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No. 11-35461

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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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.

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APPEAL FROM UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON AT TACOMA  
(No. 3:08-cv-05754-BHS)

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BRIEF OF APPELLEES

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## **CORPORATE DISCLOSURE STATEMENT**

Simon Property Group, Inc. is a publicly traded corporation. No entity owns more than 10% of Simon's stock.

IPC International Corporation is a wholly owned subsidiary of The Security Network Holdings Corporation, which is a privately owned corporation. No entity owns more than 10% of The Security Network Holding Corporation.

TABLE OF CONTENTS

I. STATEMENT OF JURISDICTION.....1

II. STATEMENT OF ISSUES.....1

III. STATEMENT OF THE CASE .....1

IV. STATEMENT OF FACTS .....3

V. SUMMARY OF ARGUMENT .....7

VI. ARGUMENT.....9

    A. Summary Judgment Standard .....9

    B. The District Court Correctly Ruled that McKown Was Required to Present Evidence of Prior Crimes at the Tacoma Mall that Were Similar to Maldonado’s Attack .....10

        1. The Washington Supreme Court has not decided the issue presented here .....10

        2. The Washington Court of Appeals has uniformly held that the plaintiff must present evidence that similar crimes occurred on the premises in the past.....13

        3. There is no evidence – much less convincing evidence – that the Washington Supreme Court would overrule *Wilbert, Raider, Craig, and Fuentes*.....18

            a. McKown’s soft target argument fails .....19

            b. The Washington Supreme Court would not overrule *Wilbert, Raider, Craig, and Fuentes* based on the al Qaeda attacks of 9/11 .....20

            c. The requirement that the plaintiff present evidence of prior crimes on the premises, similar to the crime that caused his injury, has a firm foundation in Washington law .....22

<b>C. The District Court Correctly Ruled that McKown Failed to Submit Evidence of Prior Crimes at the Tacoma Mall That Were Sufficiently Similar to Maldonado’s Attack to Render that Event Reasonably Foreseeable .....</b>	<b>25</b>
<b>1. Evidence of criminal activity in general is not enough .....</b>	<b>25</b>
<b>2. The crimes described in McKown’s evidence were not similar to Maldonado’s shooting spree.....</b>	<b>29</b>
<b>3. The <i>admissible</i> evidence reveals nothing even remotely similar to the event in which McKown was injured .....</b>	<b>33</b>
<b>D. The District Court Correctly Ruled that Simon Had No Duty to Intervene and Protect McKown Once the Shooting Started.....</b>	<b>36</b>
<b>E. Summary Judgment in Favor of IPC Was Appropriate .....</b>	<b>40</b>
<b>1. If the Court affirms the dismissal of Simon, it must affirm the dismissal of IPC .....</b>	<b>40</b>
<b>2. By entering into a contract to provide certain services at the mall, IPC did not assume Simon’s duties to its invitees.....</b>	<b>41</b>
<b>3. McKown has no right to sue IPC for the alleged breach of its contract with Simon .....</b>	<b>45</b>
<b>VII. CONCLUSION .....</b>	<b>46</b>
<b>VIII. STATEMENT OF RELATED CASES.....</b>	<b>46</b>

## TABLE OF AUTHORITIES

### CASES

<i>Addisu v. Fred Meyer, Inc.</i> , 198 F.3d 1130, 1134 (9th Cir. 2000) .....	10
<i>Applied Information Sciences Corp. v. eBay, Inc.</i> , 511 F.3d 966, 973 (9 <sup>th</sup> Cir. 2007) .....	34
<i>Burke &amp; Thomas, Inc. v. International Org. of Masters</i> , 92 Wn.2d 762, 767, 600 P.2d 1282 (1979) .....	46
<i>Burnett v. Stagner Hotel Courts, Inc.</i> , 821 F.Supp. 678, 683-684 (N.D.Ga. 1993) .....	33
<i>Capital Dev. Co. v. Port of Astoria</i> , 109 F.3d 516, 519-521 (9 <sup>th</sup> Cir. 1997) .....	13
<i>Celotex Corporation v. Catrett</i> , 477 U.S. 317, 324, 106 S.Ct. 2584, 91 L.Ed.2d 265 (1986) .....	9
<i>City of Long Beach v. Standard Oil Co. of California</i> , 46 F.3d 929, 937 (9 <sup>th</sup> Cir. 1995) .....	34
<i>Craig v. Washington Trust Bank</i> , 94 Wn.App. 820, 976 P.2d 126 (1999) .....	passim
<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998) .....	43, 44
<i>Fuentes v. Port of Seattle</i> , 119 Wn.App. 864, 82 P.3d 1175 (2003), <i>review denied</i> , 152 Wn.2d 1008 (2004) .....	passim
<i>Harris v. Harris &amp; Hart, Inc.</i> , 206 F.3d 838, 841 (9th Cir. 2000) .....	9
<i>Hendricks v. Lake</i> , 12 Wn.App. 15, 22, 528 P.2d 491 (1974) .....	40
<i>Hernandez v. Spacelabs Med., Inc.</i> , 343 F.3d 1107, 1112 (9th Cir. 2003) .....	9
<i>Hutchins v. 1001 Fourth Ave. Assoc.</i> , 116 Wn.2d 217, 220, 802 P.2d 1360 (1991) .....	11, 22, 23
<i>In re B.R.</i> , 732 A.2d 633, 639 (Pa. Super. 1999) .....	21

*In re Bledsoe*, 569 F.3d 1106, 1109 (9<sup>th</sup> Cir. 2009).....13

*In re Watts*, 298 F.3d 1077, 1082-1083 (9<sup>th</sup> Cir. 2002) .....13

*Johnson v. State*, 77 Wn.App. 934, 943, 894 P.2d 1366 (1995)..... 17, 18, 27, 33

*Kim v. Budget Rent-a-Car*, 143 Wn.2d 190, 199, 15 P.3d 1283 (2001).....23

*King County v. Rasmussen*, 299 F.3d 1077, 1088 (9<sup>th</sup> Cir. 2002) .....10

*Kwan Fai Mak v. Blodgett*, 754 F.Supp. 1490, 1491 (W.D.Wash. 1991) .....21

*Leitch v. City of Delray Beach* , 41 So.3d 411, 412 (Fla.App. 2010).....33

*Lonsdale v. Chesterfield*, 99 Wn.2d 353, 361, 662 P.2d 385 (1983).....46

*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).....10

*McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953)..... 27, 28

*Nelson v. City of Irvine*, 143 F.3d 1196, 1206-1207 (9<sup>th</sup> Cir. 1998).....13

*Nivens v. 7-11 Hoagy’s Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997) ..... passim

*Olson v. The Bon, Inc.*, 144 Wn.App. 627, 633-634, 183 P.3d 359 (2008) .....43

*Orr v. Bank of Am.*, 285 F.3d 764, 783 (9<sup>th</sup> Cir. 2002)..... 10, 34

*Passovoy v. Nordstrom, Inc.*, 52 Wn.App. 166, 758 P.2d 524 (1988) ..... 37, 38

*Pedersen v. Klinkert*, 56 Wn.2d 313, 317, 320, 352 P.2d 1025 (1960).....13

*Raider v. Greyhound Lines*, 94 Wn.App. 816, 819-820, 975 P.2d 518, *review denied*, 138 Wn.2d 1011 (1999) ..... passim

*Rikstad v. Holmberg*, 76 Wn.2d 265, 456 P.2d 355 (1969).....27

*Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 994-995 (9<sup>th</sup> Cir. 2007)... 13, 14, 18

*Schnurr v. Bd. of County Comm'rs*, 189 F.Supp. 2d 1105, 1115 (D.Colo. 2001)...21

*Shelby v. Keck*, 85 Wn.2d 911, 914-915, 541 P.2d 365 (1975).....11

*U.S. v. McVeigh*, 119 F.3d 806, 808 (10<sup>th</sup> Cir. 1997) .....21

*Vikingstad v. Baggott*, 46 Wn.2d 494, 496-97, 282 P.2d 824 (1955).....46

*Wilbert v. Metropolitan Park District*, 90 Wn.App. 304, 950 P.2d 522 (1998)  
..... passim

**RULES**

Fed.R.Evid. 703 .....35

Fed.R.Evid. 801 ..... 34, 39

Fed.R.Evid. 801(a)-(c) .....34

Fed.R.Evid. 802 ..... 34, 39

## **I. STATEMENT OF JURISDICTION**

Appellees Simon and IPC accept appellant McKown's statement of jurisdiction.

