them in the event of an emergency. That is why Simon had “Evacuation Procedures” that were supposed to be followed in the event of an emergency, but the procedures could not be followed because mall security was understaffed, they had no surveillance system to identify the source of the danger, and they had no ability to warn their invitees of the danger or tell them how to safely evacuate because the intercom system, which they had, did not work and was inaccessible to mall security.

If the Court narrowed section 344 to prevent a trial court from considering the nature and character of a business, including the relevant industry standard, a business like Simon can know that it needs to do more to protect its invitees from reasonably foreseeable harm, but disregard its knowledge simply because no prior similar act has occurred at this particular location. AWB suggests the Court needs to adopt a bright line test of prior similar acts in order to avoid business owners becoming the insurers of their invitees, but Simon’s knowledge in this case illustrates why such a rule would go too far and why section 344 is not so limited.

To hold otherwise would allow AWB and its constituents to reap the economic benefits of its invitees but ignore the special relationship that arises from accepting those benefits, a policy that this Court rejected in *Nivens*:

What we have impliedly recognized in earlier cases, we now explicitly hold: a special relationship exists between a business and an invitee because the invitee enters the business premises for the economic benefit of the business. As with physical hazards on the premises, the invitee entrusts himself or herself to the control of the business owner over the premises and to the conduct of others on the premises. Such a special relationship is consistent with general common law principles. We discern no reason not to extend the duty of business owners to invitees to keep their premises reasonably free of physically dangerous conditions in situations in which business invitees may be harmed by third persons.

133 Wn.2d at 202 .

II. CONCLUSION

McKown respectfully requests the Court decline AWB's invitation to narrow the scope of Restatement (Second) of Torts § 344. Instead, McKown respectfully requests the Court re-affirm that Washington follows section 344, including comments d and f, and hold that an invitee may establish reasonably foreseeable harm through evidence of (1) the owner's knowledge of prior similar acts, including acts at its other similar businesses, (2) the owner's knowledge that the harm felt within the general field of danger that was reasonably foreseeable, or (3) the nature and character of the business, including the relevant industry standard.

Dated this 8th day of February, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Bernadette Lovell, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed at Pfau Cochran Vertetis Amala PLLC, and that on today's date, I caused the foregoing Answer of Appellant Brendan McKown to Brief of Amicus Curiae by the Association of Washington Business to be served via regular mail and electronic mail by directing delivery to the following individuals:

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