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**THE SUPREME COURT OF  
THE STATE OF WASHINGTON**

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CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

IN

BRENDAN McKOWN,

Appellant

v.

SIMON PROPERTY GROUP, INC., d/b/a TACOMA  
MALL; IPC INTERNATIONAL CORPORATION,

Appellees

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**ANSWER OF APPELLEES SIMON PROPERTY GROUP, INC. AND  
IPC INTERNATIONAL CORPORATION TO BRIEF OF AMICUS  
CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE  
FOUNDATION**

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## I. INTRODUCTION

Simon and IPC (collectively “Simon”) submit this brief in answer to the Brief of Amicus Curiae Washington State Association for Justice Foundation (“WSAJF”). WSAJF urges the Court to apply a rule that would effectively transfer the responsibility for protecting the public against crime from the government to private businesses. Even if nothing remotely like the crime in question had ever occurred on the defendant’s premises, WSAJF’s proposal would permit the plaintiff to take the issue of foreseeability to the jury based solely on overly broad concepts such as the “character” of the defendant’s business or “the totality of the circumstances.” Notably, the state that first developed this rule later rejected it. Finally, WSAJF supports a rule under which even the most horrific crime would be foreseeable as long as the business had reason to believe that *any* criminal act – no matter how trivial or innocuous – was likely to occur on its premises.

Simon urges the Court to endorse the rule followed by the Court of Appeals. To establish the foreseeability of the harm caused by the criminal, the plaintiff must show that similar acts of violence had occurred on the defendant’s premises in the past. The prior acts must be sufficiently similar in nature to the criminal attack that injured the plaintiff to have alerted the business that such an act was likely to occur.

II. SECTION 344 AND COMMENTS d AND f ARE NOT CONTROLLING LAW IN WASHINGTON BECAUSE THEIR ADOPTION WAS NOT NECESSARY TO THE DISPOSITION OF NIVENS

WSAJF argues that Restatement (2d) of Torts § 344 and comments d and f constitute binding precedent in this state. According to WSAJF, the Court's discussion of § 344 and comments d and f in *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997), was necessary to establish "the metes and bounds" of a business's duty to protect its invitees from criminal acts of third persons. WSAJF Br. at 8. But defining the scope of that duty was not necessary to the resolution of *Nivens*.

To resolve the case before it, the *Nivens* Court was required to decide only two issues. The first was whether a special relationship exists between a business and an invitee so as to impose on the business *some* duty to take reasonable steps to protect invitees from imminent criminal harm or reasonably foreseeable criminal conduct by third persons. 133 Wn.2d at 194. The Court answered that question "yes." *Id.*

Second, the Court was required to decide whether it was appropriate to impose on all businesses the distinct duty – hiring security guards – on which the plaintiff rested his entire case. *Nivens*, 133 Wn.2d at 205-207. The Court answered this question "no." *Id.* Since the plaintiff restricted his case to this one theory, it was not necessary for the Court to decide anything

else. Since Nivens “did not base his case on a general duty of a business to an invitee,” *id.* at 205, the Court was not required to define the parameters of that general duty.

Citing *State ex rel Lemon v. Langlie*, 45 Wn.2d 82, 89-90, 273 P.2d 464 (1954), WSAJF notes that when a court establishes a legal principle and then decides that the litigant’s claim does not meet the requirements for applying the principle, the language establishing the governing principle is not dicta. WSAJF Br. at 8. Simon agrees. The difference between *Nivens* and the prior case at issue in *Lemon*, however, is that in *Nivens* there was no need for the Court to establish § 344 and comments d and f as a governing principle in the first place.

In *Lemon*, the earlier case under consideration was *Reiter v. Wallgren*, 28 Wn.2d 872, 184 P.2d 571 (1947). See *Lemon*, 45 Wn.2d at 88. Reiter, a taxpayer, sued the Governor and other officials to prohibit the impending sale of certain State capitol timber. *Id.* at 873. Reiter had no special or pecuniary interest in the subject matter of the action that was any different than any other taxpayer. *Id.* at 874. He had not informed the state attorney general of the irregularities and illegalities on which his lawsuit was based, and had never demanded that the attorney general take action to block the transaction. *Id.* at 876. Reiter did not allege that the attorney

general had refused to act or that a demand for such action would have been useless. *Id.* The trial court dismissed the case. *Id.* at 874.

