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No. 11-35461

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRENDAN MCKOWN, a single individual,

Appellant,

v.

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

Appellees.

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APPEAL FROM UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON AT
TACOMA (No. 3:08-cv-05754-BHS)

BRIEF OF APPELLANT

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I. STATEMENT OF JURISDICTION

District Court Jurisdiction: The district court had original subject-matter jurisdiction over this case under 28 U.S.C. § 1332 because (1) appellant McKown is a citizen and resident of Pierce County, Washington, (2) appellee Simon is a Delaware corporation with its principal place of business in Indianapolis, Indiana, (3) appellee IPC is an Illinois corporation with its principal place of business in Bannockburn, Illinois, and (4) the amount in controversy is greater than \$75,000.

Court of Appeals' Jurisdiction: The Ninth Circuit Court of Appeals has jurisdiction over this appeal under 28 U.S.C. § 1291 because appellant McKown seeks appellate review of a final decision by the United States District Court for the Western District of Washington.

Filing Dates: Under Fed. R. App. P. 4(a)(1)(A), McKown timely appealed the final decision by the district court because (1) the district court dismissed McKown's claims against IPC on December 29, 2010, (2) the district court's final decision was made on May 4, 2011, when it granted Simon's motion for reconsideration and dismissed McKown's remaining claims against Simon, (3) the district court entered final judgment on May 5, 2011, and dismissed McKown's claims against Simon and IPC, and (4) McKown paid the filing fee and filed his notice of appeal on May 27, 2011, within thirty days of May 4, 2011.

Assertion of Final Order: This appeal is from final orders of the district court that disposed of all of McKown's claims against Simon and IPC.

II. STATEMENT OF ISSUES PRESENTED

(1) Whether the district court erred in concluding Simon owed no duty to observe and protect McKown when (a) as a business owner, Simon had a duty to protect McKown from reasonably foreseeable harm at the Tacoma Mall, (b) before McKown was shot, the mall security director complained to Simon and IPC about the need to make the mall a "safer place to shop," including the need for surveillance cameras, (c) that same security director testified he and his superiors knew the mall was a "soft target" that might be attacked, (d) Simon's internal documents acknowledged that same danger, including the danger that an attacker might use a vacant hallway to prepare for an assault, as happened here, (e) McKown's security experts provided un-rebutted testimony that a shooting was foreseeable based on prior crimes at the mall, in the region, and across the country, and (f) McKown's security experts provided un-rebutted testimony that the shooting was foreseeable based on industry-wide knowledge of the risk?

(2) Whether the district court erred in concluding Simon had no duty to intervene and protect McKown when (a) his experts testified that Simon should have known and responded to the imminent harm posed by a man while he aggressively roamed around the mall with a guitar case full of guns and

ammunition, during the ten minutes that he openly loaded his weapons in a vacant hallway, when he emerged with large guns under his trench coat, or at the very least, during the eight minutes between when he started shooting and when he shot McKown, (b) before McKown was shot, the mall's security director warned Simon and IPC about the need for a surveillance system, (c) before McKown was shot, Simon's internal documents acknowledged that an attacker might use a vacant hallway to prepare for an assault, as happened here, and (d) before McKown was shot, Simon's internal documents acknowledged that during an emergency Simon was responsible for insuring "that everyone vacates the building as safely and quickly as possible" and informing "each tenant to close their gates, security their store and leave immediately"?

(3) Whether the district court erred in concluding IPC had no duty to protect McKown when (a) Simon had a duty to protect McKown from reasonably foreseeable harm at the Tacoma Mall, (b) IPC signed a "security services" contract with Simon to fulfill that duty, including monitoring and controlling "entry and exits to [the mall] and vital areas" and "[r]espond[ing] to and provid[ing] assistance in security related situations, and (c) IPC's mall security director testified his "main responsibility" was "to provide a safe place for people to come shop"?

III. PERTINENT TREATISE

Restatement (Second) of Torts § 344 (1965)

§ 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.

IV. STATEMENT OF THE CASE

Appellant McKown worked at the Tacoma Mall in Tacoma, Washington. Appellee Simon was an owner of the mall, and Simon contracted with appellee IPC to provide security at the mall.

On November 20, 2005, a man dressed in a trench coat entered the Tacoma Mall with a guitar case. Under the trench coat and in the guitar case were two assault weapons and a large amount of ammunition. After walking around the mall and trying to draw attention to himself, he went into a back hallway and started

loading his two assault weapons. Ten minutes later, he emerged from the hallway and began shooting. After eight minutes of shooting, during which he shot six people, the man shot McKown.

At the time he was shot, McKown had taken refuge in a mall store in order to help others who were confused and did not know where the shooter was or how to safely evacuate. McKown filed suit against Simon and IPC because he alleges they failed to protect him. More specifically, McKown alleges Simon and IPC were negligent 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.

IPC moved for summary judgment, asserting its contract with Simon to provide security at the mall did not create a duty to protect McKown from foreseeable harm. The district court granted that motion.

Simon also moved for summary judgment. While Simon admitted it had a duty to protect McKown from harm, it asserted an active shooter was unforeseeable as a matter of law because this was the first active shooting inside the mall. The district court initially denied that motion because it concluded foreseeability was a question for the jury.

After Simon moved for reconsideration, the district court reversed itself and concluded the shooting was not foreseeable as a matter of law. For that same

reason, the district court concluded Simon had no duty to protect McKown once the shooting started. McKown timely appealed.

V. STATEMENT OF FACTS

A. **Simon is an Owner of the Tacoma Mall and It Contracted with IPC to Provide Security at the Mall**

Simon is the owner of the Tacoma Mall in Tacoma, Washington. In September 1999, Simon and IPC entered into a “Security Services Contract” to provide security at the mall, and in January 2003, Simon and IPC renewed that contract.¹ The following year, they amended their contract for the specific purpose of ensuring Simon was an additional insured on IPC’s insurance policies.²

The contract between Simon and IPC required IPC to (1) respond to all alarm conditions and any other indications of suspicious activities, (2) use reasonable efforts to deter and detain persons who were attempting to gain unauthorized access to the mall, and (3) respond to and provide assistance in security-related situations at the mall, including criminal acts.³

The director of mall security testified his responsibility was “to provide a safe place for people to come and shop.”⁴

¹ Excerpt of Record, Vol. 2, at 41-47.

² *Id.* at 62-63, 74, 80.

³ *Id.* at 49.

⁴ *Id.* at 82-84.

B. Simon and IPC Knew the Tacoma Mall was a “Soft Target” and Knew They Needed to Protect Their Invitees From an Attack and During an Attack

The same security director who admitted his duty was “to provide a safe place for people to come and shop” also admitted he had “lots of discussions” with Simon and IPC about how the mall was a “soft target” that might be the subject of a terrorist attack.⁵ Simon and IPC were sufficiently concerned about the possibility of an attack that they adopted new policies and procedures, including evacuation points for mall employees and customers.⁶

Simon’s internal documents also acknowledged that “recent terrorist attacks” made it aware of the danger that a vacant hallway might be used to prepare for an assault on its invitees. For example, in 2003 and 2004, Simon’s mall manager warned his tenants to keep a look-out for “anyone suspicious in the back hallways” and to “notify mall security ... right away” because “[w]e all play an equal part in keeping the mall safe for our employees and customers.”⁷

C. McKown’s Experts Provided Unrebutted Testimony that an Attack on the Mall was Reasonably Foreseeable

McKown’s two security experts testified that an attack on the mall was reasonably foreseeable. This testimony was not rebutted.

⁵ *Id.* at 87.

⁶ *Id.* at 87-89.

⁷ *Id.* at 90-93.

