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**THE SUPREME COURT OF  
THE STATE OF WASHINGTON**

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CERTIFICATION FROM THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

IN

BRENDAN McKOWN,

Appellant

v.

SIMON PROPERTY GROUP, INC., d/b/a TACOMA  
MALL; IPC INTERNATIONAL CORPORATION,

Appellees

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**BRIEF OF APPELLEES SIMON PROPERTY GROUP, INC. AND  
IPC INTERNATIONAL CORPORATION**

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## I. INTRODUCTION

Dominick Maldonado walked into the Tacoma Mall, opened fire with semi-automatic weapons, and shot seven people. He knew none of his victims. He robbed no one. There was no logical explanation or understandable motive for his crimes. He was a madman who sprayed bullets at innocent people because, in his own words, "Today is the day I will be heard." His attack was dispassionate, random, and massive.

One of Maldonado's victims was plaintiff Brendan McKown. McKown brought a negligence action against Simon Property Group, Inc., an owner of the mall, and IPC International Corporation, which contracted with Simon to provide security services at the mall.

The United States Court of Appeals for the Ninth Circuit has asked this Court to answer three questions concerning the scope of the duty that a business owes its invitees to protect them from criminal acts of third persons, and the foreseeability of such acts. The first question asks whether Washington adopts Restatement (Second) of Torts § 344 (1965), including comments d and f, as controlling law. The answer should be that while a business has a duty to take reasonable steps to protect invitees from imminent criminal harm or reasonably foreseeable criminal conduct by third persons, section 344 and comments d and f impose far too broad a

duty on businesses. The Court should place a reasonable limit on the scope of that duty.

The Court should set the appropriate limit on a business's duty by adopting the rule that all three divisions of the Washington Court of Appeals have followed. The answer to the Ninth Circuit's second question should be: "To create a genuine issue of material fact as to the foreseeability of the harm resulting from a third person's criminal act when the defendant did not know of that person's dangerous propensities, the plaintiff must show previous acts of similar violence on the premises."

To the Ninth Circuit's third question, the answer should be: "The prior acts of violence on the premises must have been sufficiently similar in nature and location to the criminal act that injured the plaintiff, sufficiently close in time to the act in question, and sufficiently numerous to have put the business on notice that such an act was likely to occur."

## **II. QUESTIONS CERTIFIED BY THE NINTH CIRCUIT**

1. Does Washington adopt Restatement (Second) of Torts § 344 (1965), including comments d and f, as controlling law?

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?

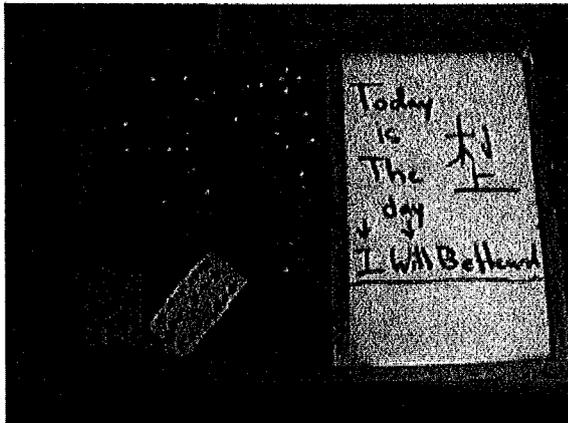
3. If proof of previous acts of similar violence is required, what are the characteristics which determine whether the previous acts are indeed similar?

### III. STATEMENT OF THE CASE

On November 20, 2005, Dominick Maldonado entered the Tacoma Mall and shot seven people. Supplemental Excerpts of Record (“SER”), 63. It is undisputed that Maldonado did not know any of his victims.

Defendant Simon is an owner of the Tacoma Mall. Cert. Ord. at 5. Defendant IPC contracted to provide security services at the mall. *Id.* McKown was an employee of one of the mall’s tenants. *Id.* at 2.

According to his girlfriend, Maldonado had become mentally unstable and volatile during the time leading up to the shooting. SER, 8-11. She feared that he was suicidal and had concerns about his access to weapons. *Id.* at 9-12; 21-22. Sometime before noon on the day of the shooting, Maldonado wrote the following message on the whiteboard in his bedroom:



*Id.* at 5-7; 23.

At 12:09 p.m. Maldonado called 911 and informed the operator that he was going to begin shooting. SER, 24-25.

**9-1-1:** What are you reporting?

**Caller:** Yes, I'm a gentleman that currently owns an MAK-90 Chinese-made assault rifle, and I also have in my possession an Intratec Tec-90.

**9-1-1:** Sir, what is it we can do for you here at 9-1-1?

**Caller:** Oh, I'm just alerting you that I'm about to start shooting right now.

*Id.* When the 911 operator asked him for his location, Maldonado replied "follow the screams." *Id.*

Maldonado then dropped his coat and began randomly shooting. SER, 51-61. At 12:10 p.m., one minute after Maldonado had made his call to 911, IPC used the mall's police band radio to report directly to the Tacoma Police dispatcher that someone had started shooting in the mall. *Id.* at 64-66; 47-49. Police officers were at the mall by 12:15:49. *Id.* at

49. Over an eight-minute period, Maldonado shot seven people. Br.App. at 8; SER 63. The last person shot was McKown. SER 63.

Armed with his own handgun, McKown had decided to shoot the gunman. SER 1-2. When Maldonado walked past him, McKown ordered Maldonado to put his weapons down and tried to draw his own gun. *Id.* at 3-4. Maldonado shot McKown before McKown could fire his own weapon. *Id.* Maldonado then went into a “Sam Goody” music store and took hostages. *Id.* at 50-51, 58, 61. He was ultimately taken into police custody. Cert. Order at 4.

In the district court, McKown submitted evidence that the rate of assaults in the City of Tacoma was “high.” Excerpts of Record Vol. II (“ER II”), 119-20. He presented evidence of shootings at other malls. *Id.* at 126-127. He also submitted evidence of three prior incidents (a carjacking, a robbery, and a threat apparently arising out of a dispute) in which the suspect reportedly pointed a gun at another person in the parking lot of the Tacoma Mall. *Id.* at 132-144. No gun was fired in any of these incidents. *Id.* None of them took place in the mall. *Id.* Each involved only a single victim. *Id.*

McKown also cited six incidents between 1992 and 2000 involving the discharge of a firearm on the Tacoma Mall’s property. ER II, 126-128. In three of these incidents, there was a confirmed resulting injury. In the

other three, no one was hurt. *Id.* In each of the six incidents, the firing of a gun arose out of a dispute, or the shooter apparently had some other motive for directing the violence at a single specific person. ER Vol. I (“ER I”), 7; ER II, 126-128. Maldonado shot patrons at random. ER I, 7.

McKown concedes that Maldonado’s attack was the first time that someone had opened fire inside the Tacoma Mall. Br. App. at 6. The six incidents involving discharge of a firearm took place between five and thirteen years before Maldonado shot McKown. ER II, 126-128.

#### IV. ARGUMENT

A. To the Extent this Court Adopts Section 344 and Comments d and f as Controlling Law, the Court Should Limit that Section and those Comments by Requiring Proof of Prior Similar Acts on the Premises; And Where the Criminal Act is Unforeseeable, the Duty of the Business to Protect Invitees from Imminent Harm Must Be Limited to What the Business Could Have Reasonably Done After It Learned that the Act Was Ongoing or Imminent

1. The history of the law concerning a defendant’s duty to protect a plaintiff against criminal acts of third parties

In every negligence case, the plaintiff must prove duty, breach, causation, and damages. *Nivens v. 7-11 Hoagy’s Corner*, 133 Wn.2d 192, 198, 943 P.2d 286 (1997). Whether the defendant owed a duty to the plaintiff is a question of law. *Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991).

The general rule at common law is that a private person does not have a duty to protect others from the criminal acts of third parties. *Hutchins*, 116 Wn.2d at 223. “This is an expression of the policy that a person is normally allowed to proceed on the basis that others will obey the law.” *Tortes v. King County*, 119 Wn.App. 1, 7, 84 P.3d 252 (2003), *review denied*, 151 Wn.2d 1010 (2004). “As a policy matter, this premise has legitimacy even in an area of urban crime because the alternative is to presume the need for extraordinary care by all to avoid the responsibility for the lawlessness of others.” *Hutchins*, 116 Wn.2d at 236.