To resolve the case, this Court had to decide whether – under the facts of the case – Reiter had the capacity to sue. 28 Wn.2d at 874. The Court held that as a condition precedent to a taxpayer’s maintenance of an action challenging the legality of what state officials are about to do, the plaintiff must show either that he made demand on the attorney general to bring the action and the attorney general refused, or that such a demand would have been useless. *Id.* at 876-877, 881-882. Because Reiter had failed to make such a showing, the Court affirmed the dismissal of his case. *Id.* at 882.

In *Reiter*, the Court had to decide whether making demand on the attorney general was a precondition to the maintenance of the taxpayer’s lawsuit because the plaintiff in that case had failed to take that step. In other words, the facts and procedural posture of *Reiter* made it necessary for the Court to decide the legal issue (or to establish the “governing principle,” to use WSAJF’s phrase) for which the case was later cited, in order to resolve the case before it.

In *Nivens*, by contrast, it was not necessary for the Court to adopt §344 of the Restatement or to announce that comments d and f describe the limits of a business owner’s duty. Whatever the scope of that duty might

be, all the Court had to decide in *Nivens* was that it did not include a distinct duty to hire security guards. Because the plaintiff did not argue that the defendant had breached any other duties, the *Nivens* Court was not required to define the metes and bounds of what other duties a business might or might not owe its invitees to protect them from criminal harm.

It becomes even clearer that the language on which WSAJF relies was dicta when one considers the purpose for which it cites that language. In *Nivens* the Court quoted from comment f to § 344. 133 Wn.2d at 204-205. WSAJF, in turn, relies on comment f for its argument that a plaintiff may establish the foreseeability of the harm he suffered at the hands of the third person through evidence of the “place or character” of the defendant’s business, even if there is no history of similar crimes on the defendant’s premises. WSAJF Br. at 9 (citing comment f).<sup>1</sup>

In *Nivens*, however, the Court expressly declined to “undertake an analysis of the foreseeability of Nivens’ injury here because Nivens did not base his case on a general duty of a business to an invitee.” 133 Wn.2d at 205. Foreseeability was simply not an issue in this Court’s opinion in *Nivens*. And the Court certainly did not consider the question of whether

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<sup>1</sup> “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.” Restatement (Second) of Torts § 344 (1965), comment f (emphasis added). McKown, of course, makes the same argument. Br. App. at 19.

evidence of the “place or character” of the defendant’s business may be sufficient to establish the foreseeability of the plaintiff’s harm. The Court’s quotation of the “place or character” language of comment f was not necessary to the resolution of *Nivens*.

**III. TO ESTABLISH THAT THE CRIMINAL ACT THAT HARMED HIM WAS REASONABLY FORESEEABLE, THE PLAINTIFF MUST PRESENT EVIDENCE OF PRIOR SIMILAR ACTS OF VIOLENCE ON THE PREMISES**

**A. To Whatever Extent § 344 and Comments d and f Are to Be Regarded as Controlling Law, They Should Be Limited So As Not To Conflict with the Prior Similar Acts Rule**

The Court’s discussion of § 344 and comments d and f was not necessary to the decision in *Nivens*. Thus, § 344 and comments d and f do not constitute binding precedent.

But if the Court is now inclined to adopt some elements of § 344 and comments d and f as controlling law, the Court should reject any elements that conflict with the prior similar acts rule followed by the Court of Appeals. Under that rule, to establish the reasonable foreseeability of the harm he suffered at the hands of a criminal, the plaintiff must show that similar acts of violence had occurred on the defendant’s premises in the past.