McKown's experts explained the attack on the mall was reasonably foreseeable because of prior violent crimes in the immediate area,⁸ prior shootings at malls in the Puget Sound area, prior shootings and gun-related crimes at the mall,⁹ and industry-wide knowledge of the risk of such an attack.¹⁰

Simon was well aware that the Tacoma Mall was a dangerous place because it was the location of six separate shootings between 1992 and 2005.¹¹ For example, in November 1992, a young man was shot several times in the mall parking lot. His friends drug him through the mall, leaving a trail of blood.¹² Two years later, up to thirteen shots were fired at the mall.¹³ The local newspaper reported that “[b]ullets flew inside the Tacoma Mall on Saturday, hitting within feet of scattering shoppers.”¹⁴

In October 1996, a gunman shot and wounded a man as he ran into the lobby of the mall movie theater.¹⁵ In response, the mall's managers told the local paper they had implemented a “crisis-management plan” and intended to hold a meeting

⁸ *Id.* at 101-06 (¶¶ 22-24, 26, 28-31), at 117-20 (¶¶ 22, 25, 27-28).

⁹ *Id.* at 126-27; *id.* at 97, 104-06 (¶¶ 9.8, 28-30); *id.* at 114, 120 (¶¶ 11.14, 27).

¹⁰ *Id.* at 100, 104-08 (¶¶ 19, 28-29, 33); *id.* at 117-20 (¶¶ 20, 22-25).

¹¹ *Id.* at 126-27.

¹² *Id.* at 127.

¹³ *Id.*

¹⁴ *Id.* at 128.

¹⁵ *Id.* at 126-27.

with the mall's owners "to review security measures to determine if they can be improved."¹⁶

In addition to shootings, McKown's experts testified a shooting was reasonably foreseeable because there were a number of gun-related crimes at the mall before the shooting.¹⁷ For example, in February 2005, local police responded to a man who had a gun pointed at him in the mall parking lot.¹⁸

While the shooting in November 2005 was the first time someone had opened fire inside the mall, McKown's experts testified the shooting was reasonably foreseeable, and for that reason, the industry standard of care required Simon to have an "active shooter" protocol to protect its employees and patrons when that day finally came:

Several recent events have put shopping malls across the country on collective notice to have plans in place to deal with violent attacks. One momentous event was the attack on America on [September] 11, 2011. After 9/11 the rules changed for everyone. In the immediate years following 9/11, enterprises that were open to large numbers of the public, such as shopping malls, were admonished by the [Department of Homeland Security] to increase security. ... This provided notice to the shopping mall industry that security programs would need to endeavor to reasonably prevent and contain this contingency. This would include an active shooter protocol, a plan in place for trained security personnel to follow to identify, deter, prevent, respond to, and contain a shooter. Clearly, no "active shooter protocol" was in place on Nov. 20, 2005. There was no active shooter

¹⁶ *Id.* at 129-31.

¹⁷ *Id.* at 97, 104-06 (¶¶ 9.8, 28-30); *id.* at 114, 120 (¶¶ 11.14, 27); *id.* at 132-35; *id.* at 136-40.

¹⁸ *Id.* at 141-44.

evacuation protocol isolating the shooter. ... The need for such a plan made it foreseeable that a violent, criminal attack could occur. In addition, had a plan been in place either Mr. McKown could have been evacuated or secured or Mr. Maldonado neutralized before Mr. McKown was injured.¹⁹

D. On November 5, 2005, the Mall Security Director Warned Simon and IPC About the Need for More Security, Including Video Surveillance

On November 5, 2005, just fifteen days before McKown was shot, the same mall security director who discussed the mall's status as a "soft target" with Simon and IPC wrote a memorandum to Simon and IPC where he explained the need for more security to make the mall a "safer place to shop."²⁰

He started his request by reminding his superiors of the mall's long history of violence and its reputation as a soft, easy target: "Our biggest problems stem from the perception that the mall is a dangerous place. ... The media aggravate the problem by using the mall as a backdrop for any story that happened within a five-mile radius of the mall."²¹

In order to make the mall safer for its employees and patrons, he recommended surveillance cameras, moving security inside the mall, and a larger police presence.²² He knew something needed to be done because the mall's intercom was inaudible, none of their security guards were trained how to use it,

¹⁹ *Id.* at 104-05 (¶ 28).

²⁰ *Id.* at 82-83.

²¹ *Id.*

²² *Id.*

and even if they did, they had no access to it on the weekends, including the Sunday at issue.²³ There were also no security cameras in the mall or in the parking lot; rather than provide any “eyes” to their four-person security staff, Simon and IPC were waiting for “facial recognition” technology.²⁴

E. Dressed in a Trench Coat and Carrying a Guitar Case Full of Ammunition, a Shooter Aggressively Roamed the Mall, Spent Ten Minutes Loading His Weapons in a Vacant Hallway, and then Spent Eight Minutes Shooting People, Stopping with McKown

On November 20, 2005, fifteen days after Simon and IPC were reminded that they needed to do more to protect their “soft target,” a man named Dominick Maldonado approached the mall wearing a black trench coat and carrying a guitar case.²⁵ Underneath the trench coat and inside the guitar case were an assault rifle, a submachine gun, and a substantial amount of ammunition.²⁶

It is undisputed the Tacoma Mall does not have a musical venue, instrument shop, or any other store that would have made it normal for someone to be walking around with a guitar case, let alone someone in a trench coat. Not surprisingly, a witness recalled how the shooter “looked strange and somewhat out of place.”²⁷ Another witness described how the shooter was walking through the mall

²³ *Id.* at 86-87.

²⁴ *Id.* at 148.

²⁵ *Id.* at 149.

²⁶ *Id.* at 152, 54.

²⁷ *Id.* at 149.

“bumping into people, walking really fast ... like he was in a bad mood.”²⁸ Later, the shooter admitted he had gone to a bathroom near the food court and made a bunch of noise, “hoping someone would come and stop him.”²⁹

When nobody confronted him, the shooter moved into a vacant hallway.³⁰ For the next ten minutes he used the hallway to load his weapons.³¹ Although a witness noticed he stuck out as “unusual” because he was wearing a trench coat and smoking a cigarette as he loaded his weapons,³² Simon did not notice him because it still had no surveillance system.³³

After he finished loading his weapons, the man left the vacant hallway and began shooting.³⁴ For the next eight minutes he walked through the mall shooting people who did not know where the shots were coming from, who did not know how to evacuate, or who stayed in the mall to help sort out the confusion.³⁵

One of those people was Brendan McKown. McKown and other mall customers took refuge in one of the mall stores. He could hear the shooter discharging his weapon as the shooter marched up and down the mall, but he did

²⁸ *Id.* at 156-57.

²⁹ *Id.* at 162.

³⁰ *Id.* at 156-57.

³¹ *Id.*; *id.* at 162.

³² *Id.* at 163-64.

³³ *Id.* at 148.

³⁴ *Id.* at 156-57.

³⁵ *Id.* at 165.

not know where the man was or whether anyone was trying to stop him. Nobody told McKown or the other customers what was happening, nobody warned them where the shooter was located, nobody instructed them how to evacuate, and nobody told them whether the police were there or whether the police were on their way. Surrounded by chaos, McKown hoped he could at least protect himself and others with his concealed weapon.³⁶

McKown eventually thought the coast was clear. He holstered his weapon so he could survey the area outside the store without being shot by the police that he assumed were in the mall and had the situation under control. Unfortunately, the shooter was still active. When McKown started to leave the store, he came face-to-face with the shooter and became his last victim.³⁷

F. McKown's Experts Provided Unrebutted Testimony that Simon Should Have Had Policies in Place to Respond to the Shooting and Protect McKown and Others Because the Shooting was Reasonably Foreseeable

While McKown's experts testified the shooting was reasonably foreseeable and Simon could have done more to *prevent* it, they also testified 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.

³⁶ *Id.* at 167-69 (¶¶ 2-3).

³⁷ *Id.* at 169 (¶ 4).

The only evidence before the district court was their testimony that it was reasonably foreseeable that McKown and others would suffer harm when Simon had no ability to detect and respond to the imminent harm posed by the shooter while he roamed the mall in a trench coat with a guitar case full of ammunition; during the ten minutes he openly loaded his weapons in a vacant hallway; when he emerged with large guns under his trench coat and started shooting; or, at the very least, during the eight minutes after he started shooting and before he shot McKown.³⁸

Because the shooting was reasonably foreseeable, they explained how Simon breached the relevant standard of care after the shooting started by having (1) no ability to monitor the imminent danger through a surveillance system, (2) no ability to warn McKown of the imminent danger and evacuate him through an intercom system, (3) no off-duty police officers to neutralize the danger, and (4) no active shooter protocol to warn and evacuate McKown during the shooting.³⁹ Put another way, the experts testified that it was reasonably foreseeable that McKown and others would suffer harm because the mall did not have a surveillance system, did not have an intercom system, did not have off-duty police officers who could

³⁸ *Id.* at 171-72 (¶ 4); *id.* at 175; *id.* at 120-24 (¶¶ 28-32).