Another policy underlying the general rule of no duty and the decisions limiting the scope of any duty to protect against criminal attacks is the principle that protection of the public from violent crime is a governmental function. *See Boren v. Worthen Nat’l Bank of Arkansas*, 324 Ark. 416, 419-420, 427-428, 921 S.W.2d 934 (1996); *Williams v. Cunningham Drug Stores, Inc.*, 429 Mich. 495, 501-504, 418 N.W.2d 381 (1988). In *Nivens*, this Court cited both *Boren* and *Williams* with approval in refusing to hold that all businesses have a specific duty to provide security guards. *Nivens*, 133 Wn.2d at 206. As the Michigan Supreme Court more recently held, “it is unjustifiable to make merchants, who not only have much less experience than the police in dealing with criminal activity but are also without a community deputation to do so,

effectively vicariously liable for the criminal acts of third parties.”  
*MacDonald v. PKT, Inc.*, 464 Mich. 322, 335, 628 N.W.2d 33 (2001).

Yet another rationale for the general rule is the arbitrary, irrational, and unpredictable nature of crime and the resulting inability of premises owners to prevent it. *MacDonald*, 464 Mich. at 335-337; *Williams*, 429 Mich. at 502-503. “Although defendant can control the condition of his premises by correcting physical defects that may result in injuries to his invitees, he cannot control the incidence of crime in the community.” *Williams* at 502.

While still adhering to the general rule that a private person has no duty to protect another from the criminal acts of third parties, this Court has recognized exceptions where there is a special relationship between the defendant and the third party, or between the defendant and the victim. *Nivens*, 133 Wn.2d at 200-201. This case concerns the second category.

In *Nivens*, the Court held that a special relationship exists between a business and its invitees. 133 Wn.2d at 202-203.<sup>1</sup> It said that a business has a duty of reasonable care to protect invitees from imminent criminal harm and reasonably foreseeable criminal conduct by third persons on the premises. *Id.* at 205. The Court also said it was adopting the Restatement

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<sup>1</sup> Washington follows the common-law rule that the duty of an owner or occupier of land to a person on the property depends on the person’s status as trespasser, licensee, or invitee. *Nivens*, 133 Wn.2d at 198, n.1. For the purpose of its summary judgment motion only, Simon assumed, without admitting, that McKown was its invitee. ER II, 166, n. 6.

(Second) of Torts § 344 and that section 344 properly delimits the duty of the business to an invitee. *Id.* at 204. Comments d and f to section 344, the Court said, describe the limit of the duty owed. *Id.*

The Court went on to say, “No duty arises unless the harm to the invitee by third persons is foreseeable.” *Nivens*, 133 Wn.2d at 205. And it noted that “Washington courts have been reluctant to find criminal conduct foreseeable.” *Id.*, n.3.

2. **In *Nivens*, the adoption of section 344 and comments d and f was not necessary to the resolution of the case**

McKown argues that in *Nivens* this Court “specifically rejected” the rule -- later followed by the court of appeals in four cases—that to establish reasonable foreseeability, the plaintiff must present evidence of prior similar acts of violence on the defendant’s premises. Br. App. at 17. In McKown’s view, the Court *decided* that the plaintiff may alternatively establish the foreseeability of the harm he suffered at the hands of the third party through evidence of the “place or character” of the defendant’s business. McKown relies on the appearance of that phrase in comment f to section 344. Because the *Nivens* Court quoted from that comment, McKown concludes that every word of comment f is controlling precedent in Washington. McKown’s arguments do not withstand careful analysis.

Language that is not necessary to the resolution of the case is not binding precedent. *State v. Johnson*, 173 Wn.2d 895, 904, 270 P.3d 591 (2012). In *Johnson* the Court described the comments in the cited case as addressing “a hypothetical fact pattern, which has arisen in the case now before us.” *Id.* at 903. Because the language was “unnecessary to the resolution” of the cited case, it was “nonbinding dictum.” *Id.* at 904. The *Johnson* Court went on to disapprove the dictum in the cited case. *Id.* See also *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) (*stare decisis* does not apply to language which is unnecessary to conclusion reached); *Ingham v. Wm. P. Harper & Son*, 71 Wash. 286, 288, 128 P. 675 (1912) (*stare decisis* applies “not [to] whatever a court may happen to say, . . . but has regard only to points and adjudications actually involved, as essential elements, in the questions in actual controversy”).

As McKown notes, this Court described the issues in *Nivens* as:

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?

133 Wn.2d at 194. The Court answered the first question “yes.” *Id.* A business “has a duty to take reasonable steps to protect invitees from imminent criminal harm or reasonably foreseeable criminal conduct by

third persons.” *Id.* Since the plaintiff confined his case to the theory that every business has a distinct duty to provide security guards, the only remaining question necessary to the resolution of the controversy between the parties was whether the court considered the creation of such a duty appropriate. *Id.* at 194, 205-207. Because it declined to impose that duty, the Court affirmed summary judgment for the defendants. *Id.*

The Court’s comments about section 344 of the Restatement and comments d and f were not necessary to the disposition of *Nivens*. Thus, those comments—including the text of section 344 and comments d and f—are not binding precedent. *Johnson*, 173 Wn.2d at 904; *Electric Lightwave*, 123 Wn.2d at 541. The answer to the Ninth Circuit’s first question, based on current Washington law, should be: “No. Section 344 and comments d and f are not controlling law.”

Moreover, the principal issue in the present case is whether the plaintiff can establish foreseeability without proof of prior similar acts of violence on the defendant’s premises. In *Nivens*, this Court expressly declined to “undertake an analysis of the foreseeability of *Nivens*’ injury” because such an analysis was not necessary to resolve the case. 133 Wn.2d at 205. Contrary to McKown’s argument, in *Nivens* this Court did not “specifically reject” the rule that to establish reasonable foreseeability,

the plaintiff must present evidence of prior similar acts of violence on the premises. See Br. App. at 17. The Court didn't consider that issue at all.

3. **If the Court adopts some elements of section 344 and comments d and f, it should do so only to the extent the section and the comments are consistent with the "prior similar acts" rule**

Simon does not mean to suggest, however, that the Court's discussion of section 344 in *Nivens* is meaningless. Although not binding precedent, that discussion obviously reflected the Court's view that section 344 and comments d and f could serve as general guidelines in defining the scope of the business's duty. In addition, Simon agrees with the concept that in the appropriate circumstances, a business may have a duty to exercise reasonable care in anticipating that certain types of violent criminal acts may be likely to occur on certain parts of the premises, and in taking reasonable precautions to protect its invitees. For example, if numerous strong-arm robberies have occurred in darkened areas of the business's parking lot at night in the recent past, the business may have a duty to anticipate that similar crimes would likely happen in the future, and to take reasonable precautions such as keeping the entire lot well lit. Simon also accepts the principle that once the business becomes aware that an unforeseeable crime is in progress or is clearly imminent, the owner may at that moment acquire a duty to exercise reasonable care to

warn or otherwise to protect its invitees. For example, a shopkeeper who sees a third person threatening an invitee with a gun on the premises should have a duty to make reasonable efforts to call the police. Section 344 and comments d and f support the imposition of such duties.

Accordingly, Simon expects that in answering the Ninth Circuit's first question, this Court will adopt section 344—and perhaps comments d and f—as controlling law *to some extent*. If the court does so, Simon asks the Court to reject section 344 and comments d and f to the extent they are inconsistent with the rule that to establish the reasonable foreseeability of the harm he suffered at the hands of a criminal, the plaintiff must show that similar acts of violence had occurred on the defendant's premises in the past. If the Court concludes that section 344 and comments d and f are currently the law in Washington without limitation and that they allow the plaintiff to establish foreseeability without evidence of prior similar crimes on the premises, Simon asks the Court to change the law. The issue of foreseeability should go to the jury only if the plaintiff presents evidence of prior similar acts of violence on the premises.

4. **If not properly limited, section 344 and comments d and f impose far too broad a duty on business owners**

The text of section 344 unreasonably requires the business owner to exercise care to protect the invitee from whatever crime might occur as

long as the owner reasonably should have anticipated that any intentionally harmful acts of third persons were likely to occur. It states:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Restatement (Second) of Torts § 344 (emphasis added).

In subsection (a), the phrase “such acts” refers to its antecedent – “intentionally harmful acts of third persons.” Thus, the possessor is subject to liability for failure to exercise reasonable care to “discover that [intentionally harmful acts of third persons] are being done or are likely to be done.” The range of “intentionally harmful acts” is as broad as the criminal code. Indeed, it is even broader. An act may be intentionally harmful without being criminal. And while compensable harm under section 344 is limited to physical harm to one’s person, the phrase “intentionally harmful acts” is not. The scope of this phrase includes everything from parking violations<sup>2</sup> to genocide.

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<sup>2</sup> Double parking intentionally harms others by blocking their cars.

Moreover, section 344 subjects the business to liability regardless of whether third persons have actually committed “intentionally harmful acts” on the premises. Instead, the business is subject to liability as long as it should have reasonably discovered that *some* “intentionally harmful acts” were “*likely* to be done.”

