

66477-8

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**COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON**

No. 66477-8

PAUL L. DEWS,

Appellant,

vs.

KENNY SO and JANE DOE SO individually and their marital
community, and ROADRUNNER DELI MART CHEVRON, and
CHEVRON U.S.A., Inc., a foreign corporation,

Respondents.

OPENING BRIEF FOR THE APPELLANT

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II.
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III.
ASSIGNMENTS OF ERROR

A. ASSIGNMENT OF ERROR No. 1

The trial court erred in entering the order of December 17th, 2010, granting defendants' Roadrunner and Kidane Mengistu's motion for summary judgment.

B. ASSIGNMENT OF ERROR No. 2

The trial court erred in entering the order of December 17th, 2010, granting defendant Chevron's motion for summary judgment.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR No. 1

Is a gas station minimart liable for a criminal assault on a business invitee where it has provided inadequate help, late at night, in a high crime area, and the assault is committed by a former criminal employee?

D. ISSUES PERTAINING TO ASSIGNMENT OF ERROR No. 2

Is an oil company liable for the tortuous conduct of a retail outlet where the oil company controls or has the right to control the negligent conduct and where it enforced strict imaging standards in order to present to the public that the retail outlet was operated by the oil company?

IV.
STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND

The complaint in Cause No. 10-2-15609-7 KNT, PAUL L. DEWS v. KENNY SO and JANE DOE SO individually and their marital

community, and GARY RUFFERN and JANE DOE RUFFERN individually and their marital community, and ROADRUNNER DELI MART CHEVRON, and CHEVRON CORPORATION, a foreign corporation, was filed April 27, 2010. (CP at Pg. 1)

The First Amended Complaint entitled PAUL L. DEWS v. KENNY SO and JANE DOE SO individually and their marital community, and ROADRUNNER DELI MART CHEVRON, and CHEVRON U.S.A., Inc., a foreign corporation, Case No. 10-2-15609-7 KNT, was filed on August 10, 2011. The Answer and Third Party Complaint by defendant Roadrunner was filed August 10, 2011. (CP at Pg. 51).

The defendant Chevron U.S.A. Inc., filed its Answer and crossclaim to Plaintiff's Amended Complaint on August 13, 2011. (Cp at Pg. 30).

The complaint in Cause No. 10-2-30025-2 SEA, PAUL L. DEWS v. KIDANE MENGISTU and JANE DO MR. MENGISTU individually and their marital community, and ROAD RUNNER CHEVRON, was filed on August 20, 2010. (CP at Pg. 330).

An order consolidating the cases was entered October 1, 2010. (CP at Pg. 339).

Defendants Kenny So and Gary Rufferen were dismissed from the case. (CP at Pg. 28-29)

On December 17, 2010, the Honorable Hollis R. Hill entered an order granting summary judgment dismissing Kidane Mengistu and Roadrunner. (CP at Pg. 314-316). On December 17, 2010, there was also an order granting summary judgment dismissing Chevron. (CP at Pg. 317-319).

Plaintiff filed his Notice of Appeal to both orders of summary judgment on December 23, 2010. (CP at Pg. 320).

B. FACTS RELEVANT TO ROADRUNNER AND KIDANE MENGISTU

Roadrunner is a Chevron gas station with a convenience store attached located in a min-mall strip at 2125 SW 356 Street Federal Way, Washington 98422. (CP at Pg. 122 ln. 5-7). This location has been the focus of criminal activity from thefts, assaults, and robberies. (CP at Pg. 223-229, 4 ln 23). Roadrunner is a magnet for criminal activity and violence especially during the weekend night alcohol rushes. (CP 202 ln 9 to 203 ln. 4). There are 3 bars near Roadrunner Chevron. (CP at Pg. 217 (Mr. Mengistu Dep. Pg. 48 ln. 5-9)) “The busy beer run” occurs just before 2 a.m. (CP at Pg. 263 (mid page), 271 (mid page)).

In 2004, in addition to several reports of thefts at or near the location, there was a robbery at the Roadrunner address at 1:26 a.m. on June 6, 2004. (CP at Pg. 225). And 3 reports of assault nearby. (Id.). In

2005, there was a weapons offense reported at 1:43 a.m. on January 17, 2005, at Roadrunner Chevron address and one reported assault nearby and the usual spate of thefts. (CP 225-226).

In 2006, there was a reported robbery at Roadrunner Chevron near midnight on July 24th, 2006; a reported assault at 3:18 a.m. on January 27th, 2006, assaults in the area, 4 thefts of vehicles in the area, 2 of which occurred at Roadrunner. (CP at Pg. 226).

In 2007, an assault was reported at 3:18 a.m. at the Roadrunner address on January 27th, 2007, a 2nd degree theft on October 5th, 2007, not to mention the several assaults at a nearby bar at 11:30 p.m., 1:45 a.m., 1:49 a.m., at Hitching Post Saloon located at 2215 S.W. 356th Street, which is less than a stone throw away from 2125 S.W. 356th Street. (CP at Pg. 227). All this is in addition to the theft of vehicles and 7 other reported thefts in the area. (*Id.*)

In 2008, before the incident that is subject of this lawsuit, there was a reported assault at the Roadrunner address on March 2, 2008, in addition to the 5 thefts reported at that address. (CP at Pg. 227-229). There were a total of 4 other reported assaults in the area and 1 robbery. (*Id.*) There were a total of 14 thefts reported in the area. (*Id.*)

Kidane Mengistu has testified that there were 3 bars around Roadrunner on November 21, 2008 (CP at Pg. 217 (Dep. Pg. 48 ln. 5-9));

that the parking lot is busy with patrons on Friday and Saturday nights (CP at Pg. 217 (Dep. Pg. 46 ln. 1-14); that there are no other businesses on the strip open between 11:00 p.m. to 2:00 a.m. that he knows of (CP at Pg. 221 (Dep. Pg. 70 ln. 19-23)). Roadrunner is open 24 hours a day (CP at Pg. 212 (Dep. Pg. 19 Ln 12, 13)).