## **II. STATEMENT OF ISSUES**

1. Did the district court correctly rule that Simon, as business owner, had no duty to protect its invitee McKown from Maldonado's attack, because (a) under Washington law a third party's criminal act is reasonably foreseeable only if similar acts had occurred on the business owner's premises in the past, and (b) McKown presented no such evidence?

2. Did the district court correctly rule that because Maldonado's attack on the mall was not reasonably foreseeable in the first place, Simon had no duty to protect McKown once the shooting started?

3. Was summary judgment in favor of IPC appropriate because IPC owed McKown no duty of care under Washington tort law or under the terms of its contract?

## **III. STATEMENT OF THE CASE**

Simon is an owner of the Tacoma Mall. IPC contracted to provide uniformed security personnel at the mall. McKown was an employee of one of the mall's tenants.

Dominick Maldonado shot seven people in the Tacoma Mall on November 20, 2005. McKown was one of the victims and was severely injured. McKown sued both Simon and IPC, contending they were legally responsible for the injuries caused by Maldonado's criminal actions.

The district court granted IPC's motion for summary judgment. It concluded that IPC owed McKown no duty to protect him from Maldonado's conduct under Washington tort law or under IPC's contract with Simon.

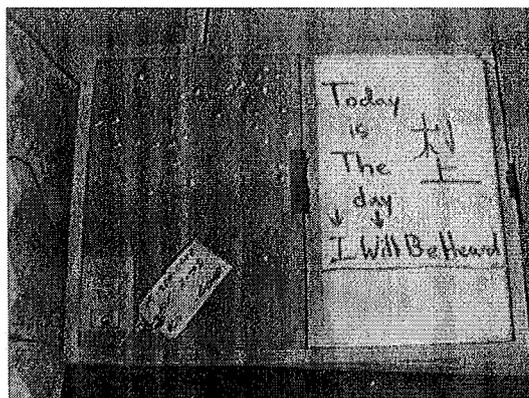
Simon moved for summary judgment on the ground that as a matter of law, Maldonado's attack on the mall was not reasonably foreseeable. The district court at first denied the motion. Then, on Simon's motion for reconsideration, the court concluded that it had manifestly erred in its determination of the applicable law. The district court held that in a negligence action by an invitee against the owner of a business for injuries caused by the criminal act of a third person on property owned or occupied by that business, Washington law requires the invitee to present evidence of prior similar crimes on the premises in order to show that the third party's act was reasonably foreseeable. The court indicated that it was inclined to grant Simon's motion for summary judgment. But it gave McKown another opportunity to present evidence that acts similar to Maldonado's had previously occurred at the Tacoma Mall.

Ultimately, having considered the evidence submitted by McKown, the district court held that there was no evidence of prior similar acts having taken place at the Tacoma Mall. Ruling as a matter of law that the attack that injured McKown was not reasonably foreseeable, the court granted Simon's motion for summary judgment.

#### IV. STATEMENT OF FACTS

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

According to his girlfriend, Maldonado had become mentally unstable and volatile during the time leading up to the shooting. *Id.* at 8-11. She urged him to seek assistance from mental health professionals. *Id.* at 11-12. She feared that he was suicidal and had concerns about his access to weapons. *Id.* at 9-12; 21-22. The night before the shooting, and sometime before noon on November 20, 2005, Maldonado wrote the following message on the whiteboard in his bedroom:



*Id.* at 5-7; 23. He then went to the Tacoma Mall.

At 12:09 p.m. Maldonado called 911 and informed the operator that he had two weapons and that he was going to begin shooting.

**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.* at 24-25. When the 911 operator asked him for his location, Maldonado replied "follow the screams." *Id.*

After finishing his call to 911, Maldonado walked to a T-Mobile telephone kiosk, dropped his coat, and began randomly shooting. *Id.* at 51-56; 57-61. At 12:10 p.m., one minute after Maldonado had made his call to 911, IPC used the Tacoma 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 a total of seven people. Br.App. at 5, 12; SER at 24-25; 42-50. The last person shot was McKown. Br. App. at 5, 12; SER at 62-63.

Armed with his own handgun, McKown had decided to shoot the person who was the source of the gunfire. SER at 1-2. He took up what he considered to be a good position from which to shoot. *Id.* When he observed Maldonado

walking past his position, McKown ordered Maldonado to put his weapons down and attempted to draw his own handgun. *Id.* at 3-4. Maldonado shot McKown several times before McKown could fire his own weapon. *Id.*

Maldonado then went into a “Sam Goody” music store. *Id.* at 51; 58; 61. Once there, he took hostages, telephoned 911 again, and demanded to speak to a police negotiator. *Id.* at 42-43; 50. He ultimately surrendered to the police.

McKown repeatedly asserts that IPC’s security director at the Tacoma Mall, Richard Erdie, considered the mall to be a “soft target” and that he talked to his superiors at IPC and to Simon about it being a “soft target.” Br. App. at 2, 7, 40, 42. Mr. McKown also asserts that Mr. Erdie “opined that the general field of danger included a ‘soft target’ attack on the mall.” Br.App. at 42. For these assertions, McKown cites Excerpts of Record (“ER”) Vol. II, at 87-89. The testimony does not support these conclusions. The relevant part of the actual testimony is:

Q. You were hired less than a year after the September 11th attacks, right?

A. That's true.

Q. And if I remember right, that was when there was a lot of talk about terrorists attacking soft targets in the United States. Do you remember that?

A. I do.

Q. Did you ever have any discussions with IPC or the mall about the potential that the mall might be a soft target?

A. I'm sure we probably had lots of discussions.

Q. And do you remember if there was any – anything come of that? Any new policies and procedures come of that?

A. They began coming out. It's process, though. It's not something that can be done instantaneously. And as time went on, things evolved.

Q. And to the best of your memory, what things evolved? What changes took place?

A. Well – we established evacuation points for mall employees and for customers so that each store could account for all their employees, things of that nature.

ER Vol. II, 87-88. In other words, (1) after the Sept. 11, 2001 attacks there was a lot of talk generally in the United States about terrorists attacking soft targets, (2) Mr. Erdie probably had lots of discussions (the subjects of which he did not specify) with IPC or the mall, and (3) out of some of his discussions came some new policies, including establishing evacuation points.

McKown also states that in Mr. Erdie's Nov. 5, 2005 memo, Mr. Erdie reminded his superiors of the Tacoma Mall's "reputation as a soft, easy target." Br.App. at 10 (citing ER, Vol. II, at 82-83). The memo does not use the word "soft," "easy," or "target." ER Vol. II, at 82-83. Mr. Erdie commented in the memo that "Our biggest problems stem from the perception that the mall is a dangerous place." *Id.* at 82. As the memo makes clear, however, Mr. Erdie felt that this perception was unjustified. *Id.* And with the exception of auto thefts, Mr. Erdie's memo said nothing about the threat of any particular kind of crime. *Id.* at 82-83.

McKown states that Simon "conceded the Department of Homeland Security recommended it have an 'active shooter protocol' to protect its invitees from an

active shooter.” Br.App. at 18, 19. 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 “concede” that Homeland Security had recommended that malls have “active shooter protocols” as of November 2005.

