No. 101768-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ALETA BRADY,

Respondent/Plaintiff,

v.

WHITEWATER CREEK, INC., a foreign corporation;
SUMMIT RIDGE, LLC, a Washington corporation,

Petitioners/Defendants.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Defendant-Petitioner Summit Ridge, LLC owned the Summit Ridge Apartments and retained Defendant-Petitioner Whitewater Creek, Inc. to manage the property. Plaintiff-Respondent Aleta Brady supplied evidence that Defendants received notice that intruders could access upper floor apartment units via the exterior balconies. The Court of Appeals concluded that this evidence made Ms. Brady's injuries, which were inflicted in her upper floor apartment by an intruder who entered via the balcony, sufficiently foreseeable.

In the course of evaluating this evidence, the Court of Appeals *did* err, just not in the way Defendants suggest. To the contrary, Ms. Brady still prevails even when the correct test for foreseeability is applied, meaning further review could not afford relief to Defendants. Moreover, the arguments Defendants make to this Court were not made to the Court of Appeals. While Defendants' petition exemplifies the confusion generated by

McKown v. Simon Property Group [1] that is discussed in Ms. Brady's own petition for review, this Court may clarify the applicable law in adjudicating Ms. Brady's petition without accepting Defendants' cross-petition.

Ultimately, Ms. Brady was raped by a man Defendants had been informed was violent and dangerous, who had not been screened for occupancy as Defendants knew was necessary to protect tenants, and who accessed Ms. Brady's apartment via a security deficiency Defendants were specifically informed about prior to the rape. Her injuries were a foreseeable consequence of Defendants' failures to act, and Defendants' petition should be denied.

II. STATEMENT OF THE CASE

A. Ms. Brady resided at the Summit Ridge Apartments.

The Summit Ridge Apartments are a 120-unit low-income apartment complex located in Spokane, Washington. CP 23, 157-

[1] 182 Wn.2d 752, 344 P.3d 661 (2015).

58. Ms. Brady moved into the Summit Ridge Apartments in July 2015 with her 10-year-old son. She lived in a third-floor apartment in Building F. CP 170; APX 57.

B. LaJuane Roberson lived at the Summit Ridge Apartments as an unauthorized resident and in violation of his hosts' lease.

Beginning in approximately November 2015, LaJuane Roberson also began living at the Summit Ridge Apartments, in Unit F-143. CP 246-47, 251-53, 273. Unlike Ms. Brady, Roberson was not a tenant, was not listed on any lease, had not been approved through Defendants' tenant screening process, and lived on the premises without authorization. CP 246-47, 251-53, 256-64, 273; APX 165-73. Ms. Brady recognized Roberson as a neighbor, APX 144-45, CP 209-10, and, through tips from tenants or maintenance persons, Defendants knew that an unauthorized resident—presumably Roberson—was living in Unit F-143. CP 240-241; APX 149-50. Consequently, during the time Roberson lived there, Defendants issued at least four separate notices to Unit F-143, each stating that an unauthorized

guest was residing in the unit, that the occupants were in violation of their lease, and that three such notices could result in eviction. CP 225-228. Defendants' property management expert testified that background checks for residents of an apartment complex are important to protect the lives and property of tenants. CP 267-69. Nevertheless, Roberson continued to live in Unit F-143 until October 2016. CP 273.

C. Ms. Brady informed Defendants that she observed Roberson assault a young female.

In the spring or early summer of 2016, from her bedroom window, Ms. Brady saw Roberson "repeatedly hit and punch[]" a young woman or teenager as he "dragged [her] across the parking lot by pulling her hair, arms, and shirt." APX 144; CP 209. The young female "was screaming throughout the assault." *Id*. Indeed, the assault was loud enough to wake Ms. Brady's sleeping son. *Id*. Ms. Brady informed Defendants about Roberson's assault on the young woman, making a written

report and discussing it with various property management employees on more than one occasion.[2] APX 144; CP 209.

