NO. 101768-5
[Court of Appeals No. 38449-7-III]

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners/Defendants,

v.

ALETA BRADY,

Respondent/Plaintiff.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER, APPELLATE DECISION & INTRODUCTION

Petitioners Whitewater Creek, Inc. and Summit Ridge, LLC (collectively, "Whitewater") ask this court to accept review of the appellate decision in *Brady v. Whitewater Creek, Inc.*, ___ Wn. App. 2d. ___, 521 P.3d 236 (Dec. 6, 2022), *recon. denied,* February 2, 2023. The trial court properly granted summary judgment dismissing Aleta Brady's suit alleging that Whitewater (owner of her Spokane apartment building) and Summit Ridge (its property manager) had a duty to protect her from a rapist, who allegedly scaled the outside of the apartment building to her third-floor balcony, entered through her unlocked balcony door, and raped her. There is no evidence in this record that Whitewater knew of this rapist's propensity to commit this crime, nor had it received any reports of similar crimes on its property at the time of this incident in 2016.

In general, there is no duty to protect others from third-party criminal activity. Yet Division Three reversed, holding that Whitewater owed Brady a duty to prevent the criminal from

sexually assaulting her in her third-floor apartment. The limited exceptions imposing such a duty require the crime to be foreseeable due to prior acts or circumstances. Brady provided no evidence demonstrating that her assault was foreseeable or that it was caused by Whitewater's negligence. *Brady* contradicts Washington law in concluding that a single prior incident of unrelated suspicious activity in the apartment complex by an unknown person made Brady's rape foreseeable to Whitewater.

Brady dramatically alters Washington law, turning property owners into insurers of their tenants. It will ultimately increase the cost of housing, particularly in low-income and high-crime areas. This Court should grant review to reverse the Court of Appeals and reconfirm its existing precedent that a single incident of nonviolent suspicious activity by an unknown person on the property does not give rise to a duty to protect invitees from subsequent unrelated, violent criminal activity.

II. ISSUES PRESENTED FOR REVIEW

1. A tenant alleged that she saw an unknown person dangling from the roof of her apartment building, apparently attempting to access a second-floor balcony, but she scared him off. The plaintiff alleged that several weeks later she was raped in her apartment unit after her assailant scaled the same apartment building to her third-floor balcony, came in through her unlocked balcony door, and attacked her. Can one suspicious nonviolent incident involving an unknown person dangling on the apartment building impose a duty on a landlord to protect its tenants from a subsequent unprecedented violent rape committed inside the tenant's apartment?

2. More simply put, can such an allegation of suspicious but nonviolent activity on the outside of a building render a subsequent rape inside an apartment foreseeable to the landlord?

III. STATEMENT OF THE CASE[1]

A. Aleta Brady was a tenant at Summit Ridge, an affordable-housing apartment building in Spokane.

Summit Ridge is an affordable-housing apartment complex located on Spokane's South Hill. CP 24. It is owned by Summit Ridge, LLC, and managed by Whitewater Creek, Inc. *Id*. Appellant Aleta Brady leased a third-floor unit in Summit Ridge beginning in July 2015. Jessica Sanfilippo and her children, Curtis and Alyssia Tancredi, also resided at Summit Ridge at various times starting July 2015. CP 256, 273, 307. Beginning as early as November 2015, a friend of Curtis Tancredi, LaJuane Roberson, began periodically staying at Sanflippo's apartment. CP 252-53. While Roberson moved out of the apartment in early 2016, he remained involved in a relationship with Alyssia Tancredi, occasionally staying at the apartment after this date. CP 273.

[1] The Decision sets forth the facts in detail. This Petition sets forth a summary of them for the Court's convenience.

B. In April 2016, Brady observed Roberson in a physical altercation with a young woman in the parking lot.

In April 2016, Brady witnessed Roberson in a physical altercation with a young female in the Summit Ridge parking lot. CP 210. Brady called 911, but there is no evidence that Roberson was charged with a crime for this incident. *Id*. Brady filed a tenant complaint form in the manager's office. *Id*. Several days later, a maintenance worker asked Brady if Roberson was the person she saw in the parking lot. *Id*. Brady responded yes. *Id*. Roberson denied assaulting a female. *Id*.

