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No. 11-35461

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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.

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

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## I. ARGUMENT

### A. **Simon Fails to View All Facts and Reasonable Inferences in a Light Most Favorable to McKown**

The district court was required to view all facts and reasonable inferences in a light most favorable to McKown. The following facts are not disputed and the Court should reject Simon's strained effort to ignore their reasonable inferences:

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>1</sup>

**Reasonable inference:** Simon knew it was reasonably foreseeable an assailant would use a vacant hallway to prepare for an attack.

2) **Undisputed fact:** Fifteen days before McKown was shot, Simon's mall security director wrote his bosses at Simon and IPC and asked for surveillance cameras in order to make the mall a "safer place to shop."<sup>2</sup>

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

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<sup>1</sup> Excerpts of Record, Vol. 2, at 90-93.

<sup>2</sup> *Id.* at 82-83.

3) **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 points for its customers.<sup>3</sup>

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

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>4</sup>

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

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 at the mall.<sup>5</sup>

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<sup>3</sup> *Id.* at 87-89.

<sup>4</sup> *Id.* at 194.

<sup>5</sup> *Id.* at 148, 156-57, 162-64.

6) **Undisputed facts:** On the day McKown was shot, Simon knew the mall's intercom was inaudible, none of its security guards were trained how to use it, and none had access to it on the day McKown was shot. 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>6</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>7</sup>

8) **Undisputed facts:** McKown and other mall customers took refuge in one of the mall stores because they did not know what was going on: "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

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<sup>6</sup> *Id.* at 86-87.

<sup>7</sup> *Id.* at 148.

responding to the situation or if it were the slightest bit clear that something was being done.”<sup>8</sup>

9) **Undisputed facts:** During the ensuing eight minutes of shooting, nobody told McKown or the 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>9</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 survey the area outside the store without being shot by the police that he assumed were in the mall and had the situation under control: “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>10</sup>

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<sup>8</sup> *Id.* at 167-69 (¶¶ 2-3).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 169 (¶ 2).

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

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

13) **Undisputed fact:** The last person shot was McKown.<sup>13</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>14</sup>

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 such emergency because it was common knowledge in the industry that Simon's invitees would likely be harmed during an emergency without such precautions.<sup>15</sup>

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<sup>11</sup> *Id.* at 169 (¶ 4).

<sup>12</sup> *Id.* at 165; *see also* Brief of Appellee at 4 (“[o]ver an eight-minute period, Maldonado shot a total of seven people”).

<sup>13</sup> Excerpts of Record, Vol. 2, at 169 (¶ 4); *see also* Brief of Appellees, at 4 (“[t]he last person shot was McKown”).

<sup>14</sup> *Cf.* Brief of Appellant, at 7-10 (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>15</sup> *Cf.* Brief of Appellant, at 13-16 (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).

Finally, it is both troubling and legally wrong for Simon to suggest it and other businesses can simply ignore the attacks of September 11, 2011, and other acts of domestic terrorism and mass shootings,<sup>16</sup> because Washington recognizes that tort duties are based on considerations that include “logic, common sense, justice, policy, and precedent.” *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 449, 243 P.3d 521 (2010).

McKown does not seek to “subject every business in the state to liability for attacks on its invitees for foreign terrorist organizations,” as Simon argues.<sup>17</sup> Instead, 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 knew its invitees were likely targets, which is why it warned its managers to keep an eye on vacant hallways for “suspicious activities,” why it created emergency evacuation routes, and why it adopted evacuation procedures to safely warn and evacuate its invitees during an emergency. Simon should not be allowed to evade liability for failing to protect its invitees from that danger and for failing to implement the procedures it had in place to do so.<sup>18</sup>

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<sup>16</sup> Brief of Appellees, at 21.