When one puts all this together, it becomes clear that section 344 imposes on the business owner a duty to anticipate criminal acts as heinous as the massive slaughter of human beings and to take reasonable precautions *in advance* against such attacks, based on the *likelihood* that at some time in the future parking violations, vandalism, or thefts would occur somewhere on the premises. To require business owners to shoulder such a burden would be unreasonable, unfair, and impractical.

Comment f does nothing to narrow the scope of the business owner’s duty. It states: “If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.” (Emphasis added). Based on this language, McKown argues that evidence of the “place or character” of the defendant’s business is alone sufficient to establish foreseeability.

Under this view and under the language of comment f, *every* criminal act is foreseeable if anything about the place or character of the defendant's business should cause him to anticipate *any* criminal conduct on the part of third persons. Thus, even if no crime of any sort has ever taken place on the premises, an attack like Maldonado's is foreseeable under comment f if the business is located in an area with a high rate of crimes against property (larceny, theft, etc.). See ER II, 101. A mass shooting by a madman was foreseeable under comment f, says McKown's expert, because of the Tacoma Mall's character as "a permissive environment that fostered criminality." See ER II, 107. And an attack by a man who phoned the 911 operator to say that he was "about to start shooting," SER 25, was foreseeable under comment f due to the Mall's characteristic of not being "deemed a weapons free zone." See ER II, 103.

Comment d also creates an expansive duty grossly disproportionate to the knowledge that will cause the duty to arise. It states that there are many situations in which the business owner cannot reasonably assume that a warning will be sufficient. It declares: "He is then required to exercise reasonable care to use such means of protection as are available, or to provide such means [of protection] in advance because of the likelihood that third persons . . . may conduct themselves in a manner which will endanger the safety of the visitor." (Emphasis added). This

language, too, appears to require the owner to take steps in advance to protect his invitees from *any and every* violent criminal act, as long as it was likely that third persons might endanger invitees in *some* way. Under this language a mass murder committed with explosives or automatic weapons would be reasonably foreseeable if shoves, slaps, or scuffles were likely to occur on the premises.

In the absence of some limitation, section 344 and comments d and f effectively *do* make the business the insurer of the invitee's safety – a result that this Court has consistently regarded as undesirable. E.g, *Mucsi v. Graoch Assoc.*, 144 Wn.2d 847, 860, 31 P.3d 684 (2001); *Nivens*, 133 Wn.2d at 203. Without guidance from the court as to the foreseeability of a third person's criminal act against the business's invitee, the jury replaces this Court as the body that makes policy decisions of broad social significance. See *Younce v. Ferguson*, 106 Wn.2d 658, 666, 724 P.2d 991 (1986) (retaining common-law classifications of invitee, licensee, and trespasser in premises liability actions in part because of a reluctance to “delegate social policy decisions to the jury with minimal guidance from the court”). See also *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 57, 176 P.3d 497 (2008) (for reasons of policy, “We have deliberately adopted a limited view of foreseeability in [the] context” of actions for negligent infliction of emotional distress). A rule requiring evidence of prior similar

acts on the premises provides the appropriate limitation. It recognizes the business owner's duty to exercise reasonable care for the safety of his invitees, but also protects him from liability for criminal acts unlike anything that his prior experience suggested he should anticipate.

5. Once the business knows that a previously unforeseeable criminal act is in progress or imminent, the business then has a duty to exercise reasonable care to warn or otherwise to protect its invitees; but its duty is limited to reasonable steps it can take at that time

The Court should make it clear that where the criminal act was unforeseeable, the duty to protect invitees from imminent criminal harm is limited to reasonable steps the business can take *after* it learns that the act is occurring or imminent.

In *Nivens*, the Court held that a business “has a duty to take reasonable steps to protect invitees from imminent criminal harm or reasonably foreseeable criminal conduct by third persons.” 133 Wn.2d at 194. Thus, a business has a duty to take reasonable steps—in advance—to protect invitees against criminal conduct that is reasonably foreseeable.<sup>3</sup>

The *Nivens* Court also imposed a duty on a business to take reasonable steps to protect its invitees from imminent criminal harm. This duty (which McKown calls a duty to “intervene”) may arise when a reasonably foreseeable act begins or becomes imminent. It may also arise,

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<sup>3</sup> The Ninth Circuit's second question addresses the issue of how the plaintiff must establish the foreseeability of the crime that injured him.

once the business knows that the act is ongoing or imminent, even if the act was unforeseeable up to that moment. But the time frame in which the business's conduct is measured must be different where the criminal act was unforeseeable before it began.

Where the criminal act was reasonably foreseeable, the jury may properly consider precautions that the business allegedly should have taken in advance to satisfy its duty to protect against imminent harm. For example, if Maldonado's attack was reasonably foreseeable, it would be appropriate for the jury to consider whether reasonable care required Simon to have hired armed, off-duty policemen *in advance* to kill a gunman like Maldonado once he began shooting. But if the attack was unforeseeable as a matter of law before it began, Simon's duty to protect against its completion must be measured only by what Simon could reasonably have done after learning that the act was ongoing or imminent.

McKown argues that once the shooting started, Simon breached its duty to take reasonable steps to protect him from imminent harm. But McKown mistakenly seeks to measure Simon's duty not by what Simon reasonably should have done in the interval between the first shot and the shots that struck McKown, but by what Simon allegedly should have done weeks, months, or even years before Maldonado's attack.

According to McKown and his experts, Simon breached its duty of care *after the shooting started* by having (1) no ability to monitor the danger through a surveillance system, (2) no ability to warn McKown of the danger through an intercom system, (3) no off-duty police officers to “neutralize” the danger [i.e., to kill Maldonado], and (4) no active shooter protocol to warn and evacuate McKown. Br.App. at 10.<sup>4</sup> None of these steps, of course, could have been taken in the eight minutes that followed the first shot. Each of these precautions would have required planning and action well in advance of the day the incident took place.

If the criminal act that harmed the plaintiff was unforeseeable as a matter of law, the business can have no duty to take any steps in advance of the act’s commencement to prevent its completion. Instead, where the criminal act was unforeseeable, the duty of the business once it knows that the act is ongoing or imminent must be limited to taking “reasonable steps [at that time] to protect invitees from imminent criminal harm.” *Nivens*, 133 Wn.2d at 194. One has an obligation to prepare only for that which one can reasonably expect to occur. If the criminal act was unforeseeable

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<sup>4</sup> McKown states that Simon “admitted that the Department of Homeland Security has long urged malls to have an ‘active shooter protocol.’” Br.App. at 13. To support this claim McKown references Simon’s citation in a brief to a Homeland Security booklet first published in 2008. ER II, 199, n.3. Simon cited to the booklet simply to provide the district court with a definition of the term “active shooter”—a term repeatedly used in McKown’s briefing. The booklet is not in the record. At any rate, by citing to a 2008 publication in a brief, Simon did not “admit” that Homeland Security had recommended that malls have “active shooter protocols” as of November 2005.

before it began, then to measure the business's conduct by what it allegedly should have done weeks or months in advance would require it to travel backwards in time.

Citing the court of appeals' opinion in *Nivens*, McKown contends that once the shooting began, Simon had a duty "to prevent or control' the shooting 'by ejection, restraint, or other appropriate means.'" Br.App. at 26 (quoting 83 Wn.App. at 45). The court's comments about the means by which a business must satisfy its duty to protect invitees from imminent criminal harm were dicta. The defendant's conduct once the assault had begun was not at issue in *Nivens*. 83 Wn.App. at 40-41 & n. 18.<sup>5</sup>

*Passovoy v. Nordstrom, Inc.*, 52 Wn.App. 166, 758 P.2d 524 (1988), on which McKown relies, does not stand for the proposition that the moment a third party begins to carry out an unforeseeable criminal act, the law retroactively imposes on the business a duty to have previously taken steps that might have protected its invitees from being harmed by that act. In *Passovoy*, store detectives intercepted a shoplifter who then fled through the store. In the ensuing chase the shoplifter pushed two patrons aside, causing injury. *Id.* at 167-168. Relying on section 344, the court held that a question of fact existed as to whether the detectives should have warned customers in the area of the chase. *Id.* at 172-174.

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<sup>5</sup> Instead, plaintiff argued only that the defendant had a duty to deploy security guards to break the cycle of loitering "well before the date that plaintiff was injured." *Id.*, n. 18.

The shoplifter's act of shoving invitees while being chased through a crowded store was entirely foreseeable. *Id.* at 173-174. And the court made it clear that the reasonableness of the store's conduct would be measured by what the detectives did after the shoplifter had begun to flee—not by what the store allegedly should have done months earlier.