C. In September 2016, another resident saw an unidentified man dangling from the roof of the apartment building, apparently attempting to access another tenant's second-floor balcony, but the witness scared him off, and Summit Ridge took steps to prevent unwanted balcony access.

Another Summit Ridge resident, Olga Yurkova, stated that on September 10, 2016, she saw an unidentified man on the roof over the breezeway to the apartment complex's stairwell trying to access a neighbor's second-floor balcony. CP 91. Yurkova saw the unknown man dangling from the ledge of the balcony.

CP 92-93. She only saw him from the back, and he was wearing a hoodie. CP at 90. He fled when Yurkova confronted him. CP 89-90.

Yurkova filed a police report and notified Whitewater in the following days. CP 94, 98. Whitewater responded to the incident by offering tenants wooden dowels to place in sliding doors which opened onto their balconies, and sent employees out to survey the grounds. CP 47-48, 59, 66. Yurkova's description of the man – such as it is (white skin and blonde hair) – would not match Roberson's description (black skin and black hair). CP 184.

D. A few weeks later, Brady was raped by an assailant who allegedly scaled the apartment building to her third-floor balcony, entering her apartment through her unlocked balcony door; Brady sued Whitewater three years later.

On September 23, 2016, Roberson sexually assaulted Brady in her apartment. CP 4. Brady alleged that Roberson gained access to her apartment by climbing up to her third-floor balcony and entering through her unlocked sliding door. CP 4.

On September 20, 2019, Brady filed the present lawsuit alleging that Whitewater "failed to provide, maintain, and implement necessary measures to warn of the possibility of uninvited access to or to prevent uninvited access to tenants' balconies at the Summit Ridge Apartments." CP 6.

E. Whitewater obtained summary judgment dismissal, but the Court of Appeals reversed, finding Brady's rape foreseeable to Whitewater.

On July 29, 2021, Whitewater filed a motion for summary judgment, demonstrating to the Court that Whitewater did not owe Brady a duty of protection, and Brady had no evidence of foreseeability necessary to establish a duty. CP 106-115. The Court granted Whitewater's motion for summary judgment. CP 365-67.

Brady then appealed the order of summary judgment to the Court of Appeals arguing Whitewater owed Brady a duty under the dangerous propensities and field of danger tests. CP 368. The Court of Appeals rejected Brady's field of danger argument, but applied the prior similar incidents test to find Whitewater

owed a duty. *Brady v. Whitewater Creek, Inc.*, 38449-7-III, 2022 WL17420727, at *16, 25 (Wash. Ct. App. Dec. 6, 2022). Despite the numerosity element of the test, the Court of Appeals held Yurkova's complaint was a prior similar incident and was alone sufficient to render Brady's assault foreseeable by Whitewater. *Brady*, at *25. Despite prevailing on appeal, Brady moved for reconsideration of the Court of Appeals' decision rejecting her dangerous propensities and field of danger arguments. The Court of Appeals denied Brady's motion.

IV. ARGUMENT

A. Discretionary review is warranted under RAP 13.4(b)(1), (2) & (4)

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; . . . or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Here, the *Brady* decision conflicts with decisions of this Court and with published decisions of the Court of

Appeals. It also involves an issue of substantial public interest that should be determined by this Court.

B. This Court's precedents narrowly constrain any duty to protect others from criminal acts of third parties, holdings with which *Brady* conflicts. RAP 13.4(b)(1).

This Court has held that the "general rule at common law is that a private person does not have a duty to protect others from the criminal acts of third parties." *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 223, 802 P.2d 1360 (1991). "[T]here is usually no duty to prevent a third party from causing physical injury to another, unless 'a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party's conduct."' *Id*. at 227. The existence of a legal duty is a question of law for the court. *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 766, 344 P.3d 661 (2015) (citing *Cummins v. Lewis Cnty.*, 156 Wn.2d 844, 852, 133 P.3d 458 (2006) ("[i]n a negligence action, the determination of whether an actionable duty was owed to the plaintiff represents a question of law to be decided by the court"); *Christensen v. Royal Sch.*

Dist. No. 160, 156 Wn.2d 62, 67, 124 P.3d 283 (2005) ("existence of a legal duty is a question of law and 'depends on mixed considerations of logic, common sense, justice, policy, and precedent'" (internal quotation marks omitted) (quoting *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001))); *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 474-75, 951 P.2d 749 (1998); *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994)).