<sup>17</sup> *Id.*

<sup>18</sup> Simon’s comments regarding the Department of Homeland Security’s “active shooter” protocol highlight the flaw in its logic. While Simon acknowledges those guidelines exist, its view of duty means neither Simon nor any other similarly

**B. In *Nivens v. 7-11 Hoagy's Corner*, the Washington Supreme Court “Clearly Articulated” the Scope of a Business Owner’s Duty to Its Invitees**

There are issues concerning two duties in this case: (1) whether Washington business owners have a duty to observe and protect their invitees from reasonably foreseeable dangers based on their past experience or the place or character of their business, and (2) whether Washington business owners have a duty to warn and protect their invitees from reasonably foreseeable dangers based on acts of a third person that are occurring.

Simon acknowledges the Washington Supreme Court analyzed these issues in *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 203-07, 943 P.2d 286 (1997), but claims the Court’s analysis was somehow dictum because it did not address whether the assault in *Nivens* was reasonably foreseeable. For that reason, Simon claims the Court’s analysis “is dictum and need not be followed.”<sup>19</sup>

Simon is incorrect because the Washington Supreme Court devoted nearly the entire *Nivens* decision to explaining why a business has a duty to protect its invitees and how to define the scope of that duty. *Id.* at 199-207. The Court’s

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situated businesses have an obligation to even look at them, let alone adopt them, until after the first active shooter kills people on their specific piece of property. Simon’s suggestion that the guidelines are irrelevant because they were published in 2008 misses the point. According to Simon, the guidelines are irrelevant for a business until after its invitees are shot. That is not and should not be the law.

<sup>19</sup> Appellees’ Brief, at 10.

eight-page analysis was not dictum because it was necessary to address the two issues before it:

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

*Nivens*, 133 Wn.2d at 194.

The Court first explained why a business owner has a duty to protect its invitees from danger:

What we have impliedly recognized in earlier cases, we now explicitly hold: a special relationship exists between a business and an invitee because the invitee enters the business premises for the economic benefit of the business. ... the invitee entrusts himself or herself to the control of the business owner over the premises and to the conduct of others on the premises. Such a special relationship is consistent with general common law principles.

*Id.* at 202 (emphasis added).

The Court then addressed how to define the scope of the duty. It is unclear why Simon urges this Court to ignore the rest of *Nivens* when the Washington Supreme Court made clear the rest of its decision was intended to guide future courts in deciding the scope of a business's duty.

More specifically, under the title "The Nature of the Duty," the Court explained it was "turn[ing] next to the affirmative duty that is owed by the business to the invitee" in order to clearly articulate the scope of the duty:

In the absence of a clear articulation of the business's duty, the business could become the guarantor of the invitee's safety from all third party conduct on the business premises. This is too expansive a duty.

*Id.* at 203.

Based on that public policy concern, Simon argues that a business never has a duty to protect its invitees from a criminal act until one of its invitees is injured from the exact same criminal act on the same premises.

But the Washington Supreme Court did not stop where Simon wants it to stop. Instead, the Court recognized that although it was important to protect businesses, it was also important to protect the invitees who entrust themselves to the control of the owner. For that reason, the Court adopted Restatement (Second) of Torts § 344 in its entirety:

We believe the Restatement (Second) of Torts § 344 is consistent with and a natural extension of Washington law and properly delimits the duty of the business to an invitee. We expressly adopt it for a business owner and business invitees.

*Nivens*, 133 Wn.2d at 203-04.

But the Court did not stop there, either. Given its stated purpose to "clearly articulate" the scope of a business owner's duty, the Court further adopted comments d and f to § 344 because they "describe the limit of the duty owed." The Court quoted those comments in their entirety. *Id.* at 204; *see also Terhune v. A.H. Robins Co.*, 90 Wn.2d 9, 18, 577 P.2d 975 (1978)

(applying the principles of comment k to Restatement (Second) of Torts § 402A to describe a product manufacturer's duty to warn); *Young v. Key Pharmaceuticals, Inc.*, 130 Wn.2d 160, 166-68, 922 P.2d 59 (1996) (acknowledging Washington adopted comment k to § 402A in *Terhune*); *Grimsby v. Samson*, 85 Wn.2d 52, 59-60, 530 P.2d 291 (1975) (limiting a defendant's liability by relying on the "standards set forth" in the comments to Restatement (Second) of Torts § 46); *Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 743-44, 565 P.2d 1173 (1977) (acknowledging Washington adopted the comments to § 46 with the "carefully chosen words of *Grimsby*").

