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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

On Certification From United States Court Of Appeals
For The Ninth Circuit

BRENDAN McKOWN, a single individual,

Plaintiff/Appellant,

vs.

SIMON PROPERTY GROUP, INC., a Delaware corporation doing
business as TACOMA MALL, and IPC INTERNATIONAL
CORPORATION, an Illinois corporation,

Defendants/Appellees.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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On Behalf of
Washington State Association for Justice Foundation

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of plaintiffs under the civil justice system, including an interest in the development and enforcement of Washington tort law.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case is before the Court on certification from the Ninth Circuit Court of Appeals in McKown v. Simon Property Group, Inc., et al. (9th Cir. #11-35461). The certification order sets forth three certified questions regarding Washington tort law, along with a synopsis of the operative facts, the underlying federal proceedings culminating in the pending appeal, and a survey of relevant Washington case law. See ORDER (August 6, 2012).¹ The questions center around interpretation of this Court's opinion in Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192,

¹ The ORDER is reproduced in the Appendix to this brief for the convenience of the Court. The order pages are numbered 8711 through 8725. These page numbers are used in this brief for citation purposes.

943 P.2d 286 (1997), and the application in Washington of Restatement (Second) of Torts, §344 & cmts. d and f (1965).²

This certification arises out of a negligence action in the U.S. District Court for the Western District of Washington. Brendan McKown (McKown) is the plaintiff and Simon Property Group, Inc. (Simon), and IPC International Corporation (IPC) are the defendants.³ For the purposes of this brief, the underlying facts are drawn from the order on certification, and the briefing of the parties before this Court. See ORDER at 8712-8719; McKown Br. at 3-14; Simon/IPC Br. at 3-6; McKown Reply Br. at 1-5.⁴

On November 20, 2005 McKown was shot and severely injured by Dominick S. Maldonado at the end of an 8-minute shooting rampage in the Tacoma Mall in Tacoma, Washington. Simon owned the mall, and IPC provided security services for the mall, pursuant to a contract with Simon.⁵ The negligence action against Simon and IPC was originally filed in state superior court, then removed to the federal district court. It appears undisputed by the parties that the action is governed by Washington law, and that McKown was "a business invitee" of Simon's at the time of the shooting. McKown asserted that Simon/IPC were negligent

² The text of Restatement, §344 & cmts. is reproduced in the Appendix for the convenience of the Court.

³ Simon and IPC filed a joint brief in this Court, which is referred to as "Simon/IPC Br."

⁴ It is assumed for purposes of this brief that the facts alleged in the parties' briefing before this Court are present in the excerpts of record that accompanies the certification. See ORDER at 8725.

⁵ The parties draw no distinction in their briefing between Simon and IPC with respect to the legal arguments before the Court, and this brief assumes there is none. Consequently, the two defendants are also referred to in this brief as Simon/IPC.

because they "failed to have reasonable safeguards in place to deter and detect an active shooter, and once the shooting began, they failed to take reasonable steps to protect him from that danger." McKown Br. at 1.

Following discovery, the district court granted Simon's and IPC's separate motions for summary judgment on the basis that the shooting was unforeseeable as a matter of law. See ORDER at 8718; McKown Br. at 1-2. The court apparently concluded that Washington law requires prior similar acts on the premises in order to impose a duty on a business owner to protect an invitee from the criminal acts of a third person. See ORDER at 8715-16. The court found McKown's evidence recounting six separate shootings at the Tacoma Mall between 1992 and 2005, and related expert opinion evidence regarding industry standards for mall security insufficient to survive Simon's motion for summary judgment. See ORDER at 8716-18; McKown Br. at 4-6 & 10-11.⁶ McKown's experts "testified the shooting was reasonably foreseeable and Simon could have done more to *prevent* it" and that "at the very least, it was foreseeable that Simon needed to have policies and procedures in place to protect its customers once the shooting *started*." McKown Br. at 9.

McKown appealed. After completion of the briefing and oral argument in the Ninth Circuit, the court certified three questions of Washington law to this Court, which accepted the certification.

⁶ This evidence is included in the excerpts of record accompanying the federal certification. See ORDER at 8725; McKown Br. at 9-11. The district court considered all of McKown's evidence on summary judgment admissible, and the Court of Appeals likewise considers the evidence admissible on appeal. See ORDER at 8718.

III. QUESTIONS ON CERTIFICATION, AND PROPOSED ANSWERS

The Ninth Circuit Court of Appeals certified questions to this Court are set forth below, with WSAJ Foundation's proposed answers:

Question No. 1. "Does Washington adopt Restatement (Second) of Torts, §344 (1965), including comments d and f, as controlling law? See *Nivens v. 7-11 Hoagy's Corner*, [133 Wn.2d 192,] 943 P.2d 286 (Wash. 1997)."

Proposed Answer: In *Nivens*, the Court adopted Restatement §344 & cmts. d and f, and its opinion constitutes binding precedent.

Question No. 2. "To create a genuine issue of material fact as to the foreseeability of the harm resulting from a third party's criminal act when the defendant did not know of the dangerous propensities of the individual responsible for the criminal act, must a plaintiff show previous acts of similar violence on the premises, or can the plaintiff establish reasonably foreseeable harm through other evidence? [Citations omitted.]"

Proposed Answer: Under Restatement §344, a plaintiff need not show previous acts of similar violence occurred on the particular premises in order to establish an issue of fact regarding the reasonable foreseeability of harm, and relevant evidence regarding the place and character of the defendant's business and past experience may suffice to create a triable issue on whether the criminal act was reasonably foreseeable.

Question No. 3. "If proof of previous acts of similar violence is required, what are the characteristics which determine whether the previous acts are indeed similar?"

Proposed Answer: Proof of previous acts of violence should not be required in every case. However, if they are required, they should not be limited to defendant's premises, nor should they have to be identical to the act that forms the basis of the plaintiff's claim. Instead, the previous acts only need to fall within the general field of danger in order to create a jury question regarding the foreseeability of the act that forms the basis of the plaintiff's claim. This jury's answer to this question should be based on the totality of the circumstances.