**B. To Establish that the Criminal Act that Harmed Him Was Reasonably Foreseeable, the Plaintiff Must Present Evidence of Prior Similar Acts of Violence on the Premises**

The answer to the Ninth Circuit's second question should be: "To create a genuine issue of material fact as to the foreseeability of the harm resulting from a third person's criminal act when the defendant did not know of that person's dangerous propensities, the plaintiff must show previous acts of similar violence on the premises."

**1. The court of appeals has consistently required evidence of prior similar acts of violence**

Since *Nivens*, the court of appeals has consistently held that where the business does not know of the dangerous propensities of the person who committed the criminal act, the injured invitee must present evidence of prior similar acts on the premises to establish foreseeability. *Wilbert v. Metrop. Park District*, 90 Wn.App. 304, 309-310, 950 P.2d 522 (1998); *Raider v. Greyhound Lines*, 94 Wn.App. 816, 819-820, 975 P.2d 518, review denied, 138 Wn.2d 1011 (1999); *Craig v. Washington Trust Bank*,

94 Wn.App. 820, 828, 976 P.2d 126 (1999); and *Fuentes v. Port of Seattle*, 119 Wn.App. 864, 870-871, 82 P.3d 1175 (2003), *review denied*, 152 Wn.2d 1008 (2004).<sup>6</sup>

In *Wilbert*, a man was fatally shot at a dance held in the defendant's community center. 90 Wn.App. at 306. The plaintiffs argued that fights and other aggressive conduct earlier in the evening put the defendant on notice that a more serious assault might occur. *Id.* at 306-307. A security expert also testified that the shooting was foreseeable. *Id.* at 307. The expert based his opinion, in part, on what he considered to be the elevated risk of "personal victimization" when certain factors are present: "1) Groups of people 15 to 24 years of age; 2) In public places; 3) With strangers; 4) With alcohol or drugs present; 5) With inadequate supervision." *Id.* at 307-308. In other words, he concluded that the fatal shooting was reasonably foreseeable based on the *character of the defendant's business* of providing a venue for dances and parties.

The court of appeals held that the shooting was unforeseeable as a matter of law. *Id.* at 306. The fights and other aggressive behavior did not establish that the defendant should have anticipated a fatal assault with a

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<sup>6</sup> See also *Tortes v. King County*, 119 Wn.App. 1, 7-8, 84 P.3d 252 (2003), *review denied*, 151 Wn.2d 1010 (2004) (as a matter of law, bus passenger's act of fatally shooting driver was not reasonably foreseeable where fellow passenger injured in resulting crash presented no evidence of past similar crimes on defendant's buses; evidence of simple assaults was not sufficient).

deadly weapon. *Id.* at 310. The expert's opinion was insufficient, the court held, because it did "not supply the prerequisites of foreseeability required by the Washington cases: specific evidence that the defendant knew of the dangerous propensities of the individual assailant or previous acts of similar violence on the premises." *Id.*

McKown argues that *Wilbert's* assessment of Washington law was wrong because the question in the cases on which *Wilbert* relied was whether the defendant knew of the third person's violent propensities, rather than whether the defendant should have foreseen criminal conduct in general. But one of the cases cited by *Wilbert*—*Jones v. Leon*, 3 Wn.App. 916, 478 P.2d 778 (1970)—actually presented both questions.

Plaintiff in *Jones* was a patron in defendant's cocktail lounge when he was shot by a third person. 3 Wn.App.at 917. Plaintiff argued that defendant had enough knowledge of the assailant's violent nature and of threats he had made so that defendant had a duty to prevent the assailant from entering the lounge. *Id.* at 922. The court disagreed, holding that the attack was unforeseeable as a matter of law. *Id.* at 925-926.

Significantly, the *Jones* court also rejected plaintiff's argument that the defendant had a duty to hire a guard to prevent disreputable patrons *generally* from entering the lounge. 3 Wn.App. at 926. Plaintiff argued that this duty arose based on the 60 incidents over the prior two years in

which defendant had called the police to intervene in disputes. *Id.* The court held that even if defendant had such a duty, the duty was limited to posting a guard at a much later hour than the time of the shooting, since the majority of the disturbances had occurred much later at night. *Id.* The court also noted that the prior disturbances “did not involve serious violence.” *Id.* In other words, the court held as a matter of law that based on the prior disturbances at the lounge the defendant had no reason to anticipate the need for a guard at the time of the incident in question and no reason to anticipate a shooting at any time. *Wilbert* properly cited *Jones* for the proposition that where “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.<sup>7</sup>

McKown argues that *Craig* supports his position that the place or character of the defendant’s business is sufficient to establish foreseeability. But *Craig* focused on the “past experience” requirement. 94 Wn.App. at 828. Moreover, the court rejected the argument that the defendant’s location and its character as a bank with money and a cash machine created the opportunity for criminal misconduct. *Id.* at 827.

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

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<sup>7</sup> In *Nivens*, this Court cited *Jones* to support the observation that “Washington courts have been reluctant to find criminal conduct foreseeable.” 133 Wn.2d at 205, n.3.

somebody chose to break the law. We agree with the trial court under these facts that no special duty results from the location and nature of the Bank's business

*Id.*

2. **Allowing evidence of the “place” of the business to establish foreseeability violates established public policy**

Based on comment f to section 344, McKown asserts that evidence of “the place or character” of the defendant’s business is alone sufficient to establish foreseeability.<sup>8</sup> McKown contends that the Tacoma Mall was located in a dangerous “place”—i.e., an area with a high crime rate—and that this made Maldonado’s crime reasonably foreseeable. ER II, 101,119-120; Br. App. at 4-5, 19-20.

But this Court has held that as a matter of public policy, evidence of a high crime rate in the area surrounding the defendant’s business may not be used to establish a tort duty. *Hutchins*, 116 Wn.2d at 236. “[I]f the premises are located in an area where criminal assaults often occur, imposition of a duty could result in the departure of businesses from urban core areas--an undesirable result.” *Id.*

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<sup>8</sup> McKown also argues that as an alternative to evidence of (1) prior similar acts on the premises, or (2) “the place or character” of the defendant’s business, the plaintiff may establish foreseeability in a third way. He says the plaintiff can show that his harm was reasonably foreseeable “when the owner ‘knows ... that the acts of the third person are occurring, or are about to occur.’” Br.App. at 19 (quoting cmt. f). At that point, however, foreseeability isn’t an issue. Once Maldonado began shooting, it was certainly foreseeable that one or more invitees might be harmed. But as Simon has explained, if the criminal act (here the random shooting of seven people) was unforeseeable as a matter of law before it began, the commencement of the act doesn’t retroactively impose on the business a duty to have previously taken precautions against it.

Simon acknowledges that the *Hutchins* Court was considering the question whether the defendant owed any duty at all to the plaintiff, rather than the issue of foreseeability. But the same policy applies equally in both contexts. Allowing a high incidence of crime in the area to render a particular act on the defendant's property foreseeable "could result in the departure of businesses from urban core areas—an undesirable result." *Id.*

This holding in *Hutchins* clearly survived *Nivens*. Four years after *Nivens*, this Court reaffirmed that "this court has rejected utilization of high crime rates as a basis for imposing a tort duty." *Kim v. Budget Rent-a-Car*, 143 Wn.2d 190, 199, 15 P.3d 1283 (2001) (citing *Hutchins*).<sup>9</sup>

To appreciate the effect of allowing evidence of the local crime rate to establish foreseeability, one need only consider McKown's evidence. One of his experts concluded that because "Tacoma has a high number of assaults," Maldonado's attack was foreseeable. ER II, 119-120.

If this kind of evidence could establish foreseeability of a crime at a particular business, then every violent assault at every business in the city of Tacoma would be foreseeable. The resulting threat of liability could cause not only "the departure of businesses from urban core areas," *Hutchins*, 116 Wn.2d at 236, but also their departure from an entire city.

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<sup>9</sup> Other courts have expressed this same concern. *MacDonald v. PKT, Inc.*, 464 Mich. 322, 344-345 & n.16, 628 N.W.2d 33 (2001); *Boren v. Worthen Nat'l Bank of Arkansas*, 324 Ark. 416, 428, 921 S.W.2d 934 (1996).