Comment f is titled "Duty to police premises." It recognizes a business owner "is not an insurer of the visitor's safety," but also recognizes the owner has a duty to protect his invitees (1) when the owner "knows ... that the acts of the third person are occurring, or are about to occur," (2) when the owner knows or should know "from past experience" that there is a likelihood of criminal conduct "in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual," or (3) when "the place or character of his business ... is such that he should reasonably anticipate careless or criminal conduct

on the part of third persons, either generally or at some particular time.”  
*Nivens*, 133 Wn.2d at 204-05 (quoting § 344, cmt. f).

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

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

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

*Id.* at 209.

If “prior similar acts on the premises” was the only way to create the duty, the Court would have replaced “reasonably foreseeable criminal

behavior” with “criminal behavior that has occurred at least once in the past on the premises.” Simon’s argument that “prior similar acts on the premises” is the only way to establish reasonably foreseeable conduct would not only require this Court to re-write and narrow the holding of *Nivens*, but it would require this Court to re-write and narrow the public policy announced in *Nivens*.

**Washington Supreme Court:**

... a special relationship exists between a business and an invitee because the invitee enters the business premises for the economic benefit of the business. ... the invitee entrusts himself or herself to the control of the business owner over the premises and to the conduct of others on the premises...

**Simon’s new, re-written version:**

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

Even if *Nivens* is dictum, which it is not, the foregoing illustrates why the Court should reject Simon’s strained effort to impose a bright-line “prior similar

acts on the premises test.” There is simply no way to harmonize such a bright-line test and the concept of “reasonably foreseeable.”

**C. While “Prior Similar Acts on the Premises” is One Way to Establish “Reasonably Foreseeable Conduct,” Making it the Only Way is Inconsistent with *Nivens v. 7-11 Hoagy’s Corner***

Simon’s argument that “prior similar acts on the premises” are required in every case is inconsistent with *Nivens* because the Washington Supreme Court did not adopt or endorse a bright-line rule that gives business owner’s immunity for the first assault, the first rape, or the first shooting on each separate premises.

Instead, the Court held that a business “owes a duty to its invitees to protect them from imminent criminal harm and reasonably foreseeable criminal conduct by third persons,” and it held that “[c]omments d and f ... describe the limit of the duty owed.” *Nivens*, 133 Wn.2d at 204-05. The bright-line test advocated by Simon, which would require a prior criminal act on the premises in question before a duty exists, directly conflicts with *Nivens*’ holding that a duty is created (1) when the owner “knows ... that the acts of the third person are occurring, or are about to occur,” (2) when the owner knows or should know “from past experience” that there is a likelihood of criminal conduct “in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual,” or (3) when “the place or character of his business ... is such that he should reasonably anticipate careless or criminal conduct on the part of

third persons, either generally or at some particular time.” *Nivens*, 133 Wn.2d at 204-05 (quoting § 344, cmt. f).

According to *Nivens* and the Restatement it adopted, those three conditions are designed to ensure that business owners are not unfairly made “an insurer of the visitor's safety,” but any of those three conditions can be met in order for the criminal conduct of a third party to be reasonably foreseeable. *Nivens*, 133 Wn.2d at 204-05 (quoting § 344, cmt. f).

**D. *Nivens* is the Only Washington Case to Address Restatement (Second) of Torts § 344 and the Three Ways of Establishing “Reasonably Foreseeable” Criminal Conduct**

Although Simon goes to great lengths to claim that “[t]he Washington Court of Appeals has uniformly held that the plaintiff must present evidence that similar crimes occurred on the premises in the past,” three of the four cases it cites do not even mention Restatement (Second) of Torts § 344, let alone comments d and f.<sup>20</sup> See e.g. *Wilbert v. Metropolitan Park*, 90 Wn. App. 304, 950 P.2d 522 (1998); *Raider v. Greyhound Lines*, 94 Wn. App. 816, 975 P.2d 518 (1999); *Fuentes v. Port of Seattle*, 119 Wn. App. 864, 82 P.3d 1175 (2003).