³⁹ *Id.* at 100, 104-08 (¶¶ 19, 28-29, 32-33); *id.* at 118-24 (¶¶ 22, 24-25, 28-32).

neutralize the danger, and did not have an active shooter protocol in place to warn and evacuate its invitees.⁴⁰

One of McKown's experts explained why it was reasonably foreseeable that McKown and others would suffer harm because of Simon's failure to implement these systems:

I have concluded that Simon Property Group and IPC failed to have an in-depth emergency preparedness plan as required by the standard of care in the industry, particularly given the "soft target" presented by the Tacoma Mall after September 11, 2001. This plan should have included prevention of and reaction to a violent, criminal attack or hostage-situation, such as Mr. Maldonado's. Mr. Erdie admitted that the defendants did not have such a plan. ... Security experts, including local and national police agencies, recommend that institutions like the Tacoma Mall have an emergency preparedness plan in place. This is because the large number of violent attacks at these institutions, including shootings in malls, has made security aware of the danger. The defendants failed to have any such plan in place which was a breach of the standard of care in the industry. As a result, it is my opinion that the defendants were unable to warn their invitees about Maldonado and how to quickly evacuate the building.

... It is my opinion that had Simon Property Group or IPC used a CCTV system, coupled with a public address system, they could have directed employees and customers, like Mr. McKown, away from Mr. Maldonado where they would not have been injured. Likewise, they could have directed the same to evacuation routes so that nobody was left as easy targets for Maldonado. ...

I have concluded that Simon Property Group and IPC failed to have an internal emergency communication system, such as a public address system, throughout the mall, as required by the standard of care in the industry. In the event of a major emergency, such as a violent, criminal attack like Mr. Maldonado's, an emergency communication system could have warned

⁴⁰ *Id.*

employees and shoppers of the danger and how to best exit stores and common areas and where to seek shelter and medical assistance. According to Mr. Erdie in his deposition, the Mall had a general intercom system but it was not very loud, inaccessible to security on the weekend, and IPC was not trained in its use. Having a communication system is a major component of many emergency plans to direct employees and shoppers on how to best exit; it is used to identify dangerous areas so people can avoid them. The public address system should be used in conjunction with a visual system, such as CCTV (see above). This dual system may significantly reduce loss of life or injury because responders can be directed to the most critical areas. On Nov. 20, 2005 the Tacoma Mall did not possess a true public address system; IPC did not even use the limited intercom system that the Tacoma Mall did have. No direction was provided to employees and shoppers on how to best exit the Mall. It is my opinion that had Simon Property Group or IPC used a public address system, coupled with a CCTV system, they could have directed employees and customers, like Mr. McKown, away from Mr. Maldonado where they would not have been injured.⁴¹

G. One of Simon's Security Guards Knew the Shooter and Could Have Recognized Him, But the Mall was Not Equipped with a Surveillance System.

At least one of Simon's security guards could have spotted the shooter and prevented the attack, but the mall did not have a surveillance system.

Chantel Bursott, who was on duty in the security office at the time of the shooting, knew the shooter was a "deranged psychopath" with a propensity for violence.⁴² She knew as much because the man had stalked her just days before the shooting, going so far as to stand outside of her home and stare angrily at her mother and child as if he wanted to kill them.⁴³ He was also the same "deranged

⁴¹ *Id.* at 119-22 (¶¶ 24, 28, and 29).

⁴² *Id.* at 187; *id.* at 191-93.

⁴³ *Id.* at 191-93.

psychopath” who had smashed her between her front door and the adjoining wall in front of her daughter.⁴⁴ According to Bursott, she would have recognized the man and would have warned others, but she never had a chance to do so because the mall did not have a surveillance system.⁴⁵

H. Simon Had Evacuation Procedures, But No Way to Implement Them

Although Simon lacked an active shooter protocol, it did have “Evacuation Procedures.” When it came time to evacuate during an emergency, the mall was supposed to “make an announcement over the PA system to customers in the mall” and to have its security team “insure[] that everyone vacates the building as safely and quickly as possible” and “inform each tenant to close their gates, security their store and leave immediately.”⁴⁶

Those procedures are evidence that Simon knew it was reasonably foreseeable that its invitees would suffer harm if the mall did not help them evacuate in an emergency. But when the shooting began and its invitees needed to be safely evacuated, nobody could help because the mall’s intercom system was inaudible, nobody knew how to use it, and even if they did, it was inaccessible to mall security on the weekends.⁴⁷ Even if the intercom system was working, the

⁴⁴ *Id.* at 4-5.

⁴⁵ *Id.* at 8.

⁴⁶ *Id.* at 194.

⁴⁷ *Id.* at 86-87.

mall could not have helped McKown and the other invitees “vacate the building as safely and quickly as possible” because it was flying blind – the mall had no surveillance system that would have allowed it to identify the location of the shooter and steer McKown and others away from him.⁴⁸

I. Simon Admits It Had a Duty to Protect McKown, But Claims an “Active Shooter” Was Not Foreseeable as a Matter of Law

Simon never disputed McKown’s expert testimony that it was common knowledge in the industry that a mall shooting was reasonably foreseeable, or that the industry standard required the mall to have a surveillance system and an intercom system in order to help its invitees safely evacuate during such emergency. Simon even admitted that the Department of Homeland Security has long urged malls to have an “active shooter protocol” for those very reasons.⁴⁹

Instead, Simon argued it had (and has) no duty to do anything to protect its invitees from a crime until after the first time the crime is committed at a particular mall. Regardless of industry knowledge, regardless of industry standards, regardless of what has happened at other malls across the country, regardless of what has happened at other malls in Washington, regardless of what has happened at other malls in Tacoma, and regardless of what has happened at other malls it owns, Simon argued that it had no duty to take any steps to protect its invitees until

⁴⁸ *Id.* at 148.

⁴⁹ *Id.* at 199 n. 3.

after a “similar act has occurred on the premises.” In this case, even though it conceded the Department of Homeland Security recommended it have an “active shooter protocol” to protect its invitees from an active shooter, Simon argued that it did not have a duty to adopt that protocol until after the first time an active shooter killed people in the Tacoma Mall.⁵⁰

The district court agreed: “... McKown has failed to submit competent evidence of random acts of indiscriminate shootings on Simon’s premises. Therefore, the Court should grant Simon’s motion for summary judgment on McKown’s negligence claims.”⁵¹

VI. SUMMARY OF ARGUMENT

McKown argues Simon and IPC had a duty to protect him because he was Simon’s invitee at the Tacoma Mall and because IPC contracted with Simon to fulfill its duty to protect him.

Under *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 203-04, 943 P.2d 286 (1997), which adopted Restatement (Second) of Torts § 344, McKown asserts the duty to protect him involved two separate duties: (1) a duty to observe and protect him before the shooting started, and (2) a duty to intervene and protect him after the shooting started.

⁵⁰ See generally *id.* at 195-206.

⁵¹ Excerpts of Record, Vol. 1, at 7.

McKown argues the district court erred in concluding Simon and IPC had no duty to protect him because it erroneously concluded the shooting was not foreseeable as a matter of law. More specifically, McKown argues the court erred by concluding a business owner can ignore common industry knowledge, and can ignore industry standards, and has no duty to protect its invitees until after the first time a particular crime occurs on the exact same premises. He argues the district court misapplied *Nivens* and mistakenly replaced the concept of “reasonably foreseeable harms” with “known harms.”

McKown argues the shooting was reasonably foreseeable because (1) his experts provided unrebutted testimony that it was common knowledge in the industry that the shooting was foreseeable, (2) his experts provided unrebutted testimony that it was common knowledge in the industry that McKown and others would suffer harm if the mall had no way to safely evacuate its invitees during an attack, and (3) he offered unrebutted evidence that Simon and IPC knew the mall was a “soft target” that might be attacked and knew their invitees were likely to suffer harm if they had no way to safely evacuate them during an attack.