See ORDER at 8712.⁷

IV. ARGUMENT IN SUPPORT OF PROPOSED ANSWERS TO CERTIFIED QUESTIONS

Introduction

Each of the certified questions relate to whether Simon/IPC owed a duty of care to McKown. Duty is a question of law for the court. See Bernethy v. Walt Failor's, Inc., 97 Wn.2d 929, 933, 653 P.2d 280 (1982). The concept of foreseeability serves to limit the scope of the duty owed. See Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 475, 951 P.2d 749 (1998). Foreseeability is ordinarily a question of fact for trial. See Nivens, 133 Wn.2d at 205. A court determines foreseeability as a matter of law only if it concludes that under the particular facts and circumstances reasonable minds cannot differ on the issue. See Christen v. Lee, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989); Schooley, 134 Wn.2d at 477. The foreseeability inquiry does not focus on whether the specific type of incident that occurred was foreseeable. Instead, "the question is whether the actual harm fell within the general field of danger which should have been anticipated." McLeod v. Grant County School Dist., 42 Wn.2d 316, 321, 255 P.2d 360 (1953); see also Rikstad v. Holmberg, 76 Wn.2d 265, 269-70, 456 P.2d 355 (1969). The answers to the certified questions presented here turn on what type of evidence is necessary to meet the foreseeability threshold in this premises liability context, in order

⁷ The full text of question No. 2, which includes citations to eight Washington appellate decisions, is set forth in the ORDER at 8712; see Appendix.

for the negligence claim to proceed to trial so the jury can resolve the foreseeability issue.

A. *Nivens* Adopted Restatement §344, Including Comments d And f, And Is Binding Precedent.

Simon and IPC's argument that this Court's adoption of Restatements §344 & cmts. d and f is mere dicta and not binding in future cases should be rejected. See Simon/IPC Br. at 10-13. The adoption of this Restatement section and comments constitutes a holding, and is precedential.⁸

In Nivens, the Court first determines that a special relationship exists between a business and its customers—having the status of invitees under Washington law—because the customers enter the premises for the economic benefit of the business. See 133 Wn.2d at 202. As a result, the Court recognizes the duty of business owners "to keep their premises reasonably free of physically dangerous conditions in situations in which business invitees may be harmed by third persons." Id. at 202-03.

The Court next addresses whether, under the facts presented in Nivens, a criminal assault at a convenience store, the recognized duty of business owners is subject to the "general common-law rule that a person owes no duty to protect others from criminal acts of third persons." Id. at 203. In answering this question, the Court looks to Restatement §344 as

⁸ Simon and IPC separately argue that if Nivens is binding precedent that the Court should "change the law" to require the issue of foreseeability only go to the jury if "the plaintiff presents evidence of prior similar acts of violence on the premises." Simon/IPC Br. at 14. Under the doctrine of stare decisis, this may only occur if Nivens is found to be both incorrectly decided and harmful. See In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

the basis for an exception to the common law rule regarding criminal activity. See id. at 202-05; see also Appendix (reproducing §344 & cmts.). The Court expressly adopts §344 (including cmts. d and f), which provides a basis for imposing negligence liability on a business owner for physical harm caused by "accidental, negligent or intentionally harmful acts":

We believe the Restatement (Second) of Torts §344 is consistent with and a *natural extension of Washington law* and properly delimits the duty of the business to an invitee. *We expressly adopt it for a business owner and business invitees.* Comments (d) and (f) to that section describe the limit of the duty owed....

Nivens at 204 (emphasis added).

Having adopted the Restatement §344 formulation as the basis for imposing liability on a business owner for the criminal acts of third persons on the premises, the Court concludes that no duty applies under the facts presented because the plaintiff's theory of recovery falls outside of §344. See id. at 205-07. Nivens' sole theory of liability was that 7-11 Hoagy's Corner had a *general* duty "to provide security personnel to prevent criminal behavior on the business premises." Id. at 205. The Court rejected this general duty, and explained how the plaintiff's conception of the duty differed from the Restatement provision adopted by the Court:

While in certain circumstances the duty arising out of the special relationship between a business and an invitee described by §344 of the Restatement may best be met by providing security personnel as part of the reasonable steps

to forestall harm to invitees,...we decline to hold such a duty always obtains as a distinct duty of care.

Nivens at 206 (citation omitted).

Nivens' adoption of §344 & cmts. d and f is a holding, not dicta. See Simon/IPC Br. at 10-13. The Court recognizes an exception to a common law rule of non-liability, establishes the metes and bounds of the exception, and then determines that the plaintiff's theory of liability falls outside of that exception. When a court establishes a legal principle and then decides that the litigant's claim does not meet the requirements for applying the principle, establishment of the governing principle is not dicta. See State ex rel. Lemon v. Langlie, 45 Wn.2d 82, 89-90, 273 P.2d 464 (1954) (rejecting argument that statement in prior case is dicta because in that case it was necessary for the Court to first determine the governing law and then decide whether the particular litigant was entitled to the benefit of that law.)⁹

⁹ The cases relied upon by Simon/IPC in support of their argument that Nivens' adoption of §344 is dicta are distinguishable. See State v. Johnson, 173 Wn.2d 895, 904, 270 P.3d 591 (2012) (concluding statement in prior case dicta because based on hypothetical facts, and not binding in any event because in plurality opinion); In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) (concluding prior statements in cases not binding because issue not before court); Ingham v. Wm. P. Harper & Son, 71 Wash. 286, 288, 128 Pac. 675 (1912) (concluding statement in prior case regarded issue not actually involved and "unnecessary to the conclusion reached," and thus not subject to doctrine of stare decisis).

