No. 319121

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STAR F. CRILL, individually,

Plaintiff-Appellant,

vs.

WRBF INC. d/b/a DENNY'S RESTAURANT; DEBRA FOUTS and JACK DOE FOUTS, individually and as a marital community; JERRY FOUTS, and JANE DOE FOUTS, individually and as a marital community; DENNY'S INC., a California Corporation; JACKIE D. LEGERE, JR.; AUSTIN GARNER,

Defendants-Respondents.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The trial court erred by striking Exhibit 8, a *Restaurant News* article regarding the foreseeability of criminal conduct at restaurants, in connection with summary judgment proceedings regarding the duty of a restaurant to prevent such criminal conduct. CP 257-58.
2. The trial court erred in dismissing Crill's complaint on summary judgment. CP 268-73, 473-77.
3. The trial court erred in denying Crill's motion for reconsideration.[1]

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in striking Exhibit 8 on grounds of hearsay where it was admissible to establish notice.
2. Whether the trial court required undue similarity and frequency of past criminal conduct—i.e., incidents of the "exact nature"—in resolving the issue of foreseeability of such incidents on the respondent's premises as a matter of law.

[1] The order denying reconsideration is being transmitted to the Court of Appeals pursuant to a supplemental designation of Clerk's Papers.

3. Whether the defendant had specific notice of the foreseeability of harm in this case and assumed a duty of care by intervening, but failed to intervene in a reasonably prudent manner.

STATEMENT OF THE CASE

I. Background facts.

Denny's Restaurant on Argonne, one of several Denny's Restaurants owned by Defendant/Respondent WRBF, Inc., is located less than a half mile from Good Tymes Bar and Grill. The Argonne Denny's is open 24 hours per day. As such, the Argonne Denny's is subject to the "bar rush" phenomenon that results on weekend nights from the closure of a nearby bar and the stream of customers who then appear at the nearby Denny's. (Lovins depo., CP 396:4-6.) Not only are the employees and management aware of this phenomenon, but they discuss as part of their training how to handle disruptive customers. (Liberg Depo., CP 369:17-21; CP 382:9-11); (Winter declaration, CP 65:6-8.) The more intoxicated the customers are, the more likely they are to "cause problems," including the potential for physical violence. (Lovins Depo., CP 405:3-5); (Declaration of Fred Del Marva, CP 216:12-18.)

It is also well known in the restaurant industry generally, and to owners of restaurants in the Denny's "system" in particular, that

remaining open during the late-night hours risks special security problems; they arise from the fact that "argumentative and assaultive conduct is a common occurrence and highly foreseeable when soliciting an after-bar clientele between the hours of 11:00 p.m. and 4:00 a.m." (Declaration of Fred Del Marva, CP 215:24-26.) As a result, a prudent owner of a restaurant such as the Argonne Denny's will employ a specially trained manager to be on duty during the late night hours in order to identify intoxicated customers at the time of entry and take appropriate measures to insure the safety of restaurant customers. (Declaration of Fred Del Marva, CP 216:28-217:2.)

On the night of January 2, 2009 and the early morning hours of January 3, 2009 (Friday night/Saturday morning), the Argonne Denny's did not have a manager on duty.[2] Instead, one of the servers, Maryquince Winter, attempted to fulfill the role of acting manager while at the same time acting as a server. (Winter Depo., CP 309:24-310:1.)

Austin Garner had been drinking at the Good Tymes Bar and Grill prior to its closing at 2 a.m. on January 3, 2009. (Garner Depo., CP 204:10-12.) He could not remember whether he had consumed between

