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.

SUPPLEMENTAL BRIEF OF APPELLANT RE: APPLICABILITY OF *McKOWN V. SIMON PROPERTY GROUP* (Wash. 2015)

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INTRODUCTION

In answering the certified question in *McKown v. Simon Property Group, Inc.*, __ Wn.2d __, 344 P.3d 661 (2015), the Washington Supreme Court provided clear guidance as to one aspect of this appeal—whether the trial court used the proper standard for granting summary judgment with respect to the premises liability claim (it did not). However, it left open the question of whether the dismissal of plaintiff's complaint could be justified on other grounds, a question which cannot be properly resolved without a trial. In order to evaluate this latter question, it is necessary to clarify the distinction that *McKown* draws between the *existence* of a duty of care and the *scope* of the duty of care. Thus, this brief will address four questions:

(1) Did the trial court err in focusing exclusively on the "prior similar acts on the premises" prong of Restatement § 344 cmt. f?

(2) What is the difference between the *existence* of a duty of care (a question of law) and the *scope* of the duty of care (a question of fact)?

(3) Does the evidence in this case permit a finding of the *existence* of a duty of care, and should the case be remanded for trial on the *scope* of that duty?

(4) Does *McKown* alter or confirm the existence of a separate basis for liability raised in Crill's previous briefing through the affirmative conduct by Denny's that, separate from its duty as a premises owner, imposes a duty of care?

ANALYSIS

A. The Trial Court erred in requiring prior similar acts on the premises.

McKown makes clear that Washington courts follow the approach to premises liability described in the Restatement (Second) of Torts § 344 (1965): "[W]e reiterate that *Restatement (Second) of Torts* section 344 is generally consistent with Washington law, and that comments d and f generally describe the contours of the duty owed." *McKown*, ¶ 15, 344 P.3d at 665. *See also McKown*, ¶ 35, 344 P.3d at 671. It is equally clear that it is erroneous to focus exclusively on prior similar acts on the premises: "In answer to the Ninth Circuit's second inquiry, proving acts of similar violence is not the only way for a plaintiff to establish a duty as provided in the *Restatement*." *McKown*, ¶ 35, 344 P.3d at 671. To be more specific,

> Thus, comment f, like section 344 itself, contemplates two kinds of situations that may give rise to a duty—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.

McKown, ¶ 23, 344 P.3d at 667 (emphasis supplied).

In dismissing Crill's complaint on summary judgment, the trial court erroneously considered prior similar incidents on the premises to be a

necessary condition for the defendant to be under a duty of care to adopt reasonable precautions to prevent such assaults:

> Crill claims WRBF was given ample notice of the potential dangers to patrons in operating a restaurant at night, as well as a means to address those dangers. Crill concludes that WRBF negligently failed to keep its premises safe for its patrons. Crill's argument must fail because she has offered no evidence relating specifically to the Denny's on Argonne Ave in Spokane, WA. She has offered no proof that Denny's could reasonably foresee a third party assault on its premises.

Trial Court's Opinion, CP 272 (emphasis supplied).

It is clear that the trial court regarded the "character of the business" as insufficient to establish the foreseeability of injury which would give rise to a duty of care. Because the trial court used an improper standard in dismissing plaintiff's complaint, appellant has established the basis for reversing the trial court's judgment.

However, plaintiff anticipates that defendant will argue that, notwithstanding the trial court's use of an incorrect standard, the judgment below may still be affirmed if it is justified on another ground. *Youker v. Douglas County,* 178 Wn.App. 793, 327 P.3d 1243 (Div. 3 2014). Thus, the question arises whether or not the plaintiff has offered sufficient evidence in support of her claim that the defendant owed her a duty of care under the "character of the business" basis recognized in comment f and in

turn recognized in *McKown*. To answer this question, it is necessary to apply the distinction between the *existence* of a duty of care, and the *scope* of that duty, as explained in *McKown*.

B. The existence of a duty of care is a question of law, but the scope of that duty is a question of fact.

McKown addresses the confusion that has arisen as a result of apparently conflicting statements about whether foreseeability is a question of law to be decided by the court or a question of fact to be decided by a jury. *McKown* explained that foreseeability is actually relevant in both determinations: first, the court must consider whether, as a matter of law, the defendant owed a duty of care to the plaintiff. "[F]oreseeability as a question of whether a duty is owed is ultimately for the court to decide." *McKown*, ¶ 10, 344 P.3d at 664. "The existence of a legal duty is a question of law for the court." *Id.* at ¶ 11.

