SUPREME COURT OF THE STATE OF WASHINGTON

NO. 98664-9

LUCY CELES
Respondent,

v.

LONE PINE APARTMENTS, LLC, AND
TARGA REAL ESTATE SERVICES, INC.,

Petitioners.

RESPONDENT'S OPPOSITION TO PETITION FOR REVIEW

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Lucy Celes ("Ms. Celes" or "Plaintiff") was formerly a tenant at the Lone Pine Apartments, and she was severely injured in a fire that was intentionally set in the stairwell outside her apartment. Ms. Celes brought this action against property owner Lone Pine Apartments, LLC ("Lone Pine"), and property manager Targa Real Estate Services, Inc. ("Targa"), (collectively "Defendants") because they failed to adequately address drug trafficking occurring at the Lone Pine Apartments, breaching duties they owed to her as their invitee and tenant.

After their first summary judgment motion was denied, Defendants moved for summary judgment a second time, and Plaintiff presented evidence that drugs were in fact being sold out of an adjacent unit at the Lone Pine Apartments, that Defendants had notice of this activity as much as 17 months before Ms. Celes was injured, and that Defendants permitted it to continue in violation of state and federal criminal laws requiring them to refrain from permitting drug dealers to operate on their premises. The record further contained evidence from which a jury could conclude that Ms. Celes's injuries were both causally related to and the foreseeable result of the ongoing drug trafficking that Defendants permitted. Nevertheless, the trial court granted summary judgment. Despite evidence Ms. Celes's injuries were foreseeable *as a factual matter*, the trial court concluded they were not *legally* foreseeable because Defendants had not previously endured a similar arson-type incident, which the trial court held was

required under the circumstances pursuant to *McKown v. Simon Property Group*, 182 Wn.2d 752, 344 P.3d 661 (2015).

The Court of Appeals reversed, concluding that Plaintiff was not required to identify evidence of prior similar acts of violence and may instead demonstrate foreseeability in other ways, including via evidence of Defendants' past experience with the property that gave them notice of the drug trafficking there. This ruling is consistent with *McKown*, is legally correct, and does not satisfy any of the criteria for review by this Court.

Defendants complain not that Ms. Celes's injuries were in fact unforeseeable but rather that the evidence does not conform to narrow limitations that the case law does not actually impose. Unable to deny that *McKown* expressly permits foreseeability to be proven in different ways, Defendants instead misrepresent the record and Plaintiff's arguments and ask the Court to weigh the evidence in a manner inconsistent with the procedural posture. Ultimately, Defendants either seek a rule that permits them "one free crime" before they can be liable regardless of how foreseeable or easily preventable injuries actually are—a notion so unsupported by law, justice, and common sense such that it does not require review by the Supreme Court to confirm it should be rejected—or they seek a case-specific review of factual issues Plaintiff raised in the trial court, which would not justify review by this Court even if those arguments had merit. Further, Defendants' sensational claims about the consequences of

the ruling below are unwarranted and ignore the fact that Defendants *already* had duties to act, including under state and federal *criminal law*. The Petition should be denied.

I. STATEMENT OF THE CASE

A. Lucy Celes was injured when a fire consumed her apartment, and the evidence at summary judgment established genuine issues of material fact as to whether that fire arose from ongoing drug trafficking on the premises of the Lone Pine Apartments of which Defendants had notice.

At times pertinent to this case, Defendants owned and operated the Lone Pine Apartments.[1] Ms. Celes signed a lease for Unit 4 at the Lone Pine Apartments on April 3, 2014, and she moved in shortly thereafter. CP at 38, 193. Unit 4 was on the second floor, across an open stairwell from Unit 2:

CP at 193. Unit 2 was leased to Metropolitan Development Council (MDC), which sublet the apartment to Tyronda Bermudez. CP at 38, 142-65, 193. Although not on any lease, Ms. Bermudez's boyfriend, Linwood Smith,[2] lived with her in Unit 2 and had done so long before Ms. Celes moved in.

[1] This is a simplification that does not meaningfully affect the issues discussed herein. *Accord* CP at 688 (explaining Defendants' relationship and roles).