[2] Maryquince Winter testified that on the night in question the manager who was scheduled did not come to work because of "an issue with flooding at his house." (CP 65:14-15) There is no evidence that the Argonne Denny's made any effort to find a replacement for the manager, but simply expected Winter to "fill in as needed in a management role" while also fulfilling her duties as a server. (CP 65:3-4)

one and six alcoholic beverages. (CP 204:10-12.) A later arresting officer reported smelling the odor of alcoholic beverages on his person, and behavior consistent with someone under the influence of alcohol. (CP 48.) Notwithstanding Garner's intoxicated state, he and his friends were seated in the restaurant in a booth immediately behind that of Star Crill and her friend Mario Diaz. (Crill depo.,[3] CP 28:20-21.) Another person in Garner's party, Jackie D. Legere, was also "very drunk." (Crill depo., CP 29:10-13.) Although Crill and Diaz were speaking in a normal tone of voice about general topics, including politics, Legere spoke in a loud voice and repeatedly told Crill and Diaz to "shut the f*** up." (Crill depo., CP 30:5-6.) Maryquince Winter was told by a fellow server that "there may be a problem with some patrons seated in booths along the windows." (CP 65:17-18.) She went to "observe the situation" but concluded that there were "no issues or problems occurring at that time." (CP 65:21.) She "kept an eye on those tables" and after hearing loud voices she "told them all to quiet down, and settle down, or leave." (CP 66:5-6.)

After she seated some other customers Winter learned from another server that the Garner party had been cursing at someone in the Crill party and that someone at the tables was no longer seated but was standing up. (CP 66:7-8; CP 324:5-6.) Winter then went to the Garner

[3] Star Crill was married to Slade Seehawer June 13, 2010. By the time of the deposition she had changed her name, but the lawsuit was initiated in her maiden name.

table and told them that they had to leave. (CP 66:9-10.) Instead, Garner and his friends surrounded Winter, at which point Winter decided to call the police. (Winter depo., CP 323:13-15.) While she was on the phone calling the police, she learned that Crill had been assaulted by Garner. (Winter depo., CP 325:103.) Garner had punched Crill in the back of the neck at the base of the skull that caused a "knot on her head" (CP 52) resulting in permanent injuries, including psychological and cognitive deficits. (CP 8-9.)

II. Procedural history.

Star Crill timely filed a complaint for damages on December 13, 2011. (CP 3-9.) On May 8, 2013 defendant WRBF filed a motion for summary judgment, contending that WRBF had no prior knowledge of criminal conduct at the Argonne Denny's and that the complaint should be dismissed as a matter of law. (CP 21:4-5.) In support of its motion, WRBF submitted the Declaration of Don Wold, the General Manager at the Argonne Denny's, who described a "manager's log" that would contain reports of incidents relating to fights or assaults in the restaurant. (CP 62:5-8.) He testified that there were no incidents relating to fights or assaults between late September 2008 and the first of January, 2009. (CP 62:5-8.)

In response, plaintiff submitted a brief in opposition to summary judgment, including the declaration of Fred Del Marva, an expert qualified to testify concerning the restaurant industry generally, and the policies followed by Denny's Restaurants in particular. In his declaration Del Marva described the "completely different crowd" that patronizes a late-night restaurant and the security measures that the Denny's "system" recognizes must be employed in order to ensure the safety of their customers. (CP 215:24-216:25.) In his expert testimony Del Marva referenced an article from the *Restaurant News* dated December 2, 2007, which was entitled "Restaurants open themselves up to greater risks with later hours." (CP 231-37.) The article was attached to his declaration as Exhibit 8. *Id.* It included a report of the fatal stabbing of a Denny's waitress in Florida, and a statement by Mike Jank, the vice president of risk management for the 520 Denny's company stores and 947 franchised restaurants, stating "I just hope operators realize they are going to have problems if they don't keep in mind that the security issues you have in the daytime are far different at night." Del Marva cited this statement in support of his conclusion that those who were in the Denny's "system" were well aware of the special dangers posed by operating a late-night restaurant. (CP 216:8-11.)