3. **Permitting the plaintiff to prove foreseeability based on the “character” of the defendant’s business effectively makes any crime “foreseeable” at any business**

Analysis of the kind of evidence that McKown offered demonstrates that if the character of a business alone were sufficient to establish foreseeability, then virtually any crime would be foreseeable at every business. As evidence of the “character” of the Tacoma Mall, McKown presented expert testimony that the mall had an insufficient number of security guards to deter crime. ER II, 104. The inference is that crime is likely at any business that has either no security guards at all or not enough of them. Certainly the vast majority of businesses in this State do not hire security guards. In *Nivens* this Court refused to require all businesses to do so. 133 Wn.2d at 205-207. Yet, if the “character” of a business is sufficient to establish foreseeability, then every crime will be deemed foreseeable at every business that has what the plaintiff’s expert regards as an “insufficient” number of security guards.<sup>10</sup>

McKown and his experts also argue that an attack like Maldonado’s was reasonably foreseeable because of the Tacoma Mall’s character as an allegedly “soft” target. Br.App. at 4, 20; ER II, 119, 171.

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<sup>10</sup> McKown also argues that his harm was foreseeable because the mall did not have armed off-duty police officers to “dissuade” Maldonado from attacking the mall in the first place and to “neutralize” the danger once he began shooting. Br.App. at 10; ER II, 123. Under McKown’s “character of the business” argument, a crime like Maldonado’s would be foreseeable at any business that does not hire armed off-duty policemen.

The implication of this argument is that an attack in which a gunman sprays bullets randomly at strangers and kills or wounds many people is reasonably foreseeable at any business which is a “soft target.” McKown has never offered a definition of that term. But if a “hard” target is one that is heavily fortified and/or defended (e.g, an armored car carrying currency and staffed with heavily armed guards) and a “soft” target is one that is not, then almost every business in the country is a “soft target.” Thus, if the victim of a criminal attack can establish its foreseeability with evidence of the “soft” character of the defendant’s business, then virtually every violent crime is reasonably foreseeable at virtually every business.

4. **Allowing the “character” of the business to establish foreseeability improperly places more importance on the category into which the business falls than on the history of crime at that location**

McKown argues that Maldonado’s attack on the Tacoma Mall was foreseeable because there had been shootings at other shopping malls. Br.App. at 4-5; ER II, 105. The thrust of this argument is that if crimes have occurred at other businesses of a certain character or type, the nature of such businesses necessarily makes similar crimes foreseeable at every business that falls into the same category.

In *Craig*, however, the court rejected the notion that the defendant bank “created the opportunity for criminal misconduct by the very nature

of the Bank's business.” 94 Wn.App. at 827. Although crimes have certainly occurred at other banks, this does not mean that every bank should be subject to liability whenever a crime occurs on its premises.

Similarly, in *Williams v. Citibank, N.A.*, 247 A.D.2d 49, 50-52, 677 N.Y.S.2d 318 (1998), the court rejected the argument that automated teller machines (ATMs) by their nature attract criminal activity. To subject the defendant to liability without evidence of prior crimes at the *particular* ATM in question, the court held, would expose banks to “absolute and virtually limitless liability.” *Id.* at 53.

The California Supreme Court has refused to accept the proposition that crime is more foreseeable, as a matter of law, at certain types of businesses than others. *Sharon P. v. Arman, Ltd.*, 21 Cal.4th 1181, 1185, 1193-1195, 989 P.2d 121, 91 Cal.Rptr.2d 35 (1999).<sup>11</sup> Virtually any type of business or location, the court noted, can be the venue for violent crime. *Id.* at 1193-1194. To classify one type of business premises (parking garages in that case) as a sort where crime is highly foreseeable would invite endless litigation over what other types of business should be similarly classified. *Id.* at 1194. Moreover, to regard crime as highly foreseeable in parking garages would mistakenly attribute more importance to the general character of a business than to the history

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<sup>11</sup> Disapproved on other grounds, *Reid v. Google, Inc.*, 50 Cal.4th 512, 235 P.3d 988, 113 Cal.Rptr.3d 327 (2010).

of crime at the particular location where the plaintiff was attacked. *Id.* at 1194-1195. Such a rule “would burden virtually all owners of underground commercial garages in contravention of settled state policy that they, as landlords, should not be forced to become the insurers of public safety.” *Id.* at 1195.

5. **The rule proposed by McKown effectively transfers the duty to protect the public against crime from the government to private businesses**

In *Nivens*, this Court held that to impose on all businesses a distinct duty to provide security guards “would unfairly shift the responsibility for policing, and the attendant costs, from government to the private sector.” 133 Wn.2d at 205-206. To illustrate its reasoning, the Court quoted extensively from *Williams v. Cunningham Drug Stores, Inc.*, 429 Mich. 495, 418 N.W.2d 381 (1988):

“The duty advanced by the plaintiffs is essentially a duty to provide police protection. That duty, however, is vested in the government by constitution and statute.... To require defendant to provide armed, visible security guards to protect invitees from criminal acts in a place of business open to the general public would require the defendant to provide a safer environment on his premises than his invitees would encounter in the community at large. Defendant simply does not have that degree of control and is not an insurer of the safety of his invitees.... The inability of government and law enforcement officials to prevent criminal attacks does not justify transferring the responsibility to a business owner such as defendant.”

133 Wn.2d at 206 (quoting 418 N.W.2d at 384-385) (emphasis added).

Yet, if the “character” of the business alone is sufficient to establish foreseeability, then the absence of armed, visible security guards is enough to send the case to the jury. This is precisely the argument that McKown makes here. Br.App. at 4, 10, 20; ER II, 104, 119, 123, 171 (insufficient number of guards and armed off-duty policemen made Maldonado’s attack on the Tacoma Mall foreseeable). Even if the business’s past experience gives it no reason to anticipate a crime of the sort that injures the plaintiff, the business is subject to liability for “failing to provide a safer environment on his premises than his invitees would encounter in the community at large.” *Nivens*, 133 Wn.2d at 206 (quoting *Williams*, 418 N.W.2d at 384-385).

According to McKown’s experts, Simon’s failure to have a “state-of-the-art” surveillance system also made it foreseeable that Maldonado would attack the Tacoma Mall and that, once there, he would shoot multiple victims. Br.App. at 10; ER II, 120-122. Simon allegedly should have foreseen that if a deranged gunman began shooting people, a surveillance system would have enabled Simon to locate the gunman and kill him immediately before he shot anyone else. *Id.* But killing a gunman requires well-trained, armed security guards or off-duty policemen. ER 121, 123. Thus, the alleged foreseeability of harm to McKown based on the absence of a surveillance system is inextricably

tied to the absence of armed guards/policemen on the site. Moreover, this kind of real-time electronic monitoring is also a form of protection that far exceeds any security precautions provided by government in the community at large. A rule that permits the jury to find any type of crime foreseeable based on the defendant's failure to provide a surveillance system "would unfairly shift the responsibility for policing, and the attendant costs, from government to the private sector." *Nivens*, 133 Wn.2d at 205-206.

6. **The "prior similar acts" rule properly determines foreseeability based on the business's knowledge of what has actually happened on its property**

If a particular type of crime has occurred repeatedly on its premises in the recent past, a business may have reason to anticipate that such a crime will happen again. E.g., *Johnson v. State*, 77 Wn.App. 934, 943, 894 P.2d 1366 (1995) (foreseeability of rape of college student in front of her dormitory was question of fact where there had been eleven rapes on campus in preceding three years).<sup>12</sup> But if the criminal act that injures the plaintiff is unlike any event that had taken place on the premises in the past, the act should be unforeseeable as a matter of law. See *Wilbert*; *Raider*; *Craig*; *Fuentes*; and *Tortes*.

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<sup>12</sup> The opinion in *Johnson* did not discuss the plaintiff's evidence in detail, but the plaintiff's brief recited the history of similar crimes on the premises. SER at 67-68

The place or character of the defendant's business may make it *conceivable* that any crime could occur on its premises. "But conceivability is not the equivalent of foreseeability." *Boren v. Worthen Nat'l Bank of Arkansas*, 324 Ark. 416, 427, 921 S.W.2d 934 (1996). To establish foreseeability, "the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location." *Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149, 153, 694 N.Y.S.2d 445 (1999) (emphasis added).

The "prior similar acts" rule also finds support in the reasons for the general rule that one has no duty to protect another from the criminal acts of third parties. As this Court has observed, "one is normally allowed to proceed on the basis that others will obey the law. As a policy matter, this premise has legitimacy even in an area of urban crime because the alternative is to presume the need for extraordinary care by all to avoid the responsibility for the lawlessness of others." *Hutchins*, 116 Wn.2d at 236. If a business owner is to be deprived of the right to assume that others will obey the law, this should be the case with respect to only those types of crime that his past experience gave him reason to anticipate.

Another rationale for the general rule of no duty is the arbitrary, irrational, and unpredictable nature of crime and the resulting inability of

businesses to prevent it. *MacDonald*, 464 Mich. at 335-337; *Williams*, 429 Mich. at 502-503. Given the wide range of criminal behavior, it is both unfair and impractical to require a business to foresee and protect against criminal acts of a sort that have never occurred on its premises.