The fourth case Simon relies upon, *Craig v. Washington Trust Bank*, 94 Wn. App. 820, 827, 976 P.2d 126 (1999), observed that *Nivens* made Restatement (Second) of Torts § 344 the law in Washington, including comments d and f:

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<sup>20</sup> Brief of Appelles at 13-17.

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

This severely undermines Simon's claim that the analysis in *Nivens* was dictum that can be ignored. But the Court went one step further in "[a]pplying the rules and principles derived from *Nivens*." Although the Court noted that no other criminal acts had been reported at the defendant's business, it also observed there was no other evidence suggesting the defendant knew or should have known of "a likelihood of criminal conduct on the part of third persons in general likely to endanger [the plaintiff]." *Id.* at 828. In other words, *Craig* not only looked for evidence of "prior similar acts on the premises," but it also looked for evidence that the defendant otherwise should have reasonably foreseen the danger.

Like the court in *Craig*, this Court is bound to follow *Nivens*. *In re Bledsoe*, 569 F.3d 1106, 1109 (9th Cir. 2009). But putting that aside, a review of the three other lower court decisions shows either that these courts did not meaningfully consider *Nivens*, or to the extent they did, their holdings are only consistent with *Nivens* so long as "prior similar acts on the premises" is only considered one of the three ways to show criminal conduct is reasonably foreseeable.

As discussed in McKown's opening brief, *Wilbert* was simply wrong when it divined the "prior similar acts on the premises test" out of its observation that

“Washington cases analyzing foreseeability have focused upon the history of violence known to the defendant.” 90 Wn. App. at 308-09.

Why is *Wilbert* wrong? Because that observation is wrong. Or more precisely, that observation is fatally skewed because it is based on a few cases that used an owner’s knowledge of a particular individual’s dangerous propensities as the basis for determining duty. 90 Wn. App. at 308-09.

*Fuentes* suffers from the same incomplete analysis because it cited *Nivens* to conclude that “[t]he kind of knowledge required before a duty to protect arises is knowledge from past experience that there is a likelihood of conduct which poses a danger to the safety of patrons.” 119 Wn. App. at 870.<sup>21</sup> But that is only one of the ways that *Nivens* concluded a harm can be reasonably foreseeable. The fact that *Fuentes* did not address the other two ways does not mean the Court intended to exclude them or intended for “prior similar acts on the premises” to be a bright-line test for an owner’s duty to its invitees.

The third case, *Raider*, is of no help because it reached its decision by relying on *Wilbert*’s incomplete analysis. 94 Wn. App. at 819.

With all due respect, *Craig* illustrates why Simon’s argument is backwards. The Washington Supreme Court has decided the “rules and principles” that define the scope of a business owner’s duty to its invitees. It expressly did so in *Nivens*.

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<sup>21</sup> Like *Craig*, the fact that *Fuentes* cites *Nivens* for this proposition is further evidence that the Washington Supreme Court’s decision was not dictum.

**E. Simon Knew It Needed to Closely Monitor Its Vacant Hallways for “Suspicious Activities” and It Does Not Dispute the Industry Standard of Care Required Surveillance Cameras for those Hallways**

Simon’s argument that “[t]here is no evidence that any employee of Simon or IPC saw Maldonado loading guns”<sup>22</sup> highlights the problem with its logic – Simon knew the vacant hallway was a blind spot yet still wants to avoid liability for failing to monitor that blind spot.

It is undisputed that Simon knew the vacant hallway was an area where someone like Maldonado might prepare for an attack. 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>23</sup>

Despite this knowledge, Simon did not install surveillance cameras so it could keep a close eye on the vacant hallways. McKown’s experts testified this fell below the standard of care that existed in 2005.<sup>24</sup> As a result, Simon was unable to monitor the vacant hallway where Maldonado spent ten minutes loading his guns prior to opening fire.