WRBF moved to strike the *Restaurant News* article attached to Del Marva's declaration, contending that it was hearsay. (CP 253-55.) The trial court granted WRBF's motion, and struck the article on grounds of hearsay. (CP 258:2.) On June 21, 2013 the parties presented oral argument regarding the summary judgment motion, and on July 29, 2013 the trial court issued a written opinion granting the motion, ruling: "The facts presented in this case are insufficient to give rise to a reasonable foreseeability of the assault upon Crill." (CP 272.) The trial court's review of relevant case law led her to the conclusion that "past criminal behavior on a premises does not provide reasonable foreseeability of future crimes unless such future crimes are of the exact nature of the past criminal behavior." (CP 271; emphasis supplied.) The opinion also relied upon the evidence of the lack of previous recorded incidents in the manager's log submitted by Don Wold: "The empty incident log kept by WRBF shows this restaurant is not accustomed to altercations on its premises." (CP 273.)

The plaintiff moved for reconsideration of its opinion, based on two grounds: (1) the evidence presented at the time of summary judgment was misleading in light of evidence available as a result of depositions that

were taken after the summary judgment materials had been filed;[4] and (2) the trial court had misapplied the standard for what was reasonably foreseeable: instead of requiring that the plaintiff establish that a previous incident of the "exact nature" had previously occurred on the premises, the plaintiff need only show that "the actual harm fell within a general field of danger which should have been anticipated." (CP 287:7-8.) The trial court denied the motion for reconsideration. (CP 557.)

ARGUMENT

I. The trial court erred in striking the *Restaurant News* article, Exhibit 8, as hearsay.

A. Exhibit 8 should not have been excluded as hearsay because it was not offered for the truth of the matter asserted.

In ruling on whether the trial court properly excluded evidence at the summary judgment stage, a reviewing court considers the issue de novo. *Davis v. Fred's Appliance*, 171 Wn.App. 348, 287 P.3d 51 (Div. 3 2012); *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). A statement is hearsay if it is "offered in evidence to prove the truth of the matter asserted." ER 801(c); *State v. Ruiz*, 176 Wn.App. 623, 309 P.3d 700 (Div. 3 2013). Exhibit 8 described a series of attacks that had

[4] In particular, the "incident log" upon which WRBF argued that it had no prior history of altercations was shown to be unreliable (CP 279-281); and Maryquince Winter testified in her deposition to notice at the time of the incident that a physical altercation was foreseeable.

occurred at restaurants that were open late at night, and the heightened risk associated with a late-night restaurant. If the article were being offered to prove the truth of the claims in the article—that attacks had actually occurred with greater frequency at late night restaurants—then the trial court's analysis would have started on the right foot. However, because the article was for the purpose of showing *notice* to restauranteers of the dangers of operating a late-night restaurant, the article does not rely upon the truth of the matter asserted. *Cf. Rector v. Thompson,* 26 Wash. 400, 402, 67 Pac. 86 (1901) (affirming admission of letter containing hearsay on grounds that it was relevant to establish notice that converted property was stolen); *see generally* 5B Karl B. Tegland, Wash. Prac., Evidence Law & Practice § 801.10 (5th ed.) (regarding definition of hearsay; citing *Rector*). Even if the facts stated in the article were proven to be completely false, the article would still establish that restauranteers *had warning* of the danger of operating a late-night restaurant, and thus the attack in question was foreseeable.[5]

[5] Moreover, the article contains a quotation from a high-ranking Denny's Vice President who warned about the danger of ignoring the differences between the security risks during the daytime and those late at night. Again, even if he was wrong in his assessment, the article establishes the *perception* of someone intimately familiar with the situation confronting WRBF on the night in question.

B. Exhibit 8 should not have been excluded as hearsay because it was part of the basis of an expert's opinion.

In opposing WRBF's motion for summary judgment plaintiff submitted the Declaration of Fred Del Marva, who had extensive experience in evaluating the security preparations of restaurants such as the Argonne Denny's. He testified that in order to provide reasonable security for customers during the late-night operation of a restaurant such as the Argonne Denny's, the restaurant needed to have a full-time manager who was specially trained to deal with the late-night crowd. In support of his opinion, he referenced Exhibit 8. (CP 216:8-11.) It is well established that an expert may rely upon material that would otherwise be inadmissible as hearsay. ER 703; *In re Detention of Coe,* 175 Wn.2d 482, 286 P.3d 29 (2012); *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn.App. 229, 215 P.3d 990 (Div. 3 2009). Precisely this use of Exhibit 8 was being offered in this case, and the Court's granting of the Motion to Strike was error.