And if the Court concludes that § 344 and comments d and f are currently the law in Washington without limitation and that they allow the

plaintiff to establish foreseeability without evidence of prior similar crimes on the premises, Simon asks the Court to change the law to be consistent with the prior similar acts rule. In other words, if McKown and WSAJF are correct in their position that (a) this Court's statements in *Nivens* did indeed establish § 344 and comments d and f as controlling law, and (b) *Nivens* and comment f permit the plaintiff to establish the foreseeability of the criminal act that harmed him based solely on the "place or character" of the defendant's business, then Simon asks this Court to overrule these elements of *Nivens*. *Id.*

WSAJF correctly points out that under the doctrine of stare decisis, this Court will overrule an earlier decision only if it is found to be both incorrect and harmful. WSAJF Br. at 6, n. 8 (citing *In re Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). Simon has shown that to the extent *Nivens* allows the plaintiff to establish the foreseeability based solely on the "place or character" of the defendant's business and without proof of prior similar crimes on the premises, *Nivens* is both incorrect and harmful.

In its principal brief, Simon demonstrated that § 344 and comments d and f are so broadly worded that, if not properly limited, they impose an extraordinarily burdensome duty on businesses. See Simon's Br. at 13-18. WSAJF does not address this fundamental problem.

Simon also explained in detail why the prior similar acts rule is superior to the “totality of the circumstances” rule that WSAJF and McKown contend this Court adopted in *Nivens*.<sup>2</sup> Simon’s Br. at 26-41. Allowing evidence of the “place” of the business to establish foreseeability violates established public policy of this state. *Id.* at 26-27. Permitting the plaintiff to prove foreseeability based on the “character” of the defendant’s business effectively makes any crime foreseeable at any business. *Id.* at 28-29. Allowing the “character” of the business to establish foreseeability improperly places more importance on the category into which the business falls than on the history of crime at that location. *Id.* at 29-31. The totality of the circumstances rule effectively transfers the duty to protect the public against crime from the government to private businesses. *Id.* at 31-33. The prior similar acts rule properly determines foreseeability based on the business’s knowledge of what has actually happened on its property. *Id.* at 33-35. Other courts have endorsed the “prior similar acts” rule. *Id.* at 35-37. California, which first developed the totality of the circumstances rule, has abandoned it. *Id.* at 38-41.

The brief of WSAJF addresses none of these concerns.

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<sup>2</sup> The “totality of the circumstances test” is based on the reference to the “place or character” of the business in the Restatement § 344, cmt. f. *Boren v. Worthen Nat’l Bank of Arkansas*, 324 Ark. 416, 427, 921 S.W.2d 934 (1996). “The analysis thus includes the nature, condition, and location of the premises, in addition to any prior similar incidents, and a duty can be found where no prior criminal attacks have occurred.” *Id.* WSAJF also describes comment f as calling for consideration of “the totality of the circumstances.” Br. at 13-14.

Finally, Simon argued that in this field of the law – negligence actions by an invitee for injuries inflicted by the criminal acts of third persons on the premises of a business – it is appropriate for the Court to set specific requirements for foreseeability. Simon Br. at 42-48. Simon explained that for policy reasons, a court may deliberately adopt a limited view of foreseeability in a certain context, in order to narrow what would otherwise be an unfairly broad range of exposure for defendants. As an analogy, Simon pointed to the development of the law concerning foreseeability in actions for negligent infliction of emotional distress. *Id.* at 44-45. In that field of tort law, as Simon explained, this Court has “recognized that specific limitations must be placed on the foreseeability standard,” *Hegel v. McMahon*, 136 Wn.2d 122, 128, 960 P.2d 424 (1998), and has “deliberately adopted a limited view of foreseeability in this context.” *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 57, 176 P.3d 497 (2008) (emphasis added to both quotations). Simon’s Br. at 45 & n.20. Pointing to the similar need to limit the business owner’s unreasonably broad scope of potential liability under the totality of the circumstances test, Simon urged the Court to hold that proof of prior similar acts on the business’s premises is a prerequisite to finding foreseeability of the criminal act that injured the invitee. *Id.* at 45-47.