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<sup>22</sup> Brief of Appellee, at 38.

<sup>23</sup> Excerpts of Record, Vol. 2, at 90-93.

<sup>24</sup> *Id.* at 120-22 (¶¶ 28-29), at 171-72 (¶ 4).

In an argument that vividly illustrates the problem with the “prior similar acts on the premises test,” Simon argues that it was free to ignore that known danger and it was free to ignore the standard of care because “the entire event was unforeseeable as a matter of law.”<sup>25</sup>

Respectfully, this argument is senseless. A business owner can admit that it needs to closely monitor an area for “suspicious” activity because “[w]e all play an equal part in keeping the mall safe for our employees and customers,” but when it fails to do so, it can escape liability by claiming the suspicious activity was unforeseeable as a matter of law?

This makes no sense because it turns the concept of “reasonably foreseeable dangers” on its head. If a business owner knows of a danger, knows it needs to guard against that danger, and knows its protections are below the standard of care, the business owner has a duty to protect its invitees by at least meeting the relevant standard of care. To hold otherwise provides immunity to a business owner for failing to protect its invitees from dangers it knows are reasonably foreseeable until the first invitee is injured. Such immunity is contrary to law.

Apparently sensing the district court went too far in concluding that Simon could ignore a known danger and could knowingly ignore the standard of care, Simon suggests the Court should not consider the evidence McKown offered

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<sup>25</sup> Brief of Appellees, at 36.

regarding “how Maldonado looked and when and where he allegedly loaded his guns” because it claims that evidence is hearsay.<sup>26</sup>

The evidence offered by McKown was admissible, as reflected in how it was relied upon by McKown’s expert:

... The general manager went so far as to tell his tenants to look for “anyone suspicious in the back hallways” and to immediately call security, but defendant Simon made no effort to install security cameras that would have allowed its security to monitor those back hallways in real time. As I testified in my deposition, it is my opinion on a more probable than not basis that defendant Simon breached the industry standard of care by failing to do so, and that its breach caused Plaintiff to suffer injuries because Maldonado spent approximately ten minutes loading his weapons in a back hallway at the Mall which would have given Simon’s security ample opportunity to intervene or at least evacuate the building. While shootings may be rare, they are a foreseeable danger for shopping malls and they pose a risk of severe injury and death. That is why the industry standard required Simon to implement the precautions outlined in my prior declarations, including security cameras and an intercom system, whose cost is substantially outweighed by the risk to its customers without such precautions.<sup>27</sup>

Even if the evidence was hearsay, McKown’s expert relied upon it and Simon did not object to his testimony. Fed. R. Evid. 703.

Moreover, the statements Simon wants the Court to ignore are statements that four separate witnesses gave the Tacoma Police Department while it was investigating the shooting. Each document indicates the officer contacted the

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<sup>26</sup> Brief of Appellees, at 39.

<sup>27</sup> Excerpts of Record, Vol. 2, at 170-72 (explaining newspaper reports and police incident reports are reasonably relied upon by experts in the field when deciding what dangers are foreseeable and what steps need to be taken to protect invitees from those dangers).

witness, obtained a statement, and generated the document pursuant to their duty to investigate and report as a police officer.<sup>28</sup> Fed. R. Evid. 803(8).

McKown was allowed to rely on these documents when responding to Simon's motion for summary judgment. *See* Fed. R. Civ. P. 56(c) (allowing a party to rely on "materials in the record," including "documents"). The United States Supreme Court long ago made clear that a nonmoving party is not required to "produce evidence in a form that would be admissible at trial in order to avoid summary judgment." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548 (1986). Instead, a summary judgment motion can "be opposed by any of the kinds of evidentiary materials listed in Rule 56(c)." *Id.*; *see also Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir. 2003) (same). Along those lines, this Court has acknowledged "a general principal" whereby it "treat[s] the opposing party's papers more indulgently than the moving party's papers." *Lew v. Kona Hosp.*, 754