II. The trial court erred in requiring a previous incident of the "exact nature" before imposing a duty of care.

A. Washington law imposes upon a property owner the duty to protect invitees from the foreseeable conduct of third parties, even if that behavior is criminal.

It is true that ordinarily one does not have a duty to protect others from the criminal acts of third parties. *Schwartz v. Elerding*, 166 Wn.App.

608, 270 P.3d 630 (Div. 3 2012); *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997). However, it is equally true that a duty of care will be imposed upon a property owner if the defendant's property affords "a special or peculiar temptation or opportunity for crime." *Schwartz v. Elerding*, 166 Wn.App. at 618, 270 P.3d at 636. Washington courts have adopted the Restatement (Second) of Torts §§ 302 & 302B (1965). *Id.* Thus, the burden on a plaintiff to survive summary judgment is to establish that at the time of the injury, the risk of criminal conduct was "reasonably foreseeable."

It should be emphasized that the question of whether the defendant actually exercised reasonable care is distinct from the question of whether the defendant *owed* a duty of care. The trial court's error below was in ruling that the defendant did not *owe* a duty of care.

B. To require a previous incident of the "exact nature" before imposing a duty of care would be in effect to adopt a "one-bite" rule with respect to criminal conduct.

To put the case in its simplest form, the trial court applied a standard that has never been the law in Washington. The case relied upon by the trial court, *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997), does not require that there be an incident of the "exact nature" as the one that injured the plaintiff. Yet it was assumed by the trial court that a duty of care only arises after an incident precisely like the

one for which plaintiff is claiming damages had already occurred. Not only must have there been a previous assault, but there must also have been a previous assault in the precise location where the current claim arose. For example, the trial court acknowledged that there had been a previous altercation in the parking lot at the Argonne Denny's. "However," the Court held, "the fight took place outside the restaurant in the parking lot. . . . [¶] Keeping in line with *Nivens* and its progeny, an isolated altercation in Denny's parking lot is insufficient to base a claim of foreseeability **on an indoor assault**." (CP 273; emphasis added.)

The trial court simply misread *Nivens* and its progeny. In *Nivens* the Washington Supreme Court acknowledged that by inviting customers to its business premises the defendant had accepted a duty "to keep their premises reasonably free of physically dangerous conditions in situations in which business invitees may be harmed by third persons." *Nivens,* 133 Wn.2d at 203, 943 P.2d at 292. If, for example, the defendant left a portion of the premises secluded and unlighted, offering a criminal the means to perpetrate a criminal assault on a customer, a duty of care would be imposed. The reason that the plaintiff's claim in *Nivens* was dismissed on summary judgment (and affirmed on appeal) was because "Nivens abandoned any argument of duty based on the special relationship between business and invitee, arguing instead a business generally owes a duty to

provide security personnel to prevent criminal behavior on the business premises. We decline to find such a duty." *Nivens*, 133 Wn.2d at 205, 943 P.2d at 293. Here, by contrast, the plaintiff is not seeking a broad rule that special security personnel should have been hired; she only points to the failure of the defendant to ensure that a manager (not a server who would "fill in" as acting manager when called upon) was on duty during those hours when the risk of criminal assault was at its height.

Nivens imposed a duty of care on owners with respect to their business invitees that was in part drawn from the Restatement (Second) of Torts § 344, which the Court described as being "consistent with and a natural extension of Washington law[.]" *Nivens*, 133 Wn.2d at 204. The Court further quoted with approval cmt. *f* to § 344, which provides:

> *f. Duty to police premises.* Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons 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. *If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.*

(Emphasis added.) The adoption by Washington courts of § 344 was noted in *Craig v. Washington Trust Bank*, 94 Wn.App. 820, 976 P.2d 126 (Div. 3 1999). Although in that case the court declined to impose a duty of care upon the owner (because the owner had no reason to foresee criminal conduct by the transients who injured the plaintiff), in the case at bar the evidence supplied by the testimony of Fred Del Marva amply demonstrates the foreseeability of the type of criminal conduct that injured the plaintiff.