On this subject too, the brief of WSAJF is silent.

To the extent that *Nivens* allows the plaintiff to establish the foreseeability of the criminal act that injured him based on the “totality of the circumstances” or the “place or character” of the defendant’s business, and without proof of prior similar crimes on the defendant’s premises, *Nivens* should be overruled. For the same reasons, as summarized above and as explained more fully in Simon’s principal brief, if the Court is now inclined to adopt any portion of § 344 and comments d and f, it should do so only to the extent they do not conflict with the prior similar acts rule.

**B. All of the Relevant Post-*Nivens* Cases Decided by the Court of Appeals Correctly Applied the Prior Similar Acts Rule**

**1. *Wilbert and Raider***

WSAJF argues that two of the Court of Appeals cases -- *Wilbert v. Metrop. Park District*, 90 Wn.App. 304, 950 P.2d 522 (1998); and *Raider v. Greyhound Lines*, 94 Wn.App. 816, 975 P.2d 518, *review denied*, 138 Wn.2d 1011 (1999) -- were wrongly decided because they were “inconsistent with the § 344 analysis adopted in *Nivens*.” WSAJF Br. at 12.

This argument, of course, presupposes that the *Nivens* Court’s discussion of § 344 and comments d and f was necessary to the resolution of that case. As Simon has explained, that discussion went well beyond the issues that the Court was required to decide and therefore is not binding precedent. *State v. Johnson*, 173 Wn.2d 895, 904, 270 P.3d 591 (2012).

Moreover, in both *Wilbert* and *Raider*, foreseeability was at the heart of the case. In *Nivens*, however, foreseeability was not an issue. 133 Wn.2d at 205. Nothing in the actual holding in *Nivens* prohibited the *Wilbert* and *Raider* courts from deciding that the plaintiff's harm was unforeseeable as a matter of law because there was no evidence of prior similar acts on the defendant's premises.

Even if one considers the language that was not necessary to the Court's decision, *Nivens* provides more support for the prior similar acts rule than it does for the rule that allows the plaintiff to establish foreseeability solely through evidence of the "place or character" of the defendant's business (i.e., the "totality of the circumstances" rule). It's true that the Court quoted the "place or character" language of comment f. But the Court did not place emphasis on that language. Instead, it added emphasis to that portion of the comment which states that because the possessor of land is not an insurer of the visitor's safety, he ordinarily has no duty to anticipate criminal conduct. And the Court emphasized the part of the comment which states that the duty to anticipate such conduct may arise from the possessor's *past experience*.

*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.*

*Nivens*, 133 Wn.2d at 204-205 (quoting comment f) (emphasis provided by the Court).<sup>3</sup>

In addition, the *Nivens* court declared that “Washington courts have been reluctant to find criminal conduct foreseeable.” 133 Wn.2d at 205, n.3. In support of that observation, the Court favorably cited *Jones v. Leon*, 3 Wn.App. 916, 478 P.2d 778 (1970). In *Jones* the court held as a matter of law that based on the history of prior disturbances at the defendant’s cocktail lounge, the defendant had no reason to anticipate the need for a guard at the time of the incident in question and no reason to anticipate a shooting at any time. 3 Wn.App. at 926. If this Court had intended to reject the prior similar acts rule in *Nivens*, it would not have cited *Jones*. *Wilbert*, in turn, properly cited *Jones* for the proposition that where “there is no history of such crimes occurring on the premises, the courts have held the criminal conduct unforeseeable as a matter of law.” 90 Wn.App. at 309.

As another example of the reluctance of Washington courts to find criminal conduct foreseeable, the *Nivens* Court cited *Christen v. Lee*, 113 Wn.2d 479, 780 P.2d 1307 (1989). *Nivens*, 133 Wn.2d at 205, n.3. In

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<sup>3</sup> Both of the illustrations to comment f involve the business’s past experience on its own premises with acts similar to the act that injured the plaintiff. Restatement (2d) Torts § 344, comment f, illustrations 1 and 2.