However, once the court determines that a legal duty is owed to the plaintiff, foreseeability is also relevant to determining the *scope* of that duty: "[O]nce 'a duty is found to exist from the defendant to the plaintiff then concepts of foreseeability serve to define the scope of the duty owed.'" *McKown*, ¶ 11, 344 P.3d at 664, quoting *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 475, 951 P.2d 749 (1998).

The question of *whether* a duty of care is owed (which is a question of law for the court) is to be evaluated in light of "mixed considerations of logic, common sense, justice, policy, and precedent." *McKown*, ¶ 11, 344 P.3d at 664, quoting language originally found in T. Street, Foundations of Legal Liability 110 (1906), and first adopted by *King v. City of Seattle*, 84 Wn.2d 239, 525 P.2d 228 (1974).

McKown recognizes that the duty of care owed to business invitees includes protection from "reasonably foreseeable" criminal acts of third persons. *McKown*, ¶ 16, 344 P.3d at 666. While this duty does not make the business owner a "guarantor of the invitee's safety," because such a standard would be "too expansive a duty," (*Nivens v. 7–11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997), quoted in *McKown*, ¶ 16, 344 P.3d at 666), a duty will arise if criminal conduct is reasonably foreseeable. In making this determination, the court must consider whether imposition of a duty of care is consistent with "logic, common sense, justice, policy, and precedent."

1. McKown warned against a focus on "location" as a basis for liability

Although comment f of the Restatement recognizes "place . . . of the business" as a basis for finding that careless or criminal conduct on the part of third persons was foreseeable, *McKown* warned against using this

criterion in such a way that it would impose an unfair burden upon those who choose to locate a business in high crime locations. As previously recognized in *Hutchins v. 1001 Fourth Avenue Assocs.*, 116 Wn.2d 217, 236, 802 P.2d 1360 (1991) (quoted in *McKown*, ¶ 24, 344 P.3d at 668), "[I]f the premises are located in an area where criminal assaults often occur, imposition of a duty could result in the departure of businesses from urban core areas—an undesirable result."

By similar logic, it would be a perverse application of public policy to apply a lower standard of care for a business located in an area that was relatively free of criminal assault. Yet an argument very close to this is the one which defendant offered to the trial court and one upon which the trial court relied. It might be true, the trial court acknowledged, that Denny's *in other locations* were the site of criminal assaults. But so long as the Denny's at Argonne had no history of criminal assault, the experience in other locations was irrelevant: "[Crill] has only offered general, industry-wide evidence, none of which creates a genuine issue of material fact regarding the Argonne Denny's." CP 273.

2. The Character of Denny's business imposes a duty of care

As the previous quotation from the trial court's opinion recognized, Crill presented evidence in response to the defendant's motion for summary judgment that established the existence of a duty of care based upon the

character of the business operated by defendant WRBF. "It is well known throughout the Denny's 'system' 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. It is not just that such assaults are *foreseeable*, from the standpoint of predicting their occurrence. The point is that in catering to the "bar rush" crowd Denny's actually provides a location where such assaults are more likely to occur.[1]

It is to be emphasized that the character of the Argonne Denny's suggests an implication for public policy that is the mirror opposite of the "location" concern expressed in *Hutchins*. In *Hutchins* (cited with approval in *McKown*), public policy was held to disfavor the imposition of liability where the premises owner did nothing to *cause* or *encourage* the criminal assault, but simply served as the venue where assaults common to that location would occur.

In the present case, by contrast, Denny's owes a duty of care not because it happens to be in a bad location—in fact the opposite is true—but because its business model includes providing a venue where the "bar rush" crowd can "continue the party":

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[1] The fact that Denny's was on notice of the dangerous nature of its business as an all-night diner catering to a bar rush crowd is shown additionally by the improperly excluded "Exhibit 8" as was thoroughly briefed in Appellant's opening brief, pp. 8-10.

> [D]isruptive patrons/clients during the late night hours are far more likely to be intoxicated. Denny's specifically targets the after-bar clientele. They directly solicit people leaving a bar after it closes to come in and dine. These individuals have a high propensity for argumentative and disruptive behavior. This behavior can turn quickly into assaultive behavior or behavior that can lead to injuries.

Declaration of Fred Del Marva, CP 216.

Thus, based on the evidence Crill submitted to the trial court, the *character* of the defendant's business in this case justifies the imposition of a duty of care.