Shoplifting is rampant at Roadrunner. (CP at Pg. 202 ln. 9-18). Mr. Mengistu testified that 3 to 4 instances of shoplifting occur per week (CP at Pg. 218 (Dep. Pg. 51 ln. 4-7)); but his then employee, Amanda Johnston, recalls 6 to 7 instances on just the night of the incident (CP at Pg. 202 ln. 21-23). Ms. Johnston remembers many patrons drunk or on drugs at the store the night of the incident, one of which tried to steal an 18-pack of beer. (CP at Pg. 5 ln. 20-22). Ms. Johnston yelled at him as he was walking out the door and the shoplifter dropped the beer at the door but remained to stand near the door for an extended period of time. (*Id.*). Ms. Johnston remembers large crowds of drunken people hanging-out at Roadrunner Friday and Saturday nights weekends just before 2:00 a.m. because three local bars would close and people would rush to buy alcohol at Roadrunner and no other local stores were open that late. (Cp at Pg. 202 ln. 9-18).

On or about July 18, 2008, Mr. Mengistu, hired Rodrigo Hernandez as a cashier. (Cp at Pg. 246). Hernandez was a violent

convicted felon and x-convict on parole with an outstanding Washington State warrant. (CP at Pg. 252-261). Mr. Mengistu testified:

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- 15 Q Okay. Do you ask employees either orally or in writing
16 whether they have a criminal history?
17 A Yes, I do ask them, and on the application they complete,
18 they are asked, too.
19 Q Do you do a background check if they do have a criminal
20 history?
21 THE INTERPRETER: Interpreter asks to repeat the
22 last part.
23 A Yes, on the application, application asks for a background
24 history. And then on the applications they are asked to
25 write their background history, and I check that

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- 1 background history. Then I hire them if the background
2 history is --
3 Q All right. I'm asking about an independent check. If
4 they say, "No, I have no background history of criminal
5 law", do you go further to check whether or not they do?
6 A Yes, I do my own checking by calling the previous
7 employers because on the application it asks for phone
8 numbers of previous employers and I call and check about
9 their history.
10 Q What type of criminal history would disqualify an
11 applicant?
12 A Anyone with any kind of criminal history, I've never
13 hired.
14 Q Did you hire Rodrigo Hernandez?
15 A Yes.
16 Q Did you have him fill out a question asking whether he had
17 a criminal history?
18 A Yes, he completed an application.

(CP at Pg. 214)

Not only does the application filled out by Hernandez not contain any question about criminal history, it does not ask for the telephone numbers of previous employers. (CP at Pg. 246-247). Mr. Mengistu never checked with any of Hernandez's previous employers (CP at Pg. 216 (Dep. at Pg. 41 ln. 12-22)). A simple background check would have disclosed that Hernandez was on probation in Washington, had a warrant for his arrest and was convicted of aggravated battery of a police officer, burglary, stealing a car, possessing burglary tools, and aggravated felony DUI. (CP at Pg. 252-261). Mr. Mengistu has never done or had done a criminal background check on any of his potential employees. (Cp at Pg. 221 (Dep. Pg. 71 ln. 6-8))

Mr. Mengistu later fired Hernandez under suspicious circumstances after he called the police. (CP at Pg. 216 (Dep. Pg. 42 Ln. 3 to Pg. 43 Ln. 3)). Hernandez had worked for Roadrunner for 2-3 months. (Id. (Dep. Pg. 41 Ln. 23-25).

At least two of Mr. Mengistu's employees, Cody Bonn and Kyle Allen, sold alcohol through the backdoor of Roadrunner, after the Washington State 2:00 a.m. deadline, in exchange for drugs and money. (CP at Pg. 4 ln. 11-13, 201 ln 12-15).

Roadrunner employed Ms. Johnston in November of 2008. (CP at Pg. 201 ln. 4-8). Ms. Johnston had a male co-worker from 11 p.m. to 2

a.m. during the two shifts that she worked the weekend before the incident. (CP at Pg. 201 ln. 6-8). These were the only two shifts Ms. Johnston worked before the night of the incident. (*Id.*) Mr. Mengistu promised Ms. Johnston that Bonn would work with her on the night the incident occurred. (CP at Pg. 4 ln. 1-2 and ln 18-20, 201 ln 4-8 and ln. 19-21).

Ms. Johnston's co-workers on the two shifts prior to the incident locked the beer cooler at 2:00 a.m. (CP at Pg. 202 ln. 4-6). The cashier that Ms. Johnston relieved on the night of the incident told her that the key to lock the beer cooler was broken, so Ms. Johnston did not lock the beer cooler to which Hernandez was able to steal beer. (CP at Pg. 202 ln. 7-9)

Mr. Mengistu had never before scheduled a female employee to work alone during the graveyard shift from 10 p.m. to 6 a.m. (CP at Pg. 213 (Dep. Pg. 31 Ln. 12-18)). Mr. Mengistu promised Ms. Johnston that she would always have a co-worker during the hours of 11 p.m. to 2 a.m. (CP at Pg. 201 ln 1-3).

The promised co-worker did not show up to work as scheduled on the night of the incident. (CP at Pg. 201 ln. 19-22). Mr. Mengistu did not answer his phone when Ms. Johnston called him to ask for another employee to cover Bonn's shift. (*Id.*). Mr. Mengistu did not provide a substitute co-worker. (*Id.*). Ms. Johnston witnessed 6 to 7 shoplifters steal

items the night of the incident. (CP at Pg. 202 ln. 21-23). She prevented one shoplifter from stealing an 18-pack of beer by verbally commanding him to stop. (*Id.*).

Mr. Mengistu has a live video feed of the convenient store surveillance camera to his home. (CP at Pg. 221 (Dep. Pg. 71 Ln. 18 to Pg. 72 Ln. 7)). He did not watch the video feed the night of the incident even though he was at home. (*Id.*). Mr. Mengistu knew camera facing the parking lot was not working the night of the incident and had not been working for at least 2 to 3 weeks before the incident. (CP at Pg. 201, 217 (Dep at Pg. 45 Ln. 16-25). Bonn and Allen knew the surveillance cameras were not working so that they could sell alcohol after the 2:00 a.m. deadline through the backdoor for money and drugs. (CP at Pg. 201 ln. 15-17)

Hernandez, as a former employee, was familiar with the operations of Roadrunner. (CP 4 at ln. 14-17).