Finally, McKown argues the district court erred in concluding IPC had no duty to protect him because IPC contracted with Simon to provide security at the mall, IPC’s mall security director testified his job was to provide a “safe place for people to come shop,” and IPC offered no evidence to suggest it did not intend to assume Simon’s duty. At the very least, McKown argues the district court erred in not allowing a jury to decide whether IPC intended to fulfill Simon’s duty to protect him.

McKown asserts the dispositive issue is whether a business owner in Washington has a duty to protect its invitees from reasonably foreseeable dangers, including common dangers recognized by its industry, or whether a business owner has no duty to protect its invitees from those dangers until after the first time a particular danger actually occurs on the same premises.

Because the district court believed that Washington law has not been clearly determined that issue,⁵² McKown respectfully requests the Court certify that issue to the Washington Supreme Court for review.

VII. ARGUMENT

A. **Simon and IPC Owed McKown Two Duties: a Duty to Observe and Protect, and a Duty to Intervene and Protect**

The district court erred in dismissing McKown's claims against Simon and IPC because it adopted Simon's erroneous argument that a business owner "can be held liable to their invitees for the intentional criminal acts of third parties *only if very similar criminal acts have occurred on the premises in the past.*"⁵³ As discussed below, that is not the law.

Before addressing that erroneous decision, it is important to point-out that Simon and IPC owed McKown two separate duties: (1) a duty to observe and

⁵² *Id.* at 4. Given the uncertainty of Washington law on this issue, McKown believes it would be appropriate for the Court to certify this issue to the Washington Supreme Court.

⁵³ Excerpts of Record, Vol. 2, at 195 (emphasis in original); Excerpts of Record, Vol. 1, at 7 (dismissing McKown's claims because McKown has failed to submit competent evidence of random acts of indiscriminate shootings on Simon's premises").

protect (e.g., someone *might* start shooting inside the mall), and (2) a duty to intervene and protect (e.g., someone *has* started shooting inside the mall).

The distinction between a business owner's duty to observe and duty to intervene was explained in *Nivens v. 7-11 Hoagy's Corner*, 83 Wn. App. 33, 45-46, 920 P.2d 241 (1996), *aff'd* by 133 Wn.2d 192, 202-03, 943 P.2d 286 (1997):

Similarly, § 344 reflects a duty to observe and a duty to intervene. The duty to observe is a duty of reasonable care to observe activity on the premises. The duty to intervene is a duty of reasonable care to prevent or control such activity as is unreasonably hazardous to others, by ejection, restraint, or other appropriate means. The duty to observe may exist whenever the premises are open to the public, but the duty to intervene arises only when a reasonable person in the same circumstances as the defendant would know, to use the words of § 344, that the accidental, negligent, or intentionally harmful acts of third persons "are being done or are likely to be done." In other words, the duty to intervene arises only when a reasonable person acting under the same circumstances as the defendant would perceive that unreasonable conduct by a third person is impending or occurring, and thus that there is an unreasonable risk of harm to invitees.

This distinction is important because McKown alleges Simon and IPC breached both duties, but the district court dismissed both claims because of its erroneous conclusion that the shooting was unforeseeable as a matter of law.

As these issues involve the application of Simon's duty, this Court reviews the district court's decision under a de novo standard of review. *Dyer v. U.S.*, 832 F.2d 1062, 1068 (9th Cir. 1987).

B. The District Court Erred in Concluding Simon Had No Duty to Observe and Protect McKown Based on Its Erroneous Decision that the Shooting was Unforeseeable as a Matter of Law

The district court erred in concluding Simon had no duty to observe and protect McKown⁵⁴ because it based that holding on its erroneous decision that the shooting was unforeseeable as a matter of law.

1. Simon Had a Duty to Observe and Protect McKown from Reasonably Foreseeable Harm

In Washington, a defendant has a duty to prevent the intentional acts of a third person when “a special relationship exists between the defendant and either the third party or the foreseeable victim of the third-party’s conduct.” *Hutchins v. Fourth Avenue Assocs*, 116 Wn.2d 217, 227, 802 P.2d 1360 (1991). For many years, the Washington Supreme Court has recognized that “[t]hese special relationships typically arise when one party is entrusted with the well-being of the other party.” *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998).

One type of special relationship that gives rise to such a duty is the duty of a business owner to protect its invitees from foreseeable harm. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 202-03, 943 P.2d 286 (1997) (a business has a duty to protect its invitees from foreseeable harm); *Folsom*, 135 Wn.2d at 674 n.1, (a possessor of land open to the public has an affirmative duty to protect its

⁵⁴ *Id.* at 2-9.

visitors). When it moved for summary judgment, Simon did not dispute that McKown was its invitee⁵⁵ or that *Nivens* is the leading Washington Supreme Court decision on a business owner's duty to its invitees.

In order to appreciate the Washington Supreme Court's decision in *Nivens*, it is important to start with the appellate decision that it affirmed in full. *See e.g. Nivens v. 7-11 Hoagy's Corner*, 83 Wn. App. 33, 920 P.2d 241 (1996), *aff'd by* 133 Wn.2d 192, 943 P.2d 286 (1997).

At the outset of that decision, the Washington Court of Appeals explained that plaintiff Nivens sued a 7-11 after he was attacked by loitering teenagers. Although teenagers often did so, and occasionally fought with each other, they had never attacked a customer. *Id.* at 36-37. After the 7-11 moved for summary judgment, Nivens responded with expert testimony that the store should have provided security to disband the teenagers. *Id.* at 39-40. Although the trial court denied the 7-11's motion, it later excluded evidence that the 7-11 failed to hire, or should have hired, security guards. Rather than proceed to trial on any other ground, Nivens asserted his claim was based "solely on the failure of the store to hire security personnel to deal with the loitering ... before the time that this assault occurred." *Id.* at 40. Based on this narrow theory, the trial court dismissed the case. *Id.*

⁵⁵ Excerpts of Record, Vol. 2, at 166 n. 6.

After focusing on this procedural history, the Court of Appeals reiterated that plaintiff Nivens raised only a narrow duty issue “with respect to the store’s conduct *before* the assault on Nivens began. Nivens does *not* contend that the store failed to exercise reasonable care *after* the assault had begun.” *Id.* at 40-41 (emphasis in original). (This is the separate duty to intervene that is analyzed in Section C, below).

The Court of Appeals then examined a Washington business owner’s duty to its invitees. Drawing heavily on the Restatement (Second) of Torts, the Court began by acknowledging that a landowner owes a duty to its invitees that consists of two components: one that relates to physical conditions on the premises, and a second that relates to human activities on the premises. Given the allegations at issue, the Court focused on the latter. *Id.* at 41-43.

This point in the decision is where the district court’s decision in this case misses the mark. Rather than support a restrictive view of duty, one that gives immunity to landowners for the first assault, the first rape, or the first murder, the Court of Appeals adopted the much broader duty that is recognized in Restatement (Second) of Torts § 344:

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 42-43.

The Court of Appeals explained this duty is imposed on landowners “based on the notion that one who controls any confined space, into which he or she invites the public, has an obligation of reasonable care to observe and control activities within that space.” *Id.* at 44. More specifically, the Court observed this duty to protect invitees really involves two separate duties:

Similarly, § 344 reflects a duty to observe and a duty to intervene. The duty to observe is a duty of reasonable care to observe activity on the premises. The duty to intervene is a duty of reasonable care to prevent or control such activity as is unreasonably hazardous to others, by ejection, restraint, or other appropriate means. The duty to observe may exist whenever the premises are open to the public, but the duty to intervene arises only when a reasonable person in the same circumstances as the defendant would know, to use the words of § 344, that the accidental, negligent, or intentionally harmful acts of third persons “are being done or are likely to be done.” In other words, the duty to intervene arises only when a reasonable person acting under the same circumstances as the defendant would perceive that unreasonable conduct by a third person is impending or occurring, and thus that there is an unreasonable risk of harm to invitees.

Id. at 45-46.