7. **Other states have endorsed the “prior similar acts” rule**

In *Boren*, 324 Ark. at 426-428,<sup>13</sup> the court considered both the “prior similar acts” test and the “totality of the circumstances” test—a term used by courts to describe the rule that McKown proposes here. The totality of the circumstances test is based on the reference to the “place or character” of the business in the Restatement § 344, cmt. f. 324 Ark. at 427. “The analysis thus includes the nature, condition, and location of the premises, in addition to any prior similar incidents, and a duty can be found where no prior criminal attacks have occurred.” 324 Ark. at 427.

The Arkansas court rejected the totality of the circumstances test for several reasons. *Boren*, 324 Ark. at 427-428. First, the court held that to adopt that test would impose a duty to guard against random criminal acts by third parties—a step that the court did not regard as good policy. *Id.* at 428. Second, the court was reluctant “to shift responsibility for violent, non-foreseeable, third party criminal conduct from the government to the private sector.” *Id.* Third, the court held that it was

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<sup>13</sup> This Court cited *Boren* with approval in *Nivens*. 133 Wn.2d at 206.

inappropriate “as a matter of policy to impose a higher duty on business owners who are willing to provide their services in ‘high crime areas’ or ‘near a housing project’—most commonly the areas in which low and moderate income residents are to be found.” *Id.*

The *Boren* court chose to apply the “prior similar incidents” test. 324 Ark. at 426-428. Under this rule, courts focus on prior similar incidents to determine whether a particular crime was foreseeable. *Id.* at 426. The court noted that the duty to police the premises under comment f—i.e., the duty to be aware of crimes that had occurred on the property—was the “underpinning” of this rule. *Id.*<sup>14</sup> The rationale for the rule is that conceivability is not the equivalent of foreseeability. *Id.* at 426-427.

The New York courts have consistently required evidence of prior similar crimes in order to take the issue of foreseeability to the jury. In *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 519-520, 407 N.E.2d 451, 429 N.Y.S.2d 606 (1980), New York’s highest court applied section 344 and quoted a portion of comment *f*. But the court made it clear that the issue of foreseeability should be determined based solely on the owner’s past experience – not the “character” of his business. *Id.* at 519-520. The court did *not* quote the “place or character of his business” language from comment *f*. Since *Nallan*, New York courts have repeatedly held that to

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<sup>14</sup> The court was obviously referring to the language in comment *f* that focuses on the owner’s “past experience,” and not to the “place or character” language.

establish foreseeability, the plaintiff must present evidence of prior similar crimes either on the defendant's premises or in the immediately surrounding area.<sup>15</sup>

Under Texas law, "foreseeability is established through evidence of specific previous crimes on or near the premises." *Trammel Crow Central Texas, Ltd. v. Gutierrez*, 267 S.W.3d 9, 12 (Tex. 2008). "The foreseeability requirement protects the owners and controllers of land from liability for crimes that are so random, extraordinary, or otherwise disconnected from them that they could not reasonably be expected to foresee or prevent the crimes." *Id.* at 17. Because the attack on the plaintiff "was so extraordinarily unlike any crime previously committed" at the defendant's mall, defendant "could not have reasonably foreseen or prevented the crime and thus owed no duty in this case." *Id.*<sup>16</sup>

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<sup>15</sup> E.g., *Novikova.*, 258 A.D.2d at 153 (criminal conduct at issue must be shown to be reasonably predictable based on prior occurrence of same or similar criminal activity at a location sufficiently proximate to the subject location); *Johnson v. City of New York*, 7 A.D.3d 577, 577-578, 777 N.Y.S.2d 135 (2004) (plaintiff must show that prior similar criminal activity made the crime at bar reasonably predictable). Crime in the general neighborhood is insufficient to establish foreseeability. *Williams v. Citibank, N.A.*, 247 A.D.2d 49, 677 N.Y.S.2d 318 (1998).

<sup>16</sup> Other jurisdictions requiring evidence of prior similar incidents include Kentucky, *Grisham v. Wal-Mart Stores, Inc.*, 929 F.Supp. 1054 (E.D.Ky. 1995) (Kentucky law); Georgia, *Drayton v. Kroger Co.*, 297 Ga.App. 484, 485, 677 S.E.2d 316,317 (2009); and Alabama, *Baptist Memorial Hosp. v. Gosa*, 686 So.2d 1147, 1152-1153 (Ala. 1996).

8. **California, which created the rule that McKown urges this Court to adopt, has abandoned it**

In *Isaacs v. Huntington Memorial Hospital*, 38 Cal.3d 112, 211 Cal.Rptr. 356, 695 P.2d 653 (1985), California became the first state to adopt the “totality of the circumstances” test.<sup>17</sup> As McKown does here, the court criticized the prior similar incident rule as too rigid and as unfairly allowing the landowner “one free assault.” 38 Cal.3d at 125-126. Emphasizing the “place or character” language of comment f to section 344, the *Isaacs* court held that foreseeability of the criminal act should be determined in light of the totality of the circumstances. *Id.* at 124, 126-127. Prior similar incidents are not necessary, said the court. *Id.* at 127. “[O]ther types of evidence may also establish foreseeability, such as the nature, condition and location of the defendant’s premises.” *Id.* at 129.

Only eight years after *Isaacs*, the California Supreme Court abandoned the totality of the circumstances test in favor of a “balancing test” that, in most cases, requires proof of prior similar violent acts. In *Ann M. v. Pacific Plaza Shopping Ctr.*, 6 Cal.4<sup>th</sup> 666, 25 Cal.Rptr.2d 137, 863 P.2d 207 (1993),<sup>18</sup> the court held that a change in the law was

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<sup>17</sup> Again, the quoted phrase is another term used to describe the rule that McKown proposes. *E.g., Boren*, 324 Ark. at 427.

<sup>18</sup> Disapproved on other grounds, *Reid v. Google, Inc.*, 50 Cal.4<sup>th</sup> 512, 235 P.3d 988, 113 Cal.Rptr.3d 327 (2010).

necessary, because violent crime was so much a part of society that it could happen at any place open to the public. *Id.* at 678.

The *Ann M.* court held that the scope of the landowner's duty to protect against foreseeable third-party crime should be "determined in part by balancing the foreseeability of the harm against the burden of the duty to be imposed." 6 Cal.4<sup>th</sup> at 678. The court then held that the burden of hiring security guards (the precaution which the defendant allegedly should have taken) was sufficiently great that "a high degree of foreseeability is required." *Id.* at 679. The degree of foreseeability necessary to impose such a duty "rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises." *Id.* (emphasis added). To hold otherwise, the court noted, "would be to impose an unfair burden upon landlords and, in effect, would force landlords to become the insurers of public safety, contrary to well established policy in this state." *Id.*

The California Supreme Court recently reaffirmed that to subject the defendant to liability for its failure to take "burdensome" preventative measures, the plaintiff must show "heightened foreseeability." *Delgado v. Trax Bar and Grill*, 36 Cal.4th 224, 242-244 & n.24. 113 P.3d 1159, 30 Cal.Rptr.3d 145 (2005). Among the precautions the court considers burdensome and therefore requiring a showing of heightened

foreseeability are: (1) hiring security guards, (2) activating and monitoring security cameras, (3) providing bright lighting, (4) providing periodic “walk-throughs” by existing personnel, and (5) providing stronger fencing. *Id.* at 243 n.24.<sup>19</sup> “Heightened foreseeability” must be established by evidence of prior similar incidents on the premises or other indications of a reasonably foreseeable risk of violent criminal assaults in that location. *Id.* Where a minimally burdensome measure can prevent harm, only “regular” foreseeability is required. *Id.*

As a practical matter, unless the proposed precaution would have imposed only a very minimal burden on the defendant, foreseeability under California law must be established by evidence of past similar acts on or very near the defendant’s premises. True, the *Delgado* court stated that “heightened foreseeability” could be established by “other indications of a reasonably foreseeable risk of violent criminal assaults in that location.” 36 Cal.4th at 243, n.24. But the only example the court gave of such “other indications” was “similar violent crime occurring on the premises of a nearby and substantially similar business establishment.” *Id.* at 239-240, n.19 (citing *Ann M.*, 6 Cal. 4<sup>th</sup> 679, n. 7). And in the cited

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<sup>19</sup> All the precautions that Simon allegedly should have taken—hiring armed, off-duty policemen and more security guards, installing and monitoring a sophisticated surveillance system, having a better public address system, and implementing an active shooter protocol – would apparently be regarded by California courts as burdensome and therefore not required unless the plaintiff could show heightened foreseeability.

footnote in *Ann M.*, the court described this alternative proof as “*immediate proximity* to a substantially similar business establishment that has experienced violent crime on its premises.” (emphasis supplied). *Delgado* made it clear that *Ann M.* was still the law. As the court said in *Ann M.*, heightened foreseeability “rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner’s premises.” 6 Cal.4<sup>th</sup> at 679 (emphasis added).