[2] Witnesses commonly refer to Mr. Smith by the nickname "Black."

CP at 91, 138, 193, 198, 201, 204-05, 226, 261-62. Defendants were aware Mr. Smith lived in Unit 2. CP at 201, 204-05.

At summary judgment, Plaintiff presented evidence sufficient to permit a reasonable finder of fact to conclude that, during the time Ms. Celes lived at the Lone Pine Apartments, Mr. Smith sold illegal drugs out of Unit 2. Among other things, Mr. Smith admitted on multiple occasions that he was selling illegal drugs,[3] and at least one other resident of the Lone Pine Apartments observed him doing so, CP at 204. Evidence of a regular stream of short-duration non-tenant visitors to Unit 2 at all hours supports an inference that Mr. Smith was trafficking drugs specifically from that unit, CP at 194-95, 198, 201, 293, 330, which, again, is where even Defendants' own maintenance man understood Mr. Smith to be living, CP 201.

Plaintiff also presented evidence that would permit a reasonable finder of fact to conclude that Defendants not only should have known but in fact knew of the drug trafficking out of Unit 2. For example, it was commonly understood by Lone Pine residents that Mr. Smith sold drugs from Unit 2. CP at 194, 201-02, 204-05, 293, 330. As early as April of 2013—17 months before Ms. Celes was ultimately injured—a resident told Defendants' apartment manager that it appeared drugs were being sold out

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[3] CP at 204, 301. Defendants suggest Mr. Smith's admission to law enforcement, after he was found possessing a knife and methamphetamine, that he sold drugs is a "completely unrelated issue[]" that does not show notice of Mr. Smith's drug trafficking. Pet., at 8 n.2. Plaintiff does not suggest that this is evidence of notice but rather that it is strong evidence that Mr. Smith *was in fact selling drugs*. *See* ER 804(b)(3); CP 754.

of Unit 2, and at that time the apartment manager acknowledged that she too thought Mr. Smith was selling drugs. CP at 205. Defendants' maintenance man lived in the Lone Pine Apartments, and he personally observed "strange visitors going in and out of [Unit 2], up and down the stairs" "at odd hours in the middle of the night," which caused him to personally suspect that drug dealing was occurring. CP at 201-02. Tenants complained to Defendants' maintenance man about drug dealing and Unit 2, and multiple times he passed these complaints along to the apartment manager. CP at 202, 330. Plaintiff's property management expert opined that, under the circumstances, a reasonable property owner or manager would believe Unit 2 was the site of drug-related criminal activity, CP 386, and even Defendants' expert testified that Defendants had adequate notice of potential drug trafficking to at least require inquiry, CP at 762.

Late on September 4 or early on September 5, 2014, an argument occurred at or near Unit 2 involving Mr. Smith, Ms. Bermudez, and a man later determined to be Roger Faleafine. CP at 195, 198, 293. Various witnesses heard an argument regarding "the exchange not being even," CP at 91, 138, and Mr. Faleafine shout "I'll be back[;] I got you!," CP at 198, and "[d]on't worry, I get you, I got you, I'll be back!," CP at 293.

At roughly 7:00 a.m., on September 5, 2014, Mr. Faleafine returned to the common stairwell near Ms. Celes's apartment and ignited a small

amount of gasoline. *See* CP at 90-93, 137-140, 309-11, 333-36, 338-39, 341-42, 359-67. The resulting fire consumed Ms. Celes's apartment:

CP at 371. Ms. Celes was home at the time, and she was forced to flee by jumping from her balcony. CP at 195. She was severely burned, necessitating multiple skin graft surgeries, and she fractured multiple bones as a result of her escape, which required further surgeries. CP at 195, 313.