Defendants' own leases demonstrate that they believe they may properly evict their tenants[3] for a single uncharged act of violence committed by a tenant's guest, with the leases specifying that "proof of violation shall NOT require criminal conviction." CP 264. Despite Defendants' notice of the assault, Roberson continued to live on the premises as an unauthorized, unscreened resident. CP 273.

D. Defendants were informed a man had been seen accessing an apartment balcony from the building exterior.

Early in the morning on Saturday, September 10, 2016, Summit Ridge tenant Olga Yurkova witnessed a man attempting

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[2] Ms. Brady identified Roberson to Defendants' employees in person, and Defendants' employees were familiar with Roberson and understood who she meant. APX 144-45, CP 209-10. However, Ms. Brady did not learn Roberson's name until after she was raped and DNA evidence identified him as her attacker—she only recognized him as a neighbor in the apartment complex.

[3] Roberson, of course, was not a tenant but rather an unauthorized resident.

to access her neighbor's second-floor balcony. Using the roof of a common stairwell separating the units, the man was able to reach up, grab the balcony railing, and pull himself up. Ms. Yurkova saw him just as he was getting onto the balcony, and she called out to him, causing him to return to the roof of the stairwell and disappear. CP 89-94. After confirming with her neighbor that the man she saw was not authorized to be there, Ms. Yurkova and the neighbor contacted the police and reported the incident. CP 179; CP 182-185. At the time, Ms. Yurkova was living in the same building in the Summit Ridge complex as Ms. Brady, Building F. CP 98.

On Monday, September 12, 2016, when Defendants' property management office was open, Ms. Yurkova completed and submitted an incident report to management. CP 98, 179. Defendants claim that, in response, they distributed dowels that could be used to secure balcony doors to an unknown number of tenants. CP 47-48, 150-51; APX 30-31, 104-05; *but see* CP 184 (Yurkova reporting Defendants "did nothing to make the

apartments more safe" and that she "had to make her own door block"); APX 138 (same). Regardless of whether the distribution actually occurred, Defendants' claim proves that they *subjectively understood residents were endangered* by the ability of persons to access upper floor apartments from the building exterior. Moreover, Defendants were aware that upper floor tenants often mistakenly believed they were safe from intruders, CP 206, and Whitewater's regional property manager testified that tenants should have been told about Ms. Yurkova's observations, CP 163. Nevertheless, Ms. Brady was not informed of the balcony intruder. *See* CP 172.

E. Ms. Brady was raped in her apartment less than two weeks later.

On September 23, 2016, an intruder entered Ms. Brady's apartment, strangled her into unconsciousness, and raped her. Roberson was subsequently identified as the perpetrator through DNA analysis. CP 6, 11. Ms. Brady had locked her front door before the attack, meaning the sliding glass door of her balcony was the only possible point of entry. CP 170-171. Ms. Brady

testified that, had she been told about Ms. Yurkova's observations and the risk of balcony access by persons outside the building, she would have locked the balcony door. CP 172.

Roberson was later arrested and convicted by a jury of Rape in the First Degree and Burglary with Sexual Motivation in the First Degree. He was sentenced to 318 months in prison. CP 187-204.

F. Procedural history.

Ms. Brady filed this action, and the trial court dismissed her claims at summary judgment. CP 371-73. The Court of Appeals reversed, concluding that, because there was evidence Defendants had notice that intruders could access upper floor apartments via exterior balconies, there was sufficient evidence regarding the foreseeability of Ms. Brady's injuries.[4]

Despite securing reversal, Ms. Brady moved to reconsider aspects of the Court of Appeals's opinion addressing evidence of

[4] The Court of Appeals also held that the trial court erred in striking the report of Ms. Brady's expert.

the prior assault by Roberson. The Court of Appeals denied the motion, and Ms. Brady has separately petitioned for review.