Paul Dews arrived at Roadrunner at approximately 1:40 and bought 2 one-liter bottles of Mountain Dew and a pack of Camel filters at approximately 1:50 a.m. (CP at Pg. 205 ln. 19-21, 270-271). Mr. Dews saw that Ms. Johnston did not feel safe because of the criminal element and shoplifting during the “beer rush.” (CP at Pg. 270-271). Mr. Dews was smoking outside of the Roadrunner entrance just after 2:00 a.m. when

he saw Hernandez pull up in his car and walk into the store. (CP at Pg. 6 ln. 10-13).

Hernandez attempted to steal alcohol after the 2:00 a.m. deadline. (CP at Pg. 203 ln. 14-20). Ms. Johnston threatened to call the police if he did. (CP at Pg. 203 ln. 19-20). Mr. Dews heard Hernandez threaten to kill Ms. Johnston if she called the police. (CP at Pg. 7 Para. 60). Ms. Johnston called the police and walked towards Hernandez while speaking on the telephone. (CP at Pg. 203 ln.). As a result, Mr. Dews walked towards the front door. (CP at Pg. 7 Para. 60). Mr. Dews and Hernandez arrived at the door at the same time. (CP at Pg. 7 Para. 61). Ms. Johnston continued to walk towards Hernandez while speaking on the phone with the police. (CP at Pg. 280-281). Hernandez stabbed Mr. Dews in the face, breaking his six-inch blade in Mr. Dews' eye socket and nose. (CP at Pg. 7 Para. 65). Hernandez continued to stab Mr. Dews in his body with the knob of the knife – not knowing the blade was already lodged in Mr. Dews' face – in an apparent attempt to murder him. (CP at Pg. 7 Para. 67).

Ms. Johnston, instead of staying away behind the counter and calling 911, encroached upon the assailant at a brisk pace coming within arms-reach of Hernandez, which caused a violent response from Hernandez. (CP at Pg. 281-282). Mr. Mengistu believed his employee, Amanda Johnston, should not have approached Hernandez as he walked

out with the beer because this provoked Hernandez to stab Paul Dews.

(CP at Pg. 219 (Dep.Pg. 54 ln. 1-11))

Mr. Mengistu thought that his employee, Amanda Johnston, was wrong to follow the assailant she should have stayed behind the cash register. (CP at Pg. 219 (Dep. Pg. 54 ln. 1-11)). Hernandez pled guilty to attempted second degree murder for stabbing Mr. Dews and is now incarcerated. (CP at Pg. 283-285).

Sometime after the incident, Mr. Mengistu locked the doors after 1:00 a.m. and served alcohol through the window after he was robbed at gun point (CP at Pg. 221 (Dep. Pg. 50 ln. 3 to Pg. 51 ln. 3 and Pg. 70 ln. 13-18). At 1:56 a.m. on October 16, 2010, a man was shot to death in the Roadrunner parking lot during a weekend night beer rush. (CP at Pg. 250). A large crowd of people were in the parking during the shooting. (CP at Pg. 234-237). On December 20, 2010, after the filing of this appeal, a man was stabbed.

C. FACTS RELEVANT TO CHEVRON

Mr. Mengistu signed a contract with Chevron. (CP at Pg. 108 ln. 7-9).

Chevron has the authority to change the terms of the contract and has in fact unilaterally changed contractual terms related to, *inter alia*,

strengthening the mandatory training program requirements, adjusting the image/logo provisions, and raising the amount of insurance coverage.

The agreement that Chevron Products Company ('Chevron') enters with Chevron retailers have been revised. You should review the attached agreements with care. Change from the prior forms of agreements include the following: Changes Applicable to All Retailers...

(CP Pg. at 153-156)

Chevron required Mr. Mengistu to present his business to the public as a Chevron operated outlet for the benefit of Chevron by, *inter alia*, strictly controlling the Chevron image, logo and products displayed at Roadrunner for the benefit of Chevron.

(a)... Retailer agrees at all times to give the dispensing equipment, displays... and not to disparage or diminish in any way by act or omission the good reputation of such trademarks, trade names, products or retail outlets.

(c) Image Standards Chevron branded retail outlets comprise a unified network with a distinctive visual identity. **By conveying a coherent and instantly recognizable image, Chevron branded retail outlets boost brand recognition and increase the value of the brand for the benefit of Chevron** and its marketers and retailers alike. Accordingly, Retailer shall at all times during the term of this Contract cause the Premises to comply with Chevron current and future image standards for branded retail outlets, as set forth in Chevron *Hallmark 21 Retail Image Guidelines*...

(CP at Pg.128-129)(emphasis added).

Chevron's logos and insignias are clearly displayed throughout Roadrunner's premises in order to make Roadrunner to appear like a Chevron outlet. (CP at Pg. 231). Chevron can order Roadrunner to take down Chevron insignia. (CP at Pg. 131). Roadrunner employees are required to wear Chevron uniforms. (CP at Pg.109).

Chevron can terminate its contract with Roadrunner for at least 12 different reasons including:

- (1) Retailers by act or omission breaches or defaults on any covenant, condition or other provision of this Contract
...

(CP at Pg. 132-133)

Chevron and its representatives have the right to enter Roadrunner at any time to confirm performance of all the terms of the contract. (CP at Pg. 109). Chevron has the authority to send undercover agents to evaluate Roadrunner through its mystery shopper program. (CP at Pg. 2) Chevron requires Roadrunner adequately staff the premises. (CP at Pg. 109).

The contract requires Mr. Mengistu maintain safety and cleanliness at the premises. (CP at Pg. 109). Chevron representatives enter, evaluate and rate the facilities at least every two or three months using one of at least two different Chevron check-off lists. (CP at Pg. 141, 244-245). They give Mr. Mengistu a copy of the evaluation and give him verbal instruction on how to improve his rating. (Id.; CP at Pg. 177).

Chevron required Mr. Mengistu to attend a mandatory Chevron “Retailer Training Program” in San Ramon California. (CP at Pg. 97).

Chevron has the contractual authority to send Mr. Mengistu and at least one employee to at least one training course every year.

Chevron may require Retailer and one Retailer’s employees at the Premises to attend and successfully complete any such training program at the Retailer’s expense, subject to the following limitations... Chevron may not require attendance by Retailer and one of Retailer’s employees at more than one training program in any calendar year during the term of this Contract.

