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SUPREME COURT  
OF THE STATE OF WASHINGTON

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

BRENDAN MCKOWN, a single individual,

Appellant,

v.

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

Appellees.

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REPLY BRIEF OF APPELLANT BRENDAN MCKOWN

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## I. ARGUMENT

### A. The Undisputed Facts Illustrate Why the Court Should Reject a Bright Line Test that Requires “Prior Similar Acts” in Lieu of Reasonable Foreseeability

At the time of the shooting, IPC and Simon had a contract for IPC to provide security at nearly 150 malls and shopping centers across the country that were owned, co-owned, and/or managed by Simon or an affiliate of Simon.<sup>1</sup> Despite this substantial experience, IPC and Simon argue they should not be held accountable for disregarding both the industry standard and their own policies and procedures for protecting invitees like McKown. The following facts remain undisputed and highlight why Washington should not adopt a legal standard that would conclude IPC and Simon acted reasonably as a matter of law:

1) **Undisputed facts:** In 2003 and 2004, Simon’s internal documents acknowledged that “recent terrorist attacks” made it aware that a vacant hallway might be used to prepare for an assault on its invitees. Simon warned its managers and employees to keep a look-out for “anyone suspicious in the back hallways” and to “notify mall security ... right away” because “[w]e all play an equal part in keeping the mall safe for our employees and customers.”<sup>2</sup>

In this case, the shooter spent ten minutes loading his weapons in a vacant hallway.<sup>3</sup>

**Reasonable inference:** Simon knew it was reasonably foreseeable an assailant would use a vacant hallway to prepare for an attack but did nothing to meaningfully monitor its hallways.

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<sup>1</sup> Amendment to Security Service Contracts, Excerpt of Record, Vol. 2, at 62-81.

<sup>2</sup> Letter from Heim to Tenants, dated March 19, 2003, and Memo from Heim to Tenants, dated June 30, 2004, Excerpt of Record, Vol. 2, at 90-93.

<sup>3</sup> Statement of William Mitchell, Excerpt of Record, Vol. 2, at 156-57; Statement of Joseph Hudson, Excerpt of Record, Vol. 2, at 162.

2) **Undisputed fact:** After the terrorist attacks of September 11, 2011, Simon was sufficiently concerned about the possibility of an attack on the mall that it adopted evacuation procedures.<sup>4</sup>

**Reasonable inference:** Simon knew an attack on the mall was reasonably foreseeable and knew it was reasonably foreseeable its invitees would be injured if they were not safely evacuated.

3) **Undisputed fact:** Fifteen days before McKown was shot, Simon's mall security director wrote his supervisors at Simon and IPC and asked for surveillance cameras in order to make the mall a "safer place to shop."<sup>5</sup>

**Reasonable inference:** Simon knew its existing security team (four guards) could not safely monitor the mall's blind spots, including its vacant hallways.

4) **Undisputed facts:** On the day McKown was shot, Simon had "Evacuation Procedures" that required the mall to "make an announcement over the PA system to customers in the mall" and to have its security team "insure[] that everyone vacates the building as safely and quickly as possible" and "inform each tenant to close their gates, secure their store and leave immediately."<sup>6</sup>

**Reasonable inference:** Simon knew an attack was reasonably foreseeable and knew it was reasonably foreseeable its customers would be injured if they were not safely evacuated.

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<sup>4</sup> Deposition of Richard Erdie, Excerpt of Record, Vol. 2, at 87-89.

<sup>5</sup> Memorandum from Richard Erdie, Excerpt of Record, Vol. 2, at 82-83.

<sup>6</sup> Evacuation Procedures, Excerpt of Record, Vol. 2, at 194.