III. ARGUMENT

A duty to protect others from the criminal conduct of a third party may arise if there is a special relationship between either the defendant and the plaintiff or between the defendant and the third-party actor. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 200, 943 P.2d 286 (1997); Restatement (Second of Torts) § 315 (1965). This duty to protect is limited to situations where the harm to the injured party is foreseeable. *Nivens*, 133 Wn.2d at 205. A defendant with such a duty is obligated to exercise reasonable care to address any foreseeable harms. *Id*.

Defendants had a special relationship with Ms. Brady because she was their tenant and invitee. *See id*. at 195; *Griffin v. West RS, Inc*., 97 Wn. App. 557, 985 P.2d 1070 (1999), *rev'd on other grounds*, 143 Wn.2d 81 (2001); *Mucsi v. Graoch Assocs., Ltd. P'ship No. 12*, 144 Wn.2d 847, 855, 31 P.3d 684 (2001) ("A residential tenant is an invitee."). Consequently,

Defendants owed her a duty to use reasonable care to ameliorate foreseeable harms.

A. The Court should deny Defendants' petition because the arguments they make were not raised in the Court of Appeals.

At the Court of Appeals, Defendants agreed that foreseeability is to be judged by whether the harms to Ms. Brady "'fell within a general field of danger which should have been anticipated.'" Resp. Br. at 27 (quoting *McLeod v. Grant Cty. Sch. Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953)). Accordingly, Defendants argued that Ms. Brady's injuries did not fall within the pertinent field of danger, not that they were unforeseeable under a "prior similar incidents" test derived from *McKown*, as they now contend. Indeed, Defendants barely cited *McKown* at all to the Court of Appeals, and never on the subject of *McKown*'s "prior similar incident" test. *See* Resp. Br. at 27, 33.

Defendants are not permitted to make arguments to this Court that they did not raise in the Court of Appeals. *State v.*

Laviollette, 118 Wn.2d 670, 680, 826 P.2d 684, 689 (1992) ("This court has previously stated that it will refrain from reviewing questions not raised in the Court of Appeals."); *Peoples Nat. Bank of Washington v. Peterson*, 82 Wn.2d 822, 830, 514 P.2d 159, 164 (1973) (stating that rules that preclude appellate review of matters not raised to the trial court "apply to [Supreme Court review of] issues and theories not appropriately raised before the Court of Appeals"). Defendants' petition should be denied for this reason alone.

B. Foreseeability is typically assessed via a "general field of danger" test.

Under Washington law, foreseeability turns on what an actor knew or should have known under the circumstances and on what a reasonable person would have anticipated. *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 764, 818 P.2d 1337 (1991). Washington courts have indicated a wide variety of evidence bears on whether an outcome is foreseeable, including prior experience with a problem, the existence of policies addressing a particular problem, legislative recognition

of a particular problem, and expert opinion. *See, e.g., Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 50-51, 929 P.2d 420 (1997).

In the typical case, the focus in assessing foreseeability is not on "the specific type of incident which here occurred" or "whether the actual harm was of a particular kind which was expectable." *McLeod*, 42 Wn.2d at 321. Instead, the inquiry is broader, focusing on "whether the actual harm fell within a *general field of danger* which should have been anticipated." *Id*. (emphasis added); *see also Quynn v. Bellevue Sch. Dist.*, 195 Wn. App. 627, 640, 383 P.3d 1053 (2016). Accordingly, this Court has stated:

> The sequence of events, of course, need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbable and highly unexpectable, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability….

McLeod, 42 Wn.2d at 322.[5] As is pertinent here, even "[i]ntentional or criminal conduct may be foreseeable unless it is so highly extraordinary or improbable as to be wholly beyond the range of expectability." *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 430, 378 P.3d 162 (2016) (quotation marks omitted).

This broad "general field of danger" test for foreseeability is well-established and longstanding, and Washington courts have repeatedly invoked it in cases arising from all manner of "special relationships," including landlord-tenant and business-invitee cases like this one .[6] It is natural that such cases would

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[5] *See also* Restatement (Second) of Torts § 435 (1965) ("If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.").