Plaintiff presented evidence at summary judgment that would permit a reasonable finder of fact to conclude that the fire—and consequently Ms. Celes's injuries—arose from the drug trafficking activity connected to Unit 2. Evidence supporting such a conclusion includes, inter alia, the evidence that the arson occurred at the place where Mr. Smith regularly sold drugs to non-tenants, that the arson was preceded by an argument between the non-tenant arsonist and Mr. Smith at the place where Mr. Smith regularly sold drugs, and that the argument concerned "the exchange not being even" and involved threats to come "back" and "get" Mr. Smith. *See* discussion *supra*. The arsonist himself, who had no other known business

on the premises, attributed his actions to methamphetamine, CP at 779, 782-83, which Mr. Smith admitted to selling, CP at 301. Moreover, Plaintiff's and defense experts agreed that violence, including violence against drug dealers, can as a general matter be expected to accompany drug trafficking, CP at 385, 400-02, 775-79, and there was expert opinion that the Lone Pine arson specifically was the result of drug trafficking, CP at 402.[4]

B. Plaintiff presented evidence that the injuries to Ms. Celes were—regardless of the applicable legal test for foreseeability—literally a foreseeable consequence of the drug trafficking activity known to be occurring on the premises.

Plaintiff presented ample evidence that it was foreseeable that violence arising from the drug trafficking associated with Unit 2 might injure Ms. Celes. Physical injury to innocent tenants is known in both the law enforcement and property management communities to be a foreseeable consequence of drug-related criminal activity, and such knowledge is part of the standard of care for apartment managers and owners. CP at 385, 400-01. Our state and national legislatures recognize the risk to tenants and property that is created by nearby drug-related activity.[5] The known dangers posed by such activity have given rise to a broad body of laws designed to

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[4] Defendants insist that the accounts of Mr. Smith, Ms. Bermudez, Mr. Faleafine, and Mr. Faleafine's companion should be credited, that is, that their self-serving statements to police show that any argument among them occurred off the Lone Pine premises and was unrelated to Mr. Smith's drug trafficking. Pet., at 3, 8. However, these accounts are themselves contradictory, as, for example, Mr. Smith also told the police that the argument with Mr. Faleafine took place at Unit 2, CP at 498, and Defendants overlook the abundant contrary evidence identified by Plaintiff here. Defendants may raise their arguments with the jury, but they are necessarily unavailing at summary judgment.

[5] *See* 42 U.S.C. § 11901; 1988 Wash. Sess. Laws 598-599 (included at CP 350-51).

permit property owners and managers to put a stop to that activity efficiently, effectively, and without fear of liability.[6] Similarly, state and federal law imposes criminal penalties not just on those directly involved in drug-related criminal activity but also on those who permit it to occur on premises they own or control.[7] And municipal ordinances declare buildings or places used for drug activity to be public nuisances and impose civil penalties for maintaining such nuisances.[8] The foreseeable nature of the risk is further evident in the specific prohibitions against drug activity in Defendants' own leases, CP at 46, 145-46, 149, as well as the existence of and Defendants' participation in the Crime Free Multi Housing Program, which imposes limits on renting to persons with a history of drug-related crime, CP at 38, 227-28, 344-46.

The foreseeable dangers of drug-trafficking specifically include violence directed against a drug dealer, for example, by a disgruntled drug purchaser for purposes of retribution. CP at 345, 400-01, 776-77. Defendants' own expert criminologist testified that there is a well-known nexus between drugs or drug trafficking and violence, which requires security managers to take action to prevent and aggressively respond to any such activities on the properties for which they are responsible. CP at 775-

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6 *See* RCW 59.18.180(3) & (6); RCW 59.18.390; RCW 59.18.400; *accord* RCW 59.18.075(1); 59.18.130(6).

7 *See* 21 U.S.C. § 856; RCW 69.53.010; *accord* RCW 69.50.402(f).

8 Lakewood Municipal Code 9.06.040-080; *accord* RCW 7.43.

78; *see also* CP at 761. Plaintiff further presented evidence that the foreseeable dangers specifically include fire and arson, CP at 345, 385, 400-02, and, indeed, that a significant share of all arsons is drug-related, CP at 401-02, 406-08. Moreover, reports of gunshots from Unit 2 just a few months prior to the fire gave Defendants specific notice that the activity in Unit 2 was dangerous.[9] CP at 195. Accordingly, Lone Pine and Targa were on notice that—as a literal, factual matter—the drug trafficking associated with Unit 2 created a risk of harm to innocent tenants like Ms. Celes.