B. In Order To Prove A Negligence Claim Under Restatement §344 Based Upon The Criminal Acts of A Third Person, Plaintiff Is Not Required To Show Previous Acts Of Similar Violence Occurred On The Premises; Foreseeability Of Harm May Be Established Through Evidence Regarding The Place Or Character Of The Defendant's Business And Past Experience Bearing On Operation Of The Business.

Under Restatement §344, in determining whether the business owner should have reasonably anticipated a criminal act and taken reasonable measures to prevent it, a court *may* consider prior criminal acts on the premises, but it is not required to do so.¹⁰ Comment f to §344 allows consideration of the business owner's "past experience," and contemplates any number of different considerations, including, but not necessarily limited to, prior criminal acts on the premises. Comment f also permits a court to consider relevant evidence bearing upon the place or character of the defendant's business, in addition to past experience. See id. Restatement §344 & cmt. f do not *require* proof of previous similar acts on the premises. This is a key element of the "natural extension of Washington law" alluded to in Nivens, 133 Wn.2d at 204.¹¹

Nevertheless, a number of Washington Court of Appeals opinions since Nivens have seemingly engrafted onto §344 a requirement to prove that similar prior criminal acts occurred on the premises before a business

¹⁰ A pre-Nivens example of an instance where prior criminal acts on the premises were sufficient to create a question of fact on foreseeability is Johnson v. State, 77 Wn.App. 934, 943, 894 P.2d 1366 (1995) (upholding viability of premises liability claim against college for rape of student in light of "evidence of numerous crimes taking place on campus each year").

¹¹ Cf. Christen v. Lee, 113 Wn.2d at 514 (concurring/dissenting opinion by Utter, J., criticizing majority's foreseeability analysis because it "unnecessarily narrows the concept of notice" in requiring evidence of prior criminal conduct by the person causing injury).

owner may be found to have a duty to take reasonable precautions against potential criminal conduct on the premises. See ORDER at 8712 (collecting cases). Simon/IPC argue that post-Nivens Court of Appeals opinions present the proper interpretation of Nivens, and should be followed. See Simon/IPC Br. at 1-2, 25-29. For the reasons discussed below, each of the cases relied upon either misapprehends the holding in Nivens, or is distinguishable:

Wilbert v. Metropolitan Park Dist., 90 Wn.App. 304, 950 P.2d 522 (1998): The court acknowledged, correctly, that “the ‘pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather the question is whether the actual harm fell within a general field of danger which should have been anticipated.’” Id., 90 Wn.App. at 308 (quoting McLeod, supra, 42 Wn.2d at 321). Nonetheless, the court found the criminal conduct at issue – a shooting at a dance – unforeseeable as a matter of law in the absence of evidence of a “history of such crimes” or “similarly violent episodes” occurring on the premises. Id. at 309. In so doing, the court relied on cases that *predate* Nivens without acknowledging the broader inquiry permissible under Restatement §344, or that the adoption of §344 represents “a natural extension of Washington law.” 133 Wn.2d at 204.

Raider v. Greyhound Lines, Inc., 94 Wn.App. 816, 975 P.2d 518, *review denied*, 138 Wn.2d 1011 (1999): The court properly recognized that, “[t]o be foreseeable, the harm must lie within the general field of

danger covered by a specific duty owed by the defendant,” and also that “foreseeability is normally a jury question[.]” Id., 94 Wn.App. at 819. However, relying on Wilbert, Raider holds that a racially motivated criminal assault in a bus station was not reasonably foreseeable as a matter of law in the absence of a “history of such crimes” or “similar violence” on the premises. Id. As in Wilbert, there is no recognition of the broader criteria established in Nivens under Restatement §344.¹²

Craig v. Washington Trust Bank, 94 Wn.App. 820, 976 P.2d 126 (1999): This case involved a criminal assault of an employee of an independent contractor of the bank occurring outside of the bank, when the employee was emptying the trash. The court cited to and quoted from Nivens and Restatement §344 & cmts. d and f as controlling, but found that the record did not support a genuine issue of material fact on foreseeability based upon the lack of any “‘past experience’ giving reason to know a likelihood of criminal conduct on the part of third persons in general likely to endanger [the plaintiff].” 94 Wn.App. at 828. Craig did not limit such past experience to similar criminal conduct, nor did it exclude the possibility of a question of fact regarding foreseeability based upon other factors such as the “place or character” of the business. Restatement §344 cmt. f. Craig is distinguishable on its facts.

¹² The result in Raider is further troubling because the court seems to suggest that the prior similar criminal acts must result from a similar motivation. See 94 Wn.App. at 820 (stating “there is no indication that Mr. Lindholm’s attack bore any relationship or similarity to the past crimes. Rather, the evidence suggests Mr. Lindholm’s action was racially motivated ...”).

Fuentes v. Port of Seattle, 119 Wn.App. 864, 82 P.3d 1175 (2003), *review denied*, 152 Wn.2d 1008 (2004): The court properly recognized that “determination of foreseeability is usually left for jury determination if the damage complained of falls within the general threat of harm that the plaintiff claims makes the defendant’s conduct negligent.” Id., 119 Wn.App. at 870. The case involved a violent carjacking in the Sea-Tac International Airport's passenger pickup area. The court undertook a Nivens-based analysis and found that under the particular facts, including the absence of carjacking incidents in this area of the airport and proffered crime statistics, that plaintiff had failed to establish a question of fact on reasonable foreseeability. It is apparent that in Fuentes the plaintiff attempted to establish a jury question regarding foreseeability based upon a single assault and a history of “car prowls” at the Sea-Tac garage. See id. at 870. There does not appear to have been any further attempt to establish foreseeability based on other forms of “past experience” or other factors bearing on the “place or character” of the pickup area, and Fuentes does not exclude the possibility of establishing a jury question regarding foreseeability in either of these other ways. See id. Fuentes is likewise distinguishable on the facts.