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<sup>28</sup> Excerpts of Record, Vol. 2, at 149 (official Tacoma Police Department Supplemental Report indicating the reporting officer contacted Christopher Winters because he was a "possible witness" and "advised Christopher that I would note his observations in the police report"); at 160-62 (official Tacoma Police Department Supplemental Report indicating the reporting officer was "assigned ... the duty of interviewing one of the hostages from the Sam Goody store ... Joseph Hudson"); at 163-64 (official Tacoma Police Department Supplemental Report indicating the reporting officer "was called at home by Sgt. Davidson to respond to the Tacoma Police station for an active shooter at the Tacoma Mall ... I arrived and was instructed to respond to the 3 sector substation. ... I noticed several people waiting in this area. I contacted ... Shoshana Overrocker ..."); at 156 (Tacoma Police Department Supplemental Report indicating the reporting officer "conducted a taped interview of W/Mitchell ... [t]his interview covered what W/Mitchell observed at the Tacoma Mall on 11/20/05 ... I placed the cassette tape into the Pierce County Property Room as evidence.").

F.2d 1420, 1423 (9th Cir. 1985); *Hughes v. United States*, 953 F.2d 531, 543 (9th Cir. 1992) (facts underlying the affidavit are of the type that would be admissible as evidence even though the affidavit itself might not be admissible).

Shortly after the shooting, four separate witnesses described how Maldonado stuck out as he roamed the mall, entered a vacant hallway, and emerged with his loaded weapons. McKown's experts relied on these statements, they were obtained by the police while they were investigating the shooting, and there is no reason to believe these same witnesses will testify any differently at trial).

**F. As Recognized in *Passovoy* and *Nivens*, Simon Had a Separate Duty to Intervene and Protect McKown Once the Shooting Started**

Simon led the district court to error by suggesting it had no duty to intervene and protect McKown once the shooting started, and its brief does not cite a single case to support its argument.

Instead, without any legal authority, Simon suggests it had no duty to intervene and protect McKown because "the purported duty ... is based on the premise that an attack like Maldonado's was reasonably foreseeable."<sup>29</sup>

Respectfully, this argument is flat wrong, and Simon's rhetoric illustrates why. In its brief, Simon asserts that "[t]o accept McKown's argument would require Simon to protect McKown from conduct that was unforeseeable just

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<sup>29</sup> Brief of Appellees, at 36.

seconds earlier” and argues that “[a] holding to that effect would render the concept of foreseeability meaningless.”<sup>30</sup>

But that exact issue was presented to the Court in *Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 173, 758 P.2d 524 (1988), *review denied*, 112 Wn.2d 1001 (1989), where Washington first adopted Restatement (Second) of Torts § 344(b) to hold that a business owner has a duty to “give a warning adequate to enable [its] visitors to avoid the harm, or otherwise to protect them against it.”

Just like Simon argues here, the defendant in *Passovoy* argued it had no duty to warn or protect its invitees because the incident occurred within a “split second” so it “did not have time to give a warning” to the plaintiffs. After noting the plaintiffs provided evidence “that the suspect was chased through part of a department within the store and then down the stairs,” the Court rejected the defendant’s argument because “a material issue of fact exists concerning whether the detective could have warned [the plaintiffs] in time for them to protect themselves.” *Id.* at 173.

Moreover, despite no evidence of prior similar acts on the premises, the Court rejected the defendant’s argument that the assault was not foreseeable because “[t]he likelihood that a pursued shoplifter might knock down an

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<sup>30</sup> Brief of Appellees, at 36-37.

unsuspecting customer in a crowded store is one of the hazards which may result from a store's failure to give a warning.” *Id.* at 174.

