

SUPREME COURT OF THE STATE OF WASHINGTON

McKown v. Simon Prop. Grp., Inc., 182 Wn. 2d 752

344 P.3d 661 (2015) · No. No. 87722-0 · Decided March 5, 2015

SUMMARY

The Washington Supreme Court answered certified questions from the Ninth Circuit concerning a business owner's duty to protect invitees from third-party criminal conduct. The court held that Washington generally follows Restatement (Second) of Torts § 344 and comments d and f, and that a duty based on prior similar acts requires incidents sufficiently similar in nature and location, sufficiently close in time, and sufficiently numerous to provide notice of likely harm. The court did not decide when a duty may arise solely from the place or character of a business.

CASE DETAILS

COURT	Supreme Court of the State of Washington
WRITING FOR THE COURT	Madsen, C.J.
JURISDICTION	Washington
DECIDED	March 5, 2015
DOCKET	No. 87722-0
DISPOSITION	other
PROCEDURAL POSTURE	The United States Court of Appeals for the Ninth Circuit certified three questions concerning Washington premises-liability law to the Washington Supreme Court.
STANDARD OF REVIEW	Questions concerning the existence of a legal duty are reviewed as questions of law. Foreseeability concerning whether harm falls within the scope of an established duty is ordinarily a question for the trier of fact, but may be decided as a matter of law when reasonable minds cannot differ.
PRECEDENTIAL VALUE	published precedential en banc opinion
PARTIES	Brendan McKown v. Simon Property Group, Inc., IPC International Corporation

TOPICS

premises liability

duty of care

negligence

appellate procedure

standard of review

PRACTICE AREAS

torts premises liability negligence appellate procedure

QUESTIONS PRESENTED

1. Whether Washington generally adopts Restatement (Second) of Torts § 344, including comments d and f, as governing the duty owed by businesses to invitees.
2. Whether a plaintiff must prove prior similar acts of violence on the premises to create a genuine issue of material fact regarding the foreseeability of third-party criminal harm.
3. If a prior-similar-incidents approach applies, what characteristics make prior incidents sufficiently similar to establish foreseeability.
4. Whether the place or character of a business, standing alone, can establish a duty to protect invitees from third-party criminal conduct.

HOLDINGS

1. Washington generally adopts Restatement (Second) of Torts § 344, including comments d and f, as consistent with Washington law and as describing the contours of a business possessor's limited duty to protect invitees from third-party criminal conduct.
2. Proof of prior similar acts is not the only way to establish a business's duty or the foreseeability of third-party criminal harm under § 344. The court declined to decide the circumstances under which the place or character of a business alone may create such a duty.
3. When a duty is premised on the possessor's prior experience, the plaintiff must generally show a history of prior similar incidents on the business premises. The prior incidents must be sufficiently similar in nature and location, sufficiently close in time, and sufficiently numerous to have placed the business on notice that similar criminal conduct was likely to occur.

KEY QUOTATIONS

“The prior acts of violence on the business premises must have been sufficiently similar in nature and location to the criminal act that injured the plaintiff, sufficiently close in time to the act in question, and sufficiently numerous to have put the business on notice that such an act was likely to occur.” (at 1)

“But foreseeability as a question of whether a duty is owed is ultimately for the court to decide.” (at 6-8)

“A possessor of land who holds it open to the public for entry for his business purposes is not an insurer of the safety of such visitors against the acts of third persons.” (at 12)

“Subjecting a merchant to liability solely on the basis of a foreseeability analysis is misbegotten.” (at 17)

FACTUAL BACKGROUND

On November 20, 2005, Dominick Maldonado entered Tacoma Mall carrying concealed firearms and ammunition and opened fire on shoppers and employees. He injured seven people, including Brendan McKown, a mall employee who attempted to stop him. At the time, the mall had four unarmed security guards, no security

cameras, and an intercom system that was inaudible and inaccessible on weekends. McKown alleged that Simon failed to exercise reasonable care to protect him from foreseeable criminal harm.

PROCEDURAL HISTORY

McKown, a Tacoma Mall employee injured during a mass shooting, sued Simon Property Group in negligence. Simon removed the action to the United States District Court for the Western District of Washington and moved for summary judgment. The district court initially denied summary judgment, then reconsidered and granted it after concluding the shooting was unforeseeable as a matter of law under a prior-similar-acts test. The Ninth Circuit certified three questions to the Washington Supreme Court regarding the duty owed by businesses to protect invitees from third-party criminal conduct.

DISPOSITION

other

REMAND INSTRUCTIONS

The Washington Supreme Court answered the certified questions and did not direct further proceedings in the state court. The answers were to guide the Ninth Circuit in resolving the federal appeal.

CASES CITED

- *Nivens v. 7-11 Hoagy's Corner*, 133 Wash. 2d 192, 943 P.2d 286 (1997)
- *Hutchins v. 1001 Fourth Avenue Assocs.*, 116 Wash. 2d 217, 802 P.2d 1360 (1991)
- *Christen v. Lee*, 113 Wash. 2d 479, 780 P.2d 1307 (1989)
- *Cummins v. Lewis County*, 156 Wash. 2d 844, 133 P.3d 458 (2006)
- *Schooley v. Pinch's Deli Market, Inc.*, 134 Wash. 2d 468, 951 P.2d 749 (1998)
- *Tincani v. Inland Empire Zoological Soc'y*, 124 Wash. 2d 121, 875 P.2d 621 (1994)
- *Younce v. Ferguson*, 106 Wash. 2d 658, 724 P.2d 991 (1986)
- *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wash. 2d 190, 15 P.3d 1283 (2001)
- *Robb v. City of Seattle*, 176 Wash. 2d 427, 295 P.3d 212 (2013)
- *Wilbert v. Metro. Park Dist. of Tacoma*, 90 Wash. App. 304, 950 P.2d 522 (1998)
- *Raider v. Greyhound Lines, Inc.*, 94 Wash. App. 816, 975 P.2d 518 (1999)
- *Fuentes v. Port of Seattle*, 119 Wash. App. 864, 82 P.3d 1175 (2003)
- *Johnson v. State*, 77 Wash. App. 934, 894 P.2d 1366 (1995)
- *MacDonald v. PKT, Inc.*, 464 Mich. 322, 628 N.W.2d 33 (2001)
- *McKown v. Simon Prop. Grp., Inc.*, 689 F.3d 1086 (9th Cir. 2012)