In sum, the Court of Appeals opinions in Wilbert and Raider are inconsistent with the §344 analysis adopted in Nivens, and should be disapproved. Craig and Fuentes are each resolved under a Nivens-based

fact analysis that finds plaintiff's evidence insufficient to send the matter to the jury.¹³

C. To The Extent The Court Requires Proof Of Previous Acts Of Similar Violence, Such Acts Should Not Be Limited To The Defendant's Premises; The Previous Acts Need Not Be Identical In Nature And Magnitude So Long As They Alert The Defendant To The Likelihood Of Criminal Acts On The Premises.

For the reasons discussed in §B, supra, the Court should clarify that to prevail under §344 it is not necessary for the plaintiff to prove prior similar acts on the premises. However, to the extent the Court does require such acts, or to the extent that a plaintiff chooses to rely solely on such acts, they should not be required to be identical in nature and magnitude to the event in question, nor should they be confined solely to the defendant's premises. Any such limitations are at odds with Restatement §344 cmt. f criteria, which allows for consideration of place or character of the defendant's business and the defendant's past experience. These considerations may well include, at minimum: (1) criminal conduct within the general field of danger on the premises, (2) previous criminal acts in the vicinity of the defendant's premises, (3) the known or knowable experiences of other business owners involved in businesses similar to the defendant's, (4) any subjective recognition of the

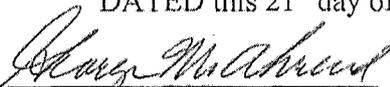
¹³ Simon/IPC also cite to Tortes v. King County, 119 Wn.App. 1, 84 P.3d 252 (2003), *review denied*, 151 Wn.2d 1010 (2004). See Simon/IPC Br. at 7, 25, 38. In Tortes, the court held that a public utility is not liable for injuries incurred by plaintiff due to the violent criminal activity of another on a county bus. Even if Tortes is subject to §344, see cmt. e, it relies upon both Wilbert and Raider in concluding no reasonable foreseeability as a matter of law. See 119 Wn. App. at 8 & n.5. Moreover, Tortes is distinguishable on the facts because the court upheld the superior court striking expert testimony on the standard of care for public transit operators because it was outside of the witness's expertise. See id. at 13.

foreseeability of harm on the part of the defendant-business owner,¹⁴ and (5) the existence of a standard of care applicable to the business; in short, the totality of the circumstances. The common characteristic of the evidence is whether, either in isolation or in combination with other relevant evidence, it demonstrates the business owner was alerted to the likelihood of criminal acts by third persons on the premises.¹⁵

V. CONCLUSION

The Court should adopt the arguments advanced in this brief in answering the certified questions.

DATED this 21st day of January, 2013.


FOR BRYAN P. HARNETIAUX,
WITH AUTHORITY


GEORGE M. AHREND

On Behalf of WSAJ Foundation

¹⁴ In the briefing before the Court, it appears that Simon/IPC arguably had some subjective appreciation of the risk. See McKown Br. at 4, 6-7.

¹⁵ Simon/IPC argue alternately that the Court should adopt the sliding-scale foreseeability analysis fashioned by the California Supreme Court in Delgado v. Trax Bar & Grill, 113 P.3d 1159, 1167, 1171 & n.24 (Cal. 2005). This test is unnecessary, as §344 & cmts. d and f provide a sufficient framework for evaluating foreseeability under the particular circumstances. Moreover, to the extent the Delgado formulation imposes a sliding-scale foreseeability analysis depending on how onerous financially the precautionary measures at issue may be, in Washington the question of the impact of financial considerations (cost evidence) on the reasonableness of a defendant's conduct is left to the trier of fact. See Bodin v. City of Stanwood, 130 Wn.2d 726, 927 P.2d 240 (1998) (majority holding reflected in concurring and dissenting opinions).

Appendix

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRENDAN MCKOWN, a single individual, <i>Plaintiff-Appellant,</i> v. SIMON PROPERTY GROUP INC, a Delaware corporation doing business as Tacoma Mall; IPC INTERNATIONAL CORPORATION, an Illinois corporation, <i>Defendants-Appellees.</i>
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No. 11-35461
D.C. No.
3:08-cv-05754-BHS
Western District of
Washington,
Tacoma
ORDER

Filed August 6, 2012

Before: Ronald M. Gould, Jay S. Bybee, and Carlos T. Bea,
Circuit Judges.

COUNSEL

Darrell L. Cochran (argued), Jason P. Amala, Pfau Cochran Vertetis Amala PLLC, Seattle, Washington, for the plaintiff-appellant.

T. Jeffrey Keane, Keane Law Offices, Seattle, Washington, for the defendants-appellees.

ORDER

For the reasons explained below, we respectfully certify to the Washington Supreme Court the following questions:

1) Does Washington adopt Restatement (Second) of Torts § 344 (1965), including comments d and f, as controlling law? *See Nivens v. 7-11 Hoagy's Corner*, 943 P.2d 286 (Wash. 1997).

2) To create a genuine issue of material fact as to the foreseeability of the harm resulting from a third party's criminal act when the defendant did not know of the dangerous propensities of the individual responsible for the criminal act, must a plaintiff show previous acts of similar violence on the premises, or can the plaintiff establish reasonably foreseeable harm through other evidence? *See Wilbert v. Metro. Park Dist. of Tacoma*, 950 P.2d 522 (Wash. Ct. App. 1998); *see also Fuentes v. Port of Seattle*, 82 P.3d 1175 (Wash. Ct. App. 2004); *Craig v. Wash. Trust Bank*, 976 P.2d 126 (Wash. Ct. App. 1999); *Raider v. Greyhound Lines, Inc.*, 975 P.2d 518 (Wash. Ct. App. 1999); *cf. Nivens*, 943 P.2d 286; *Christen v. Lee*, 780 P.2d 1307 (Wash. 1989); *Passovoy v. Nordstrom, Inc.*, 758 P.2d 524 (Wash. 1988), *review denied*, 112 Wash. 2d 1001 (1989); *Miller v. Staton*, 365 P.2d 333 (Wash. 1961).