II. ARGUMENT

This appeal arises out of Defendants' motion for summary judgment, a posture in which a court must "consider all evidence and all reasonable inferences therefrom in a light most favorable to the nonmovant." *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974); *see also* CR 56(c). The Supreme Court will accept review only when a decision of the Court of Appeals is in conflict with a decision of this Court or a published decision of the Court of Appeals or when then a case involves significant constitutional issues or issues of substantial public interest. RAP 13.4(b). These criteria are not met here, and the Court should decline review.

[9] Defendants' assertions that "[n]o one claims that Lone Pine had knowledge of . . . any prior violent crime" and "there was no known track record of violent crime" are unequivocally false. *See* Pet., at 1, 8.

A. Defendants had a special relationship with Ms. Celes sufficient to support a duty to guard against third-party criminal conduct.

A duty to protect others from third-party criminal conduct may arise if a special relationship exists between the defendant and the third person or between the defendant and the plaintiff. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 200, 943 P.2d 286 (1997). While a harm must be sufficiently foreseeable before a duty arises, a defendant bound by such a duty is required to exercise reasonable care to address foreseeable harms. *Id*. at 205.

Under Washington law, a variety of relationships are deemed sufficiently "special" such that they give rise to a duty to prevent third party criminal conduct.[10] Such a duty exists between a business and its invitees, including a landlord and its tenants.[11] Ms. Celes was Defendants' tenant and invitee, and therefore Defendants had a special relationship with her.[12] Ms.

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[10] *See, e.g., Donohoe v. State*, 135 Wn. App. 824, 837, 142 P.3d 654 (2006) (identifying special relationships between certain individuals and schools, hotels, hospitals, businesses, taverns, and possessors of land); Restatement (Second) of Torts §§ 314A, 315. Defendants suggest cases involving the "special relationship" between schools and students are different and therefore inapplicable. Pet., at 17. This is incorrect. A defendant need not have custody of a plaintiff for a special relationship to arise, as only "entrustment" for the protection of another is required. *H.B.H. v. State*, 192 Wn.2d 154, 173, 429 P.3d 484 (2018). Washington courts have recognized that business-invitee and landlord-tenant relationships satisfy this entrustment criteria. *Nivens*, 133 Wn.2d at 202; *Griffin v. W. RS, Inc.*, 97 Wn. App. 557, 567, 984 P.2d 1070 (1999), *rev'd on other grounds*, 143 Wn.2d 81, 18 P.3d 558 (2001). Nor is the duty arising from the special relationship between a school and its students heightened, as the duty in all instances is one of reasonable care to prevent foreseeable harm. *H.B.H.*, 192 Wn.2d at 169; *Hendrickson v. Moses Lake Sch. Dist.*, 192 Wn.2d 269, 275-78, 428 P.3d 1197 (2018).

[11] *See, e.g., Nivens*, 133 Wn.2d at 195; *Griffin*, 97 Wn. App. at 566; *Faulkner v. Raquetball Vill. Condo. Assn*., 106 Wn. App. 483, 23 P.3d 1135 (2001); *accord 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.").

[12] Defendants also had a special relationship with the occupants of Unit 2 by virtue

Celes's status as Defendants' tenant and invitee has never been meaningfully contested, and Defendants' Petition glosses over these principles almost entirely. The conclusion that Defendants had a special relationship with Ms. Celes sufficient to support a duty to prevent foreseeable third-party criminal conduct is unambiguously correct under existing authority and is not a basis for review by this Court.

B. The Court of Appeals committed no error with respect to any factual determination, nor if it did would any such error justify review by this Court.