Even if the Washington Supreme Court’s adoption of Restatement (Second) of Torts § 344 in *Nivens* was dictum, which it is not, *Passovoy* clearly adopted § 344(b) as the law in Washington and held that a business owner, like Simon, has a duty to “give a warning adequate to enable [its] visitors to avoid the harm, or otherwise to protect them against it.” 52 Wn. App. at 173.<sup>31</sup>

While *Passovoy* and *Nivens* were the first Washington cases to adopt § 344, their decision to do so was consistent with a number of other cases where Washington courts recognized that a business owner has a duty to intervene “as soon as reasonably possible” once an assault is occurring.

For example, in *Christen v. Lee*, 113 Wn.2d 479, 505-06, 780 P.2d 1307 (1989), even though the assault was not foreseeable before it started, the Court concluded the owner had a duty to intervene “as soon as reasonably possible” once the assault was underway. *Id.* at 506. While causation is not an issue in this appeal, *Christen* also rejected Simon’s argument that cause in fact can be decided as a matter of law: “... a trier of fact could reasonably infer that intervention by an armed and uniformed security guard could have defused the confrontation, or ...

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<sup>31</sup> Not only did the Washington Supreme Court deny review of *Passovoy*, but the Court approvingly cited *Passovoy*’s “duty to warn others to avoid harm” when it adopted Restatement (Second) of Torts § 344 in its entirety. *See Nivens*, 133 Wn.2d at 203-04.

detained [the assailant] and the other two individuals long enough to permit Mr. Christen to safely depart the premises.” *Id.* at 508.

Other Washington cases beside *Christen* have held that a business owner has a duty to intervene and protect an invitee once an assault becomes foreseeable. And even if the assault was previously unforeseeable, like *Christen* and *Passovoy*, those courts have concluded that a jury must decide whether the owner could have reasonably intervened. *Miller v. Staton*, 58 Wn.2d 879, 883-84, 365 P.2d 333 (1961) (“jury was entitled to conclude that, by the exercise of reasonable care for the safety of their patrons, the defendants in the operation of their tavern knew or should have known a fight was ensuing in time to stop the fight thereby avoiding the resulting injuries sustained by the plaintiff”).

The Washington Supreme Court’s decision in *Christen* is notable because *Wilbert*, the lower appellate case most heavily relied upon by Simon for its “prior similar acts on the premises” test, did not analyze a business owner’s duty to intervene. In other words, the Court was only addressing the duty to observe and protect invitees before an assault starts, not the separate duty to intervene and protect invitees after the assault is underway.

Nothing in *Passovoy*, *Nivens*, *Christen*, *Miller*, or the Restatement conditions a business owner’s duty to intervene on evidence of “prior similar acts on the premises.” Moreover, *Passovoy* and *Christen* squarely rejected Simon’s

argument that there is no duty to protect invitees from unforeseeable dangers that become foreseeable (e.g., as Simon puts it, “conduct that was unforeseeable just seconds earlier”). Instead, if a plaintiff offers evidence that the business had time to warn or protect its invitees from imminent criminal activity, “a material issue of fact exists concerning whether the [defendant] could have warned [the invitees] in time for them to protect themselves.” *Id.* at 173.

Once the shooting started, Simon had a duty to “give a warning adequate to enable [McKown] to avoid the harm, or otherwise to protect [McKown] against it.” *Passovoy*, 52 Wn. App. at 173. Simon cannot escape that duty because, just like the plaintiffs in *Passovoy*, McKown offered evidence that Simon could have warned or otherwise protected him during the undisputed eight minutes that elapsed from the time the shooting started until McKown was shot:

... 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. ...<sup>32</sup>

This opinion is in line with Simon’s own “Evacuation Procedures,”<sup>33</sup> but Simon was unable to follow those procedures because its security team had no way to monitor the shooter, and even it did, its security team had no PA system or other

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<sup>32</sup> Excerpts of Record, Vol. 2, at 119-22 (¶¶ 24, 28, and 29); *see also id.* at 171-72 (¶ 4).

<sup>33</sup> *Id.* at 194.

way to insure that McKown “vacate[d] the building as safely and quickly as possible” and to inform McKown and the invitees hiding with him to “close their security gates, secure their store and leave immediately.”