3) If proof of previous acts of similar violence is required, what are the characteristics which determine whether the previous acts are indeed similar?

* * *

The acts of violence underlying this tort case are horrific. On November 20, 2005, Plaintiff-Appellant Brendan McKown was shot and injured by Dominick S. Maldonado inside the Tacoma Mall during Maldonado's eight-minute shooting rampage. At the time, McKown was working in one of the stores in the Mall. Co-Defendant-Appellee Simon Prop-

erty owned the Mall, and IPC International, the other co-defendant-appellee, contracted with Simon to provide security services at the Mall. In Washington state court, McKown brought state law negligence claims against the defendants to recover damages for his injuries, and the defendants removed to federal court on grounds that there was diversity jurisdiction.¹ The district court granted summary judgment to the defendants, and McKown appealed to our court.

While we are conscious of the very real human suffering presented in this case, the questions with which we are confronted would be perfect for a first-year torts exam. What is the scope of the defendants' duty to protect McKown from harm from such a shooting? Were these acts of violence foreseeable to the defendants? In answering these questions, we must look to Washington law. But, as we explain below, we are unsure of what the answers are. We therefore certify the above questions to the Washington Supreme Court in the hope that the court will honor our request and clarify these important and recurring questions.

I.

Because this is an appeal from a grant of summary judgment to the defendants, we relate the facts in the light most favorable to McKown as the nonmoving party. *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004).

A.

On November 20, 2005, a man named Dominick S. Maldonado walked into the Tacoma Mall, in Tacoma, Washington. Maldonado was wearing a trench coat and carrying a concealed MAK-90 rifle, a concealed Intertec Tec-9 pistol, and a guitar case containing ammunition. After entering the

¹McKown also brought contract claims against the defendants, but he does not press those on appeal.

mall, Maldonado stopped near a soda machine and loaded his rifle, passed by a T-Mobile kiosk multiple times, and then began shooting. Over a period of approximately eight minutes, Maldonado injured seven people, the last of which was McKown.

McKown's injuries occurred in the course of his attempt to intervene. McKown, who was legally armed with a handgun, had been hiding in a store with several other people when he saw Maldonado. Here is McKown's harrowing account of what occurred next:

[Maldonado] turned, I got my hand in here. . . . I [said] . . . young man, I think you need to put your weapon down. He spins around, I draw and right as I aim and I'm pulling the trigger back, first shot hits me in the abdomen. Kicks my gun arm into the air. Kicks out and contorts my legs into uncomfortable, unduplicatable [sic] positions like up and out and up and back. And I'm trying to bring my gun arm down and I prayed the most un-Christian prayer of my life, which was: "please, God, let me shoot this guy before he kills somebody else." . . . [The pain] was horrible, horrible. . . .

So point is, I'm trying to bring my gun arm down to shoot him. You know, I'm thinking I'm doing my dying actions here, and then he hits me again and again and again and again. . . .²

Maldonado then took several people as hostages in a Sam Goody record store for several hours, but he was eventually taken into custody. McKown was left paralyzed. Maldonado was convicted of several crimes of violence and sentenced to 163 years in prison.

²For clarity, some punctuation has been altered from that in the deposition transcript.

Simon Property owns the Tacoma Mall, a 1.3 million-square-foot shopping center located in Tacoma, Washington. In September 1999, Simon and IPC had entered into a "Security Services Contract" to provide security at the mall. In January 2003, the contract was renewed, and it was then amended in 2004. Under the contract, IPC was to provide "security services and equipment at the [Mall]."

B.

On November 12, 2008, McKown filed a complaint against Simon and IPC in Pierce County Superior Court in the state of Washington, and the defendants removed to federal district court based on diversity. In his complaint, McKown alleged five state law causes of action against defendants: (1) failure to protect tenants and business invitees from foreseeable criminal conduct; (2) negligent rendering of security measures and services; (3) negligent performance of undertaken duty; (4) negligent hiring and/or failure to employ security personnel; and (5) breach of express and/or implied contract.

Each defendant moved for summary judgment. The district court first granted IPC's motion and dismissed all claims against IPC. The district court held that IPC owed no duty of care to McKown because McKown failed to show that McKown's status as a business invitee of Simon, for whom IPC contracted to provide security services, created a "special relationship" between IPC and McKown. McKown filed a motion for reconsideration, which the district court denied.³

However, the district court denied Simon's motion for summary judgment regarding the tort claims. The district court

³Western District of Washington, Local Rule CR 7(h) provides: "*Standard.* Motions for reconsideration are disfavored. The court will ordinarily deny such motion in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence."

held that the issues of foreseeability of the criminal acts and Simon's proximate cause for McKown's injuries were issues for the jury. The district court stated that it could not conclude that Maldonado's shooting was "so highly extraordinary or improbable as to be wholly beyond the range of expectability," (quoting *Christen*, 780 P.2d at 1313); thus, it could not conclude that the shooting was unforeseeable as a matter of law.

Simon filed a motion for reconsideration. The district court granted Simon's motion in part on the ground that the court had overlooked case law from Washington state intermediate appellate courts delimiting a "prior similar acts on the premises test" to determine whether foreseeability of third-party criminal conduct is a question for the jury. To address this standard, the district court gave McKown the opportunity to file additional briefing to present "evidence of relevant prior similar acts."

McKown presented in his supplemental briefing the declaration of Darrell L. Cochran, McKown's attorney, and eighty-six pages of exhibits, including news articles, police incident reports, and court records as evidence of six shootings and three other incidents involving guns at the Tacoma Mall. McKown, the non-moving party, summarized this evidence as follows:

Between 1992 and 2005, the Tacoma Mall was the location of six separate shootings:

- In May 1992, mall security ejected two groups of men who were arguing inside the Tacoma Mall. As one group waited at the Mall's bus center, the other group drove by and fired six to eight shots.
- In November 1992, a young man was shot several times in the Tacoma Mall parking lot. His

friends drug [sic] him through the Mall, leaving a trail of blood.