As explained above, Plaintiff presented evidence sufficient to permit a reasonable jury to conclude that Mr. Smith was selling drugs from Unit 2, that Defendants had notice that Mr. Smith was selling drugs from Unit 2, and that Ms. Celes's injuries were as a factual matter—irrespective of the legal standard—a foreseeable consequence of that activity. Defendants complain that they lacked "proof" of drug trafficking, apparently because they did not literally see drugs changing hands, which ignores that circumstantial proof is in fact proof. Instead, the evidence at summary judgment was that the standard of care for property managers does not require the near certainty Defendants insist on, CP at 385-88, and their own expert agreed that Defendants had sufficient notice to at least require inquiry, CP at 762. Regardless, Defendants' characterization of evidence

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of their control over that unit. *See Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 229, 802 P.2d 1360 (1991) ("[O]ne's possession of land may give the possessor control over the conduct of others the land possessor allows to enter, so that the possessor is required to exercise that control for the protection of persons off the premises."); Restatement (Second) of Torts §§ 315(a), 318.

regarding their notice of drug trafficking as "vague" is effectively a concession that such evidence exists. When more than one interpretation of the evidence is possible, factual determinations are for a jury, and the Court of Appeals did not err by concluding a jury must decide these issues of fact.

Furthermore, to the extent Defendants' complaints with the Court of Appeals opinion hinge on factual matters specific to this case, that opinion is not in conflict with any other decision of this Court or the Court of Appeals, nor would it pose a significant constitutional issue or involve an issue of substantial public importance. *See* RAP 13.4(b). In short, there is no error in any factual determination, and, even if there were, it would not justify review by this Court.

C. The conclusion that Ms. Celes's injuries were, as a legal matter, sufficiently foreseeable to permit a jury to decide the case was neither incorrect nor inconsistent with *McKown*.

The Court of Appeals concluded that Plaintiff may demonstrate foreseeability without proof of prior similar acts of violence, and this conclusion is neither erroneous nor in conflict with *McKown* or any other decision of this Court. Indeed, *McKown* stated—repeatedly—that proof of prior similar acts of violence is not the only means of establishing foreseeability. 182 Wn.2d at 761-62, 770, 774. And Washington courts have rejected the notion that a defendant is entitled to "one free crime" before

liability may attach,[13] which would be the inevitable result of a rule requiring proof of prior similar acts in every case.

The Court of Appeals further concluded that, because Plaintiff did not seek to demonstrate foreseeability via proof of prior similar acts, *McKown*'s prior-similar-incidents test did not apply, and that evidence Defendants knew of drug trafficking on the premises—a circumstance that can be expected to endanger nearby tenants—is cognizable evidence of foreseeability that a court may properly consider. *McKown* held that Washington law is consistent with comment f to section 344 of the Restatement (Second) of Torts, which in turn states that possible bases for concluding a harm may be foreseeable include "past experience," as well as the nature and location of a business. 182 Wn.2d at 764. However, the *McKown* opinion's further analysis addressed only cases in which a plaintiff seeks to demonstrate foreseeability by proof of prior similar acts of violence "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. *McKown* did not hold—nor could it be expected to have held, given the unique facts of the case—that "past experience" is limited to prior similar acts of violence.[14] This is entirely consistent with the illustrations in

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[13] *See Quynn v. Bellevue Sch. Dist.*, 195 Wn. App. 627, 641, 383 P.3d 1053 (2016) (holding school's duty to protect students does not arise only after tortious acts occur, the law does not require "'one free rape'"); *accord 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.'").

[14] *Accord McKown*, 182 Wn.2d at 783 (Stephens, J., concurring) ("[T]he

the comments to section 344,[15] with how *McKown* has been interpreted in the federal courts,[16] and with a long line of Washington "special relationship" cases.[17] The conclusion by the Court of Appeals on this point is neither erroneous nor in conflict with *McKown*.

Defendants suggest, with overwrought rhetoric but little analysis, that the Court of Appeals "gutted" *McKown*'s rejection of "'a broad notice rule' which 'would become an all-expansive standard for imposing a duty on a business'" "to anticipate and protect against all conceivable third party crime."[18] The *McKown* Court's concern was that "[b]ecause criminal activity is irrational and unpredictable," as with the random shooting at

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Restatement does not artificially limit what evidence constitutes 'past experience.' Nor does it narrowly define 'past experience' to require prior similar acts on the same premises during the current owner's tenure.").