Simon discusses the evidence of crimes that had been committed at the Tacoma Mall before this incident in the Argument section below. Please see section subsection C., entitled “The District Court Correctly Ruled that McKown Failed to Submit Evidence of Prior Crimes at the Tacoma Mall That Were Sufficiently Similar to Maldonado’s Attack to Render that Event Reasonably Foreseeable.”

## V. SUMMARY OF ARGUMENT

To prevail on his negligence claim against Simon, McKown had to establish that Maldonado’s act was reasonably foreseeable. The Washington Supreme Court has not decided the question of whether the plaintiff in a case like this must present evidence of past similar crimes on the premises in order to establish foreseeability. But the Washington Court of Appeals *has* decided this question in several cases and has uniformly held that the answer is “yes.” There is no reason—much less

the convincing evidence required—to conclude that the state’s highest court would overrule the multiple decisions of its intermediate appellate courts on this issue. Because the crimes that had previously occurred at the Tacoma Mall were not similar to Maldonado’s attack, the mass shooting was unforeseeable as a matter of law. Thus, Simon had no duty to protect McKown from the third-party conduct that caused his injuries.

The firing of the first shot did not instantaneously create a legal duty that did not previously exist. Once the Court has accepted the proposition that as a matter of law the random shooting of seven people in the mall was not reasonably foreseeable, the analysis is at an end. Because Maldonado’s attack was unforeseeable, Simon owed McKown no duty of care to protect him from that attack. To hold that Maldonado’s first shot suddenly created a duty for Simon to prevent conduct which was unforeseeable just seconds earlier would render the concept of foreseeability meaningless.

IPC had no duty under Washington tort law principles to protect McKown because it had no special relationship with McKown. And IPC did not contractually “assume” the general duty that Simon, as a business owner, owed to its invitees. Moreover, *in this case* Simon owed no duty of care to protect McKown from Maldonado’s acts, because those acts were unforeseeable as a matter of law. Thus, there was no relevant duty for IPC to “assume.”

## VI. ARGUMENT

### A. Summary Judgment Standard

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact which would preclude summary judgment as a matter of law. *Celotex Corporation v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2584, 91 L.Ed.2d 265 (1986). The party moving for summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Id.*, 477 U.S. at 324. Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to present “specific facts showing that there is a genuine issue for trial.” *Id.* Summary judgment must be entered against a party who fails to present evidence sufficient to establish an essential element of that party’s case. *Harris v. Harris & Hart, Inc.*, 206 F.3d 838, 841 (9th Cir. 2000) (citing *Celotex*, 477 U.S. 317 at 322). The non-moving party cannot defeat summary judgment with allegations in the complaint, or with unsupported conjecture or conclusory statements. *Hernandez v. Spacelabs Med., Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). Rather, the non-moving party must go beyond the pleadings and identify facts showing the existence of a genuine issue for trial. *Celotex*, 477 U.S. at 324.

A scintilla of evidence or evidence that is not significantly probative does not present a genuine issue of material fact. *King County v. Rasmussen*, 299 F.3d

1077, 1088 (9th Cir. 2002) (citing *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000)). The non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts,” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), and “must respond with more than mere hearsay and legal conclusions.” *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th Cir. 2002). Admissible evidence must be produced to show that a genuine issue of material fact exists. *Orr*, 285 F.3d at 783.

**B. The District Court Correctly Ruled that McKown Was Required to Present Evidence of Prior Crimes at the Tacoma Mall that Were Similar to Maldonado’s Attack**

**1. The Washington Supreme Court has not decided the issue presented here**

The central question before the Court is this: In an action by an invitee against the owner of a business for injuries caused by the criminal act of a third person on property owned or occupied by that business, must the invitee present evidence of prior similar crimes on the premises in order to show that the third party’s act was reasonably foreseeable? McKown argues that in *Nivens v. 7-11 Hoagy’s Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997), the Washington Supreme Court decided this issue. It did not.

In every negligence case, the plaintiff must prove duty, breach, causation, and damages. *Nivens*, 133 Wn.2d at 198. 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 is that a person owes no duty to others to prevent harm caused by the criminal acts of third persons. *Id.* at 223. But a duty may arise to protect others from third-party criminal conduct if a special relationship exists between the defendant and the third party's victim. *Nivens*, 133 Wn.2d at 200. In those limited situations in which Washington courts have imposed on defendants a duty to protect plaintiffs from the acts of third parties, the courts have limited the scope of the duty to those acts that are reasonably foreseeable. E.g., *Shelby v. Keck*, 85 Wn.2d 911, 914-915, 541 P.2d 365 (1975) (*cited with approval in Nivens*, 133 Wn.2d. at 205, n.3).

As McKown notes, the Washington Supreme Court held in *Nivens* that a special relationship exists between a business and its invitees. *Nivens*, 133 Wn.2d at 202-203.<sup>1</sup> It then stated that a business owes its invitees a duty of reasonable care to protect them from imminent criminal harm and reasonably foreseeable criminal conduct by third persons on the premises. *Id.* at 205. The court went on to say, “No duty arises unless the harm to the invitee by third persons is

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<sup>1</sup> Washington adheres to 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.

foreseeable.” *Id.* And it noted that “Washington courts have been reluctant to find criminal conduct foreseeable.” *Id.*, n.3.

But in *Nivens*, the Washington Supreme Court expressly stated that it was *not* analyzing the issue of foreseeability in that case. *Id.* at 205. “We do 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.* Since Nivens limited his case to a theory of liability that the Washington Supreme Court rejected (i.e., that businesses always have a duty to provide security guards), there was no need for the court to reach the issue of the foreseeability of the attack that caused Nivens’ injury. *Id.* at 205-207.

McKown nevertheless contends that in *Nivens* the Supreme Court decided that the plaintiff may establish the reasonable foreseeability of the criminal act that injured him through evidence of either past similar crimes on the premises *or* the “place or character” of the defendant’s business. Br. App. at 29-30. McKown relies on the appearance of that phrase in *comment f* to the Restatement (Second) of Torts § 344 (1965), which the Nivens court quoted as part of its general description of the duty of a business to an invitee. *Nivens*, 133 Wn.2d at 205.

Because the Supreme Court did not decide whether the assault on Nivens was reasonably foreseeable, however, the language on which McKown relies was

not necessary to the decision. As such, it is *dictum* and need not be followed. *Pedersen v. Klinkert*, 56 Wn.2d 313, 317, 320, 352 P.2d 1025 (1960).

When interpreting state law, federal courts are bound by decisions of the state's highest court. *In re Bledsoe*, 569 F.3d 1106, 1109 (9<sup>th</sup> Cir. 2009). But *dictum* from the highest court of a state, although relevant, is not controlling in a federal court's determination of state law. *Capital Dev. Co. v. Port of Astoria*, 109 F.3d 516, 519-521 (9<sup>th</sup> Cir. 1997) (analysis of later decisions of state supreme court and court of appeals demonstrated that supreme court, if squarely confronted with the issue, would not follow *dicta* from earlier case).

**2. The Washington Court of Appeals has uniformly held that the plaintiff must present evidence that similar crimes occurred on the premises in the past**

Where the state's highest court has not addressed the issue in question, a federal court interpreting state law must follow the relevant decisions of the state's intermediate appellate courts, unless there is convincing evidence that the state's highest court would reach a different conclusion. *Bledsoe*, 569 F.3d at 1110 (following decision of Oregon Court of Appeals where there was "little evidence—and certainly not 'convincing evidence'—that the Oregon Supreme Court would repudiate" that decision); *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 994-995 (9<sup>th</sup> Cir. 2007); *In re Watts*, 298 F.3d 1077, 1082-1083 (9<sup>th</sup> Cir. 2002); *Nelson v. City of Irvine*, 143 F.3d 1196, 1206-1207 (9<sup>th</sup> Cir. 1998).