In those rare instances where a person has a duty to control the conduct of third persons to prevent harm to others, the standards are set forth in the RESTATEMENT (SECOND) OF TORTS § 315 (1965) ("RST § 315"). *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275-76, 979 P.2d 400 (1999). RST § 315 provides:

> There is no duty so to control the conduct of a third person as to prevent them from causing physical harm to another unless:

> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Hertog, 138 Wn.2d at 276 (quoting RST § 315).

A special relationship exists between a business and an invitee. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 202, 943 P.2d 286 (1997). This special relationship may, in limited circumstances, give rise to a duty to protect the invitee from the criminal acts of third persons. *McKown*, 182 Wn.2d at 766.

But this Court has consistently expressed reluctance to place the burden of third-party criminal conduct onto businesses. 182 Wn.2d at 766 (this Court "has continued to recognize under premises liability standards that the duty to protect invitees is not a broad duty but a limited one, in recognition that it is often unfair to place the burden of third parties' criminal conduct on a business"); *accord Nivens*, 133 Wn.2d at 203-04; *Hutchins*, 116 Wn.2d at 236. The duty to protect invitees thus reaches only reasonably foreseeable third-party criminal conduct. *McKown*,

182 Wn.2d at 765-67 (discussing RESTATEMENT (SECOND) OF TORTS § 344 ("RST § 344"). This test "narrows the duty inquiry to whether the *specific acts* in question were foreseeable rather than whether the landowner should have anticipated any act from a broad array of possible criminal behavior or from past information from any source that some unspecified harm is likely." *Id*. at 767. This test goes to the *existence* of the duty, not just its scope. *Id*. (quoting RST § 344, comment f).

In *McKown*, this Court further determined the situations giving rise to a landlord's duty to protect tenants from the criminal acts of third parties (*id.* at 768):

> the first is where the landowner knows or has reason to know of immediate or imminent harm, and the second is where the possessor of land knows, or has reason to know, based on the landowner's *past experience*, the *place* of the business, or the *character* of the business, there is a likelihood that harmful conduct of third parties will occur on his premises.

Where liability is premised on a business's past experience, foreseeability may be established where the business knew or had reason to know of "a history of similar violence on the

premises or… the dangerous propensities of the individual responsible." *Wilbert v. Metro. Park Dist. of Tacoma*, 90 Wn. App. 304, 309, 950 P.2d 522 (1998). "[I]f the criminal act that injures the plaintiff is not sufficiently similar in nature and location to the prior act(s) of violence, sufficiently close in time to the act in question, and sufficiently numerous, then the act is likely unforeseeable as a matter of law under the prior similar incidents test." *McKown*, 182 Wn.2d at 772.

In *Brady*, the Court of Appeals properly concluded that (1) Whitewater had no special relationship with Roberson; (2) Summit Ridge's place and character as an apartment complex did not make Roberson's criminal acts foreseeable; and (3) Whitewater did not know of Roberson's dangerous propensities. 521 P.3d at 247. Yet the *Brady* court erroneously held that the unrelated suspicious activity described in Yurkova's complaint *was* a prior similar incident to Brady's rape inside her apartment, making Roberson's heinous criminal act foreseeable to Whitewater. *Id*. at 248.

This holding conflicts with this Court's articulation of the prior similar incidents test in *McKown*. *McKown* holds that a criminal act must be "sufficiently similar in nature and location to the prior act(s) of violence, sufficiently close in time to the act in question, *and* sufficiently numerous." 182 Wn.2d at 772 (emphasis added). The Court explicitly rejected a "totality of the circumstances test," requiring instead that prior incidents must fulfill *all three* elements, or the subsequent criminal conduct is not foreseeable as a matter of law. *Id*.