C. There is a genuine issue regarding the *scope* of defendant's duty of care

1. Evidence regarding the scope of the duty of reasonable care must be presented to avoid dismissal

Even if plaintiff has established the existence of a duty of care, a court may still dismiss a claim on summary judgment if the plaintiff has failed to establish the existence of any genuine issue of material fact regarding the *scope* of that duty. In keeping with *McKown*'s concern that premises owners not be unduly burdened with the risk of criminal conduct occurring on their premises, a trial court should consider whether there is evidence from which a reasonable finder of fact could conclude that the defendant failed to use reasonable care in light of the nature of the assault that took place.

For example, under the facts of *McKown* itself, even if the plaintiff succeeded in persuading the court that the *character* of a shopping mall such as the one operated by the defendants made criminal conduct foreseeable, and thus the defendant had a duty to use reasonable care to prevent criminal assaults, it would still be incumbent upon the plaintiff to provide evidence as to the *scope* of that duty. In other words, what specific action would a defendant exercising reasonable care have taken to prevent the injury that occurred? But this question has become a question of fact. Unless no reasonable finder of fact could conclude based upon the evidence that the scope of the defendant's duty included taking measures that would have prevented the injury suffered by the plaintiff, the case must proceed to trial. To repeat the formula explained in *McKown*, the trial court considers foreseeability in two steps: first, the trial court considers whether there is sufficient foreseeability (in light of the policy concerns identified above) to impose a duty of care; second, even if there is a duty of care, unless the plaintiff presents evidence that the *scope* of the defendant's duty extends to the prevention of this type of injury, the plaintiff cannot survive summary judgment.

2. Abundant evidence exists in this case to establish a triable issue

Once we turn to the facts of this case, it is abundantly clear that there is a genuine issue of material fact regarding the scope of the defendant's

duty. There was a simple precaution that WRBF itself recognized was ordinarily required for a late-night restaurant: the employment of an assistant manager who could screen customers to refuse admittance to visibly intoxicated customers and to maintain good order on the premises. *See* Appellant's Opening Brief, at 3. Defendant WRBF was notified that the assistant manager assigned to the late night shift on the night of the injury would not be at work because of a flooding problem at his house. *Id.* WRBF chose not to employ a replacement for him, but instead designated Maryquince Winter, a server, to serve double duty as a temporarily designated "assistant manager" while being simultaneously required to perform her ordinary duties as a server. In effect, WRBF simply neglected the precautions that it had previously recognized were necessary to provide reasonable safety for the restaurant's customers.

Crill's evidence in opposition to summary judgment, detailed more thoroughly in Crill's opening brief on appeal, also discussed the negligent handling of the situation once it became clear to WRBF's employees that an altercation was occurring, or about to occur.

In short, unlike the case where the defendant could have done little to avoid the threat posed by the risk that injured the plaintiff, here the scope of the defendant's duty included simple precautions that it admittedly did

not take. The question of whether or not the defendant used reasonable care is a question of fact that is not susceptible to summary judgment.

D. Affirmative Conduct by WRBF Constitutes a Separate Basis for Imposing a Duty of Care

The previous sections of this brief address the duty that WRBF owed to Crill based upon her status as a business visitor on their premises. That duty arises when the premises owner has a duty to protect its invitee from a danger, even if the danger originated from a source other than the premises owner.

McKown also recognizes that a duty will be imposed when the premises owner does not simply fail to protect the plaintiff from harm, but actually engages in conduct that makes the harm more likely: "A duty to protect another is owed when the actor's own affirmative acts create or expose the plaintiff to a recognizable high degree of risk of harm." *McKown*, ¶ 17, n. 4, 344 P.3d at 666. Unlike Restatement § 344, which focuses on the duty of the premises owner to prevent harm caused by third persons, comment e to the Restatement (Second) of Torts § 302B (1965) imposes a duty of care when the defendant has actually caused the harm or increased the risk that the harm will occur.

Two types of such affirmative conduct are present in this case. The first is that, as the previous sections demonstrate, Crill presented evidence

that Denny's restaurants make criminal assaults more likely because their business model is based upon providing a location where the "bar rush" crowd will congregate, and such persons are significantly more susceptible to assaultive behavior. Second, there is evidence in this case that after being alerted to the potential for imminent assaultive behavior, a WRBF employee began to intervene in the dispute and actually made things worse rather than better. On either theory, WRBF owed a duty of care to act reasonably once its conduct exposes the plaintiff to a risk of harm. This basis for liability is fully spelled out in the briefing that Crill previously submitted.

CONCLUSION

McKown acknowledges and reinforces the principles upon which Crill asks for reversal.

Respectfully submitted this 11th day of May, 2015.

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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 May 11, 2015, I served the document to which this is annexed by personal delivery to:

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Signed on May 11, 2015 at Spokane, Washington.

Tyler C. Smith