Four post-*Nivens* decisions of the Washington Court of Appeals have squarely addressed the issue presented here—*i.e.*, whether a jury question exists with regard to foreseeability where there is no evidence of prior similar crimes on the premises. In *Wilbert v. Metropolitan Park District*, 90 Wn.App. 304, 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, 976 P.2d 126 (1999); and *Fuentes v. Port of Seattle*, 119 Wn.App. 864, 82 P.3d 1175 (2003), *review denied*, 152 Wn.2d 1008 (2004), the court held that in the absence of such evidence, the criminal act of a third person is not reasonably foreseeable as a matter of law. In each of these cases the court affirmed summary judgment in favor of the defendant. The four cases include at least one decision from each of the three divisions of the state’s court of appeals.<sup>2</sup>

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. *Raider*, 94 Wn.App. at 817-818. 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. In her action against the bus company, the plaintiff presented

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<sup>2</sup>Although not dispositive, it is worthy of note that in two of these cases, *Raider* and *Fuentes*, the Washington Supreme Court denied review. See *Ryman*, 505 F.3d at 995, n.2.

evidence of high criminal activity at the station, “including prostitution, drugs, and a shooting two years earlier.” *Id.* at 818 (emphasis supplied). But the court of appeals held as a matter of law that the shooting of the plaintiff was not reasonably foreseeable. *Id.* at 820. Although there had been an earlier shooting, there was no evidence “that similar racially motivated conduct had occurred” in the past. *Id.* (emphasis supplied). 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 defendant rented space in its community center for a dance. *Wilbert*, 90 Wn.App. at 306. During the dance, a man was shot and killed by two assailants. *Id.* The plaintiffs argued that several 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. They also relied on the opinion testimony of a security expert that the fatal 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. *Wilbert*, 90 Wn.App. at 306. The fights and other aggressive behavior were “insufficient to establish that Metro should, on the basis of the events earlier in the evening, have anticipated a fatal assault with a deadly weapon.” *Id.* at 310. The expert’s opinion was of no help to plaintiffs, the court held, because it “does 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.*

Plaintiff in *Fuentes* was sitting in her car on the pick-up drive for passengers at the Seattle-Tacoma airport. *Fuentes*, 119 Wn.App. at 866. A man entered her car, punched her in the mouth, and hijacked her car. *Id.* at 867. The man was fleeing from police officers who had seen him breaking into an unoccupied vehicle in the airport’s parking garage. *Id.* at 866-867. Plaintiff presented evidence of car-prowling in the parking garage, evidence of a previous assault there, and a report stating that “a passenger at Seattle-Tacoma International Airport is more likely to be a victim of a crime tha[n] at any other comparable airport in the United States.” *Id.* She also presented statistics documenting crimes at the airport. *Id.*

The court of appeals upheld summary judgment for the airport, holding that the event that caused plaintiff’s injuries was unforeseeable as a matter of law. *Fuentes*, 119 Wn.App. 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 in one part of large facility do not establish the foreseeability of violent crimes in another part. In addition, there was no evidence that the type of crime committed in *Fuentes*—carjacking—had previously occurred anywhere at the airport. *Id.* at 871. The “carjacking of Fuentes’ car was so highly improbable as to be beyond the range of expectability . . . [and] was unforeseeable as a matter of law.” *Id.*

Plaintiff in *Craig* worked for an independent contractor that provided janitorial services to the defendant bank. *Craig*, 94 Wn.App. at 822-823. Plaintiff was assaulted one night as she left the building to take out the trash. *Id.* at 822. She argued that the assault was reasonably foreseeable because the bank allegedly knew that transients sometimes loitered near the outside garbage receptacle. *Id.* at 823, 828. The court disagreed. “[T]he Bank did not have reason to know that the criminal acts might occur simply because transients occasionally loitered near the Bank building.” *Id.* at 828.

In *Johnson v. State*, 77 Wn.App. 934, 943, 894 P.2d 1366 (1995), the court of appeals held that there was a genuine issue of fact concerning the foreseeability of the rape of a college student in front of her dormitory. But in that case, the very same type of crime had occurred repeatedly on the defendant’s premises in the recent past. The opinion did not discuss the plaintiff’s evidence in detail, but as the

plaintiff's brief indicates, there had been eleven rapes on the campus in the preceding three years. SER at 67-68.<sup>3</sup>

**3. There is no evidence – much less convincing evidence – that the Washington Supreme Court would overrule *Wilbert, Raider, Craig, and Fuentes***

McKown does not dispute the conclusion that *Wilbert, Raider, Craig, and Fuentes* stand for the following proposition: there is a genuine issue of material question fact as to whether the third party's criminal conduct was reasonably foreseeable only if plaintiff presents evidence that similar acts had occurred on the defendant's premises in the past. Instead, McKown argues that the four court of appeals decisions were wrongly decided.

But that isn't enough. The Washington Supreme Court has not decided the issue. The Washington Court of Appeals has. Under these circumstances, "the federal court *must* follow the state intermediate appellate court decision unless the federal court finds convincing evidence that the state's supreme court likely would not follow it." *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 994 (9<sup>th</sup> Cir. 2007) (emphasis supplied). McKown does not and cannot demonstrate that

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<sup>3</sup> *Raider, Wilbert, Fuentes* and *Craig* all dealt specifically with the duty first recognized in *Nivens*. *Johnson* was decided before *Nivens*. The *Johnson* court assumed, without analysis, that a landowner's duty to protect its invitees from dangerous conditions on the property included a duty to exercise reasonable care in protecting them from the reasonably foreseeable criminal conduct of third parties. *Johnson*, 77 Wn.App. at 940-941

Washington's Supreme Court would overrule the four relevant decisions of its court of appeals.

**a. McKown's "soft target" argument fails**

McKown seeks to discredit the four court of appeals decisions cases by arguing that none of them "involved a 'soft target' like the Tacoma Mall whose 'place or character' made the harm reasonably foreseeable." Br. App. at 34. This argument fails. First, there is no evidence in the record attempting to explain what a "soft target" is. Plaintiff's expert Wuorenma labeled the Tacoma Mall a "soft target" (ER II, at 119), but made no effort to explain what the term means to him or anyone else.

Second, despite McKown's assertions to the contrary (Br. App. at 2, 7, 10, 40, 42), there is no evidence that IPC or Simon considered the Tacoma Mall to be a "soft target," whatever that term might mean. The Nov. 5, 2005 memo from IPC's security director Richard Erdie cited by McKown does not use the term "soft target," and nothing in the memo suggests that it there was anything "soft" about the mall. ER II, 82-83. Mr. Erdie never testified that he considered the Tacoma Mall to be a "soft target" or that he talked to his superiors at IPC or to Simon about it being a "soft target." ER II, 87-88. And Mr. Erdie's testimony does not support McKown's assertion that he "opined that the general field of danger included a 'soft target' attack on the mall." Br.App. at 42.

Third, McKown has offered no evidence or explanation as to how the Tacoma Mall was any more “soft” than the businesses at issue in the four court of appeals cases. If a “hard” facility is heavily defended and a “soft” one is not, then the businesses in at least three of the four cases were clearly “soft.” *Wilbert*, 90 Wn.App. at 306 (community center rented out spaces for a dance and a wedding reception in same building on night of fatal shooting, and assigned one employee to monitor both events; no security personnel); *Raider*, 94 Wn.App. at 818 (bus terminal did not employ security checks or electronic security equipment, sometimes had security personnel on the site, but not at time of the shooting in question; no indication that security personnel were ever armed); *Craig*, 94 Wn.App. at 822-823, 827-828 (bank – no security personnel). And if a facility’s “softness” is proportional to the number of visitors it attracts every day, then the major airport in *Fuentes* was far “softer” than a shopping mall. But in *Fuentes* as well as the other three cases, the court held that the attack on the plaintiff was unforeseeable as a matter of law.