The Court then turned to whether “a reasonable person in the store’s position ... would have foreseen third-party conduct in the general nature of violence

directed at one or more of the store's invitees." *Id.* at 47. It concluded plaintiff Nivens failed to meet that burden because "[i]n sum, there is a dearth of evidence to support a finding that a reasonable person would have foreseen violence of the general type that occurred here, and neither the evidence nor inferences therefrom is sufficient to bring the store within the obligated class." *Id.* at 53.

Importantly for this case, the Court noted that plaintiff Nivens had withdrawn any claim that the 7-11 owed him a duty under Section 344(b) to warn him of the impending danger or protect him from it, so it did not reach the issue of whether the store owed him a duty once the assault started. *Id.*; *cf. Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 758 P.2d 524 (1988) (business owner had a duty to warn customers of a danger so they could protect themselves). (Again, this separate duty to intervene is discussed in Section C, below).

Upon review of that decision, the Washington Supreme Court began by agreeing that "[b]ecause a business has a special relationship with [its invitees], it has a duty to take reasonable steps to protect invitees from imminent criminal harm or reasonably foreseeable criminal conduct by third parties." *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 194, 943 P.2d 286 (1997). However, just like the Court of Appeals, the Court observed that Nivens "specifically confined his case" to whether business owners have "a distinct duty to retain security personnel to prevent criminal acts by third parties." *Id.* It pointedly noted that plaintiff

Nivens refused to raise any duty issue other than whether all businesses have a duty to hire security: “[t]he trial court actually attempted to persuade Nivens that just because the courts have not imposed an obligation to hire security guards does not mean [the 7-11] did not breach some other duty to Nivens ...” *Id.* at 196-97.

After canvassing prior cases, the Court described a Washington business owner’s duty to protect its invitees from the foreseeable acts of third parties:

What we have impliedly recognized in earlier cases, we now explicitly hold: a special relationship exists between a business and an invitee because the invitee enters the business premises for the economic benefit of the business. **As with physical hazards on the premises, the invitee entrusts himself or herself to the control of the business owner over the premises and to the conduct of others on the premises.** Such a special relationship is consistent with general common law principles. We discern no reason not to extend the duty of business owners to invitees 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 (emphasis added).

The Court then focused on the scope of the duty that arises from the special relationship between a business owner and its invitees. The Court adopted Restatement (Second) of Torts § 344 in its entirety because the duty recognized therein “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.” *Id.* at 203-04.

Importantly, the Washington Supreme Court rejected the district court's conclusion that a store owner must only protect its invitees from prior similar incidents on the specific 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.**

Id. at 204-05 (emphasis added).

Nowhere did the Washington Supreme Court hold that a business owner has immunity for the first rape, the first assault, or the first shooting victim on the premises, and nowhere did the Court limit the scope of the duty based on "the place or character of his business" as opposed to his "past experience." Instead, the Court made clear that "a business owes a duty to its invitees to protect them from imminent criminal harm and reasonably foreseeable criminal conduct by third persons" and "must take reasonable steps to prevent such harm in order to satisfy the duty." *Id.* at 205. And while the Court acknowledged the duty is limited by

what is foreseeable, it reaffirmed that “[f]oreseeability is ordinarily a fact question.” *Id.*

Turning to Nivens’ claim, the Court explained it would not analyze the foreseeability of Nivens’ injury because he “did not base his case on a general duty of a business to an invitee.” *Id.* Instead, Nivens argued that every business in America owes a duty to provide armed security to prevent criminal behavior, an argument the Court rejected because it would shift the burden of policing from government to business. However, while the Court was not willing to require every business owner to hire armed security, it acknowledged that “... 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 ...” *Id.* at 205-07.

Under *Nivens* and the Restatement (Second) of Torts § 344, the district court erred in concluding the shooting was unforeseeable as a matter of law because (1) Simon had a duty to protect McKown from reasonably foreseeable harm, (2) what is reasonably foreseeable depends on either “the place or character of [Simon’s] business” or “[Simon’s] past experience,” and, (3) the issue of foreseeability is a jury question given the evidence offered by McKown, which the district court was required to view in a light most favorable to McKown.

There is a good reason the Washington Supreme Court and § 344 utilize a “reasonably foreseeable” approach rather than giving business owners immunity for the first assault, the first rape, and the first shooting. If the district court is correct, and Simon had no duty until after the first “random act[] of indiscriminate shooting on Simon’s premises,”⁵⁶ no amount of “off premises” knowledge could ever force Simon or other business owners to take reasonable steps to protect their invitees from danger. Duty no longer depends on what is reasonably foreseeable, but on what has happened in the past at a particular business.

For example, sports stadiums, concert venues, airports and airlines could do away with security screening, even if they were aware of bombings and shootings at similar businesses. Or more to the point, even if Simon was aware of shootings at dozens of other malls, or even at its own malls, it would have no obligation to do anything to protect its invitees from that danger. Just like Simon argued to the district court, Simon and others businesses would have no obligation to acknowledge or abide by industry standards or regulations because the common knowledge and practices of an industry would be irrelevant. A business could ignore industry standards, admit it was “only a matter of time,” yet escape liability.

In fact, that is what Simon and IPC argued in this case. Even though their security director told Simon and IPC that the mall needed a surveillance system to

⁵⁶ Excerpts of Record, Vol. 1, at 7.

make it a “safer place to shop,” even though Simon and IPC knew the mall was a “soft target,” even though Simon and IPC created evacuation points for the mall because they knew it might be attacked, and even though their Evacuation Procedures required them to use a (non-existent) intercom system to evacuate their invitees in order to protect them during an emergency, the district court concluded Simon was not required to do anything to protect McKown because this was the first time a shooter had opened fire inside the mall.

The problem with the district court’s holding is illustrated by Simon’s underlying argument that it “had no duty to have a surveillance system to monitor such an attacker, no duty to instruct plaintiff through an intercom system to evacuate in the event of such an attack, and no duty to hire armed police officers to kill the madman.”⁵⁷ Simon successfully made these arguments even though the evidence shows Simon knew it needed a surveillance system, knew it needed to safely evacuate McKown through an intercom system, and knew it needed to hire off-duty officers to protect its invitees.

The district court erred in agreeing with those arguments because the Washington Supreme Court did not adopt such a narrow view of a business owner’s duty to protect its invitees. The Court did not adopt such a narrow view of the law because, as reflected in Simon’s arguments, it would replace the duty to

⁵⁷ Excerpts of Record, Vol. 2, at 207-08.

protect invitees from “reasonably foreseeable” dangers with a duty to protect invitees from dangers that have already occurred. The district court erred in ignoring *Nivens* and conditioning Simon’s duty on evidence of prior “random acts of indiscriminate shootings on Simon’s premises.”⁵⁸

2. The District Court Ignored the Supreme Court’s Decision in *Nivens* and Felt Erroneously “Obligated” to Follow Lower Court Decisions that Misconstrue *Nivens* and Washington Law

Although the district court erred in adopting that restrictive view, it recognized that Washington law is unclear in this area: “The Court is unaware of, and the parties have not directed the Court’s attention to, a post-*Nivens* case in which the Washington Supreme Court considered the issue of foreseeability on facts analogous to those present in the instant action.”⁵⁹

Rather than abide by the “reasonably foreseeable” standard in *Nivens*, the district court adopted Simon’s more restrictive view and relied on a handful of lower court, post-*Nivens* decisions that injected a “prior similar acts on the premises test” requirement into a business owner’s duty. The district court felt

⁵⁸ Excerpts of Record, Vol. 1, at 7.

⁵⁹ *Id.* at 4. Given the uncertainty of Washington law on this issue, McKown believes it would be appropriate for the Court to certify this issue to the Washington Supreme Court.

“obligated” to do so because it concluded there was no convincing evidence that the Washington Supreme Court would decide differently.⁶⁰ This was error.

First, no Washington Supreme Court case has overruled *Nivens* or adopted the limitations urged by Simon and adopted by the district court.