- In March 1993, another young man was shot in the Tacoma Mall parking lot as he walked up to a car. The wounded man staggered into the Mall. In its news report of the shooting, the News Tribune noted that three months earlier a man had reported to the police that he had been robbed at gunpoint outside the Sears store at the Mall.
- In August 1994, up to thirteen shots were fired at the Tacoma Mall. The News Tribune reported that “[b]ullets flew inside the Tacoma Mall on Saturday, hitting within feet of scattering shoppers.”

The Pierce County prosecutor testified that “three uninvolved witnesses were in the direct line of fire and they all dove for cover.” She also noted that “[t]here were 13 shell casings found in the parking lot at the Mall and one entrance door was shattered. At least five bullets struck the entrance area of the Mall.” When one of the shooters was sentenced, he was ordered to pay restitution to the Tacoma Mall and was ordered to have no contact with the Tacoma Mall.

- In October 1996, a gunman shot and wounded a man as he ran into the lobby of the movie theater at the Tacoma Mall. The man did not know who shot him. In response to the shooting, the Tacoma Mall’s managers told the News Tribune that they had implemented a “crisis-management plan” and intended to hold a meeting with the Mall’s owners “to review security measures to determine if they can be improved.”

- In March 2000, five youths were arrested after they fired shots in the Tacoma Mall parking lot.

Simon also knew or should have known of other incidents involving guns at the Tacoma Mall in the years leading up to the shooting at issue:

- In November 2001, Tacoma Police responded to a woman who was carjacked at gunpoint in the parking lot of the Tacoma Mall.
- In March 2003, Tacoma Police responded to a man who was robbed at gunpoint in the Tacoma Mall parking lot while waiting for his girlfriend.
- In February 2005, Tacoma Police responded to a man who had a gun pointed at him in the Tacoma Mall parking lot.

The district court granted Simon's motion for reconsideration and its motion for summary judgment on McKown's negligence claims. It concluded that "McKown [had] failed to submit competent evidence of random acts of indiscriminate shootings on Simon's premises" as required by the "prior similar acts on the premises test." The district court found that the incidents McKown described were (1) too remote in time, with the most recent shooting occurring five years prior to Maldonado's shooting; (2) too dissimilar in location because all the incidents occurred outside rather than inside the mall; and (3) too dissimilar in nature because the prior incidents involved violence directed toward a specific person rather than at random people.⁴

⁴Because the district court addressed all of McKown's evidence and did not rule any of it inadmissible, we assume that all of McKown's evidence of prior acts may properly be considered at this stage in the litigation.

McKown timely appealed the district court's adverse orders.

II.

The district court had diversity jurisdiction under 28 U.S.C. § 1332, and we have jurisdiction under 28 U.S.C. § 1291.

We review grants of summary judgment de novo and determine, “viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.” *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004) (internal quotation marks omitted).

Washington law authorizes the Washington Supreme Court to accept certified questions from the federal courts. Wash. Rev. Code § 2.60.020. We have previously certified questions to the Washington Supreme Court where a question of law “has not been clearly determined” by the Washington courts” and where “the answer to [the] question is outcome determinative.” *Bylsma v. Burger King Corp.*, 676 F.3d 779, 783 (9th Cir. 2012) (quoting Wash. Rev. Code § 2.60.020). Certification is especially appropriate where the issues of law are complex and have “significant policy implications.” *Perez-Farias v. Global Horizons, Inc.*, 668 F.3d 588, 593 (9th Cir. 2011).

III.

In this appeal, McKown argues that Washington law establishes two separate business owner duties to its invitees, both of which were breached by Simon and IPS: the duty to observe and the duty to intervene. McKown further argues that the district court erred by concluding that Maldonado's shooting was not foreseeable as a matter of law under either duty. As explained below, we cannot answer this question

because the scope of the foreseeability inquiry under Washington law is not sufficiently clear to us. Thus, we conclude that certification of the questions stated above is necessary.

Since we are sitting in diversity, “we must begin with the pronouncements of the state’s highest court, which bind us.” *Hilton v. Hallmark Cards*, 599 F.3d 894, 905 (9th Cir. 2010). Neither party disputes that Washington law applies. We must also keep in mind that *only* the Washington Supreme Court’s decisions are binding, and “[i]n the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions,” among other sources of authority, “as guidance.” *Nelson v. City of Irvine*, 143 F.3d 1196, 1206 (9th Cir. 1998) (internal quotation marks omitted).

A.

To show negligence under Washington law, “the plaintiff must prove duty, breach, causation, and damages.” *Nivens*, 943 P.2d at 289. The key issue in this case is whether Simon owed a duty to protect McKown from the criminal acts of Maldonado. Whether a duty exists is a question of law. *Id.*

In *Nivens*, the Washington Supreme Court held that a business owner owes a duty to its invitees to protect them from harm arising from third persons because “a special relationship exists between a business and an invitee.” *Id.* at 291-92. Here, Simon conceded that McKown was a business invitee. Therefore, Simon owed a duty to McKown to protect him from harm by third persons. *Id.* at 292-93.

It is the scope of that duty that is dispositive. The Washington Supreme Court, in *Nivens*, adopted Restatement (Second) of Torts § 344 (1965) to delimit the nature and scope of the duty owed by a business to its invitees. *Id.* at 292-93. *Nivens*, quoting the Restatement, says:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Id. at 292 (emphasis added):

The *Nivens* court also appeared expressly to adopt comments d and f to § 344 to describe the limits of the duty owed. *Id.* In relevant part, the court stated that a possessor of land, although “ordinarily under no duty . . . until he knows or has reason to know” that the acts of third persons may harm his invitees, may “know or have reason to know, *from past experience.*” *Id.* (emphasis added) (quoting § 344 cmt. f). Thus, “[i]f the place or character of his business, or his *past experience*, is such that he should reasonably anticipate . . . criminal conduct on the part of third persons, . . . 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.” *Id.* (emphasis altered in part) (quoting § 344 cmt. f).

