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

Appellees.

BRIEF OF APPELLANT BRENDAN MCKOWN

PFAU COCHRAN VERTETIS AMALA PLLC
Darrell L. Cochran, WSBA No. 22851
Jason P. Amala, WSBA No. 37054
Attorneys for Appellant
701 Fifth Avenue, Suite 4730
Seattle, WA 98104
Phone: (206) 462-4339
Attorneys for Appellant Brendan McKown

 ORIGINAL

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I. INTRODUCTION

The fundamental issue presented in this appeal is how the finder of fact should determine whether a danger is reasonably foreseeable in the context of a business owner's duty to protect its invitees from foreseeable harm.

Appellant Brendan McKown worked at the Tacoma Mall in Tacoma, Washington. Respondent Simon Property Group, Inc., was an owner of the mall, and Simon contracted with respondent IPC International Corporation to provide security at the mall.

On November 20, 2005, a man dressed in a trench coat entered the Tacoma Mall with a guitar case. Under the trench coat and in the guitar case were two assault weapons and a large amount of ammunition. After walking around the mall and trying to draw attention to himself, he went into a back hallway and started loading his two assault weapons. Ten minutes later, he emerged from the hallway and began shooting. After eight minutes of shooting, during which he shot six people, the man shot McKown.

At the time he was shot, McKown had taken refuge in a mall store in order to help others who were confused and did not know where the shooter was or how to safely evacuate. McKown filed suit against Simon and IPC because he alleges they failed to protect him. More specifically, McKown alleges Simon and IPC were negligent because they failed to have reasonable safeguards in place to deter and detect an active shooter, and once the shooting began, they failed to take reasonable steps to protect him from that danger.

McKown's claims were filed in Pierce County Superior Court, but were removed to the District Court for the Western District of Washington based on diversity jurisdiction. After discovery, IPC moved for summary judgment, asserting its contract with Simon to provide mall

security did not create a duty to protect McKown from foreseeable harm. The District Court granted that motion.

Simon also moved for summary judgment. While Simon admitted it had a duty to protect McKown from harm, it asserted an active shooter was unforeseeable as a matter of law because this was the first active shooting inside the mall. The District Court initially denied that motion because it concluded foreseeability was a question for the jury. After Simon moved for reconsideration, the District Court reversed itself and concluded the shooting was not foreseeable as a matter of law. For that same reason, the District Court concluded Simon had no duty to protect McKown once the shooting started.

McKown timely appealed to the United States Court of Appeals for the Ninth Circuit. After briefing and oral argument, the Ninth Circuit certified the questions below to this Court for consideration.

II. ASSIGNMENTS OF ERROR

The Ninth Circuit certified the following questions to this Court:

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*, 943 P.2d 286 (Wash.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*, 950 P.2d 522 (Wash. Ct. App. 1998); *see also Fuentes v. Port of Seattle*, 82 P.3d 1175 (Wash. Ct. App.2004); *Craig v. Wash. Trust Bank*,

976 P.2d 126 (Wash. Ct. App. 1999) ; *Raider v. Greyhound Lines, Inc.*, 975 P.2d 518 (Wash. Ct. App. 1999); *cf. Nivens*, 943 P.2d 286; *Christen v. Lee*, 780 P.2d 1307 (Wash. 1989); *Passovoy v. Nordstrom, Inc.*, 758 P.2d 524 (Wash. 1988), review denied, 112 Wash.2d 1001 (1989); *Miller v. Staton*, 365 P.2d 333 (Wash. 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?

III. STATEMENT OF THE CASE

A. **Simon is an Owner of the Tacoma Mall and It Contracted with IPC to Provide Security at the Mall**

Simon is the owner of the Tacoma Mall in Tacoma, Washington. In September 1999, Simon and IPC entered into a “Security Services Contract” to provide security at the mall, and in January 2003, Simon and IPC renewed that contract.¹ The following year, they amended their contract to ensure Simon was an additional insured on IPC’s insurance policies.²

The contract between Simon and IPC required IPC to (1) respond to all alarm conditions and any other indications of suspicious activities, (2) use reasonable efforts to deter and detain persons who were attempting to gain unauthorized access to the mall, and (3) respond to and provide assistance in security-related situations at the mall, including criminal acts.³

The director of mall security testified his responsibility was “to provide a safe place for people to come and shop.”⁴

¹ Security Services Contract, Excerpt of Record, Vol. 2, at 41-47.

² *Id.* at 62-63, 74, 80.

³ *Id.* at 49.

⁴ Memorandum from Richard Erdie, Excerpt of Record, Vol. 2, at 82-83; Deposition of Richard Erdie, Excerpt of Record, Vol. 2, at 84.

B. Simon and IPC Knew the Tacoma Mall was a “Soft Target” and Knew They Needed to Protect Their Invitees From an Attack and During an Attack

The same security director who admitted his duty was “to provide a safe place for people to come and shop” also admitted he had “lots of discussions” with Simon and IPC about how the mall was a “soft target” that might be the subject of a terrorist attack.⁵ Simon and IPC were sufficiently concerned about the possibility of an attack that they adopted new policies and procedures, including evacuation points for mall employees and customers.⁶

Simon’s internal documents also acknowledged that “recent terrorist attacks” made it aware of the danger that a vacant hallway might be used to prepare for an assault on its invitees. For example, in 2003 and 2004, Simon’s mall manager warned his tenants 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.”⁷

C. McKown’s Experts Provided Unrebutted Testimony that an Attack on the Mall was Reasonably Foreseeable

McKown’s two security experts testified that an attack on the mall was reasonably foreseeable. This testimony was not rebutted.

According to McKown’s experts, an attack on the mall was reasonably foreseeable because of prior violent crimes in the immediate area,⁸ prior shootings at malls in the Puget

⁵ Deposition of Richard Erdie, Excerpt of Record, Vol. 2, at 87.

⁶ *Id.* at 87-89.

⁷ Letter from Heim to Tenants, dated March 19, 2003, Excerpt of Record, Vol. 2, at 90-91; Memo from Heim to Tenants, dated June 30, 2004, Excerpt of Record, Vol. 2, at 92-93.

⁸ Declaration of William Nesbitt, Excerpt of Record, Vol. 2, at 101-06 (¶¶ 22-24, 26, 28-31); Declaration of Robert Wuorenma, Excerpt of Record, Vol. 2, at 117-20 (¶¶ 22, 25, 27-28).

Sound area, prior shootings and gun-related crimes at the mall,⁹ and industry-wide knowledge of the risk of such an attack.¹⁰

Simon was well aware that the Tacoma Mall was a dangerous place because it was the location of six separate shootings between 1992 and 2005.¹¹ For example, in November 1992, a young man was shot several times in the mall parking lot. His friends drug him through the mall, leaving a trail of blood.¹² Two years later, up to thirteen shots were fired at the mall.¹³ The local newspaper reported that “[b]ullets flew inside the Tacoma Mall on Saturday, hitting within feet of scattering shoppers.”¹⁴

In October 1996, a gunman shot and wounded a man as he ran into the lobby of the mall movie theater.¹⁵ In response, the mall’s managers told the local paper they had implemented a “crisis-management plan” and intended to hold a meeting with the mall’s owners “to review security measures to determine if they can be improved.”¹⁶

In addition to shootings, McKown’s experts testified a shooting was reasonably foreseeable because there were a number of gun-related crimes at the mall before the shooting.¹⁷

⁹ “Mall Shootings in the South Sound,” Excerpt of Record, Vol. 2, at 126-27; Declaration of William Nesbitt, Excerpt of Record, Vol. 2, at 97, 104-06 (¶¶ 9.8, 28-30); Declaration of Robert Wuorenma, Excerpt of Record, Vol. 2, at 114, 120 (¶¶ 11.14, 27).