[6] *See, e.g.*, *Celes v. Lone Pine Apartments, LLC*, 13 Wn. App. 2d 1060 (2020) (unpublished, cited per GR 14.1) (landlord and tenant); *H.B.H. v. State*, 192 Wn.2d 154, 176-77, 429 P.3d 484 (2018) (Department of Social and Healtarh Services and foster children); *Hendrickson v. Moses Lake Sch. Dist.*, 428 P.3d 1197, 1201 (2018) (school and student); *Anderson v. Soap Lake Sch. Dist.*, 191 Wn.2d 343, 368, 423 P.3d 197 (2018) (school and student); *N.L.*, 186 Wn.2d at 430 (school and student); *N.K. v. Corp. of Presiding Bishop of Church of Jesus*

apply the same test, given that all "special relationship" cases have their genesis in the same common law principles embodied by, among other things, section 315 of the Restatement (Second) of Torts.[7]

Christ of Latter-Day Saints, 175 Wn. App. 517, 526, 307 P.3d 730 (2013) (church and boy scout participating in church-sponsored scouting trip); *M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 193, 252 P.3d 914 (2011) (church and child congregant); *Fuentes v. Port of Seattle*, 119 Wn. App. 864, 870, 82 P.3d 1175 (2003) (business and invitee); *Tortes v. King Cty.*, 119 Wn. App. 1, 8, 84 P.3d 252 (2003) (common carrier and passenger); *Raider v. Greyhound Lines, Inc.*, 94 Wn. App. 816, 819, 975 P.2d 518, 519 (1999) (business and invitee); *Wilbert v. Metro. Park Dist. of Tacoma*, 90 Wn. App. 304, 308, 950 P.2d 522 (1998) (business and invitee); *Niece*, 131 Wn.2d at 50 (group home for persons with developmental disabilities and resident); *Johnson v. State*, 77 Wn. App. 934, 942, 894 P.2d 1366 (1995) (university and student living in dorm); *Shepard v. Mielke*, 75 Wn. App. 201, 206, 877 P.2d 220 (1994) (nursing care facility and resident); *J.N. By & Through Hager v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 58-59, 871 P.2d 1106 (1994) (school and student). *Accord Griffin*, 97 Wn. App. at 570 ("[W]e recognize that a residential landlord has a duty to protect its tenant against foreseeable criminal acts of third parties. As in *Nivens*, this duty is the same as that of a business to its invitee.").

[7] *See H.B.H.*, 192 Wn.2d at 169 ("Common examples of § 315(b) protective special relationships include the relationships between schools and their students, innkeepers and their guests, common carriers and their passengers, and

C. The alternate "prior similar incidents" test for foreseeability set out in *McKown* is applicable in only certain cases, not relevant here.

In *McKown v. Simon Property Group*, in response to questions certified by the Ninth Circuit Court of Appeals, this Court addressed the liability of a shopping mall owner for a random mass shooting,[8] and the plaintiff sought to establish foreseeability through evidence of prior unrelated shootings on the premises. The *McKown* Court explained that, when

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hospitals and their patients."); *Nivens*, 133 Wn.2d at 200-03 (holding the business-invitee relationship is a special relationship under section 315); *Griffin*, 97 Wn. App. at 564-65, 570h (discussing section 315 and holding the relationship between landlord and tenant qualifies as a "special relationship"). *Compare H.B.H.*, 192 Wn.2d at 173 (citing *Nivens*) (stating, in a case involving relationship between DSHS and foster children, that "entrustment for the protection of a vulnerable victim, not physical custody, is the foundation of a special protective relationship"), *with Nivens*, 133 Wn.2d at 202 ("[A] special relationship exists between a business and an invitee…. [T]he invitee entrusts himself or herself to the control of the business owner over the premises and to the conduct of others on the premises."). *Accord* Restatement (Second) of Torts § 314A.