The Washington Supreme Court then concluded:

[B]ecause of the special relationship that exists between a business and business invitee, we hold a business owes a duty to its invitees to protect them from imminent criminal harm and reasonably fore-

seeable criminal conduct by third persons. The business owner must take reasonable steps to prevent such harm in order to satisfy the duty.

Id. at 292-93.

Additional clues to the foreseeability inquiry comes from *Christen v. Lee*, 780 P.2d 1307 (Wash. 1989). In *Christen*, the Washington Supreme Court explained that criminal conduct of third persons “bears on whether the act was foreseeable, but it does not necessarily preclude a finding of foreseeability.” *Id.* at 1313. The court continued: “an intervening [criminal] act is not foreseeable if it is ‘so highly extraordinary or improbable as to be wholly beyond the range of expectability.’ ” *Id.* (emphasis added) (quoting *McLeod v. Grant Cnty. Sch. Dist. No. 128*, 255 P.2d 360, 364 (Wash. 1953)). The court also noted that it is not the “ ‘unusualness of the act that resulted in injury to [the] plaintiff that is the test of foreseeability, but whether the result of the act is within the ambit of the hazards covered by the duty imposed upon [the] defendant.’ ” *Id.* (emphasis omitted) (quoting *Rikstad v. Holmberg*, 456 P.2d 355, 358 (Wash. 1969)). In other words, “[t]he manner in which the risk culminates in harm may be unusual, improbable and highly unexpected, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability” *Rikstad*, 456 P.2d at 358 (citation omitted).

Since *Nivens*, the Washington intermediate appellate courts have further refined the foreseeability inquiry in a way that seems to narrow the duty owed, and perhaps substantially so. See *Fuentes*, 82 P.3d 1175; *Craig*, 976 P.2d 126; *Raider*, 975 P.2d 518; *Wilbert*, 950 P.2d 522. *Wilbert* is representative of that quartet. In that case, a wedding party and organizers of a private dance event rented out adjacent space in a community center hall, operated by the Metropolitan Park District (“Metro”). *Wilbert*, 950 P.2d at 523. During the dance, Derrick Wilbert, a business invitee, was shot and killed. *Id.* at

523-24. Wilbert's family sued Metro, alleging negligence based on premises liability. *Id.* at 524. The court of appeals affirmed a grant of summary judgment for Metro, holding that the shooting was not foreseeable as a matter of law because evidence of "a number of unruly, aggressive, vulgar young people at the dance" and fights earlier in the night were insufficient to show that Metro "should reasonably have anticipated a more serious misdeed." *Id.* at 525. Therefore, the shooting was unforeseeable and "Metro owed Wilbert no duty of prevention." *Id.*

In reaching its decision, the court of appeals noted the principles of foreseeability established by the Washington Supreme Court in *Nivens* and other cases and gleaned from these that foreseeability of criminal conduct has "prerequisites." *Id.* These "prerequisites" are "specific evidence that the defendant knew of the dangerous propensities of the individual assailant or previous acts of similar violence on the premises." *Id.*

From this and the three other similar appellate cases, the district court in this case stated the test this way: "there is an issue for the jury as to whether the third party's criminal conduct is reasonably foreseeable *only if* plaintiff presents competent evidence that similar criminal conduct has occurred on the premises in the past." (Emphasis added). Applying that test, it granted summary judgment to the defendants, because it found that McKown's examples were not similar enough to the act of violence that occurred here. Therefore, the court concluded, McKown had not met his burden to show some evidence of similar criminal conduct on the premises, and the case would not be allowed to go to the jury.

B.

We are unsure whether that is the proper test under Washington law, and, if it is, how it must be applied. On the one hand, the two Washington Supreme Court cases do not create

a “similar acts on the premises test” in so many words. They may allow for a broader notion of foreseeability that would allow for McKown to take this case to a jury. On the other hand, the intermediate appellate courts have repeatedly applied just such a test, holding that it is a natural consequence of *Nivens* and other Washington Supreme Court cases. Indeed, this tension is perfectly illustrated by the district court’s initial denial of Simon’s motion for summary judgment, followed by its reversal and subsequent grant of summary judgment in light of its taking a closer look at the intermediate appellate cases. Moreover, if the “similar acts” test does apply, there is a subsidiary question of how “similar” the intervening acts must be to the act giving rise to the tort to trigger the duty. Our task, when sitting in diversity, is to ask ourselves what the Washington Supreme Court would do with this case, using the intermediate appellate decisions as guidance. Simply put, we just do not know what it would do. Hence, this certification order.

We are especially reluctant to answer this question ourselves because these questions raise important policy considerations that only Washington state can answer. After all, imposing a broader duty on a mall owner to implement security to protect against unannounced shooters could help protect the public. But it could also add expense for owners and might impact willingness of out of state property groups to buy a mall in Washington, because of expenses of monitoring or some other security guard protection. A more extensive requirement of surveillance or monitoring may also pose concerns related to the personal privacy of patrons at the mall. Especially in light of this particular case’s importance to the citizens of Washington state, we think these questions should be addressed by the state Supreme Court, rather than by a federal court sitting in diversity.

IV.

In light of our foregoing discussion, we respectfully certify to the Washington Supreme Court the questions stated at the

outset of this order. We do not intend, by the phrasing of our questions, to restrict the Washington Supreme Court's consideration of this issue. We recognize that the Washington Supreme Court may, in its discretion, reformulate the question. *Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075, 1076 (9th Cir. 1999).

If the Washington Supreme Court accepts review of the certified questions, we designate McKown to file the first brief pursuant to Wash. R. App. P. 16.16(e)(1).