[15] *See* Restatement (Second) of Torts, § 344, cmt. f, illus. 1 & 2.

[16] After considering the Washington Supreme Court's decision in *McKown* following remand, the federal district court concluded that "the scope of relevant evidence [of foreseeability was] broadened" such that it may include not only prior similar acts of violence but also evidence of past experience more generally, or "institutional knowledge," as well as the place and character of the business. *McKown v. Simon Prop. Grp.*, No. C08-5754BHS, 2016 WL 9185378, at *3 (W.D. Wash. July 7, 2016). Defendants attempt to distinguish this holding, arguing the defendant in *McKown* was more sophisticated and possessed greater relevant knowledge. Notably, this is not an argument that past experience must be limited to prior similar acts. Moreover, the distinction Defendants raise is a false one. The federal district court did not conclude that sophisticated defendants are held to a higher standard, but rather that the defendant at issue had information through its other experiences that made the injuries foreseeable even without evidence of prior similar acts. Here, even if Defendants were comparatively unsophisticated, they still had specific knowledge, obtained through their own experiences managing the Lone Pine Apartments, of ongoing activity on the premises known to pose a foreseeable risk to their tenants.

[17] *See McLeod v. Grant Cty. Sch. Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953) (stating it would "unjustifiably restrict the issue" to focus the foreseeability inquiry on "the specific type of incident which here occurred"); CP at 1006-07 (discussing "special relationship" cases that did not require proof of prior similar acts).

[18] Pet., at 2 (quoting *McKown*, 182 Wn.2d at 772); *see also* Pet., at 11 (suggesting the opinion below may lead to "unlimited liability").

issue in that case, "it is in this sense invariably foreseeable everywhere." 182 Wn.2d at 771 (quotation marks omitted). For that reason, when the foreseeability of a random crime depends on proof of prior similar acts, those acts must be "sufficiently similar in nature and location," "sufficiently close in time," "and sufficiently numerous." *Id*. at 772. However, when a crime is not random—when the evidence of foreseeability includes Defendants' knowledge of regular, ongoing criminal activity on their premises that, in the opinion of their own expert, is "a crime generator" and has a "well-known nexus" to violence such that it requires aggressive response by property managers—the floodgates are not opened to liability for all crimes generally, and no "all-expansive" foreseeability standard has been adopted.

The Washington Supreme Court recently addressed fears about "unrestrained liability" in the context of special relationship cases. *See H.B.H.*, 192 Wn.2d at 176–77. The Court noted that the duty owed is limited to one of reasonable care under the circumstances and extends only to harms that are foreseeable. *Id.* The Court acknowledged the standard "general field of danger" test for foreseeability would apply in that instance and nevertheless concluded "concerns about limitless liability are without merit." *Id.* This is the balance our tort system has struck in myriad contexts.

Similarly, the Court of Appeals ruling does not run contrary to the principle that "a possessor of the land has no duty to all others under a

generalized standard of reasonable care, or under all the circumstances." Pet., at 16. Statements to this effect appear in the case law, but they pertain to requests to abandon traditional premises liability standards of care owed by owners or occupiers of land, that is, tiered duties based on the status of visitors as invitees, licensees, or trespassers. *See, e.g., McKown*, 182 Wn.2d at 764–65. While the courts have rejected requests to abandon that framework, the opinion below is perfectly consistent with traditional premises liability standards of care, applicable only to the categories of potential claimants recognized at common law: Ms. Celes is an invitee and tenant, so the decision in this case will do nothing to extend liability "to all others" or "under all the circumstances."[19]

Finally, Defendants assert that "the focus [of Plaintiff's argument] was on whether a duty is owed based upon acts of similar violence" and that "[n]o other avenue was argued" such that the Court of Appeals erred by failing to insist on proof of prior similar acts of violence in this case. Pet., at 13. This characterization of Plaintiff's arguments is transparently false. Among other things, Plaintiff expressly represented that she was *not* attempting to establish foreseeability by prior similar acts of violence,[20] as

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[19] Nor does a ruling for Plaintiff subject landowners to liability merely because they are located in a high crime area. *See* Pet., at 19. Liability merely by virtue of presence in a high crime area is not the same as liability for harms arising from specific, ongoing criminal conduct known to be dangerous, of which a business has notice, and *arising from its own property and under its own control*. Whether a business is located in a generally high crime area is irrelevant in the latter circumstances, and *McKown* did not give businesses license to ignore dangerous and ongoing criminal activities based on their own properties.