5) **Undisputed facts:** On the day McKown was shot, Simon was not monitoring the hallway where Maldonado loaded his weapons because it had no surveillance cameras.<sup>7</sup>

6) **Undisputed facts:** On the day McKown was shot, Simon knew the mall's intercom was inaudible, knew none of its security guards were trained how to use it, and knew none had access to it because it was a weekend. For these reasons, Simon was not able to follow its own "Evacuation Procedures" that were designed to make sure its invitees "vacate[] the building as safely and quickly as possible," "close their gates," and "leave immediately."<sup>8</sup>

7) **Undisputed facts:** Aside from no intercom system, Simon could not have helped McKown "vacate the building as safely and quickly as possible" because the mall had no surveillance system that would have allowed it to identify the location of the shooter and steer McKown and others away from him.<sup>9</sup>

8) **Undisputed facts:** McKown and other mall customers took refuge in one of the mall stores because Simon was unable to follow its Evacuation Procedures and could not help its invitees safely evacuate: "I took this action only because nothing was being done or announced whatsoever. ... I would have walked away if I was not needed, but it sounded like people were being shot and no one was doing anything about it. ... I would have left the premises per the instructions given had Tacoma Mall Security announced over the public address system that there was a gunman on the premises and that law enforcement were responding to the situation or if it were the slightest bit clear that something was being done."<sup>10</sup>

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<sup>7</sup> Deposition of Steve Heim, Excerpt of Record, Vol. 2, at 148; Statement of William Mitchell, Excerpt of Record, Vol. 2, at 156-57; Statement of Joseph Hudson, Excerpt of Record, Vol. 2, 162-63; Statement of Shoshana Overrocker, Excerpt of Record, Vol. 2, at 164.

<sup>8</sup> Deposition of Richard Erdie, Excerpt of Record, Vol. 2, at 86-87.

<sup>9</sup> Deposition of Steve Heim, Excerpt of Record, Vol. 2, at 148.

<sup>10</sup> Declaration of Brendan McKown, Excerpt of Record, Vol. 2, at 167-69 (¶¶ 2-3).

9) **Undisputed facts:** During the ensuing eight minutes of shooting, nobody told McKown or the mall's other customers what was happening, nobody warned them where the shooter was located, nobody instructed them how to evacuate, and nobody told them whether the police were there or whether the police were on their way. Surrounded by chaos, McKown hoped he could at least protect himself and others.<sup>11</sup>

10) **Undisputed facts:** After receiving no warnings or evacuation instructions for what seemed like "eternal silence," McKown believed the coast was clear. He holstered his weapon so he could check the area outside the store without being shot by the police, who he assumed were in the mall and had the situation under control: "During this seemingly eternal silence, had mall security announced over the public address system that the gunman was still at large, I would have either exited the building or not placed my weapon back into my waistband. Either way, I would not be paralyzed today."<sup>12</sup>

11) **Undisputed fact:** Unfortunately, the shooter was still active. When McKown started to leave, he came face-to-face with the shooter.<sup>13</sup>

12) **Undisputed fact:** The shooter roamed the Tacoma Mall for at least eight minutes before he encountered and shot McKown.<sup>14</sup>

13) **Undisputed fact:** The last person shot was McKown.<sup>15</sup>

14) **Undisputed fact:** Simon failed to rebut the opinions of McKown's experts that it was common knowledge in the industry that a mall shooting was reasonably foreseeable.<sup>16</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 169 (¶ 2).

<sup>13</sup> *Id.* at 169 (¶ 4).

<sup>14</sup> Defendants' Motion for Summary Judgment Dismissal, Excerpt of Record, Vol. 2, at 165; *see also* Brief of Appellees at 5.

<sup>15</sup> Declaration of Brendan McKown, Excerpts of Record, Vol. 2, at 169 (¶ 4); *see also* Brief of Appellees, at 5 ("[t]he last person shot was McKown").

15) **Undisputed fact:** Simon failed to rebut the opinions of McKown’s experts that the industry standard required the mall to have a surveillance system and an intercom system in order to help its invitees safely evacuate during an emergency because it was common knowledge in the industry that Simon’s invitees would likely be harmed during an emergency without such precautions.<sup>17</sup>

These facts illustrate the fundamental problem with relying solely on the “prior similar acts” test: it would give Simon and IPC immunity despite the fact that they ignored the industry standard of care and their policies and procedures for protecting their invitees. Nowhere in their response brief do Simon or IPC acknowledge these undisputed facts. At most, they take McKown’s evidence and arguments out-of-context with the hope of painting a slippery slope argument that overlooks the undisputed facts of this case.

The Court should reject their proposed “prior similar acts” test because it would eliminate the concept of “reasonable foreseeability” and replace it with a bright line test that would not allow a jury to decide if Simon and IPC acted reasonably.