**b. The Washington Supreme Court would not overrule *Wilbert*, *Raider*, *Craig*, and *Fuentes* based on the al Qaeda attacks of 9/11**

Next, McKown asserts that the four court of appeals cases are of no significance because the events underlying them took place before the terrorist attacks of September 11, 2001. Br. App. at 34. They predated what McKown

describes as 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.” *Id.*

First, Simon has never made such a concession. Second, domestic terrorism and mass shootings occurred in the United States before September 11, 2001.<sup>4</sup> Third, there is simply no reason to believe that because the 9/11 terrorist attacks happened, the Washington Supreme Court would overrule *Wilbert, Raider, Craig*, and *Fuentes*. To accept that argument would be to subject every business in the state to liability for attacks on its invitees by foreign terrorist organizations—a result clearly at odds with the court’s admonition that businesses should not “become the guarantor of the invitee's safety from all third party conduct on the business premises.” *Nivens*, 133 Wn.2d a5 203.

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<sup>4</sup> The bombing of the federal building in Oklahoma City, which killed 168 people, took place in 1995. *U.S. v. McVeigh*, 119 F.3d 806, 808 (10<sup>th</sup> Cir. 1997). The Columbine school shooting occurred in 1999. *Schnurr v. Bd. of County Comm’rs*, 189 F.Supp. 2d 1105, 1115 (D.Colo. 2001). Fifteen people died. *In re B.R.*, 732 A.2d 633, 639 (Pa. Super. 1999). Thirteen people were shot and killed at the Wah Mee gambling club in Seattle one night in 1983. *Kwan Fai Mak v. Blodgett*, 754 F.Supp. 1490, 1491 (W.D.Wash. 1991).

**c. The requirement that the plaintiff present evidence of prior crimes on the premises, similar to the crime that caused his injury, has a firm foundation in Washington law**

McKown contends that the “prior similar acts on the premises” test has no foundation in Washington law. His contention, however, is largely a repeat of his argument that the Washington Supreme Court “rejected” this requirement in *Nivens*. Based on *dictum* in *Nivens*, McKown again asserts that “the place or character” of the defendant’s business, is alone sufficient to establish foreseeability. McKown contends that the Tacoma Mall was located in a dangerous “place”—*i.e.*, a neighborhood with a high crime rate—and that this made Maldonado’s crime reasonably foreseeable. ER II, 100-101,119-120; Br. App. at 8, 40.

But the Washington Supreme 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 v. 1001 Fourth Ave. Assoc.*, 160 Wn.2d 217, 236, 802 P.2d 1360 (1991). In *Hutchins* an assailant pushed the plaintiff from a public sidewalk into a recessed entryway of the defendant’s building and then robbed and injured him. *Id.* at 219-220. To support his argument that the owner owed him a duty of care, the plaintiff asserted that the building was in a high crime area. *Id.* In upholding summary judgment for the

defendant, the court held as a matter of policy that the rate of crime in the area should not be considered.

[T]here is a basis to conclude that the high incidence of crime in an urban area does not favor imposition of the duty urged by plaintiffs, but instead cuts the other way. That is, if the premises are located in an area where criminal assaults often occur, imposition of a duty could result in the departure of businesses from urban core areas—an undesirable result.

*Hutchins*, 116 Wn.2d at 236.

Defendants acknowledge 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 that supported the decision in *Hutchins* supports the conclusion that the crime rate in the surrounding area should not be considered in determining whether a particular crime on the landowner's property was foreseeable. Allowing a high incidence of crime in the neighborhood 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." *Hutchins*, 116 Wn.2d at 236.

This holding in *Hutchins* clearly survived *Nivens*. Four years after *Nivens*, the Washington Supreme 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*).

McKown also argues that that evidence of the “character” of the defendant’s business, “common industry knowledge,” or “industry standards” is alone sufficient to establish that the third party’s criminal act was reasonably foreseeable. Br. App. at 20, 30-31. But despite his claim that the post-*Nivens* decisions in *Wilbert*, *Raider*, *Craig*, and *Fuentes* have no foundation in Washington law, the court of appeals opinion in *Nivens* itself supports the conclusion that foreseeability must be established by evidence of past similar crimes on the premises. While the Washington Supreme Court in *Nivens* found it unnecessary to reach the issue of foreseeability, the court of appeals decided the case on that ground. *Nivens*, 83 Wn.App. at 53-55.

There was evidence of the “character” of the defendant’s business as one that habitually attracted large groups of adolescent males who loitered, drank beer, and sometimes fought with each other in the parking lot where *Nivens* was attacked. *Nivens*, 83 Wn.App. at 36-37, 40-41 & n. 18. In the two years preceding the assault on *Nivens*, the store had been the scene of three armed robberies. *Id.* at 39, n. 11. And there was “industry knowledge” and “industry practice” testimony from *Nivens*’ security expert (testimony of the sort that McKown regards as sufficient to establish foreseeability) that allowing teenagers to loiter over an extended period leads to assaults and fails to “meet the custom and practices expected of a retail store.” *Id.* at 39. Yet 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.

Finally, public policy can and does support the rule followed in *Wilbert*, *Fuentes*, *Raider*, and *Craig*. To hold that there is a jury issue as to the foreseeability of a particular crime at shopping mall A, based solely on the fact that a similar crime was committed at shopping mall B, is to confuse what is merely conceivable with what is reasonably foreseeable. Removing the requirement of evidence of past similar crimes on the defendant's premises would have sweeping consequences. It would mean that in premises liability cases arising out of the criminal act of a third party, no defendant could avoid the expense of a full trial, as long as a similar crime had occurred at some other business of the same "character" as the defendant's. "Washington courts have been reluctant to find criminal conduct foreseeable." *Nivens*, 133 Wn.2d at 205, n.3. The rule proposed by McKown would turn this concept on its head.

**C. The District Court Correctly Ruled that McKown Failed to Submit Evidence of Prior Crimes at the Tacoma Mall That Were Sufficiently Similar to Maldonado's Attack to Render that Event Reasonably Foreseeable**

**1. Evidence of criminal activity in general is not enough**

Washington cases demonstrate that to establish a genuine issue of material fact on the question of foreseeability, the earlier criminal acts on the defendant's

premises must have been very similar to those that injured the plaintiff. The following chart summarizes the relevant evidence and the holdings in these cases.

Case Name	Third Party's Criminal Conduct	Evidence Presented To Support "Foreseeability"	Was A Jury Question Presented?
<i>Wilbert v. Metropolitan Park District</i>	Fatal shooting	Unruly and aggressive behavior by young people at the dance; fights had occurred earlier in the evening.	<b>No.</b>
<i>Fuentes v. Port of Seattle</i>	Carjacking and kidnapping	Assaults and car-prowls in another area of the premises, and a report that "a passenger at Seattle-Tacoma International Airport is more likely to be a victim of a crime tha[n] at any other comparable airport in the United States."	<b>No.</b>
<i>Raider v. Greyhound Lines</i>	Racially motivated shooting which resulted in serious injury.	Prostitution, drug use and a shooting two years earlier on the premises, as well as evidence that the property "was a high crime area."	<b>No.</b>

Case Name	Third Party's Criminal Conduct	Evidence Presented To Support "Foreseeability"	Was A Jury Question Presented?
<i>Craig v. Washington Trust Bank</i>	Assault	Transients loitered near the Bank building	No.
<i>Johnson v. State</i>	Rape	11 rapes that occurred on premises within the prior three years. <sup>5</sup>	Yes.

McKown argues that he was not required to show that the crimes previously committed at the Tacoma Mall included acts similar to Maldonado's. Relying on *McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953), McKown suggests that the harm he suffered was reasonably foreseeable because it fell within the "general danger area" reflected by such crimes as simple assaults, batteries, fights, and property crimes. But the language from *McLeod* does not apply to the specific question of foreseeability in the context of a business owner's duty to protect its invitees from the criminal acts of third parties.<sup>6</sup>

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<sup>5</sup> SER at 67-68.