While a few lower appellate courts have applied *Nivens*, none of those cases involved a “soft target” like the Tacoma Mall whose “place or character” made the harm reasonably foreseeable, and none of those cases involved a soft target’s duty in an era where domestic terrorism and “active shooters” are reasonably foreseeable dangers for a shopping mall, a point Simon conceded when it relied on the Department of Homeland Security’s post-9/11 procedures for responding to an active shooter.⁶¹ *Cf. Wilbert v. Metropolitan Park*, 90 Wn. App. 304, 950 P.2d 522 (1998) (business owner who rented space to weddings and dances); *Raider v. Greyhound Lines*, 94 Wn. App. 816, 975 P.2d 518 (1999) (plaintiff shot at bus terminal in 1992 because of race); *Fuentes v. Port of Seattle*, 119 Wn. App. 864, 82 P.3d 1175 (2003) (plaintiff’s car was hijacked in February 1998 by car prowler feeling police while she was in the waiting lane at the airport); *Craig v. Washington Trust Bank*, 94 Wn. App. 820, 976 P.2d 126 (1999) (bank janitor assaulted in alley while taking out the trash).

⁶⁰ *Id.*

⁶¹ Excerpts of Record, Vol. 2, at 199 n. 3.

Second, nothing in *Nivens* suggests a business owner's duty to protect its invitees from reasonably foreseeable harm should be conditioned on a prior similar act on the premises. If the Washington Supreme Court intended to impose such a limitation, it would have said so. But nowhere did the Court give the slightest opening for providing business owners immunity from suit until after the first act on its premises. Instead, the Court adopted Restatement (Second) of Torts § 344 in its entirety because the duty recognized therein "is consistent with and a natural extension of Washington law and properly delimits the duty of the business to an invitee." *Id.* at 203-04.

Third, a careful reading of the cases relied on by the district court⁶² show that, with all due respect to those appellate courts, the "prior similar acts on the premises" requirement has no foundation in Washington law.

Simon and the district court relied principally on *Wilbert v. Metropolitan Park*, 90 Wn. App. 304, 308-09, 950 P.2d 522 (1998), which noted that *Nivens* requires a business owner to protect its invitees from "harm that is reasonably foreseeable," but then observed that "Washington cases analyzing foreseeability have focused upon the history of violence known to the defendant. Where no evidence is presented that the defendant knew of the dangerous propensities of the individual responsible for the crime, and there is no history of such crimes

⁶² Excerpts of Record, Vol. 1, at 4.

occurring on the premises, the courts have held the criminal conduct unforeseeable as a matter of law." *Cf. also Raider v. Greyhound Lines*, 94 Wn. App. 816, 819, 975 P.2d 518 (1999) (relying on *Wilbert*); *Fuentes v. Port of Seattle*, 119 Wn. App. 864, 870, 82 P.3d 1175 (2003) (erroneously concluding *Nivens* requires "knowledge from past experience that there is a likelihood of conduct which poses a danger to the safety of patrons"); *Craig v. Washington Trust Bank*, 94 Wn. App. 820 (1999) (same).

The problem with these lower court decisions is that, as explained above, *Nivens* did not give business owners immunity for failing to protect their invitees from reasonably foreseeable harms, and it did not condition that duty on knowledge of a "prior similar act on the premises." Instead, the Court (and the Restatement) hold a business owner liable for harms that are reasonably foreseeable based on "the place or character of his business, or his past experience." *Nivens*, 133 Wn.2d at 204-05 (emphasis added). In limiting the duty to foreseeable harms based on a business owner's "past experience," those lower court decisions (and the district court) deviated from the Washington Supreme Court's holding that a business owner has a duty to protect its invitees from foreseeable harms based on the "place or character of his business."

Moreover, *Wilbert* was simply wrong when it relied on the generalization that "Washington cases analyzing foreseeability have focused upon the history of

violence known to the defendant” to create the “prior similar acts on the premises test” because none of the cases it cited involved evidence that the business owner owed its invitees a duty based on the “place or character of his business.” 90 Wn. App. at 308-09 (citing cases that discussed whether a business owner knew of a particular individual’s dangerous propensities rather than common knowledge in the industry and industry standards).

While those cases may inform a business owner’s duty based on its “past experience,” they are irrelevant to a business owner’s duty based on the “place or character of his business.” As noted above, this distinction makes sense: (1) a business owner has a duty to implement basic safeguards based on dangers associated with the “place or character of his business,” and (2) a business owner has a duty to implement additional safeguards based on other dangers he knows of because of “his past experience.”

The district court erred in concluding Simon had no duty to protect McKown based on dangers associated with the place and character of its business. The Court should reverse that decision and remand McKown’s claim so a jury may decide whether the shooting was reasonably foreseeable.

3. A Jury, not the District Court, Must Decide Whether the Harm was Reasonably Foreseeable

The district court erred in taking the issue of foreseeability away from the jury. Since 1953, the Washington Supreme Court has held that, where a party owes a duty to prevent harms caused by a third party, “foreseeability” pertains not to whether the specific incident or harm was foreseeable, but whether the harm fits within a general field of danger that is foreseeable:

It seems to us, however, that counsel unjustifiably restrict the issue when they ask us to focus attention upon the specific type of incident which here occurred - forcible rape. Whether foreseeability is being considered from the standpoint of negligence or proximate cause, 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.

The sequence of events, of course, need not be foreseeable. The 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, provided other requisites of legal causation are present.

McLeod v. Grant County School Dist. No. 128, 42 Wn.2d 316, 21-22, 255 P.2d 360 (1953); *see also Rikstad v. Homberg*, 76 Wn.2d 265, 269, 456 P.2d 355 (1969) (“[i]t is not ... the unusualness of the act that resulted in injury to 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 defendant”).

Whether a particular harm fits within the general field of danger is not a question for the trial court, but is instead a question for the jury: “We have held that it is for the jury to decide whether the general field of danger should have been anticipated by [a defendant].” *McLeod*, 42 Wn.2d at 324.

The district erred in taking the issue of foreseeability away from the jury because McKown’s experts, and Simon’s own security director, explained that the shooting was foreseeable. Any remaining question as to foreseeability is a question for the jury: “Foreseeability is normally an issue for the trier of fact and will be decided as a matter of law only where reasonable minds cannot differ.” *Schooley v. Pinch’s Deli Market*, 134 Wn.2d 468, 477, 951 P.2d 749 (1998); *Nivens*, 133 at 204-05 (foreseeability is normally a question of fact for the jury); *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999) (“Breach and proximate cause are generally fact questions for the trier of fact”); *Hansen v. Friend*, 118 Wn.2d 476, 483-84, 824 P.2d 483 (1992) (“Foreseeability is normally an issue for the trier of fact. In order to establish foreseeability: the harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant. It therefore remains a question for the trier of fact whether the harm... sustained was foreseeable.”).

Nationally, every person in the United States was warned of the threat of domestic terrorist attacks on “soft targets” after the attacks of September 11,

2001.⁶³ Not surprisingly, Simon's security director testified that after 9/11 there was "a lot of talk about terrorists attacking soft targets in the United States."⁶⁴ He had many conversations with Simon and IPC about how the Tacoma Mall was just such a "soft target."⁶⁵

Recognizing that national threat, Simon and IPC discussed what measures to take to prevent and respond to a violent attack.⁶⁶ Despite their conversations about this foreseeable threat, Simon and IPC moved slowly.⁶⁷ More than four years later, their mall did not have security cameras or a public address or mass notification system,⁶⁸ their mall was still understaffed,⁶⁹ and the Tacoma Police substation in the mall was closed.⁷⁰ While they did nothing, the area around the mall became increasingly dangerous, especially when compared to national and county crime statistics.⁷¹ These were all problems that Simon and IPC were aware of, but they did not start fixing them until 2006, after the November 2005 shooting.⁷²

⁶³ Excerpts of Record, Vol. 2, at 104-05 (¶¶ 28); *id.* at 108 (¶ 24).

⁶⁴ *Id.* at 87-89.

⁶⁵ *Id.* at 87-88.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 120-22 (¶¶ 28-29).

⁶⁹ *Id.* at 192-93 (¶¶ 9-10).

⁷⁰ *Id.* at 82-83.

⁷¹ *Id.* at 100-01 (¶¶ 21-23).

⁷² *Id.* at 82-83.