As the trial court conceded, foreseeability is generally a question of fact. (CP 270.) It may only be decided as a matter of law "if the conduct is so highly extraordinary or improbable as to be wholly beyond the range of expectability." *Fuentes v. Port of Seattle*, 119 Wn.App. 864, 82 P.3d 1175 (Div. 1 2003) (quoted by the trial court in its memorandum opinion, CP 270). Yet by its own standard the trial court would treat an indoor assault as "highly extraordinary or improbable as to be wholly beyond the range of expectability" if the plaintiff could show that prior assaults had occurred in the parking lot, but never inside the restaurant. Similarly, a prior stabbing would not be sufficient to establish a duty of care if the current plaintiff had been raped.

Nor, under the trial court's reasoning, would it be sufficient to show that the owner was aware of the risk of assault at other restaurants

owned by the defendant, but none had occurred at the particular location where the plaintiff suffered harm. Indeed, the trial court appears to have accepted WRBF's characterization of the Argonne Denny's as a "family restaurant" (CP 14:2)—perhaps unlike other restaurants in the Denny's chain—where assaults resulting from a "bar rush" would be less likely to occur. The trial court found that it would be insufficient that previous assaults had occurred at other Denny's restaurants, requiring them to exercise reasonable care on behalf of their patrons: "Crill's argument must fail because she has offered no evidence relating specifically to the Denny's on Argonne Ave. in Spokane, WA." (CP 272.)

It bears repeating that the question of whether a duty of care was owed is distinct from the question of whether on this particular occasion the probability of an assault was so low that no reasonable person would have taken precautions to prevent one, or whether under the circumstances the precautions taken by the defendant were reasonable. Such a question will be for the trier of fact. By contrast, the trial court decided *as a matter of law* that the potential for an assault was "beyond the range of expectability," and that in order to find that such an event was reasonably foreseeable, there would need to be a previous incident of the *exact nature*. Such is not the law.

A parallel error was committed by the trial court in *N.K. v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 175 Wn.App. 517, 307 P.3d 730 (Div. 1 2013). While the duty of an organization toward the young people in its care is different from the duty of a restaurant to its patrons, in both cases the defendant had a duty to use reasonable care bounded by foreseeability. In *N.K.* the court began with the same standard of foreseeability that applies in this case: "Foreseeability is a question for the jury unless the circumstances of the injury are 'so highly extraordinary or improbable as to be wholly beyond the range of expectability.'" *N.K.* at ¶ 26 (footnote omitted). The trial court had dismissed the sponsor of the local scout troop, finding that the sponsor had no knowledge of the dangerous proclivities of the perpetrator of the sexual abuse, and therefore had no duty to prevent harm to the victim. Division I reversed, citing evidence from the national experience of the Boy Scouts of America. *N.K.* at ¶ 31 It also rejected the idea that knowledge of the proclivities of a specific individual was necessary to establish the foreseeability of harm:

> The general field of danger was that scouts would be sexually abused if a stranger newly arrived in town was permitted to supervise them one-on-one in isolated settings. Whether considered from the standpoint of negligence or proximate cause, such a risk cannot be described as so highly extraordinary or improbable as to compel deciding the issue of foreseeability as a matter of law. *See McLeod*, 42 Wash.2d at 323–24, 255 P.2d 360.

> A defendant's actual knowledge of the particular danger "is not required if the general nature of the harm is foreseeable under the circumstances." *Travis v. Bohannon*, 128 Wash.App. 231, 240, 115 P.3d 342 (2005). Therefore, even if there was no evidence that the church knew about specific past incidents of child sexual abuse in scouting, we would decline to decide as a matter of law that sexual abuse by adult scout volunteers was unforeseeable by the church.