<sup>6</sup> McKown also relies on *Rikstad v. Holmberg*, 76 Wn.2d 265, 456 P.2d 355 (1969). However, *Rikstad* has absolutely no bearing on the present case because it did not even involve the conduct of a third party, nor does it support McKown's claim that Maldonado's conduct was foreseeable. In *Rikstad*, the decedent got drunk and passed out in a field adjacent to a campsite where he and his friend (the defendant) had been drinking. Driving around the field in the dark, the defendant accidentally ran his truck over the decedent and killed him. The court simply held

First, in both *Wilbert* and *Fuentes* the court cited *McLeod* for this concept of the “general field of danger” or “general threat of harm.” *McLeod*, 90 Wn.App. at 308-309; 119 Wn.App. at 870. Yet in both cases the court held that prior *similar* acts on the premises are required to establish foreseeability.

Second, there is a significant difference between the duty owed by a school district to its students and the duty owed by a business owner to its customers. In *McLeod*, the school district’s duty to adequately supervise its students was *not contingent* upon prior similar acts of indecency having occurred at the school or in the darkened room where the student was raped. But the duty owed by a business owner to its customers *is contingent* upon prior similar crimes having taken place on the business premises.

The court of appeals in *Nivens* recognized that when determining the scope of duty owed based on a “special relationship,” it is inappropriate to analogize between different types of special relationships.

In our view, the stated 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,

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that in light of the evidence, the jury could rationally find that the accident was reasonably foreseeable. *Rikstad*, 76 Wn.2d at 270.

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.*

*Nivens*, 83 Wn.App. at 54 (emphasis added).

There are obvious policy reasons underlying the differences in the nature of these duties, which is why it is inappropriate for courts to analogize between different types of “special relationship” in deciding issues of foreseeability. The duty imposed on a school is necessarily broader in scope, because compulsory education requires parents to relinquish control of their minor children and place them in the custody and care of the school. Thus, the special relationship between a school and its students is both protective and custodial. But there is no custodial element to the relationship between a business and its invitees. It is only natural that courts have applied a narrower standard of foreseeability to cases in the latter category.

**2. The crimes described in McKown’s evidence were not similar to Maldonado’s shooting spree**

McKown presented police reports of three 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. ER II, 132-144. None of these incidents was even remotely similar to Maldonado’s act of randomly shooting seven people inside the mall. No gun was fired in any of these

incidents. None of them took place in the mall. Each involved only a single victim. These three alleged crimes and the underlying motivations, while reprehensible, are not extraordinary. The act of shooting seven people for no apparent reason is.

McKown also cited six incidents between 1992 and 2000 involving the discharge of a firearm on the Tacoma Mall's property. In three of these incidents, there was a confirmed resulting injury. In the other three, no one was hurt. ER II, 126-127.

(1) May 1992— in front of the Tacoma Mall bus center, men fired shots toward others with whom they had argued earlier. *Id.* at 127.

(2) Nov. 1992— victim was shot in parking lot as he argued with shooter. *Id.*

(3) March 1993— in the parking lot, victim walked up to a car occupied by three young males and was shot. *Id.* at 126-127.

(4) Aug. 1994— two teenagers fired their handguns from the parking lot in the direction of two or three other teenagers after the second group had hurled racial epithets and displayed gang insignia at the first. *Id.* at 128.

(5) Oct. 1996—a gunman shot and wounded a man as the man ran into the lobby of the Tacoma Mall Theater. *Id.* at 126.

(6) March 2000— shots were fired in the parking lot after a dispute. *Id.*

In nature and scale, location, and time-frame, these acts and Maldonado's attack are dissimilar.

*Nature and scale.* In each of the six incidents, the firing of a gun clearly arose out of a dispute between the participants, or the shooter apparently had a motive for directing the violence at a single specific person. Maldonado's crimes, by contrast, have no logical explanation and no understandable motive. He had no animosity toward his victims. Without reason, he calmly shot seven people. His attack was dispassionate, random, and massive. He was a madman who fired semi-automatic weapons at innocent people because, in his own words, "Today is the day I will be heard." SER at 6, 23. In both its nature and its scale, Maldonado's attack was radically different from any crime that had ever occurred at the Tacoma Mall.

In *Raider v. Greyhound Lines*, 94 Wn.App. 816, 819-820, 975 P.2d 518, *review denied*, 138 Wn.2d 1011 (1999), the court held that the racially motivated shooting of a bus-station patron was unforeseeable as a matter of law. The court reached this conclusion *even though there had been a shooting on the premises two years earlier*. *Id.* at 818. The shooting in *Raider* was unforeseeable as a matter of law, the court held, because there was *no evidence "that similar racially motivated conduct had occurred"* in the past at the station. *Id.* at 820 (emphasis supplied).

As in *Raider*, the past shootings on the property of the Tacoma Mall were of

an entirely different character than the event that caused plaintiff's injury. A madman's act of shooting seven people because he wanted to "be heard," bears no "relationship or similarity to the past crimes" that arose out of arguments or gang rivalries. *Raider*, 94 Wn.App. at 820.

**Location.** Even if violent crime has occurred in one part of the defendant's premises in the past, a later violent crime in a different part of the property may be unforeseeable as a matter of law. "Even if the [prior] assault 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." *Fuentes*, 119 Wn.App. at 870 (affirming summary judgment for defendant on foreseeability).

Maldonado did all of his shooting inside the mall. McKown concedes that Maldonado's attack of Nov. 20, 2005 was the first time that someone had opened fire inside the Tacoma Mall. Br. App. at 9. The incidents described in McKown's evidence took place almost exclusively in the parking lot. They are not sufficient to make it reasonably foreseeable that a madman would enter the mall's common area, pull out an assault rifle and a semi-automatic pistol, and shoot seven people for no apparent reason.

**Time-frame.** The six incidents involving discharge of firearms took place between 1992 and 2000, or *between five and thirteen years before Maldonado shot plaintiff*. ER at 126-128. By contrast, the courts considered specific incidents

going back only *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>7</sup> It is true that in these cases the court did not address the question of how recent the prior crimes must have been to support a finding of foreseeability. But other courts have addressed this issue and held that the prior incidents must not be too remote in time. E.g., *Burnett v. Stagner Hotel Courts, Inc.*, 821 F.Supp. 678, 683-684 (N.D.Ga. 1993) (Ga. Law)(crimes more than two years before the event in question were too remote); *Leitch v. City of Delray Beach*, 41 So.3d 411, 412 (Fla.App. 2010)(random shootings three and eight years earlier were “too remote in time and too infrequent to render the instant” random shooting foreseeable). The issue is whether an attack like Maldonado’s was reasonably foreseeable at the time it occurred, based on prior crimes at the mall. As a matter of law, isolated dissimilar events occurring almost exclusively in the parking lot between *five* and *thirteen* years earlier are insufficient to establish reasonable foreseeability.

**3. The *admissible* evidence reveals nothing even remotely similar to the event in which McKown was injured**

Even if this Court is inclined to conclude that the prior crimes described in McKown’s evidence were sufficiently similar to Maldonado’s attack to create a jury issue concerning foreseeability, there is another persuasive reason for affirming the district court: virtually all of that evidence was inadmissible. The

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<sup>7</sup> SER at 67-68.

very limited *admissible* evidence unquestionably failed to show that similar crimes had previously occurred at the Tacoma Mall. An appellate court may affirm the grant of summary judgment based on any ground supported by the record. *Applied Information Sciences Corp. v. eBay, Inc.*, 511 F.3d 966, 973 (9<sup>th</sup> Cir. 2007).