¹⁰ Declaration of William Nesbitt, Excerpt of Record, Vol. 2, at 100, 104-08 (¶¶ 19, 28-29, 33); Declaration of Robert Wuorenma, Excerpt of Record, Vol. 2, at 117-20 (¶¶ 20, 22-25).

¹¹ “Mall Shootings in the South Sound,” Excerpt of Record, Vol. 2, at 126-27.

¹² *Id.* at 127.

¹³ *Id.*

¹⁴ “2 Teenagers Arrested After Gunfire at Mall,” Excerpt of Record, Vol. 2, at 128.

¹⁵ “Mall Shootings in the South Sound,” Excerpt of Record, Vol. 2, at 126-27.

¹⁶ “Crisis Plan Controls Fallout from Crime, Businesses Say / Tacoma Mall Managers Acted Quickly After Shooting,” Excerpt of Record, Vol. 2, at 129-31.

¹⁷ Declaration of William Nesbitt, Excerpt of Record, Vol. 2, at 97, 104-06 (¶¶ 9.8, 28-30); Declaration of Robert Wuorenma, Excerpt of Record, Vol. 2, at 114, 120 (¶¶ 11.14, 27); Incident Report, dated November 26, 2001, Excerpt of Record, Vol. 2, at 132-35; Incident Report dated March 26, 2003, Excerpt of Record, Vol. 2, at 136-40.

For example, in February 2005, local police responded to a man who had a gun pointed at him in the mall parking lot.¹⁸

While the shooting in November 2005 was the first time someone had opened fire inside the mall, rather than just on mall property, McKown's experts testified the shooting was reasonably foreseeable, and for that reason, the industry standard of care required Simon to have an "active shooter" protocol to protect its employees and patrons when that day finally came:

Several recent events have put shopping malls across the country on collective notice to have plans in place to deal with violent attacks. One momentous event was the attack on America on [September] 11, 2011. After 9/11 the rules changed for everyone. In the immediate years following 9/11, enterprises that were open to large numbers of the public, such as shopping malls, were admonished by the [Department of Homeland Security] to increase security. ... This provided notice to the shopping mall industry that security programs would need to endeavor to reasonably prevent and contain this contingency. This would include an active shooter protocol, a plan in place for trained security personnel to follow to identify, deter, prevent, respond to, and contain a shooter. Clearly, no "active shooter protocol" was in place on Nov. 20, 2005. There was no active shooter evacuation protocol isolating the shooter. ... The need for such a plan made it foreseeable that a violent, criminal attack could occur. In addition, had a plan been in place either Mr. McKown could have been evacuated or secured or Mr. Maldonado neutralized before Mr. McKown was injured.¹⁹

D. Just Fifteen Days Before McKown was Shot, the Mall Security Director Warned Simon and IPC About the Need for More Security, Including Video Surveillance

On November 5, 2005, fifteen days before McKown was shot, the same mall security director who discussed the mall's status as a "soft target" with Simon and IPC wrote a memorandum to Simon and IPC where he explained the need for more security to make the mall a "safer place to shop."²⁰

He started his request by reminding his superiors of the mall's long history of violence and its reputation as a soft, easy target: "Our biggest problems stem from the perception that the

¹⁸ Incident Report, dated February 19, 2005, Excerpt of Record, Vol. 2, at 141-44.

¹⁹ Declaration of William Nesbitt, Excerpt of Record, Vol. 2, at 104-05 (¶ 28).

²⁰ Memorandum from Richard Erdie, Excerpt of Record, Vol. 2, at 82-83.

mall is a dangerous place. ... The media aggravate the problem by using the mall as a backdrop for any story that happened within a five-mile radius of the mall."²¹

In order to make the mall safer for its employees and patrons, he recommended surveillance cameras, moving security inside the mall, and a larger police presence.²² He knew something needed to be done because the mall's intercom was inaudible, none of their security guards were trained how to use it, and even if they did, they had no access to it on the weekends, including the Sunday at issue.²³ There were also no security cameras in the mall or in the parking lot; rather than provide any "eyes" to their four-person security staff, Simon and IPC were waiting for "facial recognition" technology.²⁴

E. Dressed in a Trench Coat and Carrying a Guitar Case Full of Ammunition, a Shooter Aggressively Roamed the Mall, Spent Ten Minutes Loading His Weapons in a Vacant Hallway, and then Spent Eight Minutes Shooting People, Stopping with McKown

On November 20, 2005, fifteen days after Simon and IPC were reminded that they needed to do more to protect their "soft target," a man named Dominick Maldonado approached the mall wearing a black trench coat and carrying a guitar case.²⁵ Underneath the trench coat and inside the guitar case were an assault rifle, a submachine gun, and a substantial amount of ammunition.²⁶

It is undisputed the Tacoma Mall does not have a musical venue, instrument shop, or any other store that would have made it normal for someone to be walking around with a guitar case,

²¹ *Id.*.

²² *Id.*

²³ Deposition of Richard Erdie, Excerpt of Record, Vol. 2, at 86-87.

²⁴ Deposition of Steve Heim, Excerpt of Record, Vol. 2, at 148.

²⁵ Statement of Christopher Winter, Excerpt of Record, Vol. 2, at 149.

²⁶ Tacoma Police Department Supplemental Report, Incident No. 053240558.76, Excerpt of Record, Vol. 2, at 152, 54.

let alone someone in a trench coat. Not surprisingly, a witness recalled how the shooter “looked strange and somewhat out of place.”²⁷ Another witness described how the shooter was walking through the mall “bumping into people, walking really fast ... like he was in a bad mood.”²⁸ Later, the shooter admitted he had gone to a bathroom near the food court and made a bunch of noise, “hoping someone would come and stop him.”²⁹

When nobody confronted him, the shooter moved into a vacant hallway.³⁰ For the next ten minutes he used the hallway to load his weapons.³¹ Although a witness noticed he stuck out as “unusual” because he was wearing a trench coat and smoking a cigarette as he loaded his weapons,³² Simon did not notice him because it still had no surveillance system.³³

After he finished loading his weapons, the man left the vacant hallway and began shooting.³⁴ For the next eight minutes he walked through the mall shooting people who did not know where the shots were coming from, who did not know how to evacuate, or who stayed in the mall to help sort out the confusion.³⁵

One of those people was Brendan McKown. McKown and other mall customers took refuge in one of the mall stores. He could hear the shooter discharging his weapon as the shooter marched up and down the mall, but he did not know where the man was or whether anyone was trying to stop him. Nobody told McKown or the other customers what was happening, nobody

²⁷ Statement of Christopher Winter, Excerpt of Record, Vol. 2, at 149.

²⁸ Statement of William Mitchell, Excerpt of Record, Vol. 2, at 156-57.

²⁹ Statement of Joseph Hudson, Excerpt of Record, Vol. 2, at 162.

³⁰ Statement of William Mitchell, Excerpt of Record, Vol. 2, at 156-57.

³¹ *Id.*; Statement of Joseph Hudson, Excerpt of Record, Vol. 2, at 162.