*Christen* the Court considered two consolidated cases. The one to which the *Nivens* Court referred was *Long v. Coates*, in which defendant Coates stabbed plaintiff Long while the two of them walked along the side of a highway. *Christen*, 113 Wn.2d at 485-486. Long also sued the bar that had continued to serve alcohol to Coates earlier the same night even though Coates was obviously drunk. *Id.* In doing so, the bar breached its duty not to serve alcohol to an obviously intoxicated person. *Id.* at 488-489. Nevertheless, this Court held as a matter of law that Coates' act of stabbing Long was not a reasonably foreseeable consequence of the bar's act of serving alcohol to Coates and the bar's knowledge that Coates had a knife. *Id.* at 491. Such a criminal assault would be foreseeable only if the drinking establishment had reason to know that the intoxicated person to whom it served alcohol had demonstrated violent propensities, either on that occasion or previously. *Id.* at 491, 496-498.

WSAJF cites Justice Utter's dissent in *Christen*, in which he criticized the majority for "unnecessarily narrow[ing] the concept of notice" by holding that "prior aggressive acts of an armed patron are the exclusive means of providing notice of increased risk to others." Br. at 9, n.9; *Christen* 113 Wn.2d at 514. Pointing to studies showing that alcohol was associated with a large percentage of violent crimes and to a common understanding of a relationship between alcohol and violence, Justice Utter

argued that this relationship itself was enough to take the issue of foreseeability to the jury. 113 Wn.2d at 517-520.

But the *Nivens* Court cited the *majority* opinion in *Christen. Nivens*, 133 Wn.2d at 205, n.3. And the majority held that to establish a jury question on the foreseeability of a criminal assault as a result of serving alcohol, the plaintiff must show that the defendant knew of the violent propensities of the particular person who later committed the crime. *Christen*, 113 Wn.2d at 496-498. This narrower view of foreseeability, favorably cited by the Court in *Nivens*, is consistent with the prior similar acts rule. Just as a criminal assault by an intoxicated bar patron is unforeseeable as a matter of law based on a general notion that alcohol consumption is sometimes associated with violent crime, so a violent attack at a particular business is unforeseeable as a matter of law based on general evidence about the crime rate in the city or the “character” of the business. Both rules reflect an appropriate reluctance to find criminal conduct foreseeable in the absence of “specific evidence that the defendant knew of the dangerous propensities of the individual assailant or previous acts of similar violence on the premises.” *Wilbert*, 90 Wn.App. at 310.

*Wilbert* and *Raider*, which relied in *Wilbert*, were both correctly decided.

## 2. Craig and Fuentes

WSAJF argues that *Craig v. Washington Trust Bank*, 94 Wn.App. 820, 976 P.2d 126 (1999), and *Fuentes v. Port of Seattle*, 119 Wn.App. 864, 82 P.3d 1175 (2003), *review denied*, 152 Wn.2d 1008 (2004), do not support the prior similar acts rule. Simon disagrees, as did the district court and the Ninth Circuit. ER I, 4-7; Cert. Order at 12-14 (regarding *Craig* and *Fuentes* as part of the same uniform group as *Wilbert* and *Raider*, and considering *Wilbert* as representative of all four cases).

Craig: According to WSAJF the court did not “exclude the possibility of a question of fact regarding foreseeability based upon other factors such as the ‘place or character’ of the business.” Br. at 11. On the contrary, the court rejected the plaintiff’s argument that the defendant’s location in the heart of a city and its character as a bank with money and a cash machine somehow created the opportunity for criminal misconduct. 94 Wn.App at 827.

In addition, the same Div. III judge who wrote the opinion in *Craig* also wrote the opinion in *Raider*. Another member of the *Craig* panel was also on the *Raider* panel. The opinion in *Raider* was issued two days before the opinion in *Craig*. There can be little doubt that the prior similar acts rule, expressly applied in *Raider*, also shaped the decision in *Craig*.