**B. This Court Adopted Comments d and f of Restatement (Second) of Torts § 344 Because Those Comments “Describe the Limit of the Duty Owed”**

Simon and IPC agree that this Court in *Nivens v. 7-11 Hoagy’s Corner*, 133 Wn.2d 192, 205, 943 P.2d 286 (1997) held that a business owner must protect its invitees from reasonably foreseeable harm. Brief of Appellees, at 8. However, Simon and IPC then suggest the Court’s

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<sup>16</sup> Cf. generally Brief of Appellant, at 4-6, 9-11 (citing expert testimony that it was common knowledge in the industry that a mall shooting was reasonably foreseeable) with generally Brief of Appellees (never disputing the same).

<sup>17</sup> Cf. Brief of Appellant, at 9-11 (citing expert testimony that the industry standard required a surveillance system and an intercom system in order to help its invitees safely evacuate during an emergency and that it was common knowledge in the industry that it was reasonably foreseeable the mall’s invitees would be harmed during an emergency without such precautions) with generally Brief of Appellees (never disputing the same).

eight-page analysis of the scope of that duty, including its conclusion that comments d and f of Restatement (Second) of Torts § 344 “describe the limit of the duty owed,” was merely dictum and should not be followed. Brief of Appellees, at 9-12.

Instead, Simon and IPC suggest the Court should ignore the majority of *Nivens* and comments d and f, and instead adopt a bright line test of “prior similar acts” that would eliminate the concept of “reasonable foreseeability.” Put another way, when Simon and IPC urge the Court to adopt Restatement (Second) of Torts § 344 and comments d and f “only to the extent that section and the comments are consistent with the ‘prior similar acts’ rule,” they are really arguing that the Court should abandon any concept of reasonable foreseeability because, in their view, a danger is not reasonably foreseeable unless the exact same danger has previously occurred on the same premises, regardless of the industry standard, the nature or character of the business, or the owner’s prior experience with similar businesses.

In order to support replacing “reasonable foreseeability” with a bright line test, Simon and IPC imagine a parade of horrors that they claim will result from evaluating more than just prior similar acts on the premises. For example, they claim the reasonable foreseeability requirement “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 act of third persons were likely to occur.” Brief of Appellees, at 14 (emphasis in original). They even go so far as to claim “reasonable foreseeability” would result in business owners being held liable for “parking violations and genocide.” Brief of Appellees, at 14.

The problem with these rather far-flung arguments is that they ignore the plain text of both *Nivens* and the Restatement (Second) of Torts § 344, which hold that business owners are only liable for failing to take *reasonable* steps to protect their invitees from *reasonably*

foreseeable danger. Tellingly, Simon and IPC quote and underline large swaths of the Restatement (Second) of Torts § 344 and its comments, but over and over they ignore the word “reasonable,” which is used *nine times* in section 344 and comments d and f. As the Court recognized in *Nivens*, the entire purpose of comments d and f is to “describe the limit of the duty owed” (e.g., to define what is reasonably foreseeable). *Nivens*, 133 Wn.2d at 203-04.

**C. Simon and IPC Distort the Unrebutted Opinions of McKown’s Experts**

Simon and IPC go to great lengths to distort the opinions of McKown’s experts regarding why the shooting was foreseeable and what Simon and IPC should have done to protect McKown, likely because Simon and IPC failed to rebut those opinions.

**First**, McKown’s experts never opined that the shooting was reasonably foreseeable solely because the mall was located in a high crime area, solely because of the mall’s reputation as a permissive environment that fostered criminality, or solely because the mall was not deemed a weapon’s free zone. Brief of Appellee’s, at 16. Instead, McKown’s experts testified that those factors, combined with other factors, such as the number of other shootings, gun-related crimes, and violent crimes at the mall itself, as well as the number of shooting at other malls in the Puget Sound area, made the shooting foreseeable.