³² Statement of Shoshana Overocker, Excerpt of Record, Vol. 2, at 163-64.

³³ Deposition of Steve Heim, Excerpt of Record, Vol. 2, at 148.

³⁴ Statement of William Mitchell, Excerpt of Record, Vol. 2, at 156-57.

³⁵ Defendants’ Motion for Summary Judgment Dismissal, Excerpt of Record, Vol. 2, at 165.

warned them where the shooter was located, nobody instructed them how to evacuate, and nobody told them whether the police were there or whether the police were on their way. Surrounded by chaos, McKown hoped he could at least protect himself and others with his concealed weapon.³⁶

McKown eventually thought the coast was clear. He holstered his weapon so he could survey the area outside the store without being shot by the police that he assumed were in the mall and had the situation under control. Unfortunately, the shooter was still active. When McKown started to leave, he came face-to-face with the shooter and became his last victim.³⁷

F. McKown's Experts Provided Unrebutted Testimony that Simon Should Have Had Policies in Place to Respond to the Shooting and Protect McKown and Others Because the Shooting was Reasonably Foreseeable

While McKown's experts testified the shooting was reasonably foreseeable and Simon could have done more to *prevent* it, they also testified that, at the very least, it was foreseeable that Simon needed to have policies and procedures in place to protect its customers once the shooting *started*.

The only evidence before the District Court was McKown's expert testimony that it was reasonably foreseeable that he and others would suffer harm when Simon had no ability to detect and respond to the imminent harm posed by the shooter while he roamed the mall in a trench coat with a guitar case full of ammunition; during the ten minutes he openly loaded his weapons in a vacant hallway; when he emerged with large guns under his trench coat and started shooting;

³⁶ Declaration of Brendan McKown, Excerpt of Record, Vol. 2, at 167-69 (¶¶ 2-3).

³⁷ *Id.* at 169 (¶ 4).

or, at the very least, during the eight minutes after he started shooting and before he shot McKown.³⁸

Because the shooting was reasonably foreseeable, McKown's security experts explained how Simon breached the relevant standard of care after the shooting started by having (1) no ability to monitor the imminent danger through a surveillance system, (2) no ability to warn McKown of the imminent danger and evacuate him through an intercom system, (3) no off-duty police officers to neutralize the danger, and (4) no active shooter protocol to warn and evacuate McKown during the shooting.³⁹ Put another way, the experts testified that it was reasonably foreseeable that McKown and others would suffer harm because the mall did not have a surveillance system, did not have an intercom system, did not have off-duty police officers who could neutralize the danger, and did not have an active shooter protocol in place to warn and evacuate its invitees.⁴⁰

One of McKown's experts explained why it was reasonably foreseeable that McKown and others would suffer harm because of Simon's failure to implement these systems:

I have concluded that Simon Property Group and IPC failed to have an in-depth emergency preparedness plan as required by the standard of care in the industry, particularly given the "soft target" presented by the Tacoma Mall after September 11, 2001. This plan should have included prevention of and reaction to a violent, criminal attack or hostage-situation, such as Mr. Maldonado's. Mr. Erdie admitted that the defendants did not have such a plan. ... Security experts, including local and national police agencies, recommend that institutions like the Tacoma Mall have an emergency preparedness plan in place. This is because the large number of violent attacks at these institutions, including shootings in malls, has made security aware of the danger. The defendants failed to have any such plan in place which was a breach of the standard of

³⁸ Declaration of Robert Wuorenma, Excerpt of Record, Vol. 2, at 171-72 (¶ 4); Deposition of Robert Wuorenma, Excerpt of Record, Vol. 2, at 175; Declaration of Robert Wuorenma, Excerpt of Record, Vol. 2, at 120-24 (¶¶ 28-32).

³⁹ Declaration of William Nesbitt, Excerpt of Record, Vol. 2, at 100, 104-08 (¶¶ 19, 28-29, 32-33); Declaration of Robert Wuorenma, Excerpt of Record, Vol. 2, at 118-24 (¶¶ 22, 24-25, 28-32).

⁴⁰ *Id.*

care in the industry. As a result, it is my opinion that the defendants were unable to warn their invitees about Maldonado and how to quickly evacuate the building.

... It is my opinion that had Simon Property Group or IPC used a CCTV system, coupled with a public address system, they could have directed employees and customers, like Mr. McKown, away from Mr. Maldonado where they would not have been injured. Likewise, they could have directed the same to evacuation routes so that nobody was left as easy targets for Maldonado. ...

I have concluded that Simon Property Group and IPC failed to have an internal emergency communication system, such as a public address system, throughout the mall, as required by the standard of care in the industry. In the event of a major emergency, such as a violent, criminal attack like Mr. Maldonado's, an emergency communication system could have warned employees and shoppers of the danger and how to best exit stores and common areas and where to seek shelter and medical assistance. According to Mr. Erdie in his deposition, the Mall had a general intercom system but it was not very loud, inaccessible to security on the weekend, and IPC was not trained in its use. Having a communication system is a major component of many emergency plans to direct employees and shoppers on how to best exit; it is used to identify dangerous areas so people can avoid them. The public address system should be used in conjunction with a visual system, such as CCTV (see above). This dual system may significantly reduce loss of life or injury because responders can be directed to the most critical areas. On Nov. 20, 2005 the Tacoma Mall did not possess a true public address system; IPC did not even use the limited intercom system that the Tacoma Mall did have. No direction was provided to employees and shoppers on how to best exit the Mall. It is my opinion that had Simon Property Group or IPC used a public address system, coupled with a CCTV system, they could have directed employees and customers, like Mr. McKown, away from Mr. Maldonado where they would not have been injured.⁴¹

G. One of Simon's Security Guards Knew the Shooter and Could Have Recognized Him, But the Mall was Not Equipped with a Surveillance System

At least one of Simon's security guards could have spotted the shooter and prevented the attack, but the mall did not have a surveillance system.

Chantel Bursott, who was on duty in the security office at the time of the shooting, knew the shooter was a "deranged psychopath" with a propensity for violence.⁴² She knew as much because the man had stalked her just days before the shooting, going so far as to stand outside of

⁴¹ Declaration of Robert Wuorenma, Excerpt of Record, Vol. 2, at 119-22 (¶¶ 24, 28, and 29).

⁴² Deposition of Chantel Bursott, Excerpt of Record, Vol. 2, at 187; Declaration of Chantel Bursott, Excerpt of Record, Vol. 2, at 191-93.

her home and stare angrily at her mother and child as if he wanted to kill them.⁴³ He was also the same “deranged psychopath” who had smashed her between her front door and the adjoining wall in front of her daughter.⁴⁴ According to Bursott, she would have recognized the man and would have warned others, but she never had a chance to do so because the mall did not have a surveillance system.⁴⁵

H. Simon Had Evacuation Procedures, But No Way to Implement Them

Although Simon lacked an active shooter protocol, it did have “Evacuation Procedures.” When it came time to evacuate during an emergency, the mall was supposed to “make an announcement over the PA system to customers in the mall” and to have its security team “insure[] that everyone vacates the building as safely and quickly as possible” and “inform each tenant to close their gates, security their store and leave immediately.”⁴⁶

Those procedures are evidence that Simon knew it was reasonably foreseeable that its invitees would suffer harm if the mall did not help them evacuate in an emergency. But when the shooting began and its invitees needed to be safely evacuated, nobody could help because the mall’s intercom system was inaudible, nobody knew how to use it, and even if they did, it was inaccessible to mall security on the weekends.⁴⁷ Even if the intercom system was working, the mall could not have helped McKown and the other invitees “vacate the building as safely and quickly as possible” because it was flying blind – the mall had no surveillance system that would

⁴³ Declaration of Chantel Bursott, Excerpt of Record, Vol. 2, at 191-93.