*Fuentes*: WSAJF notes that in *Fuentes* the Court did not say that evidence of the “place or character” of the defendant’s business is insufficient to establish foreseeability. Br. at 12. But neither did the court say that such evidence will suffice. And in holding that the carjacking of plaintiff’s car was unforeseeable as a matter of law, the court noted that there had been no carjackings at the airport. *Id.* at 870-71. In other words, there was no evidence of prior similar crimes on the premises.

IV. **THE PRIOR ACTS MUST HAVE BEEN SUFFICIENTLY SIMILAR IN NATURE TO THE CRIMINAL ACT THAT INJURED THE PLAINTIFF TO HAVE PUT THE BUSINESS ON NOTICE THAT SUCH AN ACT WAS LIKELY TO OCCUR; THE ACTS MUST HAVE OCCURRED ON THE DEFENDANT’S PREMISES**

The Ninth Circuit’s third question is: “If proof of previous acts of similar violence is required, what are the characteristics which determine whether the previous acts are indeed similar?” With regard to this question, WSAJF’s principal argument is that foreseeability may be determined based on the “place or character of the defendant’s business” and on “the totality of the circumstances.” Br. at 13-14.

WSAJF’s argument does not address the third question. Instead, it restates the conclusion that WSAJF asks the Court to reach in answer to the Ninth Circuit’s second question – i.e., “must a plaintiff show previous acts of similar violence on the premises, or can the plaintiff establish reasonably

foreseeable harm through other evidence?” If this Court has reached the third question, it has necessarily decided that evidence of the place or character of the defendant’s business or other evidence within the “totality of the circumstances” is insufficient, in the absence of prior similar acts on the premises.

WSAJF also argues that if prior similar acts are required, they need not be “identical in nature and magnitude to the event in question.”<sup>4</sup> Simon agrees that precise identity should not be required. But the rule proposed by WSAJF would remove the word “similar” from the prior similar acts rule altogether.

WSAJF contends that to create a jury issue as to foreseeability, the prior acts need only be of a nature and magnitude that would “alert the defendant to the likelihood of criminal acts on the premises.” Br. at 13. This proposal eliminates the concept of similarity altogether. It would require no comparison between the nature of the crime that injured the plaintiff and the nature of the prior acts. Under this proposal *every* criminal act – no matter how heinous in nature or massive in scale – would be foreseeable as long as prior acts gave the business reason to believe that *any* criminal act – no matter how trivial or innocuous – was likely to occur on

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<sup>4</sup> To support this argument, WSAJF says that any such limitation is inconsistent with the “place or character” language of comment f. Br. at 13. Again, once the Court has reached the third certified question, it has concluded that “place or character” evidence – without prior similar acts -- is not sufficient to establish foreseeability.

the premises. The indiscriminate killing or wounding of dozens of patrons would be deemed foreseeable if shoves, scuffles, or even shoplifting had previously occurred on the premises.

Instead, the prior acts on the premises must have been *sufficiently similar to the criminal attack that injured the plaintiff* to alert the business that such an act was likely to occur. *E.g., Wilbert*, 90 Wn.App. at 310 (fights and other aggressive behavior did not establish that the defendant should have anticipated a fatal assault with a deadly weapon).<sup>5</sup> To establish foreseeability, “the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location.” *Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149, 153, 694 N.Y.S.2d 445 (1999) (emphasis added).<sup>6</sup>

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<sup>5</sup> See also *Ann M. v. Pacific Plaza Shopping Ctr.*, 6 Cal.4th 666, 679-680, 25 Cal.Rptr.2d 137, 863 P.2d 207 (1993) (assaults and robberies not sufficiently similar to rape of plaintiff); *Sharon P. v. Arman, Ltd.*, 21 Cal.4th 1181, 1191, 989 P.2d 121, 91 Cal.Rptr.2d 35 (1999) (repeated bank robberies on main floor of building not sufficiently similar to sexual assault on plaintiff in parking garage); *Willmon v. Wal-Mart Stores, Inc.*, 143 F.3d 1148, 1151 (8<sup>th</sup> Cir. 1998) (prior fights not similar to abduction of plaintiff from premises and ensuing rape and murder of plaintiff elsewhere).