These omissions compounded the danger posed to their invitees because of the mall's reputation as an easy target for criminal activity, as their security director acknowledged shortly before the shooting.⁷³

Simon and IPC were aware, or at least should have been aware, of the danger of a mall shooting given the wave of mall shootings that had taken place in the years before the attack on November 2005.⁷⁴ They were also aware, or at least should have been aware, of the high number of violent crimes that had occurred within their own mall, including strong-arm robbery, assaults, batteries, fights, and the brandishing of lethal weapons, as well as property crimes that "have the potential of escalating to a crime against a person."⁷⁵ These events included six prior shootings at their mall and five other shootings at malls in the South Sound region between 1992 and 2001.⁷⁶

Although the district court concluded these shootings are not identical to the shooting that happened here, Washington courts focus on the "general danger area," not the "unusualness of the act." *Rikstad*, 76 Wn.2d at 269. Moreover, even if the "prior similar acts on the premises test" applied in this case, it is not to create some sort of robotic, bright-line rule, but to ensure businesses are not made "the

⁷³ *Id.*; *id.* at 120-23 (¶¶ 28-30).

⁷⁴ *Id.* at 105-06 (¶ 29).

⁷⁵ *Id.* at 101 (¶ 23).

⁷⁶ *Id.* at 126-27.

guarantor of the invitee's safety from all third party conduct on the business premises." *Nivens*, 133 Wn.2d at 203. In that regard, the test must be sufficiently flexible so that a jury can decide whether the prior acts, although not identical, put the owner on notice of the foreseeable danger that might befall its invitees.

It is also important to remember why the Washington Supreme Court recognized Simon had a special relationship with McKown in the first place: "a special relationship exists between a business and an invitee because the invitee enters the business premises for the economic benefit of the business. As with physical hazards on the premises, the invitee entrusts himself or herself to the control of the business owner over the premises and to the conduct of others on the premises." *Nivens*, 133 Wn.2d at 202-03.

The mall security director, as well as McKown's security experts, opined that the general field of danger included a "soft target" attack on the mall, which is what happened in this case. While Simon was free to argue otherwise, the jury, not the district court, should decide whether a mall shooting was foreseeable.

By choosing to run the Tacoma Mall and retain "the economic benefits of the business," Simon also chose to protect its invitees, like McKown, who entrusted Simon with their care. Viewing the evidence in a light most favorable to McKown, a reasonable jury could conclude the shooting was foreseeable. The

district court erred in ignoring that evidence, taking this factual issue away from the jury, and deciding foreseeability as a matter of law.

C. The District Court Erred in Concluding Simon Had No Duty to Intervene and Protect McKown Once the Shooting Started Based On Its Erroneous Decision that the Shooting was Unforeseeable as a Matter of Law

The district erred in concluding Simon had no duty to intervene and protect McKown once the shooting because it erroneously concluded the shooting was unforeseeable as a matter of law.⁷⁷

According to the district court, Simon had no duty to intervene and protect McKown because “[t]he business owner must be found to ‘reasonably anticipate careless or criminal conduct’ before either the ‘duty to take precautions against it’ or the duty ‘to provide a reasonably sufficient number of servants to afford a reasonable protection’ arises.”⁷⁸ That conclusion is contrary to the decision of the Court of Appeals in *Nivens* because it means a business owner has no duty to protect its invitees even after the owner learns that its invitees need help (e.g., it ignores the concept of having a duty to “intervene”):

Similarly, § 344 reflects a duty to observe and a duty to intervene. The duty to observe is a duty of reasonable care to observe activity on the premises. **The duty to intervene is a duty of reasonable care to prevent or control such activity as is unreasonably hazardous to others, by ejection, restraint, or other appropriate means.** The

⁷⁷ Excerpts of Record, Vol. 1, at 2-9.

⁷⁸ *Id.* at 8.

duty to observe may exist whenever the premises are open to the public, but the duty to intervene arises only when a reasonable person in the same circumstances as the defendant would know, to use the words of § 344, that the accidental, negligent, or intentionally harmful acts of third persons “**are being done** or are likely to be done.” In other words, the duty to intervene arises only when a reasonable person acting under the same circumstances as the defendant would perceive that unreasonable conduct by a third person is impending **or occurring**, and thus that there is an unreasonable risk of harm to invitees.

Nivens, 83 Wn. App. 33, 45-46, 920 P.2d 241 (1996) (emphasis added), *aff’d* by 133 Wn.2d 192, 943 P.2d 286 (1997).

While the district court acknowledged that decision, it chose to ignore it because it concluded the language was dicta. Even if that was true, the Court of Appeals was discussing the Restatement (Second) of Torts § 344, which the Washington Supreme Court adopted in its entirety. The Court did so because the duty recognized therein “is consistent with and a natural extension of Washington law and properly delimits the duty of the business to an invitee.” 133 Wn.2d at 203-04; *see e.g. Passovoy v. Nordstrom*, 52 Wn. App. 166, 172-73, 758 P.2d 524 (1988) (store had a duty to warn its invitees in time for them to protect themselves from a fleeing shoplifting suspect), *review denied*, 112 Wn.2d 1001 (1989).

As discussed above, the Restatement (Second) of Torts § 344 and *Passovoy* reflect two separate duties: (1) a duty to observe and protect an invitee from dangers that are reasonably foreseeable (e.g., someone *might* start a fire in the

movie theatre), and (2) a duty to intervene and protect an invitee from dangers that are actually occurring (e.g., someone *has* started a fire in the movie theatre).

As acknowledged by the Court of Appeals in *Nivens*, once the shooting started, Simon had a duty to use reasonable care “to prevent or control” the shooting “by ejection, restraint, or other appropriate means.” 83 Wn. App. at 45. And as acknowledged by *Passovoy*, a reasonable jury could conclude that “other appropriate means” includes taking reasonable steps to warn McKown of the impending danger so he could protect himself or evacuate. 52 Wn. App. at 172-73.

In concluding Simon had no duty to intervene and protect McKown, the district court ignored expert testimony that it was reasonably foreseeable that McKown would be injured because Simon had no way to detect and protect McKown from the shooter while he roamed the mall with a guitar case full of guns and ammunition, while he spent ten minutes openly loading his weapons in a mall hallway, or during the eight minutes that he roamed the mall shooting people.

The district court also ignored evidence that Simon knew its invitees would be injured if it failed to help them safely evacuate during an emergency, and it ignored McKown’s expert testimony that it was reasonably foreseeable McKown and others would be harmed if Simon had no way to safely evacuate them.

The district court erred in concluding Simon did not have a duty to intervene and protect McKown because, viewing this evidence in a light most favorable to

McKown, a reasonable jury could conclude it was reasonably foreseeable that McKown would be harmed if Simon and IPC did not have a way to safely evacuate him during an emergency.

D. The District Court Erred in Concluding IPC Had No Duty to Protect McKown When It Contracted to Fulfill Simon's Duty to Protect Its Invitees from Foreseeable Harm

The Court should reverse the district court's conclusion that IPC had no duty to protect McKown because (1) Simon had a duty to protect McKown from reasonably foreseeable harm, and (2) IPC contracted with Simon to fulfill that duty.⁷⁹ As this issue involves whether IPC owed McKown a duty, this Court reviews the district court's decision under a de novo standard of review. *Dyer*, 832 at 1068.

In this case, IPC assumed Simon's duty to protect McKown and the mall's other invitees from foreseeable harm because it signed a "security services contract" with the mall to do so. *Folsom*, 135 Wn.2d at 676 ("liability can arise from the negligent performance of a voluntarily undertaken duty"); *Hutchins*, 116 Wn.2d at 228 (acknowledging the "general group of cases" cases where a duty exists because of a "protective" relationship that involves "an affirmative duty to render aid"); *Caulfield v. Kitsap County*, 108 Wn.App. 242, 255, 29 P.3d 738

⁷⁹ *Id.* at 30-37.

(2001) (noting "these special tort duties are based on the liable party's assumption of responsibility for the safety of another").