⁴⁴ *Id.* at 192-93.

⁴⁵ *Id.*

⁴⁶ *Id.* at 194.

⁴⁷ Deposition of Richard Erdie, Excerpt of Record, Vol. 2, at 86-87.

have allowed it to identify the location of the shooter and steer McKown and others away from him.⁴⁸

I. Simon Admits It Had a Duty to Protect McKown, But Claims an “Active Shooter” Was Not Foreseeable as a Matter of Law

Simon never disputed the testimony of McKown’s security experts that it was common knowledge in the industry that a mall shooting was reasonably foreseeable, or that the industry standard required the mall to have a surveillance system and an intercom system in order to help its invitees safely evacuate during such emergency. Simon even admitted that the Department of Homeland Security has long urged malls to have an “active shooter protocol” for those very reasons.⁴⁹

Instead, Simon argued it has no duty to do anything to protect its invitees from a crime until after the first time the crime is committed at a particular mall. Regardless of industry knowledge, regardless of industry standards, regardless of what has happened at other malls across the country, regardless of what has happened at other malls in Washington, regardless of what has happened at other malls in Tacoma, and regardless of what has happened at other malls it owns, Simon argued that it had no duty to take any steps to protect its invitees until after a “similar act has occurred on the premises.” In this case, even though it conceded the Department of Homeland Security recommended it have an “active shooter protocol” to protect its invitees from an active shooter, Simon argued that it did not have a duty to adopt that protocol until *after* the first time an active shooter killed people in the Tacoma Mall.⁵⁰

⁴⁸ Deposition of Steve Heim, Excerpt of Record, Vol. 2, at 148.

⁴⁹ Defendant Simon’s Motion for Reconsideration of Denial of Summary Judgment, Excerpt of Record, Vol. 2, at 199 n. 3.

⁵⁰ See *generally id.* at 195-206.

The District Court agreed: "... McKown has failed to submit competent evidence of random acts of indiscriminate shootings on Simon's premises. Therefore, the Court should grant Simon's motion for summary judgment on McKown's negligence claims."⁵¹

IV. ARGUMENT

A. Simon and IPC Owed McKown Two Duties: a Duty to Observe and Protect, and a Duty to Intervene and Protect

Before addressing the three questions certified by the Ninth Circuit, it is important to give those questions context by pointing-out that business owners have two separate duties to their invitees: (1) a duty to observe and protect (e.g., someone *might* start shooting inside the mall), and (2) a duty to intervene and protect (e.g., someone *has* started shooting inside the mall). The distinction between these two duties was explained in *Nivens v. 7-11 Hoagy's Corner*, 83 Wn. App. 33, 45-46, 920 P.2d 241 (1996), *aff'd* by 133 Wn.2d 192, 202-03, 943 P.2d 286 (1997):

Similarly, § 344 reflects a duty to observe and a duty to intervene. The duty to observe is a duty of reasonable care to observe activity on the premises. The duty to intervene is a duty of reasonable care to prevent or control such activity as is unreasonably hazardous to others, by ejection, restraint, or other appropriate means. The duty to observe may exist whenever the premises are open to the public, but the duty to intervene arises only when a reasonable person in the same circumstances as the defendant would know, to use the words of § 344, that the accidental, negligent, or intentionally harmful acts of third persons "are being done or are likely to be done." In other words, the duty to intervene arises only when a reasonable person acting under the same circumstances as the defendant would perceive that unreasonable conduct by a third person is impending or occurring, and thus that there is an unreasonable risk of harm to invitees.

This distinction is important because McKown alleges Simon and IPC breached both the duty to observe and the duty to intervene, but the District Court dismissed both claims because of its erroneous conclusion that the shooting was unforeseeable as a matter of law, even after the shooting started.

⁵¹ Order, Excerpts of Record, Vol. 1, at 7.

B. Washington Has Adopted Restatement (Second) of Torts § 344, Including Comments D and F, as Controlling Law

The answer to the Ninth Circuit's first question is "yes, Washington adopts Restatement (Second) of Torts § 344, including comments d and f, as controlling law," because in *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 203-04, 943 P.2d 286 (1997), this Court adopted Restatement (Second) of Torts § 344, including comments d and f:

We believe the Restatement (Second) of Torts § 344 is consistent with and a natural extension of Washington law and properly delimits the duty of the business to an invitee. We expressly adopt it for a business owner and business invitees. Comments d and f to that section describe the limit of the duty owed: ...

In *Nivens*, plaintiff Nivens sued a 7-11 after he was attacked by loitering teenagers in its parking lot. Although teenagers often loitered, and occasionally fought with each other, they had never attacked a customer. *Id.* at 194-96. The 7-11 moved for summary judgment, arguing the attack was unforeseeable because Nivens presented no evidence of a prior similar attack on the premises. *Id.* at 196. The trial court denied the motion because it concluded whether the attack was foreseeable was a question for the jury. *Id.*

Just before trial, the 7-11 successfully excluded Nivens' expert testimony that the 7-11 should have hired security guards and failed to do so. *Id.* at 196. Rather than proceed to trial on any other ground, Nivens "told the court he did not wish to proceed to trial because granting the motion in limine amounted to summary judgment for [the 7-11]." As this Court pointedly noted in its subsequent decision, Nivens refused to raise any duty issue other than whether all businesses have a duty to hire security: "[t]he trial court actually attempted to persuade Nivens that just because the courts have not imposed an obligation to hire security guards does not mean [the 7-11] did not breach some other duty to Nivens, stating, 'I mean, obviously there are a number of other ways to deal with situations.'" *Id.* at 196.

Instead of arguing the 7-11 breached a duty other than to hire security guards, Nivens told the trial court that his claim was “based solely on the failure of the store to hire security personnel to deal with the loitering ... before the time that this assault occurred.” *Id.* at 196-97. As noted by the Court of Appeals, the trial court then dismissed Nivens’ claims because it concluded “there is not an affirmative duty for a merchant business to supply security personnel in the situation we are talking about here.” *Nivens v. 7-11 Hoagy’s Corner*, 83 Wn. App. 33, 40, 920 P.2d 241 (1996). The Court of Appeals upheld the trial court’s decision because there was “a dearth of evidence to support a finding that a reasonable person would have foreseen violence of the general type that occurred here, and neither the evidence nor inferences therefrom is sufficient to bring the store within the obligated class.” *Nivens*, 133 Wn.2d at 197.

This Court then granted review to answer two questions:

1. Does a business owe invitees a duty to prevent criminal activity by third persons on the premises that results in harm to invitees?
2. Does a business owe invitees a duty to provide on-premises security personnel to prevent criminal activity?

Id. at 194.

Simon has argued that the eight pages of analysis this Court provided to answer those two questions “is dictum and need not be followed.”⁵² But Simon’s argument ignores the fact that this Court was quite clearly using *Nivens* as an opportunity to explain *why* a business has a duty to protect its invitees and *how* to define the scope of that duty. *Id.* at 199-207.⁵³

After canvassing prior cases, the Court first explained why a business has a duty to protect its invitees from foreseeable harm:

⁵² Brief of Appellees to Ninth Circuit, at 10.