**9. The prior similar acts rule is the best choice**

While the balancing test now used by the California courts is far superior to the totality of the circumstances test, the balancing test requires both trial and appellate courts to undertake a highly complex analysis. First, the court (whether trial or appellate) identifies the specific measures that the plaintiff says the defendant should have taken to avoid harm. *Castaneda v. Olsher*, 41 Cal.4th 1205, 1214, 63 Cal.Rptr.3d 99, 162 P.3d 610 (2007). Second, the court must analyze how financially and socially burdensome each of these proposed measures would be to the landowner. *Id.* “Third, the court must identify the nature of the third party conduct that the plaintiff claims could have been prevented had the landlord taken the proposed measures, and assess how foreseeable (on a continuum from a mere possibility to a reasonable probability) it was that this conduct would occur.” *Id.* Fourth, the court must compare the burden of each

measure with the foreseeability that the criminal act would occur. *Id.* Under *Ann M.* and *Delgado*, the court must decide whether each measure falls into the category of burdensome precautions (such as hiring security guards or installing and monitoring surveillance systems). If it does, then to take the case to the jury the plaintiff must show that the criminal act that injured him was highly foreseeable. *Ann M.*, 6 Cal.4<sup>th</sup> at 679-680; *Delgado*, at 243 & n.24. If the precautions impose only a minimal burden, only “regular” foreseeability is required. *Delgado*, at 243, n.24

The prior similar acts rule is much easier to apply. And since the balancing test effectively requires proof of prior similar acts on or in immediate proximity to the defendant’s premises (except in cases where the precaution advocated by the plaintiff would have imposed only a very minimal burden), the two tests are highly similar. Finally, requiring the plaintiff to establish foreseeability through prior similar acts of violence on the premises properly focuses the inquiry on the business’s knowledge of what has actually happened on its property.

10. **It is appropriate in this field of the law for the court to set specific requirements for foreseeability**

“The concept of duty is a reflection of all those considerations of public policy which lead the law to conclude that a ‘plaintiff’s interests are entitled to legal protection against the defendant’s conduct.’” *Taylor v.*

*Stevens County*, 111 Wn.2d 159, 168, 759 P.2d 447 (1988) (quoting *Prosser and Keeton on Torts* § 53, at 357 (5th ed.1984)). This Court determines whether a duty exists based on mixed considerations of logic, common sense, justice, policy, and precedent. *Snyder v. Medical Service Corp.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001).

The concept of foreseeability limits the scope of the defendant's duty. *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989). "No duty arises [on the part of the business] unless the harm to the invitee by third persons is foreseeable." *Nivens*, 133 Wn.2d at 205.

Simon acknowledges that foreseeability is ordinarily an issue of fact. *Nivens*, 133 Wn.2d at 205. Washington cases have stated that foreseeability is to be decided as an issue of law only if the event was "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *Niece v. Elmview Group Home*, 131 Wn.2d 39, 50, 929 P.2d 420 (1997); *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 323, 255 P.2d 360 (1953). Simon also recognizes that under the typical analysis, the question is whether the kind of act that occurred (e.g., sexual abuse of resident by staff member at group home for developmentally disabled persons) was "within the general field of danger which should have been anticipated." *Niece*, 131 Wn.2d at 50.

But for policy reasons, a court may limit the scope of the duty that a class of defendants owes to a class of plaintiffs by limiting the circumstances under which the plaintiff's harm will be regarded as foreseeable. In other words, the court may deliberately adopt a limited view of foreseeability in a certain context, in order to narrow what would otherwise be an unfairly broad range of exposure for defendants.

Consider, for example, the development of the law regarding negligent infliction of emotional distress. Washington first recognized this cause of action in *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1976). The Court held that the plaintiff must be a person who was foreseeably endangered by the defendant's conduct, and the harm suffered must be reasonably foreseeable. *Id.* at 436-437. But the *Hunsley* Court left the determination of foreseeability entirely to the jury. *Id.*

Recognizing that the scope of liability created by *Hunsley* was too broad, this Court later restricted the scope of what it would consider to be reasonably foreseeable in actions for negligent infliction of emotional distress. *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 259-260, 787 P.2d 553 (1990). Without such a restriction, the Court noted, defendants would be subject to liability to virtually anyone who suffers emotional distress upon hearing of the death or injury of a loved one. *Id.* The Court reasoned that a defendant is more likely to foresee that severe emotional distress would

be suffered by a relative who is present at the scene of the victim's accident than to foresee such a reaction in a relative who wasn't there. *Id.* Accordingly, the *Gain* Court held that mental suffering by a relative who is not present at the scene of the accident is "unforeseeable as a matter of law." *Id.* at 260 (emphasis added).<sup>20</sup>

In *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 52-53, 56-57, 176 P.3d 497 (2007), the Court reaffirmed that for reasons of policy, it had adopted a limited view of foreseeability in claims for negligent infliction of emotional distress. The plaintiff argued that foreseeability was a jury question. *Id.* at 56. Rejecting that argument, the Court held that in that type of claim, proof that the plaintiff was at the scene at the time of the accident or shortly thereafter "is a prerequisite to finding foreseeability." *Id.* (Emphasis added). "We have deliberately adopted a limited view of foreseeability in this context." *Id.* at 57 (emphasis added).

An invitee's cause of action against a business for injury caused by the criminal act of a third person is another context in which the Court should apply a "limited view of foreseeability." *Id.* Just as the Court has established a prerequisite to finding foreseeability in actions for negligent infliction of emotional distress, so it should hold that proof of prior similar

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<sup>20</sup> "*Gain* recognized that specific limitations must be placed on the foreseeability standard." *Hegel v. McMahon*, 136 Wn.2d 122, 128, 960 P.2d 424 (1998) (emphasis added).

acts on the business's premises is a prerequisite to finding foreseeability of the criminal act that injured the invitee. Without "specific limitations . . . on the foreseeability standard," *Hegel*, 136 Wn.2d at 128, defendants in both contexts face an unreasonably broad scope of potential liability.

This is effectively what all courts applying the prior similar acts test have done. They have recognized for a variety of reasons that the "totality of the circumstances" test is not good public policy. It improperly shifts the duty to protect the public against crime from the government to private businesses. It is likely to drive businesses out of urban core areas. And it subjects a defendant to liability for every conceivable criminal act if anything about the place or character of his business should cause him to anticipate even the pettiest criminal conduct. Recognizing that the scope of liability must be limited in some reasonable way, these courts have required proof of prior similar crimes on or very near the defendant's premises as a prerequisite to foreseeability.

In applying its balancing test, the California Supreme Court has also chosen the vehicle of foreseeability to limit the scope of the landowner's liability for crimes committed by third persons.

[O]ur cases analyze third party criminal acts differently from ordinary negligence, and require us to apply a heightened sense of foreseeability before we can hold a defendant liable for the criminal acts of third parties. [citation omitted] There are two reasons for this: first, it is

difficult if not impossible in today's society to predict when a criminal might strike. Also, if a criminal decides on a particular goal or victim, it is extremely difficult to remove his every means for achieving that goal.

*Wiener v. Southcoast Childcare Centers, Inc.*, 32 Cal.4th 1138, 1149-1150, 12 Cal.Rptr.3d 615, 88 P.3d 517 (2004).

A requirement that invitees must show prior similar acts on the business's premises to establish the foreseeability of the criminal acts that injure them will not be inconsistent with *McLeod* and *Niece*. In *Niece*, the special relationship in question was that between a group home for developmentally disabled persons and its residents. 131 Wn.2d at 41. In *McLeod*, the relationship was that between a school district and its minor students. 42 Wn.2d at 317. This case concerns only the special relationship between a commercial business and its invitees.

Moreover, there is good reason to impose a broader duty on schools and homes for the developmentally disabled to protect those in their custody than on commercial businesses to protect their customers. Profoundly disabled persons cannot protect themselves and are entirely dependent on their caregivers for their safety. *Niece*, 131 Wn.2d at 46. Because education is compulsory, the relationship between schools and children is not voluntary. *McLeod*, 42 Wn.2d at at 319. "The result is that the protective custody of teachers is mandatorily substituted for that of the

parent.” *Id.* In both of these relationships, the defendant has custody of the plaintiff. That is not true in the relationship between business and invitee. In addition, the business-invitee relationship is entirely voluntary, and invitees are generally not physically or mentally incapacitated.