Under that contract, IPC had a duty to (1) respond to all alarm conditions and any other indications of suspicious activities at the mall, (2) use reasonable efforts to deter and detain persons who were attempting to gain unauthorized access to the mall, and (3) respond to and provide assistance in security-related situations, including criminal acts.⁸⁰ Given those responsibilities, it is not surprising that IPC's head of mall security stated his job was "to provide a safe place for people to come and shop."⁸¹

A security company's duty to protect the invitees of another business was the issue before the Washington Supreme Court in *Folsom*, where the Court analyzed whether a private security company had a duty to protect the employees of a restaurant that had contracted with the company for security.

Initially, the Court noted that "absent affirmative conduct or a special relationship, no legal duty to come to the aid of a stranger exists" and that "a private person does not have the duty to protect others from criminal acts of third." 135 Wn.2d at 674. However, the Court explained there are exceptions to these rules that "may create an affirmative duty to protect another from harm," and it

⁸⁰ Excerpts of Record, Vol. 2, at 49.

⁸¹ *Id.* at 84.

noted that “[t]hese special relationships typically arise when one party is entrusted with the well-being of the other party.” *Id.* at 674-75.

Although *Folsom* concluded the security company did not have a special relationship with the employees, its holding was premised solely on the fact that the security company’s contract with the restaurant had expired:

Spokane Security contracted to provide security monitoring for the Burger King restaurant; however the contract was terminated by [the franchisee] 10 months prior to the murders. While the facts indicate the equipment remained in place and was functional, **Spokane Security was not contractually obligated to provide security services** and plaintiffs have not established there was a legally recognized or established special relationship with the employees.

Id. at 675 (emphasis added).

In other words, the only reason the security company did not have a special relationship with the restaurant's employees was because its contract with the restaurant had ended ten months before the incident.

Unlike the contract in *Folsom*, it is undisputed that (1) IPC had an on-going contract with Simon to provide a safe and secure environment to McKown and the mall's other invitees, (2) IPC understood it was responsible for providing such an environment because it had been doing so since 1999, and (3) IPC’s mall security director was actively involved in evaluating the mall’s security, including the need for video surveillance and better ways to protect its invitees.

These facts establish the special relationship that was missing in *Folsom*, and that special relationship means IPC had a duty to protect McKown from foreseeable danger. *Id.* at 676 (“liability can arise from the negligent performance of a voluntarily undertaken duty”).

Protecting McKown and other mall customers was not an "incidental" benefit of the contract. To the contrary, the sole purpose of that contract was to provide a safe and secure environment to McKown and the mall's other invitees. This is reflected in the plain language of the contract, which was to provide security services at the mall, as well as the deposition testimony of IPC's director of mall security, who testified he was responsible for providing “a safe place for people to come and shop.”

Nowhere below did IPC offer any evidence or other explanation as to why it had a contract to provide security services at the mall. *Cf. Lonsdale v. Chesterfield*, 99 Wn.2d 353, 361, 662 P.2d 385 (1983) (“If the terms of the contract necessarily require the promisor to confer a benefit upon a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person.”); *see also Postlewait Constr., Inc. v. Great Am. Ins. Cos.*, 106 Wn.2d 96, 99, 720 P.2d 805 (1986) (whether parties to a contract intended to benefit a third-party is an objective test).

Someone was legally responsible for carrying out Simon's duty, and according to IPC's contract with Simon and according to its own mall security director, that someone was IPC. If IPC had no special relationship with McKown and no duty to render him aid, why did it contract with the mall to (1) respond to all alarm conditions and any other indications of suspicious activities at the mall, (2) use reasonable efforts to deter and detain persons who were attempting to gain unauthorized access to the mall, and (3) respond to and provide assistance in security-related situations, including criminal acts?

The district court's conclusion that these terms do not create a protective relationship ignores the purpose of the contract.

Finally, the district court erred in concluding there was no evidence that IPC intended to assume Simon's duty to McKown. To the contrary, the *only* evidence offered, evidence that must be viewed in a light most favorable to McKown, established that IPC intentionally assumed that duty in 1999 and re-committed itself to that duty in 2003.⁸² IPC and Simon were sufficiently concerned about IPC's exposure for doing so that they amended their agreement in 2004 to ensure IPC listed Simon as an additional insured to its insurance policies.⁸³

⁸² *Id.* at 41, 48.

⁸³ *Id.* at 62-63, 74, 80.

As discussed above, the terms of the contract between IPC and Simon required IPC to perform a range of security services that reflect their intent for IPC to fulfill Simon's duty to protect its invitees from reasonably foreseeable harms. While IPC argued that nothing in the contract required it to open fire on the shooter, that narrow view of the contract misses the point: a reasonable jury could conclude Simon and IPC intended for IPC to fulfill the mall's duty to take reasonable steps to protect McKown. This is why IPC's head of security testified his "main responsibility" was "to provide a safe place for people to come shop."

Although IPC made self-serving arguments regarding its subjective intent, the intent of the parties may be objectively determined "from the actual language of the disputed provisions, the contract as a whole, the subject matter and objective of the contract, the circumstances in which the contract was signed, the later acts and conduct of the parties, and the reasonableness of the parties' interpretations." *Diamond B. Constructors, Inc. v. Granite Falls School Dist.*, 117 Wn. App. 157, 161, 70 P.3d 966 (2003). The intent of IPC and Simon is apparent in the plain language of the contract, which is for "security services" and required IPC to (1) respond to all alarm conditions and any other indications of suspicious activities at the mall, (2) use reasonable efforts to deter and detain persons who were

attempting to gain unauthorized access to the mall, and (3) respond to and provide assistance in security-related situations, including criminal acts.⁸⁴

A reasonable jury could conclude these terms were intended to ensure that mall invitees like McKown were protected. As the Court noted in *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 361, 662 P.2d 385 (1983): “If the terms of the contract necessarily require the promisor to confer a benefit upon a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person.” The contract here necessarily required IPC to confer a benefit upon McKown and the mall’s other invitees, which means IPC intended its contract with Simon to benefit McKown.

The intent is also apparent from the subject matter and objective of the contract because it is a comprehensive contract to provide “security services” at the mall, particularly where IPC cited no evidence that someone else was providing such services. The intent is also apparent from the later acts and conduct of the parties as it is undisputed that IPC provided security services for the mall’s invitees. This is reflected in the testimony of the director of security, who testified his job was “to provide a safe place for people to come shop.” Even if that director did not participate in the negotiation or formation of the contract, his testimony is evidence of the later acts and conduct of the parties.

⁸⁴ *Id.* at 49.

And finally, the intent is apparent from the reasonableness of the parties' interpretations. Under McKown's interpretation, the mall contracted with IPC, a massive security company, to provide security for its mall invitees at the Tacoma Mall and dozens of other malls. Under IPC's interpretation, it had no such duty. A reasonable jury could conclude that interpretation is not only unreasonable, but it makes no sense as it means the mall would have been perfectly content if an IPC security guard simply walked away while one of its invitees was being assaulted.

At most, given the disputed issue of fact regarding the intent of Simon and IPC, it was error for the district court to take this issue away from the jury. *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 311, 57 P.3d 300 (2002) (a jury must decide the intent of parties if it requires "a choice among reasonable inferences to be drawn from extrinsic evidence").

VIII. CONCLUSION

For the foregoing reasons, the Court should (1) reverse the district court's decision to dismiss McKown's negligence claims against Simon and IPC, and (2) remand this case to the district court for trial.

IX. STATEMENT OF RELATED CASES

McKown is unaware of any known related case pending in this Court.

Dated this 20th day of September 2011.

Respectfully submitted,

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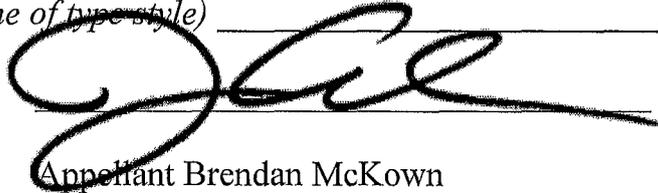
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Attorney for

Appellant Brendan McKown

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I, **Angela Holm**, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed at Pfau Cochran Vertetis Amala PLLC, and that on today's date, I caused to be served (1) the foregoing Brief of Appellant via ECF electronic service, and (2) the Excerpts of Record (Volumes I and II) via regular mail and electronic mail, by directing delivery to the following individuals:

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DATED this 20th day of September 2011.



Angela Holm