⁵³ When it moved for summary judgment, Simon did not dispute that McKown was its invitee. Defendants’ Motion for Summary Judgment Dismissal, Excerpts of Record, Vol. 2, at 166 n. 6.

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.

Id. at 202-03 (emphasis added).

The Court then addressed how to define the scope of a business owner's duty to its invitees. It is unclear why Simon has argued the Court's analysis is dictum when the Court made clear it was intended to guide future courts in deciding the scope of a business's duty. Under the title "The Nature of the Duty," the Court explained it was "turn[ing] next to the affirmative duty that is owed by the business to the invitee" in order to clearly articulate the scope of the duty:

In the absence of a clear articulation of the business's duty, 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.

Id. at 203.

Based on that public policy concern, Simon has argued that a business should never have to protect its invitees from a criminal act until one of its invitees is injured from the exact same criminal act on the same premises. But in *Nivens*, this Court specifically rejected that argument. Instead, the Court recognized that although it was important to protect businesses, it was also important to protect the invitees who entrust themselves to the control of the owner. For that reason, the Court adopted Restatement (Second) of Torts § 344, including comments d and f:

We believe the Restatement (Second) of Torts § 344 is consistent with and a natural extension of Washington law and properly delimits the duty of the business to an invitee. We expressly adopt it for a business owner and business invitees. Comments d and f to that section describe the limit of the duty owed: ...

Id. at 203-04.

The Court then quoted comments d and f in *their entirety*. *Id.* at 204. By doing so, this Court rather clearly answered “yes” to the Ninth Circuit’s question as to whether Washington has adopted Restatement (Second) of Torts § 344, including comments d and f, as controlling law.

Simon’s suggestion to the Ninth Circuit that this part of the opinion was “not necessary to the decision” so it “need not be followed,”⁵⁴ directly contradicts with this Court’s stated purpose of clearly articulating the scope of a Washington business owner’s duty to its invitees. The fact that the Court did “not undertake an analysis of the foreseeability of Nivens’ injury here because Nivens did not base his case on a general duty of a business to an invitee,” *Id.* at 205, does not somehow invalidate the Court’s decision, make its eight-page analysis dictum, or, respectfully, give lower courts authority to narrow the scope of the duty that was clearly articulated by this Court.

To the contrary, the Court ended *Nivens* by repeating its holding that businesses, like Simon, have a duty to protect their invitees from reasonably foreseeable harm:

A special relationship exists between a business and its invitees so that the business has a duty to take reasonable steps to prevent harm to its invitees from the acts of third parties on the premises, if such acts involve imminent criminal conduct or reasonably foreseeable criminal behavior.

Id. at 209.

In the event the Court initially concludes that *Nivens* did not adopt Restatement (Second) of Torts § 344, including comments d and f, McKown respectfully requests the Court do so for the same public policy reasons that it discussed in *Nivens*. Washington law should encourage business owners like Simon to take reasonable steps to protect their invitees from foreseeable harm, not cause them to ignore known dangers because they are immune from the first assault,

⁵⁴ Brief of Appellees to the Ninth Circuit, at 19-20.

the first rape, or the first shooting. A jury can then decide whether the business took reasonable steps to protect its invitees from foreseeable harm.

The Court's answer to the first certified question should be "yes, Washington follows Restatement (Second) of Torts § 344, including comments d and f, as controlling law."

C. A Plaintiff Can Establish Reasonably Foreseeable Harm in One of Three Ways, as Acknowledged in *Nivens* and in the Restatement (Second) of Torts § 344

The answer to the Ninth Circuit's second question is "no, a plaintiff is not required to show previous acts of similar violence on the premises, but instead may establish reasonably foreseeable harm through other evidence" because comment f to Restatement (Second) of Torts § 344 "properly delimits the duty of the business to an invitee." *Nivens*, 133 Wn.2d at 204.

According to *Nivens* and comment f, a plaintiff can show harm is reasonably foreseeable (1) when the owner "knows ... that the acts of the third person are occurring, or are about to occur," (2) when the owner knows or should know "from past experience" that there is a likelihood of criminal conduct "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," or (3) when "the place or character of his business ... is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time." *Id.* at 204-05 (quoting § 344, cmt. f).

Those three conditions are designed to ensure that business owners are not unfairly made "an insurer of the visitor's safety," but *any* of those three conditions can be met in order for the criminal conduct of a third party to be reasonably foreseeable. *Id.* This is why the answer to the second certified question is "no."

The Ninth Circuit likely certified this question to this Court because Simon has repeatedly argued that four post-*Nivens* lower appellate court cases hold every plaintiff in every Brief of Appellant

case must show “prior similar acts on the premises” in order for harm to be reasonably foreseeable. The problem with Simon’s argument, however, is that three of those four cases do not even mention Restatement (Second) of Torts § 344, let alone comments d and f, or this Court’s analysis in *Nivens*. See e.g. *Wilbert v. Metropolitan Park*, 90 Wn. App. 304, 950 P.2d 522 (1998); *Raider v. Greyhound Lines*, 94 Wn. App. 816, 975 P.2d 518 (1999); *Fuentes v. Port of Seattle*, 119 Wn. App. 864, 82 P.3d 1175 (2003).

Moreover, none of those cases involved a “soft target” like the Tacoma Mall whose “place or character” made the harm reasonably foreseeable, and none of those cases involved a soft target’s duty in an era where domestic terrorism and “active shooters” are reasonably foreseeable dangers for a shopping mall, a point Simon conceded when it relied on the Department of Homeland Security’s post-9/11 procedures for responding to an active shooter.⁵⁵ Cf. *Wilbert*, 90 Wn. App. at 306 (business owner who rented space to weddings and dances); *Raider*, 94 Wn. App. at 817-18 (plaintiff shot at bus terminal in 1992 because of race); *Fuentes v. Port of Seattle*, 119 Wn. App. at 866 (plaintiff’s car was hijacked by car prowler fleeing police while she was in the waiting lane at the airport); *Craig*, 94 Wn. App. at 822-23 (bank janitor assaulted in alley while taking out the trash).

Perhaps more importantly, a careful reading of those cases shows that the “prior similar acts on the premises” requirement has no foundation in Washington law. The case most frequently relied upon by Simon, *Wilbert*, correctly noted that *Nivens* requires a business owner to protect its invitees from “harm that is reasonably foreseeable,” but then incorrectly observed that “Washington cases analyzing foreseeability have focused upon the history of violence known to the defendant. Where no evidence is presented that the defendant knew of the

⁵⁵ Defendant Simon’s Motion for Reconsideration of Denial of Summary Judgment, Excerpts of Record, Vol. 2, at 199 n. 3.

dangerous propensities of the individual responsible for the crime, and there is no history of such crimes occurring on the premises, the courts have held the criminal conduct unforeseeable as a matter of law." 90 Wn. App. at 309; *cf. also Raider*, 94 Wn. App. at 819 (relying on *Wilbert*); *Fuentes*, 119 Wn. App. at 870 (erroneously concluding *Nivens* requires "knowledge from past experience that there is a likelihood of conduct which poses a danger to the safety of patrons").