The Clerk of Court is hereby ordered to transmit forthwith to the Washington Supreme Court, under official seal of the United States Court of Appeals for the Ninth Circuit, a copy of this order and all briefs and excerpts of record pursuant to Wash. Rev. Code §§ 2.60.010(4), 2.60.030(2), and Wash. R. App. P. 16.16.

Further proceedings in this court are stayed pending the Washington Supreme Court's decision whether it will accept review and, if so, receipt of the answer to the certified question. The case is withdrawn from submission until further order from this court.

The panel will resume control and jurisdiction upon receipt of an answer to the certified question or upon the Washington Supreme Court's decision to decline to answer the certified question. When the Washington Supreme Court decides whether or not to accept the certified question, the parties shall file a joint status report informing this court of the decision. If the Washington Supreme Court accepts the certified question, the parties shall file a joint status report informing this court when the Washington Supreme Court issues its answer.

SO ORDERED.

Restatement (Second) of Torts § 344 (1965)

Division 2. Negligence

Chapter 13. Liability For Condition And Use Of Land

Topic 1. Liability Of Possessors Of Land To Persons On The Land

Title E. Special Liability Of Possessors Of Land To Invitees

§ 344. Business Premises Open To Public: Acts Of Third Persons Or Animals

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

- (a) discover that such acts are being done or are likely to be done, or**
- (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.**

Comment:

a. Premises open to public for business purposes. A possessor of land is subject to liability, under the rule stated in this Section, only when he holds his land open to the public for entry for his business purposes, and then only to those who come upon the land for the purposes for which it is thus held open to the public. Such persons are commonly called business visitors. (See § 332, Comment *a.*) The rule stated here had its origin in cases of carriers who failed to protect their passengers against the acts of third persons. As it has developed, however, it is no longer limited to carriers, or other public utilities, and it applies to theatres, restaurants, shops and stores, business offices, and any other premises held open to the public for admission for the business purposes of the possessor.

The fact that the possessor is a public utility and the visitor is his patron may, however, be important in determining the care required of the possessor. See Comment *e.*

b. "Third persons" include all persons other than the possessor of the land, or his servants acting within the scope of their employment. It includes such servants when they are acting outside of the scope of their employment, as well as other invitees or licensees upon the premises, and also trespassers on the land, and even persons outside of the land whose acts endanger the safety of the visitor. The Section also applies to the acts of animals which so endanger his safety.

c. *Independent contractors and concessionaires.* The rule stated applies to the acts of independent contractors and concessionaires who are employed or permitted to carry on activities upon the land. The possessor is required to exercise reasonable care, for the protection of the public who enter, to supervise the activities of the contractor or concessionaire, including the original installation of his appliances and their operation, and his methods.

d. *Reasonable care.* A public utility or other possessor of land who holds it open to the public for entry for his business purposes is not an insurer of the safety of such visitors against the acts of third persons, or the acts of animals. He is, however, under a duty to exercise reasonable care to give them protection. In many cases a warning is sufficient care if the possessor reasonably believes that it will be enough to enable the visitor to avoid the harm, or protect himself against it. There are, however, many situations in which the possessor cannot reasonably assume that a warning will be sufficient. He is then required to exercise reasonable care to use such means of protection as are available, or to provide such means in advance because of the likelihood that third persons, or animals, may conduct themselves in a manner which will endanger the safety of the visitor.

e. *Public utilities.* In determining whether the possessor has exercised reasonable care, the fact that the possessor is a public utility, and the visitor is his patron, must be taken into account. This Section should be read together with § 343A, under Subsection (2) of which the fact that the patron is entitled to make use of the facilities is a factor of importance to be considered in determining whether it may reasonably be anticipated that he will fail to avoid harm from dangers which are known or obvious to him. Thus it may reasonably be expected that a passenger on a bus will not leave the bus even though he is aware that his safety is endangered by another drunken passenger, and even though he could achieve complete safety by doing so. In such a case it may not be enough for the servants of the public utility to give a warning, which might be sufficient if it were merely a possessor holding its land open to the public for its private business purposes. The utility may then be required to take additional

steps to control the conduct of the third person, or otherwise to protect the patron against it.

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.

Illustrations:

1. At rush hours the passengers upon the A Street Railway Company are accustomed to crowd into the cars in a manner likely to cause injury to some one in the crowd. The A Company fails to provide a sufficient staff of guards to prevent this practice. B, a passenger, is hurt in such a rush, after a single guard has warned him of the danger. The A Company is subject to liability to B.

2. The A Railway Company, knowing that the students of a local college intend to welcome its victorious football team at the railway station, and knowing from previous experience of the boisterous character of such occasions, fails to assemble a sufficient number of its employees upon the platform to control the students. The students, in joke, hustle and injure B, a passenger who is awaiting his train. The A Company is subject to liability to B.

g. The rule stated in this Section applies not only to make it the possessor's duty to protect his visitors after they have entered the land, but also to warn them before their entry of any acts or threatened acts of third persons which may endanger them if they enter.

OFFICE RECEPTIONIST, CLERK

To: George Ahrend
Cc: Bryan P Harnetiaux; Jason Amala; Jeff Keane; tjd@tjkeanelaw.com; Stewart A. Estes
Subject: RE: McKown v. Simon (SC #87722-0)

Rec'd 1-22-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: George Ahrend [<mailto:gahrend@trialappeallaw.com>]
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Cc: Bryan P Harnetiaux; Jason Amala; Jeff Keane; tjd@tjkeanelaw.com; Stewart A. Estes
Subject: McKown v. Simon (SC #87722-0)

Dear Mr. Carpenter,

On behalf of the Washington State Association for Justice Foundation, a proposed amicus curiae brief is attached to this email for filing with the Court. A letter request to appear as amicus curiae was submitted to the Court via email on January 17, 2013.

Counsel for the parties and the Washington Defense Trial Lawyers are being served simultaneously by copy of this email, by prior agreement among counsel.

Respectfully submitted,

--
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