But more importantly, nowhere do Simon and IPC acknowledge a separate, un-rebutted opinion as to why the shooting was reasonably foreseeable, which is that the mall industry knew in 2005 that a mall shooting was foreseeable:

Several recent events have put shopping malls across the country on collective notice to have plans in place to deal with violent attacks. One momentous event was the attack on America on [September] 11, 2001. After 9/11 the rules changed for everyone. In the immediate years following 9/11, enterprises that were open to large numbers of the public, such as shopping malls, were admonished by the [Department of Homeland Security] to increase security. ... This provided notice to the shopping mall industry that security programs would need to endeavor to reasonably prevent and contain this contingency. This would include an active

shooter protocol, a plan in place for trained security personnel to follow to identify, deter, prevent, respond to, and contain a shooter. Clearly, no “active shooter protocol” was in place on Nov. 20, 2005. There was no active shooter evacuation protocol isolating the shooter. ... The need for such a plan made it foreseeable that a violent, criminal attack could occur. In addition, had a plan been in place either Mr. McKown could have been evacuated or secured or Mr. Maldonado neutralized before Mr. McKown was injured.<sup>18</sup>

Nowhere in their response brief does Simon or IPC provide any facts or law that supports their position that a business can simply ignore the industry’s knowledge of a danger and the standard of care required to protect its invitees from that danger.

**Second**, McKown’s experts never opined that additional security or hiring off-duty police officers was the only additional precaution that would have protected McKown. Simon and IPC focus almost exclusively on that precaution, and wrongly suggest McKown is arguing that every business in the United States must hire security officers or off-duty police officers. While the Tacoma Mall should have had additional security or off-duty police officers because of the harm that was reasonably foreseeable, neither McKown nor his experts have never relied solely on that additional precaution or suggested that every business must implement that precaution.

Instead, McKown’s experts outlined a number of specific precautions that Simon and IPC should have taken to protect McKown: (1) a surveillance system so they could monitor and respond to the danger; (2) an intercom system so they could warn their invitees of the danger and help them evacuate; (3) off-duty police officers to neutralize the danger when it started; or, (4) an active shooter protocol to warn and evacuate their invitees once the shooting started.<sup>19</sup>

These precautions reflect not only the industry standard of care, but were either already supposed to be implemented by Simon and IPC or had been acknowledged by Simon and IPC as

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<sup>18</sup> Declaration of William Nesbitt, Excerpt of Record, Vol. 2, at 104-05 (¶ 28).

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

necessary to protect their invitees from danger: (1) their mall security director requested a surveillance system fifteen days before the shooting, but Simon and IPC were waiting for facial recognition technology; (2) the mall had an intercom system, but it was not working and was inaccessible on the day of the shooting; (3) their mall security directory requested off-duty police officers fifteen days before the shooting; and, (4) they had “Evacuation Procedures” that were supposed to be followed in the event of an emergency in order to safely evacuate their invitees, but the procedures could not be followed because their security was understaffed, they had no ability to identify the source of the danger, and they had no ability to warn their invitees of the danger or tell them how to safely evacuate.

It is unclear why Simon and IPC suggest that McKown asserts all of these precautions were required. Although all of them would have provided the best protection, McKown’s expert explained that each of them, alone, would have been sufficient:

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

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

I have concluded that Simon Property Group and IPC failed to have an internal emergency communication system, such as a public address system, throughout

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

In their haste to frame the re-frame the issue as whether every business is required to hire additional security or off-duty police officers, Simon and IPC fail to address McKown's expert testimony that less burdensome precautions would have protected him, as well as their admissions that such precautions were practical, feasible, and should have been implemented. If Simon and IPC had been able to follow their own Evacuation Procedures, or if Simon and IPC had adopted the proposals of their security director, McKown would never have been injured.

**D. Simon and IPC Admit They Owed McKown a Duty to Take Reasonable Steps to Protect Him Once the Shooting Started**

For the first time in this case, Simon and IPC acknowledge that they had a duty to take reasonable steps to intervene and protect McKown once the shooting started because at that point the harm because reasonably foreseeable. Brief of Appellees, at 18-19.

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<sup>20</sup> Declaration of Robert Wuorenma, Excerpt of Record, Vol. 2, at 119-22 (¶¶ 24, 28, and 29). This block quote was included in McKown's opening brief, but is duplicated here because of the extent to which Simon and IPC have gone to mischaracterize McKown's arguments and the opinions of his experts.