The problem with *Wilbert* and the other two lower court decisions is that, as explained above, *Nivens* did not give business owners immunity for failing to protect their invitees from reasonably foreseeable harms, and it did not condition that duty on knowledge of a "prior similar act on the premises." Instead, this Court (and the Restatement) hold a business owner liable for harms that are reasonably foreseeable based on "the place or character of his business, *or* his past experience." *Nivens*, 133 Wn.2d at 204-05 (emphasis added). In limiting the duty to foreseeable harms based on prior similar acts on the premises, those lower court decisions (and the District Court in this case) deviated from this Court's holding that a business owner also has a duty to protect its invitees from foreseeable harms based on the "place or character of his business."

Moreover, *Wilbert* was simply wrong when it relied on the generalization that "Washington cases analyzing foreseeability have focused upon the history of violence known to the defendant" to create the "prior similar acts on the premises test" because none of the cases it cited involved evidence that the business owner owed its invitees a duty based on the "place or character of his business." 90 Wn. App. at 308-09 (citing cases that discussed whether a business owner knew of a particular individual's dangerous propensities rather than common knowledge in the industry and industry standards).

Unlike the first three cases primarily relied upon by Simon, the fourth case, *Craig v. Washington Trust Bank*, 94 Wn. App. 820, 976 P.2d 126 (1999), observed that *Nivens* made Restatement (Second) of Torts § 344 the law in Washington, including comments d and f:

The *Nivens* court adopted Restatement (Second) of Torts § 344 (1965) and established a duty of reasonable care delimited by comments (d) and (f) to that section.

In *Craig*, the appellate court applied “the rules and principles derived from *Nivens*” and dismissed the case because there was no evidence of prior similar acts on the premises *and* no evidence suggesting the defendant knew or should have known of “a likelihood of criminal conduct on the part of third persons in general likely to endanger [the plaintiff].” *Id.* at 828. In other words, *Craig* not only looked for evidence of “prior similar acts on the premises,” but it also looked for evidence that the defendant otherwise should have reasonably foreseen the danger.

While prior similar acts may be sufficient to create a duty based on the owner’s “past experience,” they are not required to create a duty based on the “place or character of his business.” As noted above, this distinction makes sense: (1) a business owner has a duty to implement basic safeguards based on dangers associated with the “place or character of his business,” and (2) a business owner has a duty to implement additional safeguards based on other dangers he knows of because of “his past experience” at the particular premises.

If “prior similar acts on the premises” was the *only* way to create the duty, this Court would have replaced “reasonably foreseeable criminal behavior” with “criminal behavior that has occurred at least once in the past on the premises.” Simon’s argument that “prior similar acts on the premises” is the only way to establish reasonably foreseeable conduct would not only require this Court to re-write and narrow the holding

of *Nivens*, but it would require this Court to re-write and narrow the public policy announced in *Nivens*.

Nivens:

... a special relationship exists between a business and an invitee because the invitee enters the business premises for the economic benefit of the business. ... 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 ...

Simon's re-writing of *Nivens*:

... a special relationship exists between a business and an invitee because the invitee enters the business premises for the economic benefit of the business. ... the invitee [**only**] entrusts himself or herself to the control of the business owner over the premises [**as to criminal acts that have previously occurred on the premises**] and to the conduct of others on the premises [**as to criminal acts that they or others have previously committed on the premises, but the invitee does not trust the business owner will protect him from dangers the owner is aware of based on the owner's prior experience, industry standards, or the nature and character of his business.**]

Even if *Nivens* is dictum, which it is not, the foregoing illustrates why the Court should reject Simon's strained effort to impose a bright-line "prior similar acts on the premises test." There is simply no way to harmonize such a bright-line test and the concept of "reasonably foreseeable." Nowhere did this Court hold that a business owner has immunity for the first assault, the first rape, or the first shooting victim on the premises, and nowhere did the Court limit the scope of the duty based on "the place or character of his business" as opposed to his "past experience." Instead, the Court made clear that "a business owes a duty to its invitees to protect them from imminent criminal harm and reasonably foreseeable criminal conduct by third persons" and "must take reasonable steps to prevent such harm in order to satisfy the duty." *Id.* at 205. And while the Court acknowledged the duty is limited by what is foreseeable, it reaffirmed that "[f]oreseeability is ordinarily a fact question." *Id.*

There is a good reason this Court and § 344 utilize a “reasonably foreseeable” approach rather than giving business owners immunity for the first assault, the first rape, and the first shooting. If Simon is correct, and it had no duty until after the first “random act[] of indiscriminate shooting on Simon’s premises,”⁵⁶ no amount of “off premises” knowledge could ever force Simon or other business owners to take reasonable steps to protect their invitees from danger. Duty would no longer depend on what is reasonably foreseeable, but on what has happened in the past *at a particular business*.

For example, bars, concert venues, sports stadiums, airports, airlines, and any business that currently has basic security in place to protect their invitees from harm they believe is foreseeable could do away with those systems so long as the harm has never occurred at their specific address (even if it had occurred next door, the next block over, or the next neighborhood over). Or more to the point, even if Simon was aware of shootings at dozens of other malls, or even at its *own* malls, it would have no obligation to do anything to protect its invitees from that danger. Just like Simon argued to the District Court, Simon and others businesses would have no obligation to acknowledge or abide by industry standards or regulations because the common knowledge and practices of an industry would be irrelevant. A business could ignore industry standards, admit it was “only a matter of time,” yet escape liability for doing so.

In fact, that is what Simon and IPC argued in this case. Even though their security director told Simon and IPC that the mall needed a surveillance system to make it a “safer place to shop,” even though Simon and IPC knew the mall was a “soft target,” even though Simon and IPC created evacuation points for the mall because they knew it might be attacked, and even though their Evacuation Procedures required them to use a (non-existent) intercom system to

⁵⁶ Order, Excerpts of Record, Vol. 1, at 7.

evacuate their invitees in order to protect them during an emergency, the District Court concluded Simon was not required to do *anything* to protect McKown because this was the first time a shooter had opened fire inside this particular mall.

The problem with the District Court's decision to take this case away from the jury is illustrated by Simon's underlying argument that it "had no duty to have a surveillance system to monitor such an attacker, no duty to instruct plaintiff through an intercom system to evacuate in the event of such an attack, and no duty to hire armed police officers to kill the madman."⁵⁷ Simon successfully made these arguments even though the evidence shows Simon knew it needed a surveillance system, knew it needed to safely evacuate McKown through an intercom system, and knew it needed to hire off-duty officers to protect its invitees. A jury should be allowed to decide if Simon's decisions were reasonable in light of what the jury concludes was the foreseeable danger.

Finally, because McKown alleges Simon breached its duty to intervene and protect him *after* the shooting started, it is important to recognize the third way to establish reasonably foreseeable harm: evidence that the owner "knows ... that the acts of the third person are occurring, or are about to occur." *Nivens*, 133 Wn.2d at 204-05 (quoting § 344, cmt. f).