To avoid summary judgment, the nonmoving party “must respond with more than mere hearsay and legal conclusions.” *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9<sup>th</sup> Cir. 2002). Admissible evidence must be produced to show that a genuine issue of material fact exists. *Id.* The proponent of evidence bears the burden of establishing the necessary foundation for its admission. *City of Long Beach v. Standard Oil Co. of California*, 46 F.3d 929, 937 (9<sup>th</sup> Cir. 1995).

As evidence of prior shootings at the Tacoma Mall, McKown relies exclusively on three newspaper articles. ER II, 126-131. The statements in the articles are the out-of-court assertions of the author (the declarant), offered by McKown to establish the truth of the matter asserted—*i.e.*, that the incidents described in the article did in fact occur. Thus, the statements are hearsay. Fed.R.Evid. 801(a)-(c). Because no exception applies, the statements in the articles are not admissible. Fed.R.Evid. 802.

McKown ultimately presented a declaration from one of his expert witnesses, Wuorenma, stating that security experts rely on newspaper articles in forming their opinions about foreseeable harm at a given location. ER II, 170. “If

of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.” Fed.R.Evid. 703. Thus, the fact that the expert relied on the hearsay articles in forming his opinion that Maldonado’s attack was foreseeable might not by itself render his *opinion* inadmissible.

But an expert’s opinion that the third party’s crime against the plaintiff was foreseeable is not sufficient under Washington law to avoid summary judgment. Again, there must be evidence that prior similar crimes had in fact occurred on the defendant’s premises. E.g., *Wilbert*, 90 Wn.App. at 310 (holding an expert’s opinion on foreseeability insufficient to defeat summary judgment). Nothing in Wuorenma’s declaration renders the newspaper articles themselves admissible.

Although he does not include them in his initial excerpts of the record, McKown might later supplement his excerpts with two court documents concerning the August 1994 incident in which two teenagers fired their handguns from the parking lot toward their antagonists. Accordingly, Simon will address this evidence. McKown submitted an Affidavit of Probable Cause charging one of the shooters and a judgment convicting a youth who appears to be the other shooter. SER at 69-79. This one racially motivated discharge of firearms from the parking lot in 1994 is simply too dissimilar and too remote in time from

Maldonado's 2005 act of randomly shooting seven people in the mall to render the latter event reasonably foreseeable.

**D. The District Court Correctly Ruled that Simon Had No Duty to “Intervene and Protect” McKown Once the Shooting Started**

McKown argues that once Maldonado began shooting, Simon had a duty to protect him from being shot—even though Maldonado's attack was unforeseeable as a matter of law. McKown claims that the moment after Maldonado's first shot, Simon had a duty to “intervene” which required that Simon (1) have state of the art surveillance equipment to “monitor” Maldonado and everyone else in the mall, (2) an intercom that would be heard over the sound of gunfire and screaming so that Simon could have warned McKown about where Maldonado was and could have instructed McKown to evacuate via a safe route, and (3) armed police on duty to “neutralize” the danger (presumably by killing Maldonado). Br. App. at 14-15, 45.

But the purported duty to have taken each of these steps is based on the premise that an attack like Maldonado's was reasonably foreseeable. And as the district court correctly held as a matter of law, Maldonado's attack was *not* reasonably foreseeable. Because a massive attack by a heavily armed madman was unforeseeable under Washington law, Simon owed McKown *no duty of care* to protect him from such an event. To accept McKown's argument would require Simon to protect McKown from conduct that was unforeseeable just seconds

earlier. A holding to that effect would render the concept of foreseeability meaningless.

McKown argues that the court of appeals in *Nivens* imposed on business owners a duty under the Restatement (Second) of Torts §344 to intervene and protect an invitee from harmful acts of third parties that “are being done,” even if those acts are unforeseeable. But the court of appeals did not so hold. The plaintiff in *Nivens* never even claimed that defendant breached a duty to protect him from the assault once it had begun. *Nivens*, 83 Wn.App. at 40-41 & n. 18. Thus, the court of appeals’ comments on which McKown relies are mere *dicta*.

*Passovoy v. Nordstrom, Inc.*, 52 Wn.App. 166, 758 P.2d 524 (1988), does not support McKown’s position. In *Passovoy*, Nordstrom store detectives identified two shoplifting suspects inside a store. The detectives became concerned the shoplifters might successfully flee if they got outside the store, so the detectives intercepted the shoplifters in order to “... cut off any chance of them being able to run.” *Passovoy*, 52 Wn.App. at 168. While the detectives were leading the shoplifters back through the store to the security office, one of the shoplifters attempted to escape. *Id.* The Nordstrom detectives chased the fleeing shoplifter through the crowded store, and during the chase the shoplifter collided with a patron, causing injury. *Id.* The Court held that a question of fact existed as

to whether the detectives chasing the shoplifter should have warned customers in the area of the chase. *Id.* at 173-174.

*Passovoy* 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 owner a duty to have previously taken steps that might have protected its invitees from being harmed by that act. In *Passovoy*, the shoplifter's escape from detention by the defendant's detectives, his flight through a crowded store while the detectives chased him, and his collision with invitees were all entirely foreseeable. *Passovoy*, 52 Wn.App. at 173-174. The firing of the first shot did not impose on Simon a duty to protect McKown from Maldonado's unforeseeable attack.

McKown also appears to argue that although the attack was not reasonably foreseeable, Simon nevertheless had a duty to intervene and protect McKown from the moment Maldonado began to load his weapons. Br.App. at 14, 45. This duty arose, he contends, "because Simon had no way to detect and protect McKown from the shooter while he . . . spent ten minutes openly loading his weapons in a mall hallway." *Id.* at 45.

There is no evidence that any employee of Simon or IPC saw Maldonado loading guns or that any witness reported to Simon or IPC that he or she observed a man loading guns. McKown argues that Simon should have had a surveillance

system by which Simon/IPC could have observed Maldonado in the act of loading. This assertion about what Simon should have done, however, assumes that Simon had a pre-existing duty of care to protect McKown from Maldonado's attack. Simon had no such duty, because the entire event was unforeseeable as a matter of law. McKown's argument, if accepted, would retroactively impose on Simon—in the few minutes before the shooting started—a duty to have *previously* taken steps to prevent a criminal act that it had no duty to anticipate. This argument fails.

In addition, the evidence about how Maldonado looked and when and where he allegedly loaded his guns is largely inadmissible. McKown relies on police officers' notes of their interviews of witnesses Christopher Winters (Br.App. at 11, notes 25, 27; ER Vol. II, at 149); Joseph Hudson, who was in turn relating what Maldonado had told him (Br.App. at 12, notes 29, 31; ER Vol. II, at 160-162); and Shoshana Overocker (Br.App. at 12, n. 32; ER Vol. II, at 163-164). He also cites an unsigned, unsworn transcript of a taped police interview of witness W. Mitchell. Br.App. at 12, notes 28, 30, 34; ER Vol. II, at 156-157. All of this evidence is inadmissible hearsay. Fed.R.Evid. 801, 802.

Finally, McKown argues that because former IPC employee Chantel Bursott had witnessed angry behavior by Maldonado on the one occasion when she met him six months before the shooting, she would have recognized him if the mall had had a surveillance system, and then she would have warned others. Br.App. at 16-

17; ER Vol. II, at 191-193. Again, Simon had no duty to have a surveillance system to protect McKown from Maldonado's attack, because the attack was unforeseeable as a matter of law.

Moreover, neither IPC nor Simon had any knowledge of Ms. Bursott's prior experience with Maldonado (or of what Ms. Bursott's mother told her on the phone on another occasion). There is no evidence that she reported to anyone at IPC or Simon about either episode. Nor is there any evidence that IPC employees were expected to report to their superiors concerning every angry person they encountered in their personal lives. Knowledge that an agent acquires outside the scope of her duties is not imputed to the principal. *Hendricks v. Lake*, 12 Wn.App. 15, 22, 528 P.2d 491 (1974).