Yurkova's complaint failed to allege *any* prior act of violence,[2] much less a sufficiently similar act of violence to Roberson's rape of Brady. Instead of adhering to *McKown* and examining whether prior similar crimes or acts of violence had occurred on Whitewater's property, the *Brady* court improperly focused on the unidentified dangling man's apparent attempt to access a different balcony, which was not even a successful

[2] Indeed, it is not clear that the unidentified subject of Yurkova's complaint even committed a crime.

attempt at access, much less a violent act inside an apartment. This analysis directly conflicts with the duty inquiry articulated in *McKown*, directing courts to examine whether the *specific act in question* – the rape – was foreseeable, not whether Whitewater could have anticipated from past unrelated information that some unspecified future harm was likely to occur.

Furthermore, *Brady* appears to have improperly employed the totality of the circumstances test that *McKown* explicitly rejected. After analyzing whether Yurkova's complaint alleged an act of a sufficiently similar nature, the *Brady* court continued to analyze foreseeability: "While there was only one complaint, it was close in time to Brady's attack." 521 P.3d at 248. This sentence makes a single allegation of prior unrelated conduct somehow meet the numerosity element of the prior *similar incidents* test, supposedly compensating for the lack of numerosity by referring to proximity in time. But *McKown* requires a plaintiff to prove all three elements. 182 Wn.2d at 772.

Brady directly conflicts with *McKown* and the precedents it relies upon. This Court should grant review to resolve this conflict and to maintain the limitations it has established on placing potentially unlimited liability on landlords.

C. *Brady* also conflicts with other published decisions of the Court of Appeals. RAP 13.4(b)(2).

In multiple published opinions, the Court of Appeals has likewise consistently held that there must be evidence of *similar violence* to satisfy the prior similar incidents test and establish foreseeability. *Fuentes v. Port of Seattle*, 119 Wn. App. 864, 870, 82 P.3d 1175 (2003) (evidence of prior car prowlers in airport garage insufficiently similar to make carjacking at airport foreseeable); *Tortes v. King County*, 119 Wn. App. 1, 8, 84 P.3d 252 (2003) (evidence of prior simple assaults on buses insufficiently similar to make shooting of bus driver foreseeable); *Raider v. Greyhound Lines, Inc.*, 94 Wn. App. 816, 820, 975 P.2d 518 (1999) (evidence of prior prostitution, drugs, and shooting at bus station insufficiently similar to make racially motivated shooting at bus station foreseeable); *Wilbert*, 90 Wn.

App. at 309-10 (prior fights outside dance insufficiently similar to make shooting later in the night foreseeable).

Brady conflicts with *Fuentes*, 119 Wn. App. at 870; *Tortes*, 119 Wn. App. at 8; *Raider*, 94 Wn. App. at 820; and *Wilbert*, 90 Wn. App. at 309-10. These cases each held that plaintiffs must present evidence of prior *similar violence* to establish foreseeability. *Id.* In each case, plaintiffs provided evidence of prior crimes that the Court of Appeals determined were too dissimilar from the specific criminal act in question to establish foreseeability. *Id*.

Also contrary to *Brady*, for many of the prior crimes in those cases, *how they were accomplished* was factually similar to how the later criminal act was accomplished. For example, prior evidence of a shooting at a bus station was insufficiently similar in nature to the later racially motivated shooting at the bus station to make the latter foreseeable in *Raider*, despite both crimes involving shootings at the same bus station. 94 Wn. App. at 820. In *Wilbert*, earlier fights outside the same dance where

the plaintiff was later shot were nevertheless insufficiently similar in nature to make the shooting foreseeable. 90 Wn. App. at 309-10.

Yet *Brady* held that a prior allegation of non-violent suspicious activity by an unidentified dangling man was sufficiently similar in nature to a later forcible rape to make that rape foreseeable to the owner of the apartment building. This is a dramatic departure from the limitations previously articulated and applied by our appellate courts. Instead of requiring evidence of prior similar *violence* to establish foreseeability, the *Brady* court held that evidence of a single previous act of alleged trespassing by some unidentified person was sufficient to make Roberson's rape foreseeable, even where the description of the prior trespasser did not match Roberson in the least.

Brady also mistakenly relies on two Court of Appeals decisions: *Griffin v. W. RS, Inc.*, 97 Wn. App. 557, 566, 984 P.2d 1070, 1075 (1999), *rev'd*, 143 Wn.2d 81 (2001); and *Johnson v. State*, 77 Wn. App. 934, 894 P.2d 1366 (1995). *Brady*'s

misapplication of these two cases places it in further conflict with published Court of Appeals' decisions.