(CP at Pg. 129).

It is a breach of contract if Mr. Mengistu or an employee do not attend a Chevron training program after being ordered by Chevron or they fail to appear or fail a Chevron training test twice.

If Retailer or the employee fails to attend or successfully complete a required training program, the failing one(s) shall attend and successfully complete the next available session of the training program (provided that Retailer may designate another employee at the Premises to complete the required employee training). **A second failure by Retailer or an employee of Retailer to attend or successfully complete a required training program shall constitute a breach of this Contract.**

Id.

During Chevron’s Retailer Training Program, Chevron instructed Mr. Mengistu on how to handle safety on the premises by training and providing documentation regarding “video-robbery deterrence,” “locks on

alcohol beverage cooler doors,” “robbery deterrence decals” and issuing a “Chevron Retail Security Site Risk Rating Tool” (CP at Pg. 240-243).

All taxes charged to Chevron must be paid by Roadrunner.

- (c) Taxes: Any tax, duty, toll fee, impost, charge or other exaction, or the amount equivalent thereto, and any increase thereof now or hereafter imposed, levied or assessed by an governmental authority... if collectible or payable by Chevron, be paid by Retailer on demand by Chevron...

(CP at Pg. 130).

Chevron controls the type of gasoline octanes Roadrunner may purchase. (CP at Pg. 139). Chevron has the contractual authority to order Roadrunner to research and provide consultation to Chevron regarding how Chevron must comply with the local, state, and federal law. (CP at Pg. 133).

The contract requires that Roadrunner insure Chevron to the tune of at least \$1,000,000.00 per occurrence.

- (a) Retailer shall maintain, at Retailer’s own expense during the term hereof, insurance with respect to Retailer’s business, the Premises and all activities on or about or in connection with the Premises of the types and in the minimum amounts described as follows:
 - (1) Garage Liability or Comprehensive General Liability Insurance (bodily injury and property damage) of not less than \$1,000,000 combined single limit per occurrence...

- (b) The insurance required under clauses (1), (2) and (4) above shall provide that it is primary coverage with respect to Retailer, Chevron and all other additional insureds...

(CP at Pg. 135-136)

V.
ARGUMENT

A. SUMMARY JUDGMENT STANDARD

In reviewing a grant of summary judgment, an appellate court engages in the same inquiry as the trial court. *Nivens v. 7-11 Hoagy's Corner*, 133 Wash.2d 192 (1997). This court reviews issues of law *de novo*. *Id.*

Rule 56(c) provides in part that:

...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party....

Hash v. Children Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 915 (1988). A genuine issue of fact exists where reasonable minds could reach different conclusions in considering the same evidence. *Roth v. Kay*, 35 Wash.App. 1, 4, 664 P.2d 1299 (1983). The Court must view the evidence and all reasonable inferences from the evidence in the light most favorable to the non-moving party and most unfavorable to the moving party. *Id.*

Issues of negligence are ordinarily not susceptible to summary adjudication. *Id.* Summary judgment should be denied where the facts relevant to agency or independent contractorship are in dispute or are susceptible of more than one interpretation. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 616 P.2d 1223 (1980).

B. THE APPELLANT WAS A BUSINESS INVITEE SO THE RESPONDENTS OWED HIM THE HIGHEST DUTY OF CARE

Washington state has adopted § 332 Restatement (Second) Torts (1965) which defines “invitee” as:

1. An invitee is either a public invitee or a business visitor.
2. A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
3. A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

See also J.A. McKinnon et al. v. Washington Federal Savings and Loan Assoc. et al., 68 Wa.2d 644, 651 (1966). Washington state adopted the broadest definition of whom may qualify as a business invitee. *See Id.* at 650 (“Today we have decided to adopt the broader definition of invitee to include those who fall within the purview of the invitation as well as those who qualify as invitees under our long-standing economic benefit test.”).

Washington state law exacts a very high standard of care upon owner and occupiers of land to keep the premises safe for invitees. *Id.* at 648.

Paul Dews purchased cigarettes and soda at Roadrunner just before he was assaulted. This is contained in both his declaration and his statement to the Federal Way detective at the scene. He just walked out of the store to smoke a cigarette when the incident occurred. Even if he had not made a purchase, he would have come under the definition of “invitee” of Restatement § 332 and *J.A. McKinnon supra* and be entitled to the highest duty of care which is above the care required of trespasser or even a licensee. This special relationship is akin to the common carrier-passenger. The W.P.I. 100.01 for common carriers states that: “A common carrier has a duty to use the highest degree of care consistent with the practical operation of its type of transportation and its business as a common carrier. Any failure of a common carrier to use such care is negligence.” Therefore, the duty of care owed to the Appellant is among the highest standard of care in tort law.

C. KEN NIVENS v. 7-11 HOAGY’S CORNER ET AL. CONFIRMS THAT THE RESPONDENTS HAD A DUTY TO PROTECT THE APPELLANT FROM THE ASSAULT

In the seminal case of *Nivens*, the Court held that a merchant’s duty of reasonable care did not include providing armed security guard to

deter criminal acts of third parties because “To do so would unfairly shift the responsibility for policing, and the attendant costs, from government to the private sector.” *Nivens v. 711 Hoagy’s Corner et al.* 133 Wa. 2d 192, 205-206, 943 P.2d 286 (1997).

The *Nivens en banc* opinion starts out:

We must decide if a business owes a duty to its invitees to protect them from criminal acts by third persons on the business premises. Because a business has a special relationship with them, **it has a duty to take reasonable steps to protect invitees from imminent criminal harm or reasonably foreseeable criminal conduct by third persons.**

Id. at 194 (emphasis added).

At the outset, it should be noted that “Nivens did not present any evidence of other violent incidents at Hoagy’s.” *Id.* at 196. The plaintiff in *Nivens* based his appeal solely on the issue of whether Hoagy’s was required to provide security guards and actively avoided any claim for negligence based on foreseeable criminal activity or imminence. *Id.* at 205-206. *Nivens* would likely have affirmed the denial of summary judgment had Nivens plead such.