Based on this undisputed evidence, “a material issue of fact exists concerning whether [Simon] could have warned [McKown] in time for [him] to protect [himself].” *Passovoy*, 52 Wn. App. at 173. Simon can argue that it was unreasonable for McKown to take cover in the store and to try to protect himself and others during the chaos caused by Simon’s inability to manage the situation or evacuate its invitees, but a jury must decide whether it agrees with that argument.<sup>34</sup>

**G. A Jury Must Decide Whether IPC Assumed the Duties Simon Owed to McKown**

The district court erred in dismissing McKown’s claims against IPC because a genuine issue of material fact exists as to whether IPC intended to assume the duties that Simon owed to McKown.

While Simon is entitled to its subjective view of the intent and obligations of its contract with IPC, Washington law does not allow a trial court to rely solely on one party’s subjective view (e.g., its self-serving view).

Instead, the intent of Simon and IPC must be objectively determined. *Diamond B. Constructors, Inc. v. Granite Falls School Dist.*, 117 Wn. App. 157,

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<sup>34</sup> Excerpts of Record, Vol. 2, at 167-69 (¶¶ 2-4).

161, 70 P.3d 966 (2003). For that reason, a jury must decide the intent of parties if the parties offer “a choice among reasonable inferences to be drawn from extrinsic evidence.” *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 311, 57 P.3d 300 (2002).

The purpose of the objective manifestation theory is reflected in Simon’s arguments. Simon and IPC are allowed to offer the jury their “choice among reasonable inferences” in interpreting the contract, but McKown is allowed to offer separate reasonable inferences. A reasonable jury could easily reject IPC’s rather strained arguments (e.g., “as a massive security company we did not intend to provide security when we contracted with Simon to provide security”), and agree with the plain language and inferences highlighted by McKown in his opening brief.

Finally, Simon mischaracterizes the holding in *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998). Nowhere did the Court “[make] it clear” that there is no special relationship between a business owner’s employees and the contractor hired to provide security on the premises.”<sup>35</sup>

To the contrary, the plaintiffs in *Folsom* argued a special relationship between the security company and the employees “arose out of the contract to provide security,” but the Court concluded no such relationship existed because the

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<sup>35</sup> *Id.* at 45.

contract was terminated prior to the injury. 135 Wn.2d at 673-76. Here, IPC's contract with Simon was not terminated prior to the injury.

Moreover, while the plaintiffs in *Folsom* did not identify any other special relationship that existed, McKown did: IPC voluntarily assumed Simon's duty to protect McKown. *Id.* at 676 ("liability can arise from the negligent performance of a voluntarily undertaken duty"); *Hutchins v. Fourth Avenue Assocs*, 116 Wn.2d 217, 227 (1991) (acknowledging the "general group of cases" cases where a duty exists because of a "protective" relationship that involves "an affirmative duty to render aid"); *Caulfield v. Kitsap County*, 108 Wn.App. 242, 255, 29 P.3d 738 (2001) (noting "these special tort duties are based on the liable party's assumption of responsibility for the safety of another").

Simon had a duty to protect its invitees because "the invitee entrusts himself or herself to the control of the business owner over the premises and to the conduct of others on the premises." *Nivens*, 133 Wn.2d at 202. At the very least, a jury should decide whether Simon remained solely responsible for carrying out that duty on the day McKown was shot, or whether Simon shared that responsibility with IPC, the company it hired to provide security and protect him.

## II. CONCLUSION

For the foregoing reasons, the Court should (1) reverse the district court's decision to dismiss McKown's negligence claims against Simon and IPC, and (2) remand this case to the district court for trial.

## III. STATEMENT OF RELATED CASES

McKown is unaware of any known related case pending in this Court.

Dated this 1st day of December 2011.

Respectfully submitted,

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Signature s/Jason P. Amala

Attorney for Appellant Brendan McKown

Date December 1, 2011

**CERTIFICATE OF SERVICE**

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

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DATED this 1st day of December 2011.

s/Bernadette Lovell  
Bernadette Lovell