After conceding they had a duty to intervene and protect McKown once the shooting started, Simon and IPC suggest their duty should be limited to reasonable steps they could take at that time. While McKown disagrees with this position for the reasons stated below, it is important to point-out that this is an admission by Simon and IPC that they agree the trial court erred in taking this issue away from the jury. More specifically, Simon and IPC claim that their actions “must be measured only by what Simon could reasonably have done after learning that the act was ongoing or imminent,” but it is undisputed that Simon and IPC had Evacuation Procedures that called for them to use their intercom system to ensure their invitees “vacate[] the building as safely and quickly as possible,” “close their gates,” and “leave immediately.”<sup>21</sup> In other words, what Simon and IPC could reasonably have done after the shooting started was to use their intercom system to ensure McKown and their other invitees vacated the building as safely and quickly as possible, closed their gates, and left immediately, but Simon and IPC failed to do so. Under their own proposed standard, an issue of fact exists regarding this was negligent.

However, given that this Court certified the question of when harm is reasonably foreseeable, McKown disagrees the Court should hold that the scope of the duty to intervene is limited to what the business owner can do at the time he learns that the act is imminent or in progress. The problem with limiting the duty in this manner is that it would, once again, immunize business owners from any requirement to guard against reasonably foreseeable dangers. As illustrated by this case, such a limitation would mean that businesses, including malls, movie theatres, and dance clubs, have no duty to take reasonable steps to ensure their invitees can safely evacuate in the event of an emergency unless the same emergency has previously occurred on the same premises. This cannot be the law in Washington as it will result

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<sup>21</sup> Deposition of Richard Erdie, Excerpt of Record, Vol. 2, at 86-87.

in immunity for the injury or death of literally dozens or hundreds of people, such as people who are trapped in a burning movie theatre or dance club.

Simon and IPC suggest it would somehow be improper to hold businesses responsible for what they “should have done weeks, months, or even years” before an incident, but to hold otherwise would mean that businesses have no duty to be prepared to help their invitees once harm is imminent or occurring. Likewise, they take issue with the idea that each of the precautions McKown asserts they should have taken, such as a working intercom system and surveillance system, “would have required planning and action well in advance of the day the incident took place,” but “planning and action well in advance” is what businesses should be required to do in order to protect their invitees from reasonably foreseeable harm. This is particularly true where that duty is grounded in the fact that the owner derives a material benefit from the presence of his invitees. To hold otherwise would mean that businesses owe no duty to their invitees unless and until a prior similar act has occurred on the premises.

**E. McKown Still Prevails Under the “Balancing Test” Urged by Simon and IPC**

The Court should hold that a plaintiff is not required to show previous acts of similar violence on the premises, but may instead establish a harm is reasonably foreseeable through evidence that (1) the owner “knows ... that the acts of the third person are occurring, or are about to occur,” (2) the owner knows or should know “from past experience” that there is a likelihood of criminal conduct “in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual,” or (3) the owner knows or should know that “the place or character of his business ... is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time.” *Id.* at 204-05 (quoting Restatement (Second) of Torts § 344 (1965), cmt. f).

However, because McKown has also consistently argued that the concept of reasonable foreseeability reflects a balancing test between the danger of the foreseeable harm and the burden it would impose on business owners, the Court could consider adopting the “balancing test” that California has used to determine the scope of a business owner’s duty to its invitees if the Court believes additional guidance is needed to determine the scope of a particular business owner’s duty. *See generally Ann M. v. Pacific Plaza Shopping Center*, 6 Cal.4th 666, 25 Cal.Rptr.2d 137, 863 P.2d 207 (1993), *disapproved on other grounds, Reid v. Google, Inc.*, 50 Cal.4th 512, 113 Cal.Rptr.3d 327, 235 P.3d 988 (2010).