Hoagy’s filed a motion for summary judgment, asking for dismissal of all Nivens’s claims. Hoagy’s argued that in the absence of evidence of prior violence toward customers of the store, the attack on Nivens was unforeseeable. **The trial court denied this initial motion on June 15, 1992 because the foreseeability of the attack on Nivens was**

an issue of fact. Clerk's Papers at 271-73. The Court of Appeals affirmed the trial court...

Id. at 288 (emphasis added).

At common law, there was no duty to protect third persons from criminal acts. The Court in *Nivens* recognized the exception to the common law as set forth in The Restatement (Second) of Torts § 315.

“The RESTATEMENT (SECOND OF TORTS Section 315) states: There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection. We specifically adopted § 315...

Nivens at 200-201.

The *Nivens* Court stated “In this case, we must determine if the relationship between a business and a business invitee is a special relationship.” *Id.* at 200. The Court then lists the special relationships as “including common carrier and passenger...,” employee-employer relationships where the “employer has a duty to make reasonable provision against foreseeable dangers of criminal misconduct to which the employment exposes the employee”; psychotherapist and patient; hospital guest; and school and student. *Id.* at 201. Here, as stated above, the relationship between the Appellant and the Respondents is most akin to common carrier and passenger.

The *Nivens* Court finally concludes in its seminal holding:

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 202-203

The *Nivens* Court also makes the following appropriate observation which is applicable to our case:

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 204-205(emphasis added).

In summary the *Nivens* stated:

In summary, because of the special relationship that exists between a business and business invitee, we hold a business owes a duty to its invitees to protect them from imminent criminal harm and reasonably foreseeable criminal conduct by third persons. The business owner must take reasonable steps to prevent such harm in order to satisfy the duty.

Id. at 205.

The important observation here is that the Court specifically stated in *Nivens* “**We do not 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.**” Id. (emphasis added).

The plaintiff in *Nivens* would have survived summary judgment had he sought to establish a duty on the convenience store based on a general duty of a business invitee instead of insisting on finding a specific duty to provide security guards. Id.

Therefore, *Nivens* is the controlling case in this jurisdiction which establishes that the Appellant was a business invitee to which the highest duty of care was owed.

D. CRIMINAL CONDUCT AT ROADRUNNER WAS FORESEEABLE

The facts regarding foreseeability in this case, at the very least, create a question for the trier of fact that should survive summary judgment. The assault was foreseeable because the Respondents' agent chased and cornered a violent shoplifter without warning visitors. Serious assaults are also foreseeable where there is a high level of minor criminal activity and/or there is loitering in a convenient store parking lot after bars close and where there is a history of robberies and assaults.

It would undermine this state's adoption of the Restatement and this court's holding in *Nivens* if a store could not be held liable unless the criminal conduct is the exact type of crime, at the exact expected time, in the exact place, by the exact person, upon the exact victim in order to be foreseeable.

1. *THE CRIMINAL ACT WAS SUFFICIENTLY FORESEEABLE TO SURVIVE SUMMARY JUDGMENT BECAUSE FORESEEABILITY IS UNIQUELY A JURY QUESTION*

“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.” *Hansen v. Friend*, 118 Wn.2d 476, 484 (1992)(holding that even though the driver was under the legal age to drive a vehicle, the negligence was an issue of fact to be decided by the jury.)

The criminal activity need only fall within a “general field of danger” to be foreseeable. *McLeody v. Grant Cy. Sch. Dist.*, 42 Wn.2d 316, 321 (1953)(holding the "pertinent inquiry” regarding foreseeability of criminal conduct 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." Thus, a school district may be liable for the rape of a student by other students in a darkened, unsupervised room because acts of indecency in the room were foreseeable, even though the specific act of rape was not.).

The only time the issue of the foreseeability of criminal conduct is taken away from the jury at summary judgment is when "the occurrence is so highly extraordinary or improbable as to be wholly beyond the range of expectability." *Johnson v. State*, 77 Wash.App. 934, 942 (1995). For the purposes of summary judgment, the moving party will be assumed to know of the propensity of an assailant for violence based on any potentially available evidence. *See Robb v. City of Seattle*, No. 63299-0-I (Wash.App. 1st Div. 2010)(holding that “for the purposes of summary judgment, we assume [defendant officers] McDaniel and Lim personally knew or should have known” the assailant had a shotgun a few days before the incident even though the officers claimed they had not seen the spent shotgun shells near the assailant when they detained him a couple days before the murder.).

2. *THE RESPONDENTS ARE LIABLE BECAUSE THEIR EMPLOYEE CHASED THE ASSAILANT*

A store is liable for the assault of a visitor by a shoplifter where its employee chases the shoplifter and the shoplifter assaults the visitor in an attempt to flee the scene. *Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166 (1988)(overturning the grant of summary judgment to Nordstrom where its security guards chased a thief who shoved and injured the plaintiff in an attempt to flee the store). It is foreseeable that a fleeing shoplifter will injure an unsuspecting visitor upon being chased by an employee. *Id.* at 174. A employee that chases a shoplifters has a duty to warn visitors of the ensuing chase by giving “a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.” *Id.* at 172-173 (finding for the purpose of summary judgment that Nordstrom’s security guards did warn customers of the impending chase which could be required by the Restatement)(*quoting* Restatement (Second) of Torts § 344 (1965)). It is irrelevant whether store policy and training does not condone chasing shoplifters. *Id.* at 168-169 (“According to Passovoy, she further stated that the detectives should not have been chasing a shoplifter through the store because that was dangerous, that the detectives are instructed always to consider the safety of customers, and that, as a result of the incident, the store detectives had been retrained.”)

Here, like *Nordstrom*, the store's employee, Amanda Johnston, chased the shoplifter who assaulted the Appellant in an attempt to flee the store. Here, also like *Nordstrom*, the Respondents' employee did not adequately warn the Appellant as is required by the Restatement. Ms. Johnston called the police, after being threatened with death if she did, and briskly walked to within a few inches of the shoplifter. Ms. Johnston confronted numerous shoplifters on the night of the incident. She got in a verbal argument with one shoplifter. She also yelled at another who threw down his alcohol and hovered around the entrance. Mr. Mengistu could see all of this because he had a live video feed at his home. It is irrelevant whether Ms. Johnston did not follow store policy. Mr. Mengistu even admits that Ms. Johnston's actions in chasing the assailant was a factor in causing the assault.