[20] *E.g.*, RP at 20 ("Plaintiff is not trying to prove this [case] by prior similar acts.").

proof of prior similar acts was not required.[21] Rather than making an argument regarding prior similar acts of violence, Plaintiff unambiguously argued to the trial court that Defendant's *other* experiences in operating the Lone Pine Apartments gave them specific notice of ongoing drug-trafficking, from which Ms. Celes's injuries could be reasonably foreseen.[22] Moreover, even if Defendants were correct about the limited nature of Plaintiff's arguments—they are not—the case-specific error correction they seek does not justify review by this Court. *See* RAP 13.4(b).

D. Defendants' policy arguments are a distraction and do not justify review.

Defendants contend that "'[a]s a matter of public policy, it is not in the community's interest to impose an additional duty to landowners who are willing to provide housing to lower income and more vulnerable populations.'" Pet., at 19. However, there is no "additional duty" at issue in this instance, as, among other things, landowners *already have a duty under*

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[21] *E.g.*, CP at 701; RP at 20.

[22] *See, e.g.*, CP at 685 (describing evidence that Defendants had notice of drug trafficking through their operation of the property); *id.* at 700 (identifying "[p]rior experience with a problem" as probative of foreseeability); *id*. at 702 (arguing trial court was correct when it previously held that issues of fact remained as to whether "'[i]n the experience of the possessor'" Ms. Celes's injuries were foreseeable). Moreover, among other things, Plaintiff specifically identified the "nature" of Defendants' businesses as landlords as a basis to conclude Ms. Celes's injuries were foreseeable. RP at 16 ("Counsel for Lone Pine and Targa indicated that the nature of the business could give rise to some sort of foreseeability aside from prior similar incidents. . . . [Property management expert] Griswold's declaration says that drug-related activity is a known risk to other tenants. The nature of the business is a Landlord-Tenant business relationship, and that is one of many bases why Ms. Celes's injuries were foreseeable."). And, as explained in briefing to the Court of Appeals, Plaintiff raised arguments regarding past experience and the nature and location of Defendants' businesses on reconsideration. CP at 1010-12.

state and federal criminal law to refrain from permitting drug dealers to operate on their premises.[23] Furthermore, any burden of exercising reasonable care was not remotely onerous—after all, the care need not have been extraordinary, merely reasonable. Here, Defendants could have notified its tenant MDC of problems with the actual occupants of Unit 2; they could have evicted the occupants of Unit 2 with the benefit of a variety of policies specifically designed to help landlords evict drug dealers quickly and efficiently; or they could have simply declined to renew what had long ago become a month-to-month lease. CP at 65, 67, 142, 144. Tellingly, Defendants' own leases already forbade the very activity that they now contend they should not be asked to take reasonable measures to address.

Moreover, Defendants' public policy contention is refuted by *actual* public policy on housing. The state and federal legislatures have already spoken directly on these issues, establishing clear policies that housing should be safe and habitable generally[24] and that drug trafficking in rental and multi-family housing specifically must be prevented.[25] Indeed, tenant

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[23] Similarly, it cannot be "fundamentally unfair to hold Lone Pine liable" for the foreseeable consequences of the drug trafficking they permitted to occur when they may in fact be held *criminally liable* for their conduct. Pet., at 10.

[24] *See* RCW 59.18.060 (stating landlord duties); *see generally* RCW 59.18 (Residential Landlord-Tenant Act).