While *Griffin* concerned a similar set of facts – an assault by an intruder in a tenant's apartment –*Griffin was reversed by this Court*. 143 Wn.2d at 92. While *Brady* suggests that *Griffin* was "reversed on other grounds," that is inaccurate: this Court held that *Griffin* unnecessarily reached the duty question despite a jury finding that while the defendant breached a duty to the plaintiff, it did not proximately cause her any injury. 143 Wn.2d at 88. A *reversed* opinion addressing unnecessary issues is of no precedential value, and any "holdings" it may have otherwise made would be mere *dicta* in any event. *See, e.g.*, *In re Personal Rest. Of Erhart*, 183 Wn.2d 144, 148, 351 P.3d 137 (2015) (reversed "decision represents no precedential change in the law"); *State v. Putman*, 21 Wn. App. 2d 36, 43, 504 P.3d 868, 872 (2022) ("Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed").

Moreover, *Griffin* does not analyze foreseeability or apply the prior similar incidents test, but rather focuses in *dicta* on the nature of the special relationship between a landlord and a tenant and whether any duty to protect existed. 97 Wn. App. at 570. Because *Griffin* did not delve into the question of prior similar acts or foreseeability, *Brady* improperly relied on *Griffin* as support for its holding regarding the prior similar incidents test.

In *Johnson*, the plaintiff was raped near her college dormitory. 77 Wn. App. at 936. The *Brady* court cited *Johnson* for the proposition that "evidence that the university was aware of several crimes on campus that year was sufficient to create a material issue of fact and foreseeability," so Yurkova's complaint of some unidentified person dangling from the structure could somehow make Roberson's rape foreseeable to Whitewater. 521 P.3d at 248. While *Johnson* is unclear on this point, it appears that the evidence of prior crimes on campus were specifically sexual assaults, not unrelated and dissimilar acts or crimes. *See* 77 Wn. App. at 943 n. 29 (referring to common

knowledge of sexual assaults on campus as bolstering plaintiff's argument for foreseeability); *see also McKown*, 182 Wn.2d at 772 (describing *Johnson*'s holding as "foreseeability of rape of college student in front of her dormitory was a question of fact where there had been numerous rapes on campus each year"). This Court's interpretation of *Johnson* is consistent with the well-established case law discussed *supra*, requiring evidence of similar acts of violence to establish foreseeability.

Therefore, despite citing *Johnson* in support of its holding, *Brady* actually conflicts with *Johnson*, as it does with the other Court of Appeals' cases discussed above. This Court should grant review to address and resolve these conflicts with a great deal of existing precedent.

D. Whether to impose an expansive – and expensive – new duty on landlords to insure their tenant's safety against unprecedented criminal acts is an issue of substantial public interest that only this Court should decide. RAP 13.4(b)(4).

Brady threatens to dramatically expand the duty business owners owe to invitees by holding that a single report of an

unknown person's unrelated suspicious (nonviolent) activity somewhere on the landlord's premises is sufficient to establish the foreseeability of a later violent crime committed inside a tenant's apartment. In addition to opening businesses to potentially unlimited liability, the *Brady* holding will inevitably increase the costs of housing and disincentivize businesses from operating in high crime areas.

This Court recognized this problem when it rejected foreseeability based on a business's location in a high crime area. *McKown*, 182 Wn.2d at 768-69. By dramatically altering this Court's foreseeability analysis, *Brady* adopted an unprecedented rule imposing potential liability whenever a business is aware of any suspicious activity anywhere on its premises – almost an inevitability in high crime areas. This rule creates the same problem recognized and rejected in *McKown*.

The increased costs of this limitless liability will be passed on to consumers, including tenants. This will have an especially negative impact in the realm of affordable housing and housing

access, which are already major issues of public interest. This Court should grant review to determine this extremely important public policy question.

V. CONCLUSION

This Court should accept review of the Court of Appeals' decision in *Brady*.

VI. CERTIFICATE OF COMPLIANCE

This document contains 3844 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 3rd day of March 2023.

KIRKPATRICK & STARTZEL, P.S.

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CERTIFICATE OF SERVICE

I certify that on March 3, 2023, I caused to be served in the manner noted below a copy of the foregoing on the following individuals:

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