Although *Nivens* and the Restatement provide sufficient guidance for a jury to decide what is reasonably foreseeable, Washington public policy would support a balancing test that acknowledges the ability of business owners to re-allocate the cost of the precautions they take to protect their invitees. For example, in *Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wn.2d 217, 219-20, 802 P.2d 1360 (1991), this Court acknowledged that “one characteristic often found in cases where a land possessor’s duty to protect others from criminal assault is found is that the one found owing a duty has, among other characteristics, the ability to take precautions and the ability to fairly allocate the costs of such precautions.” *Id.* at 235 (citing *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 49 (Colo. 1987)). Although the Court concluded the ability of a business owner to allocate the costs of reasonable precautions did not apply because *Hutchins* involved whether a business owes a duty to all passersby, not to its invitees, the Court suggested the ability of a business owner to allocate costs should be considered when analyzing the owner’s duty to its invitees: “Whatever the potential for effective cost spreading by an enterprise which benefits directly from its customers, that policy is not persuasive where the alleged duty is owed

to all those off the premises who pass by on the public way.” *Id.* at 236 (citing *Blake v. Dunn Farms, Inc.*, 274 Ind. 560, 567, 413 N.E.2d 560 (1980)).

Unlike *Hutchins*, this case involves an invitee relationship that weighs in favor of holding Simon and IPC accountable for failing to take reasonable precautions to protect McKown. Even under the “balancing test” that has been adopted in California, the trial court erred in taking this case away from the jury because McKown offered undisputed evidence regarding the risk of harm, and neither Simon nor IPC presented any evidence that it would have been cost prohibitive to ensure the mall’s intercom system actually worked and was accessible, to install surveillance cameras (rather than waiting for facial recognition technology), to hire additional security or off-duty police officers, or to have the ability to actually implement their Evacuation Procedures in an emergency. This is particularly true where they could have easily allocated the cost of those precautions to their many tenants of the Tacoma Mall.

The Court should adopt the three tests for reasonably foreseeable conduct that McKown outlined above, but in the event the Court concludes needs additional guidance is needed to define the scope of the duty owed, the Court should consider the “balancing test” that has been adopted in California.

## II. CONCLUSION

McKown seeks to ensure a business that enjoys the economic benefits of attracting large crowds of people, and that knows those crowds are likely targets, adequately protects its invitees from those reasonably foreseeable dangers. It is undisputed that Simon and IPC knew their invitees were likely targets, which is why they warned their managers to keep an eye on vacant hallways for “suspicious activities,” why they created emergency evacuation routes, and why they adopted evacuation procedures that were supposed to safely warn and evacuate their

invitees during an emergency. Simon and IPC should not be allowed to evade liability for failing to protect their invitees from that danger and for failing to implement the procedures they had in place to do so.

The Court should answer the certified questions as follows:

**Question 1:** “Does Washington adopt Restatement (Second) of Torts § 344 (1965), including comments d and f, as controlling law? *See Nivens v. 7-11 Hoagy’s Corner*, 943 P.2d 286 (Wash.1997).”

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

**Question 2:** “To create a genuine issue of material fact as to the foreseeability of the harm resulting from a third party’s criminal act when the defendant did not know of the dangerous propensities of the individual responsible for the criminal act, must a plaintiff show previous acts of similar violence on the premises, or can the plaintiff establish reasonably foreseeable harm through other evidence?”

Answer: No, a plaintiff is not required to show previous acts of similar violence on the premises, but may instead establish a harm is reasonably foreseeable through evidence that (1) the owner “knows ... that the acts of the third person are occurring, or are about to occur,” (2) the owner knows or should know “from past experience” that there is a likelihood of criminal conduct “in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual,” or (3) the owner knows or should know that “the place or character of his business ... is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time.” *Id.* at 204-05 (quoting Restatement (Second) of Torts § 344 (1965), cmt. f).

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

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

Dated this 11th day of December 2012.

Respectfully submitted,

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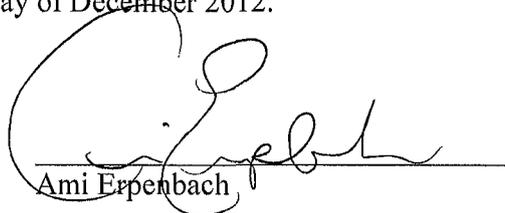
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**CERTIFICATE OF SERVICE**

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

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

DATED this 11th day of December 2012.

  
Ami Erpenbach

4812-5996-4178, v. 3

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Subject: McKown v. Simon Property Group -- No. 87722-0 -- Reply Brief of Appellant

Case Name: McKown v. Simon Property Group

Case No: 87722-0

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