Thus, it was sufficiently foreseeable that Hernandez would assault the Appellant especially have he was chased and fleeing from the scene.

3. *THE ASSUALT WAS FORESEEABLE BECAUSE THERE WAS A HIGH LEVEL OF CRIMINAL ACTIVITY AT THE LOCATION AND RESPONDENTS FAILED TO TAKE REASOANBLE STEPS TO ENSURE SAFETY*

Evidence of many minor crimes taking place on a premises make the foreseeability of more serious crimes occurring at least a jury question. *Wilbert*, 950 P.2d at 524; *Johnson*, 77 Wash. App. at 943 (evidence of

"numerous crimes" of a less serious nature taking place on campus makes rape sufficiently foreseeable making dismissal at summary judgment improper); *Cox v. Keg Restaurants U.S., Inc.*, 86 Wash.App. 239 (1997), *review denied*, 133 Wash.2d 1012, 946 P.2d 402 (1997) (premises liability verdict for assault affirmed where restaurant had notice of violent and intoxicated behavior by patron). A serious violent crime by an assailant that has only committed minor crimes in the past can be foreseeable and are thus not appropriately dismissed at summary judgment. *Robb v. City of Seattle*, No. 63299-0-I (Wash.App. 1st Div. 2010) (upholding a denial of summary judgment by the City of Seattle against the estate of a victim that was shot in the face for no apparent reason by an insane assailant that had only committed thefts in the past).

Here, like *Johnson*, there were numerous criminal acts on the premises including assaults and dozens of thefts a week. The overwhelming majority of these crimes went unreported. Here, unlike *Johnson*, there were also assaults on the premises as well. It does not matter that of murders, robberies, stabbings and shootings occurred after the assault of the Appellant. The assault of the Appellant was still sufficiently foreseeable due to the high level of criminal activity on the premises.

A convenience store owner can be liable if it fails to take reasonable steps to ensure safety of invitees in high crime areas can lead to liability.

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.

Nivens at 292 (italics in original)

See also Equilon Enters. v. Great Am. Ins. Co., 132 Wn. App. 430

(2006)(finding that Shell's insurance company must pay for the injuries of a visitor that was assaulted in the parking lot of Shell gas that was in a high crime area.). A convenience store owner can be liable if it attracts criminals and fails to disperse them and one violently attacks an invitee.

Equilon at 760-761 (enforcing the trial court's ruling at summary judgment that Shell is liable for the assault of visitor in the Shell parking lot by a large band of loiters); *See generally Nivens* at 289 (commenting that the 7-11 could be liable for the assault of an invitee by loiterers in the parking lot that regularly numbered from 10 to 100 had the plaintiff not

based his entire claim of negligence on the failure of the store to provide security guards).

Here, like *Niven* and *Equilon*, there were a large number of loiters outside of the store who engaged in criminal activity especially on weekend nights. Roadrunner is the only business open in its strip-mall and the surrounding area on weekend nights. Mr. Mengistu did not think criminal activity in the parking lot was his responsibility therefore he did not take steps to disperse or prevent the large number of criminals that would loiter in the parking lot after the three surrounding clubs would close. Employees also sold alcohol after hours in illicit transactions which likely attracted the assailant. This all attracted a high level of criminal activity on the premises, much of which went unreported. Respondents did not take reasonable steps to secure the premises.

Therefore, the high criminal activity on the Respondent's premises made the assault of the Appellant foreseeable.

E. CRIMINAL ACTIVITY WAS IMMINENT BECAUSE THE ASSAILANT WAS PROVOKED BY THE APPROACHING CLERK

As stated above, even if the criminal attack is not foreseeable, the Respondent can still be liable if the criminal harm was imminent. *Nivens* at 293 (holding "a business owes a duty to its invitees to protect them from imminent criminal harm.") The Respondents have a duty to take

reasonable steps to prevent imminent criminal harm. *Id.* (“The business owner must take reasonable steps to prevent such harm in order to satisfy the duty.”)

Not only did the Respondents not take reasonable steps to prevent the assault by at least providing additional help, or selling beer through a window as he later did; the clerk’s rapid approach of the assailant, after being threatened with murder, in fact caused the assault to be **imminent**. Her inexperience in dealing with criminal activity caused her to chase and corner an armed assailant while speaking on the telephone with police after being threatened with death if she called the police. She came within inches of the assailant. Mr. Mengistu was critical of Amanda Johnston for following the assailant because this was against his practice. Yet, Mr. Mengistu did not train her properly, did not properly supervise her, and improperly staffed the facility by leaving her alone. Mr. Mengistu even acknowledges that this was the first time he let a woman work alone on a night shift even though she was promised that she would never have to work alone during the night time rushes because she feared the criminal activity. These acts and omissions combined to put the clerk and the Appellant in immediate danger.

Respondents are liable for torts of their employees acting within the scope of their employment under the doctrine of respondeat superior.

Here, Amanda Johnston was the Respondents' agent and she was acting within the scope of her employment. The Respondents cannot use the relationship between their agent at the Appellant to undermine this doctrine.

Furthermore, as stated above, principals like Roadrunner and Chevron are responsible under the doctrine of respondeat superior when its employee created an emergency situation by chasing a shoplifter that threatened to commit murder, so that plaintiff had to come to her defense. *See Passovoy v. Nordstrom Inc.*, 52 Wa. App. 166 (1988).

F. RESPONDENTS' FAILED TO TAKE REASONABLE STEPS TO PREVENT THE APPELLANT'S INJURIES

According to *Nivens*, a business is liable for the assault of a business invitee by a third party if the business failed to take "reasonable steps" to protect the business invitee and the failure was the proximate cause of the assault.