**E. Summary Judgment in Favor of IPC Was Appropriate**

**1. If the Court affirms the dismissal of Simon, it must affirm the dismissal of IPC**

McKown argues that he is entitled to proceed to trial against IPC because IPC "contracted to fulfill Simon's duty to protect its invitees from foreseeable harm." Br.App. at 46. In other words, his claim against IPC is dependent on his claim against Simon. If the district court was correct in holding that Simon had no duty to protect McKown from being shot by Maldonado because Maldonado's attack was unforeseeable as a matter of law, then IPC owed no duty to McKown either. In that event, this Court may affirm the grant of summary judgment to IPC

without considering the question of whether IPC “assumed” Simon’s duties by contract. *Id.*

**2. By entering into a contract to provide certain services at the mall, IPC did not “assume” Simon’s duties to its invitees**

If the Court reverses the district court’s grant of summary judgment to Simon, then it becomes necessary to determine whether IPC contractually assumed any of Simon’s duties and whether McKown has any right to sue IPC for its alleged breach of contract.

The mere existence of a security services contract with IPC does not mean that IPC “assumed” Simon’s common-law duties as an owner or occupier of land. The contract does not state that the IPC was to “assume” any of the duties imposed on Simon by law. To impose those duties on IPC would be to expand its contractual obligations far beyond the scope of what IPC agreed to do. McKown has not identified, and cannot identify, any provision of the contract that supports this contention.

McKown cites IPC’s duty to “respond to all alarm conditions and any other indications of suspicious activities.” ER Vol. II, at 49. This provision did not specify any particular type of response. It did not obligate IPC’s personnel to hire armed off duty police officers to kill Maldonado, or require IPC to install and utilize an intercom system to warn Simon’s invitees that a deranged gunman was in the mall. And while it required IPC to respond to suspicious activities that IPC

observed, it did not obligate IPC to purchase and install a state of the art surveillance system, or confront and search every person wearing a coat or carrying a guitar case.

McKown next points to IPC's promise to "use reasonable effort to deter, and when only absolutely necessary, detain persons observed attempting to gain or gaining unauthorized access to the Property." *Id.* There is no evidence that Maldonado gained unauthorized access to the mall. In addition, the objective of this provision is more likely to deter theft of a tenant's property than to prevent the type of conduct that injured McKown in this case.

Next, McKown cites to the provision that required IPC to "Respond to and provide assistance in security related situations (including fires, accidents, internal disorders and attempts of sabotage or other criminal acts), in conformance with common sense and good judgment and in keeping with the policies and procedures of Owner and Owner's Managing agent." ERVol. II, at 49. This provision has nothing to do with deterring or preventing crime. It does not specify the particular type of response or assistance that is required. It does not require IPC to use force, much less deadly force, to respond to or assist in security-related situations. An attempt by an unarmed IPC employee to subdue Maldonado would not have been "in conformance with common sense and good judgment."

McKown also relies on the statement of Richard Erdie, IPC's director of security at the Tacoma Mall in 2005, that he considered it his responsibility "to provide a safe place for people to come and shop." ER Vol. II, at 84. A former employee's personal understanding of his own responsibility is irrelevant to the question of what IPC's duties were under its contract with Simon. McKown presented no evidence that Mr. Erdie participated in the negotiation of the contract. It is undisputed that Mr. Erdie was never an officer of IPC. Further, there is no evidence that he was authorized by IPC at any time to make binding statements on its behalf about the scope or meaning of any contract.

Further, even if Mr. Erdie were a party to the contract, the testimony on which McKown relies would have no legal significance. Washington courts follow the objective manifestation theory of contract law. *Olson v. The Bon, Inc.*, 144 Wn.App. 627, 633-634, 183 P.3d 359 (2008). Under this theory, the mutual assent of the parties is to be determined from their outward manifestations. *Id.* at 634. The unexpressed, subjective intentions of the parties are irrelevant. *Id.* There is no evidence that Mr. Erdie or any employee of IPC ever stated to the owner of the Tacoma Mall—the other party to the contract—that IPC “assumed” Simon's duties as a property owner.

*Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998), does not support the conclusion that IPC owed McKown a legal duty of care. In *Folsom*,

two employees of a Burger King restaurant were murdered during a robbery. *Id.* at 661. At some point during the robbery, one of the employees activated an alarm system that had been installed and operated by defendant Spokane Security. *Id.* at 673-674. Spokane Security received the alarm signal, but did not contact the police because the restaurant owner had discontinued the service. *Id.* at 674. The estates of the murdered employees sued, and the trial court granted Spokane Security's motion for summary judgment. *Id.* at 662.

The Washington Supreme Court affirmed the dismissal of Spokane Security, holding that it owed the restaurant's employees no legal duty of care. *Id.* at 673-678. The court re-affirmed the general rule that a private person has no duty to protect others from the criminal acts of third parties. *Id.* at 674. There are exceptions, the court noted, in the context of certain judicially recognized "special relationships." *Id.* at 674-675 & n.1. But the court held that there was no such special relationship between Spokane Security and the restaurant's employees. *Id.* at 675, 678.

McKown suggests that the only reason the *Folsom* court did not find a special relationship was because the restaurant had terminated its contract with the security company. But the court made it clear that the relationship between a business owner's employees and the contractor hired to provide security services on the premises simply was not one of the established "special relationships"

recognized by Washington courts as creating an exception to the general rule. *Id.* at 674-675 & n.1. “Plaintiffs allege a ‘special relationship’ existed between Spokane Security and the employees, *but fail to explain which exception applies.*” *Id.* at 675 (emphasis supplied). The court further explained that “Spokane Security was not contractually obligated to provide security services *and* plaintiffs have not established there was a legally recognized or established special relationship with the employees.” *Id.* (emphasis added). Nowhere in *Folsom* does the court indicate that it intended to establish a “special relationship” between a security company and the employees of the business by which the company was hired. In *Folsom* the Court did not reach any conclusion as to what duty the security company may have owed the employees if the contract had been valid. In Washington there is no “special relationship” between a business owner’s employees or invitees and the contractor hired to provide security services on the premises.

**3. McKown has no right to sue IPC for the alleged breach of its contract with Simon**

McKown is not a party to the contract. And he is not a third-party beneficiary. No matter what duties the contract might have obligated IPC to perform for Simon, McKown has no right to sue IPC for its alleged breach of that agreement.

“The creation of a third-party beneficiary contract requires that the parties intend that the promisor assume a direct obligation” to the third party. *Burke &*

*Thomas, Inc. v. International Org. of Masters*, 92 Wn.2d 762, 767, 600 P.2d 1282 (1979). McKown cites *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 361, 662 P.2d 385 (1983) referencing the following language: “If the terms of the contract necessarily require the promisor to confer a benefit upon a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person.” But McKown omits the following key language from *Lonsdale*: “The ‘intent’ which is a prerequisite of the beneficiary’s right to sue is ‘not a desire or purpose to confer a particular benefit upon him,’ nor a desire to advance his interests, but an *intent that the promisor shall assume a direct obligation to him.*” 99 Wn.2d at 361 (quoting *Vikingstad v. Baggott*, 46 Wn.2d 494, 496-97, 282 P.2d 824 (1955)) (emphasis supplied by *Lonsdale* court). No such intent appears in the contract between IPC and Simon. The district court properly dismissed McKown’s claims against IPC.

## VII. CONCLUSION

The Court should affirm the district court’s orders granting summary judgment in favor of Simon and IPC.

## VIII. STATEMENT OF RELATED CASES

Simon and IPC are not aware of any related case pending before this Court.

Respectfully submitted this 3<sup>rd</sup> day of November, 2011.

Keane Law Offices

/s/ T. Jeffrey Keane, WSBA 8465

Attorney for Appellees

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE  
REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,755 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003, and using type style Times New Roman, and font size 14 point.

Signature: /s/ T. Jeffrey Keane, WSBA #8465

Attorney for Simon and IPC

Dated: November 3, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 3, 2011.

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