The District Court's conclusion that Simon had no duty to intervene and protect McKown once the shooting started perhaps most vividly illustrates why a plaintiff is not required to show prior similar acts. According to the District Court, Simon had no such duty because "[t]he business owner must be found to 'reasonably anticipate careless or criminal conduct' before either the 'duty to take precautions against it' or the duty 'to provide a reasonably sufficient

⁵⁷ Defendant's Reply in Support of Motion for Reconsideration of Denial of Summary Judgment, Excerpts of Record, Vol. 2, at 207-08.

number of servants to afford a reasonable protection' arises."⁵⁸ With all due respect, that conclusion cannot be the law because it means a business owner has no duty to protect its invitees even *after* the owner learns that its invitees need help. But that duty to "intervene" is codified in Restatement (Second) of Torts § 344, as recognized by the Court of Appeals:

Similarly, § 344 reflects a duty to observe and a duty to intervene. The duty to observe is a duty of reasonable care to observe activity on the premises. *The duty to intervene is a duty of reasonable care to prevent or control such activity as is unreasonably hazardous to others, by ejection, restraint, or other appropriate means.* The duty to observe may exist whenever the premises are open to the public, but the duty to intervene arises only when a reasonable person in the same circumstances as the defendant would know, to use the words of § 344, that the accidental, negligent, or intentionally harmful acts of third persons "*are being done or are likely to be done.*" In other words, the duty to intervene arises only when a reasonable person acting under the same circumstances as the defendant would perceive that unreasonable conduct by a third person is impending *or occurring*, and thus that there is an unreasonable risk of harm to invitees.

Nivens, 83 Wn. App. 33, 45-46, 920 P.2d 241 (1996) (emphasis added), *aff'd* by 133 Wn.2d 192, 943 P.2d 286 (1997); *see e.g. Passovoy v. Nordstrom*, 52 Wn. App. 166, 172-73, 758 P.2d 524 (1988) (store had a duty to warn its invitees in time for them to protect themselves from a fleeing shoplifting suspect), *review denied*, 112 Wn.2d 1001 (1989).

Once the shooting started, Simon had a duty to use reasonable care "to prevent or control" the shooting "by ejection, restraint, or other appropriate means." *Nivens*, 83 Wn. App. at 45. And as acknowledged by *Passovoy*, a reasonable jury could conclude that "other appropriate means" included taking reasonable steps to warn McKown of the impending danger so he could protect himself or evacuate. 52 Wn. App. at 172-73.

In concluding Simon had no duty to intervene and protect McKown, the District Court ignored expert testimony that it was reasonably foreseeable that McKown would be injured because Simon had no way to detect and protect McKown from the shooter while he roamed the

⁵⁸ Order, Excerpt of Record, Vol. 1, at 8.

mall with a guitar case full of guns and ammunition, while he spent ten minutes openly loading his weapons in a mall hallway, or during the eight minutes that he roamed the mall shooting people. Instead, the District Court concluded the only evidence that could be used to establish reasonably foreseeable harm was a prior shooting inside the mall, and until after the first such shooting happened, Simon had no duty to protect its invitees from any on-going danger in the mall. Neither Washington law nor public policy supports such a bright line rule, particularly where comment f states that owners have “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*.”

In response to the Ninth Circuit’s second question, the Court should answer “no, a plaintiff is not required to show previous acts of similar violence on the premises, but may instead establish harm is reasonably foreseeable through evidence that (1) the owner “knows ... that the acts of the third person are occurring, or are about to occur,” (2) the owner knows or should know “from past experience” that there is a likelihood of criminal conduct “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,” or (3) the owner knows or should know that “the place or character of his business ... is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time.” *Id.* at 204-05 (quoting Restatement (Second) of Torts § 344 (1965), cmt. f).

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D. When a Plaintiff Relies Solely on Proof of Previous Acts of Similar Violence to Show Reasonably Foreseeable Harm, the Acts Must Be of Such Similar Nature that a Jury Could Conclude the Business Owner Should Have Reasonably Anticipated the General Danger to Its Invitees

The answer to the Ninth Circuit's third question is "if a plaintiff relies solely on proof of an owner's past experience to show reasonably foreseeable harm, the acts must be sufficiently similar that a jury could conclude the business owner should have reasonably anticipated the general danger to its invitees." Restatement (Second) of Torts § 344 (1965), cmt. f.

In addressing this third certified question, the Court should exercise its authority to slightly reformulate the question, which the Ninth Circuit acknowledged and welcomed in its Order certifying these questions.⁵⁹ The question needs to be reformulated because Simon and the three lower court decisions it frequently cites have incorrectly framed this issue: the test is not whether a plaintiff can establish reasonably foreseeable harm through "previous acts of similar violence on the premises," but whether a plaintiff can show the owner knew or should have known from the *owner's* 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." *Id.* Restatement (Second) of Torts § 344 (1965), cmt. f. The origin of the "prior acts of similar violence on the premises" language is unclear, but this Court has never used that language and no pre-*Nivens* case has used that language.

Once the question is reformulated to focus on the owner's past experience, the focus of the Ninth Circuit's question remains: what are the circumstances which determine whether the owner's past experience are sufficient to make it so a jury could conclude that "he should

⁵⁹ Order, at 15 (citing *Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075, 1076 (9th Cir. 1999)).

reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time?”

It does not appear this Court needs to announce any new law to answer that question. Instead, once it is acknowledged that the focus is on the owner’s past experience, separate from the “place or character of his business” or acts of the third person that “are occurring, or are about to occur,”⁶⁰ Washington’s traditional rule regarding foreseeability should properly balance the policy of not making a business owner “the guarantor of the invitee’s safety from all third party conduct on the business premises” with the policy of protecting the invitee who “entrusts himself or herself to the control of the business owner over the premises and to the conduct of others on the premises.” *Nivens*, 133 Wn.2d at 202-03.

Since 1953, this Court has held that, where a party owes a duty to prevent harms caused by a third party, “foreseeability” pertains not to whether the specific incident or harm was foreseeable, but whether the harm fits within a general field of danger that is foreseeable:

It seems to us, however, that counsel unjustifiably restrict the issue when they ask us to focus attention upon the specific type of incident which here occurred - forcible rape. Whether foreseeability is being considered from the standpoint of negligence or proximate cause, the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated.

The sequence of events, of course, need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbable and highly unexpected, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability, provided other requisites of legal causation are present.

⁶⁰ To the extent a new owner purchases an old business, the owner will be responsible for taking reasonable steps to protect invitees from dangers of which the new owner is aware from the owner’s past experience, such as someone with substantial experience in a particular industry. On the other hand, if the new owner is new to the industry, the owner is still responsible for protecting invitees from danger based on the “place or character of the business,” which would include prior similar acts at the business (the “place”) or similar businesses (the “character of the business”), as well as the acts of the third person that “are occurring, or are about to occur.”

McLeod v. Grant County School Dist. No. 128, 42 Wn.2d 316, 21-22, 255 P.2d 360 (1953); *see also Rikstad v. Homberg*, 76 Wn.2d 265, 269, 456 P.2d 355 (1969) (“[i]t is not ... the unusualness of the act that resulted in injury to plaintiff that is the test of foreseeability, but whether the result of the act is within the ambit of the hazards covered by the duty imposed upon defendant”).

Whether a particular harm fits within the general field of danger is not a question for the trial court, but is instead a question for the jury: “We have held that it is for the jury to decide whether the general field of danger should have been anticipated by [a defendant].” *McLeod*, 42 Wn.2d at 324; *Schooley v. Pinch’s Deli Market*, 134 Wn.2d 468, 477, 951 P.2d 749 (1998) (“[f]oreseeability is normally an issue for the trier of fact and will be decided as a matter of law only where reasonable minds cannot differ”); *Nivens*, 133 at 204-05 (foreseeability is normally a question of fact for the jury); *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999) (“[b]reach and proximate cause are generally fact questions for the trier of fact”); *Hansen v. Friend*, 118 Wn.2d 476, 483-84, 824 P.2d 483 (1992) (“Foreseeability is normally an issue for the trier of fact. In order to establish foreseeability: the harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant. It therefore remains a question for the trier of fact whether the harm... sustained was foreseeable.”).