[8] *See McKown v. Simon Prop. Grp., Inc.*, No. C08-5754BHS, 2011 WL 1675032, at *4 (W.D. Wash. May 4, 2011), *rev'd in part, vacated in part,* 622 F. App'x 621 (9th Cir. 2015) (describing shooting as "a random act of violence").

foreseeability is to be shown by proof of prior similar acts, "[t]he prior acts of violence on the business premises must have been sufficiently similar in nature and location to the criminal act that injured the plaintiff, sufficiently close in time to the act in question, and sufficiently numerous to have put the business on notice that such an act was likely to occur." 182 Wn.2d at 757.

Notably, the *McKown* Court held that a plaintiff may show the existence of a duty *without* demonstrating prior similar acts of violence on the premises, that is, a plaintiff may establish that a harm was reasonably foreseeable *through other evidence*.[9]

[9] Indeed, *McKown* "reiterate[d]" that section 344 of the Restatement (Second) of Torts, which contemplates that foreseeability may be proven by a variety of means, is consistent with Washington law. *McKown*, 182 Wn.2d at 764. In that regard, comment f to section 344 identifies "past experience," "place" of a business, and "character" of a business as bases for concluding a harm is foreseeable. None of these bases for foreseeability requires proof of prior similar acts of violence. Similarly, the illustrations following comment f suggest a commonsense approach to foreseeability, allowing that risk of injury may be anticipated even though no similar injury has occurred in the past. *See* Restatement (Second) of Torts § 344, illus. 1 & 2.

McKown, 182 Wn.2d at 771 & n.5. Furthermore, *McKown* took pains to clarify—repeatedly—that it *only* addressed the subset of cases where a plaintiff seeks to establish foreseeability solely via proof of prior similar acts of violence on the premises. The Court, for example, stated the following:

> [T]he Ninth Circuit's inquiry seeks a framework to evaluate "previous acts of similar violence on the premises," but the Ninth Circuit did not ask for a framework for evaluating "other evidence" on which the landowner's duty might be based.

Id. at 761-62.

> While proving acts of similar violence is not the only way for a plaintiff to establish a duty…, it is the one we focus on here because that is the only basis for liability that the parties meaningfully address and the only one that the Ninth Circuit has asked us to clarify.

Id. at 770.

> [P]roving acts of similar violence is not the only way for a plaintiff to establish a duty…. [P]rior history of violence is really the only basis for liability that the parties meaningfully address and the only one that the Ninth Circuit has asked us to clarify….

Id. at 774; *see also id*. at 761 (stating the Court's inquiry is "based on the facts and legal theories argued in the *McKown* case"); *id.* at 771 n.5. Accordingly, by its own express terms, *McKown* did not purport to require proof of prior similar acts in all cases, nor did it purport to address how foreseeability should be assessed in all cases.

Consistent with the limited nature of the holding in *McKown,* Washington courts have not required proof of prior similar acts and have assessed foreseeability via the standard "general field of danger" test when other proof is offered. For example:[10]

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[10] While the examples that follow arise from a variety of different types of "special relationships," these cases cannot be distinguished on the grounds that different standards apply. It is true that, on occasion, courts have characterized certain of these special relationships in lofty terms. For example, in *Niece*, the Court called the special relationship between a group home and its residents "perhaps more significant" than certain other special relationships. 131 Wn.2d at 41, 46, 51. And in *N.L.*, the Court called the duty schools owe to their students "'enhanced and solemn.'" 186 Wn.2d at 430. Nevertheless, the duty in those cases is same as the duty in a case such as this one involving a tenant and invitee: a duty of reasonable care to

- In *Celes*, 2020 WL 3265576, at *3 (unpublished, cited per GR 14.1), the court reversed summary judgment for a landlord in a case brought by a tenant, stating "[b]ecause Celes did not attempt to establish the duty by only showing acts of similar violence, the trial court should not have used the prior similar incidents test."