[25] *See* 42 U.S.C.A. § 11901 (stating legislative findings regarding the harms of drug-related criminal activity in rental housing; 1988 Wash. Sess. Laws 598-599 (included at CP 350-51) (same); 21 U.S.C. § 856 (criminalizing ownership and management of properties where drug-related criminal activity is known to occur); RCW 69.53.010 (same); 42 U.S.C. § 3607(b)(4) (exempting persons convicted of manufacture or distribution of a controlled substance from the antidiscrimination provisions of the Fair Housing Act); RCW 7.43.010(1) (public nuisance law).

safety may not be bargained away for reduced costs, as, for example, the Washington legislature has expressly forbidden landlords from entering into rental agreements exempting themselves from habitability requirements if the exemptions "violate the public policy of this state in favor of . . . ensuring safe, and sanitary housing."[26] Rather than relying on unfettered free markets to produce dangerous and unsanitary slums for low-income persons, the policy adopted by our legislature is one of mandatory baseline health and safety standards combined with active market intervention by government agencies to promote housing that is both safe and affordable.[27] Landlord liability in this case is perfectly consistent with Washington's policies regarding both drug trafficking and low-income housing.

Defendants suggest that denying landlords the protection of a one-free-crime rule may force them to "deal in stereotypes and vagaries."[28] Most forms of discrimination would, of course, violate the Fair Housing Act, 42

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[26] RCW 59.18.360(3); *see also* RCW 59.18.230(2)(a). Notably, an agreement by a tenant to waive rights and remedies relating to her landlord's violation of criminal laws forbidding ownership or management of property used for drug trafficking would be presumptively unenforceable. *See* RCW 59.18.060(1); *accord* CP at 446-48, 450.

[27] *See, e.g.*, RCW 35.82 (establishing housing authorities to promote low-income housing in part because "the operation of private enterprise" is inadequate); RCW 43.185 (establishing housing assistance program to help low-income persons obtain housing); RCW 43.180 (establishing housing finance commission to promote affordable housing through loans and investments); RCW 36.70A.540 (authorizing cities and counties to incentivize development of low-income housing); *accord* RCW 43.185B (establishing affordable housing advisory board); RCW 36.130 (permitting preferential treatment but otherwise forbidding disparate treatment of affordable housing by local governments).

[28] In making this argument, Defendants cite statistics they admit are dubious and reference the "President of the United States" in what could be construed as a gratuitous and inflammatory effort to associate a decision for Plaintiff with some of President Donald Trump's more divisive political stances. *See* Pet., at 18 n.5.

U.S.C. § 3604, or Washington's Law Against Discrimination, RCW 49.60.030(c), which forbid landlords from discriminating against applicants based on race, religion, color, and national origin, among other things.[29] Reasonable care would not require violation of these laws, and failure to do so would not be a basis for liability. Moreover, the nature of the duty at issue—reasonable care to address foreseeable harm—is ubiquitous in the tort system. To the extent Defendants contend line drawing under this standard is too hard, their complaint is with the civil justice system and negligence principles in general.

Accordingly, Defendants fail to explain how this case implicates any public policy issue that is in fact in debate, and they fail to explain how the opinion below is inconsistent with existing public policy. There is no meaningful policy issue for the Supreme Court to decide.

III. CONCLUSION

The opinion of the Court of Appeals is neither erroneous nor does it meet the criteria for review by the Supreme Court. While Plaintiff is confident she will prevail should review be accepted, she asks that review be denied and that her day in court be delayed no further.

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[29] *See also* RCW 59.15.580(2) (prohibiting landlords from discriminating against domestic violence victims); U.S. Dep't of Hous. & Urb. Dev., Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (April 4, 2016), available at https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF (indicating blanket housing discrimination based on criminal history violates the Fair Housing Act); *Jackson v. Tryon Park Apartments, Inc.*, No. 6:18-CV-06238 EAW, 2019 WL 331635 (W.D.N.Y. Jan. 25, 2019) (concluding a blanket ban on renting to felons states a Fair Housing Act disparate impact claim).

Dated this 17th day of July, 2020.

Respectfully submitted,

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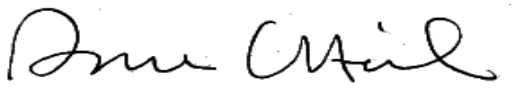

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