In this case, every person in the United States was warned of the threat of domestic terrorist attacks on “soft targets” after the attacks of September 11, 2001.⁶¹ Not surprisingly, Simon’s security director testified that after 9/11 there was “a lot of talk about terrorists attacking

⁶¹ Declaration of William Nesbitt, Excerpts of Record, Vol. 2, at 104-05 (¶ 28); Declaration of Robert Wuorenma, Excerpts of Record, Vol. 2, at 119 (¶ 24).

soft targets in the United States.”⁶² He had many conversations with Simon and IPC about how the Tacoma Mall was just such a “soft target.”⁶³

Recognizing that national threat, Simon and IPC discussed what measures to take to prevent and respond to a violent attack.⁶⁴ Despite their conversations about this foreseeable threat, Simon and IPC moved slowly.⁶⁵ More than four years later, their mall did not have security cameras or a public address or mass notification system,⁶⁶ their mall was still understaffed,⁶⁷ and the Tacoma Police substation in the mall was closed.⁶⁸ While they did nothing, the area around the mall became increasingly dangerous, especially when compared to national and county crime statistics.⁶⁹ These were all problems that Simon and IPC were aware of, but they did not start fixing them until 2006, after the November 2005 shooting.⁷⁰

These omissions compounded the danger posed to their invitees because of the mall’s reputation as an easy target for criminal activity, as their security director acknowledged shortly before the shooting.⁷¹ Simon and IPC were aware, or at least should have been aware, of the danger of a mall shooting given the wave of mall shootings that had taken place in the years before the attack on November 2005.⁷² They were also aware, or at least should have been aware, of the high number of violent crimes that had occurred within their own mall, including

⁶² Deposition of Richard Erdie, Excerpts of Record, Vol. 2, at 87-89.

⁶³ *Id.* at 87-88.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Declaration of Robert Wuorenma, Excerpts of Record, Vol. 2, at 120-22 (¶¶ 28-29).

⁶⁷ Declaration of Chantel Bursott, Excerpts of Record, Vol. 2, at 192-93 (¶¶ 9-10).

⁶⁸ Memorandum from Richard Erdie, Excerpts of Record, Vol. 2, at 82-83.

⁶⁹ Declaration of William Nesbitt, Excerpts of Record, Vol. 2, at 100-01 (¶¶ 21-23).

⁷⁰ Memorandum from Richard Erdie, Excerpts of Record, Vol. 2, at 82-83.

⁷¹ *Id.*; Declaration of Robert Wuorenma, Excerpts of Record, Vol. 2, at 120-23 (¶¶ 28-30).

⁷² Declaration of William Nesbitt, Excerpts of Record, Vol. 2, at 105-06 (¶ 29).

strong-arm robbery, assaults, batteries, fights, and the brandishing of lethal weapons, as well as property crimes that “have the potential of escalating to a crime against a person.”⁷³ These events included six prior shootings at their mall and five other shootings at malls in the South Sound region between 1992 and 2001.⁷⁴

Although the District Court concluded these shootings are not identical to the shooting that happened here, for decades this Court has focused on the “general danger area,” not the “unusualness of the act.” *Rikstad*, 76 Wn.2d at 269. Moreover, even when a plaintiff relies solely on “prior similar acts” to establish foreseeable harm, that test should not be seen as a robotic, bright-line rule, but to ensure businesses are not made “the guarantor of the invitee’s safety from all third party conduct on the business premises.” *Nivens*, 133 Wn.2d at 203. In that regard, the test must be sufficiently flexible so that a jury can decide whether the prior acts, although not identical, put the owner on notice of the “general danger area.”

For example, in this case the mall security director, as well as McKown’s security experts, opined that the general field of danger included a “soft target” attack on the mall, Simon’s internal documents acknowledged that an attack would likely start from a vacant hallway, and Simon knew from a long history of prior violent attacks at the mall that it might need to help its invitees safely evacuate the building. Based on this evidence, the jury, not the District Court, should decide whether a mall shooting was foreseeable.

It is also important to remember why this Court recognized Simon had a special relationship with McKown in the first place: “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

⁷³ *Id.* at 101 (¶ 23).

⁷⁴ “Mall Shootings in the South Sound,” Excerpts of Record, Vol. 2, at 126-27.

control of the business owner over the premises and to the conduct of others on the premises.” *Nivens*, 133 Wn.2d at 202-03. By choosing to run the Tacoma Mall and retain “the economic benefits of the business,” Simon also chose to protect its invitees, like McKown, who entrusted Simon with their care.

In response to the Ninth Circuit’s third question, the Court should answer “if a plaintiff relies solely on proof of an owner’s past experience to show reasonably foreseeable harm, the acts must be sufficiently similar that a jury could conclude the business owner should have reasonably anticipated the general danger to its invitees.” Restatement (Second) of Torts § 344 (1965), cmt. f.

V. CONCLUSION

The Court should answer the certified questions as follows:

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*, 943 P.2d 286 (Wash.1997).”

Answer: “Yes, Washington follows Restatement (Second) of Torts § 344, including comments d and f, as controlling law.” *Nivens*, 133 Wn.2d at 203-04.

Question 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?”

Answer: No, a plaintiff is not required to show previous acts of similar violence on the premises, but may instead establish a harm is reasonably foreseeable through evidence that (1)

the owner “knows ... that the acts of the third person are occurring, or are about to occur,” (2) the owner knows or should know “from past experience” that there is a likelihood of criminal conduct “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,” or (3) the owner knows or should know that “the place or character of his business ... is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time.” *Id.* at 204-05 (quoting Restatement (Second) of Torts § 344 (1965), cmt. f).

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

Answer: Proof of previous acts of similar violence is not required. However, if a plaintiff relies solely on proof of an owner’s past experience to show reasonably foreseeable harm, the acts must be sufficiently similar that a jury could conclude the business owner should have reasonably anticipated the general danger to its invitees.” Restatement (Second) of Torts § 344 (1965), cmt. f.

Dated this 21st day of September 2012.

Respectfully submitted,

PFAU COCHRAN VERTETIS AMALA PLLC

By 

Darrell L. Cochran, WSBA No. 22851

darrell@pcvalaw.com

Jason P. Amala, WSBA No. 37054

jason@pcvalaw.com

Attorneys for Appellant Brendan McKown

701 Fifth Avenue

Suite 4730

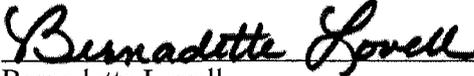
Seattle, WA 98104

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 Brief of Appellant Brendan McKown to be served via regular mail and electronic mail by directing delivery to the following individuals:

T. Jeffrey Keane
Keane Law Offices
100 NE Northlake Way, Ste. 200
Seattle, WA 98105
Attorneys for Simon Property Group, Inc., and IPC International Corporation

DATED this 21st day of September 2012.


Bernadette Lovell

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Case Name: McKown v. Simon Property Group
Case No: 87722-0
Attorney: Darrell L. Cochran
WSBA #: 22851
Phone: (253) 777-0799
Email: darrell@pcvalaw.com