- In *N.K.*, 175 Wn. App. at 530-31, the court reversed summary judgment, assessed foreseeability via the "general field of danger

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address foreseeable harms. *See id.* at 430; *Niece*, 31 Wn.2d at 41, 46, 51. *Accord Hendrickson*, 428 P.3d at 1201 ("[W]e described the duty of care as 'enhanced,' but we did not heighten the school district's duty above ordinary, reasonable care.").

What harms are foreseeable and what care is reasonable will, of course, vary with the circumstances, including the vulnerability of the party to be protected and the degree of control possessed by the party owing the duty. However, the legal standard—reasonable care—is the same. *See H.B.H.*, 192 Wn.2d at 169 ("When a special relationship exists under § 315, the party owing a duty must use reasonable care to protect the victim from the tortious acts of third parties."); *Hendrickson*, 428 P.3d at 1202 ("[E]ven when the parties have a special relationship, the standard of care remains one of ordinary, reasonable care…"). Moreover, all of these special relationships arise from the same common law principles, as discussed in the preceding section, and the "general field of danger" test for foreseeability is employed in all of these contexts. There is no reason to believe these related types of "special relationships" should be subjected to different legal standards or require categorically different kinds of proof.

test," stated the plaintiff "did not have to prove the church had prior specific knowledge that [the perpetrator] posed a threat," and concluded "the danger of sexual abuse [of scouts] by an adult volunteer was one the church reasonably should have anticipated" "even if there was no evidence that the church knew about specific past incidents of child sexual abuse in scouting."

- In *Shepard*, 75 Wn. App. at 206, the court reversed summary judgment and, without identifying prior incidents, concluded sexual assault was foreseeable because of "the number of visitors who enter and leave nursing homes daily and the level of vulnerability found in many residents" meant sexual assault fell "within the general field of danger."

- In *J.N.*, 74 Wn. App. at 59-60, in reversing summary judgment, the court concluded that a sexual assault by one student upon another may be within "the general field of danger" and therefore foreseeable on account of "arguably inadequate recess supervision and the presence of nearby, accessible, and generally unsupervised rest rooms" even though the first student had not previously committed a sexual assault and no other prior such assaults were identified. *Accord id*. ("The trial court mistakenly focused on the fact that A.B.'s prior behavior had never manifested itself as a sexual assault upon another student.").

- In *McLeod*, 42 Wn.2d at 321-22, in reversing dismissal, the Court concluded that a rape at a school may be within the "general field of danger" and therefore foreseeable based on the fact boys and girls were permitted to play together unsupervised near an unlocked and darkened room, though no prior incidents were identified and there was no allegation the perpetrators had "known vicious propensities."

McKown did not purport to overrule these cases[11] and, as noted above, took pains to disclaim such a broad application of its holding.

Indeed, it is unsurprising that *McKown* would be inapplicable to other methods of proving foreseeability. Most obviously, the *McKown* test—scrutiny for similarity, numerosity, and temporal proximity—is only workable when applied to proof of prior similar incidents, and it is nonsensical when applied to other evidence.

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[11] *Celes* was decided subsequent to *McKown*.

The rationale of *McKown* is that, when there is no reason to expect that a crime will occur other than the fact that crimes have been committed in that location in the past, the prior crimes must be sufficiently similar, numerous, and close in time to ensure that they are in fact not random, and that instead the premises owner truly has reason to anticipate future harm and a meaningful opportunity to attempt to prevent it. *See McKown*, 182 Wn.2d at 771-72. For example, a parking lot may not generally entail a material safety risk, but repeated muggings there might give notice that the lighting is inadequate, or even notice that some other factor *that may never be identified* attracts muggers.

However, the concerns addressed by the *McKown* Court are not present when there is other evidence of foreseeability, such as notice of a specific, known source of danger. One does not need to see a methamphetamine laboratory explode, or an elderly tenant slip on a visibly icy sidewalk, to appreciate the hazard. In such circumstances, the danger is by definition not

random, and it is fair, in principle, to expect premises owners to take action to address the danger, and to then hold them liable if they fail to act and harm occurs, even if it occurs in an unusual way.