<sup>6</sup> WSAJF properly cites *Johnson v. State*, 77 Wn.App. 934, 943, 894 P.2d 1366 (1995) as an example of a case in which prior criminal acts on the premises were sufficient to create a fact issue on foreseeability. In that case a college student was raped in front of her dormitory. The opinion did not discuss the plaintiff's evidence in detail, but the plaintiff's brief reveals that there had been eleven rapes on the campus in the preceding three years. SER at 67-68.

While the scale or magnitude of the prior acts need not be identical to that of the crime in question, it must be similar. In *Lopez v. McDonald's Corp.*, 193 Cal.App.3d 495, 500-501, 238 Cal.Rptr. 436 (1987), a man walked into a McDonald's restaurant armed with semi-automatic weapons and a large supply of ammunition, opened fire, and shot a total of 32 people – killing 21 of them. He told his wife before he left home that day that he was going “hunting for humans.” *Id.* Even under the totality of the circumstances test then applied by California courts,<sup>7</sup> the court found the event unforeseeable as a matter of law. *Id.* at 500, 509-512. “[T]he risk of a maniacal, mass murderous assault” was so remote and unexpected “that a reasonably prudent business enterprise would not consider its occurrence in attempting to satisfy its general obligation to protect business invitees from reasonably foreseeable criminal conduct.” *Id.* at 509-510.

WSAJF also concludes that the prior similar acts should not be limited to the defendant's premises, but may include similar acts in the “vicinity.” Br. at 13. But this argument runs afoul of established public policy that evidence of similar crimes in the area surrounding the defendant's business may not be used to establish a tort duty. *Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wn.2d 217, 236, 802 P.2d 1360 (1991). “[I]f

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<sup>7</sup> The California Supreme Court later abandoned the totality of the circumstances test in favor of a “balancing test” that, in most cases, requires proof of prior similar violent acts. *Ann M.*, 6 Cal.4<sup>th</sup> at 678-679. See Simon's principal brief at 38-41.

the premises are located in an area where criminal assaults often occur, imposition of a duty could result in the departure of businesses from urban core areas--an undesirable result.” *Id.*

The Court of Appeals has required proof of prior similar crimes *on the defendant's premises*. *Wilbert*, 90 Wn.App. at 310; *Raider*, 94 Wn.App. at 819; *Fuentes*, 119 Wn.App. at 870-871.<sup>8</sup> “[O]ne is normally allowed to proceed on the basis that others will obey the law.” *Hutchins*, 116 Wn.2d at 236. If a business is to be deprived of the right to proceed on that basis, this should be the case with respect to only those crimes that are similar to prior acts that had occurred on the property with which the business is most familiar – its own premises.

Dated this 8th day of February, 2013.

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<sup>8</sup> *Fuentes* further held that violent crimes in one part of a large facility do not establish the foreseeability of violent crimes in another part. 119 Wn.App. at 870-871.

SUPREME COURT  
OF THE STATE OF WASHINGTON

BRENDAN McKOWN,	)	
	)	
Plaintiff-Appellant,	)	<b>CERTIFICATE OF SERVICE</b>
	)	
vs.	)	
	)	
SIMON PROPERTY GROUP,	)	
INC., d/b/a TACOMA MALL;	)	
IPC INTERNATIONAL	)	
CORPORATION,	)	
	)	
Defendants-Appellees	)	

I hereby certify that on February 8, 2013, copies of the Answer of Appellees Simon Property Group, Inc. and IPC International Corporation to Brief of Amicus Curiae Washington State Association for Justice Foundation was served on counsel at the following address and by the method(s) indicated:

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I declare under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

DATED this 8<sup>th</sup> day of February, 2013, at Seattle, Washington.

  
\_\_\_\_\_  
Donna M. Pucel

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