The court of appeals recognized this distinction in *Nivens*.

In our view, the stated [special] relationships fall into at least two groups. In one group are relationships that are both custodial and protective, such as the school-student relationship and the hospital-patient relationship. In another group are relationships that are protective but not custodial, such as the hotel-guest relationship and the store-customer relationship. In the first group, one party is typically incapacitated, as for example by immaturity or illness. In the other, each party is typically a fully functioning adult. Although it may be appropriate to analogize among relationships within the same group, we do not think it appropriate to analogize relationships in one group to those in the other, at least in the usual case. In general, then, we decline to use school-student or hospital-patient cases when analyzing the liability of a store.

83 Wn.App. at 54 (emphasis added). On this basis, the court of appeals in *Nivens* appropriately distinguished *McLeod*.<sup>21</sup>

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<sup>21</sup> Although this court did not reach the issue of foreseeability in *Nivens*, the court of appeals did. *Nivens*, 83 Wn.App. at 53-55. Because no loiterer had previously attacked or threatened a patron on the premises, the court of appeals held that the attack on *Nivens* was unforeseeable as a matter of law. *Id.* at 52-53.

C. **The Prior Acts of Violence on the Premises Must Have Been Sufficiently Similar in Nature and Location to the Criminal Act That Injured the Plaintiff, Sufficiently Close in Time to the Act in Question, And Sufficiently Numerous to Have Put the Business on Notice That Such an Act Was Likely to Occur**

The answer to the Ninth Circuit's third question should be: "The prior acts of violence on the business's premises must have been sufficiently similar in nature and location to the criminal act that injured the plaintiff, sufficiently close in time to the act in question, and sufficiently numerous to have put the business on notice that such an act was likely to occur."

1. **The nature of the prior criminal acts must be highly similar to the act that injured the plaintiff**

The prior crimes occurring on the premises must be sufficiently similar in nature to the criminal act that injured the plaintiff to have placed the business owner on notice that precautions should be taken against that specific type of criminal activity. The court of appeals has required a high degree of similarity in the nature of the criminal acts. Both the type of crime and the assailant's motive are relevant considerations.

For example in *Raider*, a white man walked into a bus station, saw a white woman standing next to a black man, and then began firing a gun at both of them. 94 Wn.App. at 817-18. The assailant knew neither one of them. *Id.* at 818, 820. He shot the woman (the plaintiff) repeatedly, while

calling her a “nigger loving bitch.” *Id.* at 818. The plaintiff presented evidence of a high level of criminal activity at the station, “including prostitution, drugs, and a shooting two years earlier.” *Id.* at 818 (emphasis added). But the court held as a matter of law that the shooting of the plaintiff was not reasonably foreseeable. *Id.* at 820. There was no evidence “that similar racially motivated conduct had occurred” in the past. *Id.* And “although the bus terminal was a high crime area, there is no indication that [the assailant’s] attack bore any relationship or similarity to the past crimes.” *Id.* In *Wilbert*, the court held that fist-fights and belligerent and rowdy activity did not make the more serious crime of assault with a firearm foreseeable. 90 Wn.App. at 310.<sup>22</sup>

In comparing the criminal act that injured the plaintiff with prior crimes, the scale of the events should also be an important consideration. Even if a business has been the scene of a shooting during a robbery or a heated dispute, that business has no reason to expect an attack in which the assailant dispassionately shoots everyone in sight, killing or wounding multiple victims.

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<sup>22</sup> See also *Ann M.*, 6 Cal.4<sup>th</sup> at 679-680 (assaults and robberies not sufficiently similar to rape of plaintiff); *Sharon P.*, 21 Cal.4<sup>th</sup> at 1191 (repeated bank robberies on main floor of building not sufficiently similar to sexual assault on plaintiff in parking garage); *Willmon v. Wal-Mart Stores, Inc.*, 143 F.3d 1148, 1151 (8<sup>th</sup> Cir. 1998) (prior fights not similar to abduction of plaintiff from premises and ensuing rape and murder of plaintiff elsewhere).

2. The prior acts must have occurred on a part of the premises similar to the location where the plaintiff was injured

The court of appeals has required that the prior similar acts occur on the defendant's premises. *Wilbert*, 90 Wn.App. at 309; *Raider*, 94 Wn.App. at 819; and *Fuentes*, 119 Wn.App. at 870-871. Plaintiff in *Fuentes* was sitting in her car on the pick-up drive for passengers at the Seattle-Tacoma airport, when a man entered her car, punched her in the mouth, and hijacked her car. *Fuentes*, 119 Wn.App. at 866-87. She presented evidence of prior car-prowling incidents in the parking garage and a previous assault there. *Id.* The court held that the event that caused the plaintiff's injuries was unforeseeable as a matter of law. *Id.* at 871. "Even if [the evidence] had established a pattern of violent crimes in the airport garage, that would not be dispositive of a pattern of crime at the airport pick-up drive." *Id.* at 870. In other words, violent crimes occurring in one part of a large facility do not establish the foreseeability of violent crimes in another part. A business that occupies a large area may logically decide to direct its crime-prevention efforts at the part of the facility where the most serious criminal acts have occurred.

3. **The frequency of prior similar acts must be sufficient to provide notice that an act like the one that injured the plaintiff was likely**

Washington courts have made it clear that a single criminal act similar to the one in question is not sufficient to establish foreseeability. *Wilbert*, 90 Wn.App. at 310 (previous acts); *Raider*, 94 Wn.App. at 819 (history of such crimes); *Fuentes*, 119 Wn.App. at 870 (pattern of violent crimes). The court's use of the plural was not accidental.

Other courts have also required proof of multiple crimes similar to the act that harmed the plaintiff. *E.g.*, *Boren*, 324 Ark. at 427-427 (one prior attack at same ATM did not make attack on plaintiff reasonably foreseeable); *Golombek v. Marine Midland Bank, N.A.*, 193 A.D.2d 1113, 598 N.Y.S.2d 891 (1993) (two prior robberies—one at night deposit box and other in bank itself—not sufficient to establish foreseeability of shooting of plaintiff during robbery at deposit box).

4. **The court should only consider prior crimes that occurred within two or three years of the event in question**

In determining the foreseeability of criminal conduct, the court of appeals has considered specific events going back a limited period of time—two years in *Raider*, 94 Wn.App. at 818, and *Fuentes*, 119

Wn.App. at 866, 870-871, and three years in *Johnson*, 77 Wn.App. 934.<sup>23</sup>

While no Washington court has specifically addressed the question of how recent the prior crimes must be to support a finding of foreseeability, these decisions suggest that two or three years is a reasonable time frame. In *Burnett v. Stagner Hotel Courts, Inc.*, 821 F.Supp. 678, 683-684 (N.D.Ga. 1993), the court expressly considered the issue and held that crimes occurring more than two years before the event in question were too remote. The issue is whether a criminal act similar to that which injured the plaintiff was – at the time – likely to occur. Events that occurred five, ten, or more years before the attack on the plaintiff do not create a present likelihood of such an act.

## V. CONCLUSION

If not appropriately limited, section 344 of the Restatement and comments d and f impose an unreasonable burden on businesses to protect their invitees from the criminal acts of third persons. To set a reasonable limit on the potential liability of businesses for such acts, this Court should adopt the rule uniformly followed by all three divisions of the court of appeals. The Court should hold that to establish the foreseeability of the criminal act that harmed him, the plaintiff must present evidence of prior similar acts of violence on the business's premises. The prior criminal acts

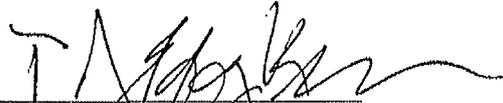
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<sup>23</sup> See SER, 67-68.

on the premises must have been sufficiently similar in nature and location to the act that injured the plaintiff, sufficiently close in time to the act in question, and sufficiently numerous to have put the business on notice that such an act was likely to occur.

Dated this 20 day November, 2012.

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SUPREME COURT  
OF THE STATE OF WASHINGTON

BRENDAN McKOWN, )

Plaintiff-Appellant, )

vs. )

SIMON PROPERTY GROUP, )  
INC., d/b/a TACOMA MALL; )  
IPC INTERNATIONAL )  
CORPORATION, )

Defendants-Appellees )

**CERTIFICATE OF SERVICE**

I hereby certify that on November 20, 2012, copies of the Brief Of Appellees Simon Property Group, Inc. And IPC International Corporation was served on counsel at the following address and by the method(s) indicated:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20<sup>th</sup> day of November, 2012, at Seattle, Washington.

  
\_\_\_\_\_  
Donna M. Pucel

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