To that end, Washington courts have rejected the notion that a defendant may be entitled to "one free crime" before liability may attach. *See Quynn*, 195 Wn. App. at 641 (holding duty of a school to protect students does not arise only after tortious acts and have occurred, the law does not require "'one free rape'"); *Tanguma v. Yakima Cty*., 18 Wn. App. 555, 563, 569 P.2d 1225 (1977) ("When negligent conduct produces a foreseeable risk of injury, the actor may not find refuge in a 'long history of good fortune.'"). This is true even when foreseeability is shown by proof of prior similar acts of violence committed by other perpetrators.[12] In such cases, it is just that the prior similar

[12] *McKown* expressly does not apply to proof of the dangerous propensities of *the person who caused a plaintiff's injuries*, such as evidence of Roberson's prior assault. *See* Brady Pet. for Rev. at 11-20.

acts are necessary to permit a landowner to anticipate the subsequent harm, and the initial crimes are not "free" because they could not reasonably be foreseen.

D. The Court of Appeals's conclusion that Ms. Brady's injuries were foreseeable from notice of the balcony security flaw is correct.

Ms. Yurkova's report regarding the balcony intrusion constituted not simply notice of a prior similar act but rather notice of a *defect in the physical premises* that rendered tenants like Ms. Brady unsafe.[13] Indeed, notice of this security defect would be material regardless of whether anyone was observed trying to exploit it. Accordingly, as Defendants previously agreed in the Court of Appeals, such evidence is subject to the "general field of danger" test for foreseeability, not *McKown*'s alternate "prior similar incidents" test.

Because the *McKown* test is inapplicable, Defendants' argument that the Court of Appeals failed to correctly apply that

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[13] In this way, this evidence relates to the "place" of Defendants' business, whatever else the Restatement may mean by that term. *See* Restatement (Second) of Torts § 344, cmt. f.

test misses the mark. In that regard, Defendants' petition exemplifies the confusion generated by the *McKown* decision and that is discussed in Ms. Brady's own petition. Notably, adoption of the arguments in Defendants' petition—requiring prior similar incidents even when security flaws are known to exist and thereby endanger residents—would have the effect of granting landlords one (or more) free crime(s) before liability would attach, regardless of how foreseeable a tenant's injuries were.

Applying the proper inquiry, Ms. Brady's injuries were foreseeable: reasonable measures are necessary to prevent intruders from accessing apartment units via exterior balconies, whether the harm an intruder threatens is rape, assault, or simply theft; therefore, rape by an intruder who accessed Ms. Brady's apartment via the balcony is squarely within the applicable field of danger. In fact, as explained above, Defendants *subjectively appreciated* the risk to tenant safety. It is true that the Court of Appeals erred insofar as it suggested a "prior similar incidents"

test derived from *McKown* applies to this evidence. However, because the ultimate conclusion of the Court of Appeals—that notice of the balcony security flaw supports foreseeability—is correct, further review would not afford relief to Defendants.

E. Defendants' policy arguments are meritless.

While Defendants cite generalities about the limits of liability for the criminal conduct of third parties, Ms. Brady's claims are well-established in Washington law, which already balances the various competing interests, including those of business owners. This case creates no new duties and imposes no new costs.

Ms. Brady merely seeks application of existing negligence principles, whereby a business's duty does not run to the world at large, just to invitees, and that duty does not require a business to guarantee the safety of invitees, only to take reasonable precautions to address those harms that are reasonably foreseeable. Liability under such circumstances is neither unfair nor unreasonable.

IV. CONCLUSION

Ms. Brady respectfully asks that the Court deny Defendants' petition. While that petition evidences confusion in the case law that requires this Court's attention, the Court may clarify matters through Ms. Brady's own petition.

DATED this 31st day of March, 2023.

I certify that this document contains **4931** words in compliance with RAP 18.17.

Respectfully submitted,

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