The trial court in this case applied the wrong standard to determine whether the assault on the plaintiff was unforeseeable as a matter of law. So long as the evidence was sufficient to support a jury's conclusion that the assault on the plaintiff was reasonably foreseeable, the motion for summary judgment should have been denied.

III. WRBF had specific notice of the foreseeability of harm in this case and assumed a duty of care by intervening, but failed to intervene in a reasonably prudent manner.[6]

Even if a defendant would otherwise owe no duty of care to prevent harm to the plaintiff, a duty attaches once the defendant voluntarily assumes the duty to protect the plaintiff and then negligently fails to do so. *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998) One of the bases for imposing a duty of care upon one who has begun to help a plaintiff in peril is the situation where the defendant

[6] On reconsideration, the trial court noted the argument that there was an independent duty based upon the voluntary action by Winter to intervene in the situation. However, the trial court characterized this argument as not having been raised *before* summary judgment was heard. (CP 561.) Nonetheless, the plaintiff *did* raise the argument in the course of the summary judgment hearing: "There's no general duty of a third-party to step in to separate or a bystander to step in and stop a fight. [¶] However, if they do step in, they must use the standard of reasonable care then becomes an issue. If Ms. Crill had some expectancy of being able to rely upon their intervention, they have to show that their employees acted with reasonable care." (RP 19:15-21.)

misleads the plaintiff into believing that the danger was being addressed. *Id.*

In this case current and former WRBF managers admit the company trained its managers to defuse confrontations involving disruptive guests for the purpose of protecting customers from being harmed by other customers. (CP 369, 373-74, 398-400, 405.) WRBF staff recognized the potential danger the night Ms. Crill was injured and when Ms. Winter was informed by a fellow server that the party in the booth adjoining the plaintiff was a potential problem. Whether her intervention was reasonably prudent is a question of fact for a jury. She intervened not once, not twice, but three different times to address the situation. Her interventions were ineffectual and accomplished little more than persuading Ms. Crill that the restaurant would be controlling the situation.

The first time Ms. Winter asked plaintiff and her companion "if she wanted some water, and asked her if everything was OK, and she said 'yes'—she did not report any problems to me." (CP 65:22-24.) In other words, Winter assumed responsibility for insuring that the disturbance of which she had become aware was dealt with properly. She "kept an eye on those tables" (CP 66:1) and returned again when she heard loud voices. She then asked the Garner party "if there was a problem, and they said there was not, and I told them all to quiet down, and settle down, or

leave." (CP 66:5-6.) When she returned a third time to find that the Garner party was standing and she told them to leave and they refused, she told them that she was going to call the police. (CP 66:11-13.) Instead of taking appropriate steps to insure that the disturbance ended peacefully, she "squeezed out from among them," (CP 66:12) and left to call the police. While they were left alone the third time, Garner assaulted the plaintiff.

Under WRBF's theory of the case, Denny's owed no duty to plaintiff to prevent injury from the danger that was posed by Garner and his increasingly belligerent conduct and was not on notice that any injury was foreseeable. But WRBF trained its managers to recognize that the reason they intervene with disruptive customers is to protect its customers from one another, and Winter in this case clearly recognized that there was a danger. This answers the question on notice—WRBF, through its staff, was on notice of the risk of harm, leaving only the question of whether its intervention attempts were reasonable. Since this question is a factual dispute that cannot be resolved on summary judgment, the dismissal should be reversed and the case remanded for trial.

CONCLUSION

Based on the foregoing appellant Crill respectfully asks the Court to reverse and vacate the Superior Court's orders granting summary judgment and denying reconsideration, and remand this case for a trial on the merits.

Respectfully submitted this 24th day of March, 2014.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On March 24, 2014, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

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Signed on March 24, 2014 at Ephrata, Washington.

Shari M. Canet, Paralegal