In addition to the reasons listed above, respondents acted unreasonably, *in alia*, in the following ways which were the proximate cause of the assault:

1. Chasing and cornering a shoplifter while on the telephone with the police after being threatened with death if the police were called;

2. Hiring Hernandez, a convicted violent felon on parole with a warrant, such that he knew the operations of the mini-mart and believe he could illicitly get beer after the 2:00 a.m. deadline;
3. Failing to lock the alcohol cooler after the 2:00 a.m. deadline;
4. Failing to clear the parking lot of loitering groups of criminals;
5. Failing to properly staff the premises by not providing a second clerk to work during the nighttime weekend beer-rush after promising to do so;
6. Failing to supervise and train staff by, *inter alia*, leaving an untrained female employee alone, for the first time, during the nighttime weekend beer-rush after she said she would not work alone in such a criminal atmosphere;
7. Failing to keep essential video surveillance cameras in working order which allowed the illicit sale of alcohol by employees and other criminal activity;
8. Failing to respond to telephone calls of its employee Amanda Johnston;
9. Failing to report numerous acts of shoplifting and other criminal activity at the Roadrunner so that Roadrunner became a magnet for criminals especially on weekend nighttime rushes;

10. Failing to properly supervise Roadrunner on the live-feed video surveillance camera at Mr. Mengistu's home; and

Respondents could have taken the reasonable step of locking the front doors after 1 a.m. and selling items through a window as is now done. Washington State Rule of Evidence 407 allows subsequent remedial measures as evidence of feasibility of precautionary measures that could be reasonably taken to prevent the tortuous conduct. Mr. Mengistu finally decided to sell goods through the window after 1pm after *he* was robbed at gun point and a thief tried to walk out with the entire cash register when an employee failed to appear for a shift. This remedial measure did not prevent the murder in the parking lot on October 16, 2010, or the stabbing in the parking lot on December 22, 2010 (after the filing of the appeal), but it could have prevented the assault of the Appellant because Hernandez would likely have simply left if he did not have access to the alcohol cooler.

Chevron could have taken many steps to ensure safety, which would have prevented this incident from occurring including training or providing its retail owners a way to do criminal background checks on potential employees. Chevron could of used the before it hired Mr. Mengistu and employees like Conn and Allen.

G. THERE WAS NEGLIGENCE, NEGLIGENT SUPERVISION, NEGLIGENT HIRING, AND NEGLIGENT TRAINING

This court should not focus solely on whether Hernandez was an employee at the time of the tort. The negligence supervision, hiring, and training of Amanada Johnston, Cody Bonn, Kyle Allen is also the basis of the plaintiff's claims. See the immediately preceding section for how this negligence proximately caused the assault.

H. CHEVRON IS LIABLE FOR THE TORTUOUS CONDUCT OF ROADRUNNER, ITS EMPLOYEES AND MR. MENGISTU

Summary judgment should be denied where the facts relevant to agency or independent contractorship are in dispute or are susceptible of more than one interpretation. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 616 P.2d 1223 (1980). Usually the question of control or the right to control is one of fact for the jury. *Jackson v. Std. Oil Co.*, 8 Wn. App. 83, 91 (1972)(citing *McLean v. St. Regis Paper Co.*, 6 Wn. App. 727 (1972). “[T]he label ‘employee,’ or ‘agent’” is not determinative of the question of vicarious tort liability. *Id.* at 91. Rather, vicarious liability arises when one controls or has the right to control another’s actions through contractual provisions or otherwise. *Id.* “[A] written contract provision disclaiming control is not dispositive on the question of control.” *Id.* at 93.

Chevron cannot rely on a blanket disclaimer in the contract to claim vicarious liability does not exist. This Court has enforced ruling

against oil companies like Shell under near identical circumstances.

Chevron's level of control and, especially, its contractual right to control Roadrunner in the area to which negligence arose creates a legitimate factual dispute not properly dismissed at summary judgment.

*1. CHEVRON CANNOT RELY ON ITS CONTRACTUAL
CLAUSE DISCLAIMING LIABILITY TO WHOLESALE
DISMISS VICARIOUS LIABILITY*

In a contract between an oil company and a retailer, the oil company cannot undermine vicarious tort liability by inserting a clause disclaiming liability or simply labeling each party an "independent business." *Pagarigan and Jackson. Pagarigan v. Phillips Petroleum Co.*, 16 Wn. App. 34 (1972); *Jackson*, 8 Wn. App. at 93.

Chevron claims that a term in the contract between Chevron and Roadrunner relieves it of all vicarious liability. The disclaimer is nearly identical to the following clause cited by the oil company in *Pagarigan* and *Jackson*:

Standard contends, however, that this provision of the [following] distributor's agreement is determinative on the question of control: "It is understood and agreed that Distributor in the performance of this agreement is engaged in an independent business...Company reserves no right to exercise any control over any of Distributor's employees and that all employees of Distributor shall be entirely under the control and direction of Distributor, who shall be responsible for their actions and omissions."

Jackson, 8 Wn. App. at 93; *Pagarigan v. Phillips Petroleum Co.*, 16 Wn. App. 34 (1972). The Court *Jackson* and *Pagarigan* rejected this argument by the oil company in summary judgment.

It is manifest, however, from what we have already said, that a written contract provision disclaiming control is not determinative on the question of control.

Jackson, 8 Wn. App. at 93; *see also Pagarigan* 16 Wn. App. at 38. Like the court in *Jackson*, this Court should reject Chevron's reliance on the disclaimer clause. To give the clause such dispositive effect would undermine the very purpose of vicarious liability especially at summary judgment. *Jackson*, 8 Wn. App. at 91.

2. *BASED ON THE HOLDING IN EQUILON ENTERS v. GREAT AM. INS. CO., A JURY COULD FIND THAT CHEVRON IS LIABLE UNDER THE DOCTRINE OF APPARENT AGENCY AND OSTENSIBLE AGENCY*

Apparent agency is a question for the trier of fact which is not normally susceptible to summary judgment. *Hansen v. Horn Rapids ORV Park*, 85 Wash.App. 424, 428 (1997)

In the factually analogous case of *Equilon Enters. v. Great Am. Ins. Co.*, 132 Wn. App. 430 (2006) this court enforced a trial court's ruling at summary judgment that Shell could be vicariously liable through the doctrine of apparent agency. The following facts from *Equilon* are especially relevant to this case:

Said Aba Sheikh was assaulted and severely beaten by several youths who had been loitering in the parking lot of the South Seattle Market (the Market)... Aba Sheikh sued numerous defendants under various theories of liability, including the Market and Shell. The complaint alleged that the Market knew or should have known that its premises were susceptible to criminal activity, and failed to take steps to protect patrons from third party criminal acts on the premises. The complaint also alleged that the Market did not maintain the premises in a safe manner and did not train its clerks in how to disperse groups of delinquents and respond to criminal activity and emergency situations. The complaint alleged that Shell owed the same duty as the Market, or, in the alternative, was liable for the acts and omissions of the Market under agency principles... Shell filed a motion for summary judgment to dismiss all of Aba Sheikh's claims against Shell. The trial court dismissed the claims predicated on actual agency, holding that Shell had no ownership or contractual rights regarding the Market. But the trial court did not dismiss the apparent agency claim, holding that there was some evidence suggesting that at the time of the attack, Aba Sheikh was "acting in reliance upon the understanding that this was 'a Shell station' and therefore would have adequate security." Shell contends that Powell-Christensen's operations included establishing retail outlets and licensing them to use and display Shell's logos, pursuant to the contract between Powell-Christensen and Shell. Shell argues that Aba Sheikh's agency claims against Shell were asserted based on the presence of the Shell signs at the Market. Accordingly, Shell argues, Shell's liability arose out of the presence of the Shell signs at the Market.

Equilon, 132 Wn. App. at 430-436.

Here, like *Equilon*, this case involves a plaintiff that was assaulted in the parking lot of a gas station by the intentional tort of a third party. Also, here, like *Equilon*, a large oil company (Shell) entered into a fuel distribution agreement with a retailer of its gasoline. Also, here, the agreement required that the retailer name the oil company as an additional insured. The plaintiffs in both cases sued the large oil company and the

private retailer of its gasoline for the negligent training, supervision and hiring of the retailers employee. The plaintiff also alleged that the oil company and the retailer should have known that the premises was susceptible to criminal activity and that it failed to take reasonable measures to insure safety. This case survived summary judgment.

The circumstances here present a jury question. The standard for apparent agency stated in *Hansen* is as follows:

We first address the question of apparent authority. A person acts with apparent authority when a principal makes objective manifestations to a third party that lead the third party to believe the person is the agent of the principal. The manifestations must have two effects: "First, they must cause the one claiming apparent authority to actually, or subjectively, believe that the agent has authority to act for the principal. Second, they must be such that the claimant's actual, subjective belief is objectively reasonable." Apparent authority may be inferred only from the acts of the principal, not from the acts of the agent. **Whether apparent authority exists is normally a question for the trier of fact.**

Id. at 428 (citations omitted)(emphasis added)

Here Chevron requires that Roadrunner prominently display Chevron signs, logos, products and insignia on the premises. The contract provisions requiring it are stringent. Chevron also requires Roadrunner employees to wear Chevron uniforms. This is meant to create a "distinctive visual identity. By conveying a coherent and instantly recognizable image, Chevron retail outlets boost brand recognition and

increase the value of the brand for the benefit of Chevron and its marketers and retailers alike.”

Chevron intended for members of public to believe Roadrunner was part of the Chevron Corporation. These “objective manifestation” could lead the Appellant to reasonably believe that the wrongdoer (Roadrunner) was an agent of Roadrunner. Like the Shell station in *Equilon*, the fact that Roadrunner appeared to be run by Chevron activated the doctrine of apparent agency where the victim is assaulted in the parking lot by criminals.

Like the Court in *Equilon* this court should deny Chevron’s motion for summary judgment because there is a legitimate jury question regarding the issue of apparent agency in this case.

3. *THE CASE OF KROSHOUS v. KOURY IS
DISTINGUISHABLE FROM THE FACTS IN THIS CASE*

Chevron’s sole reliance on the holding in *Kroshus v. Koury*, 30 Wn. App. 258 (1981) is misguided. The facts in this case are much more akin to *Equilon*.

In *Koury*, the convenience store’s negligence is based on the store owner’s wife causing a car accident while driving to the bank to deposit checks for the store. Here, like *Equilon*, and unlike *Koury*, the convenience store’s negligence arose when a third party *criminally*

assaulted the plaintiff in the store's parking lot. Also, Here, like *Equilon*, and unlike *Koury*, the assault occurred in an area susceptible to crime which was a factor contributing to the negligence. Similarly, the plaintiff in *Equilon* and this case plead in their complaints that the stores employees were not adequately supervised or trained to deal with criminal activity on the premises.

Here, the facts in this case are sufficiently distinguishable from *Koury* (a 1981 decision), and analogous with *Equilon* (a 2006 decision).

4. *CHEVRON HAD THE RIGHT TO CONTROL THE CONDUCT IN WHICH THE NEGLIGENCE AROSE*

The contractual right to control is equivalent to the actual exercise of control when deciding whether an oil company is vicarious liable for the torts of a Retailer. *Koury*, 30 Wn. App. at 258.

Chevron argued that there should be no vicarious liability because it did not in fact control Roadrunner's safety, training, surveillance cameras, or employees. Chevron further claims that it "had no control or right to control security measures, the decisions to hire or fire employees, and the hours of operation and sales of liquor." In the same breadth Chevron relies on *Koury* above for the notion that Chevron can only be liable if it had the right to control the specific action to which the negligence arose. Thus, a legitimate factual dispute over the interpretation

of the contract arises, which is not properly dismissed at summary judgment.

Chevron had the contractual right to control the negligent conduct that gave rise to this complaint including: the right to control safety, the right to control training, the right to control staffing, the right to control the premises general maintenance and appearance, etc...

Chevron can unilaterally change the terms of the contract to improve safety at Roadrunner.

Mr. Mengistu stated that he would never hire an applicant with a criminal history. Chevron could have easily improved safety by, *inter alia*, providing training and links to websites that conduct criminal background checks and/or barring potential employees like Hernandez that have warrants, are on parole, or have been convicted of robbery or violent offenses and other criminal activity.

Chevron could have also improved safety to which the negligence arose by exercising its contractual right to enter, inspect, and evaluate Roadrunner and direct Mr. Mengistu to comply. Chevron uses at least two check-off lists to rate and evaluate Roadrunner's performance. These evaluations are given to Mr. Mengistu with directions on how to improve the score/rating. Chevron produced a "Chevron Retail Security Site Risk Rating Tool" during Mr. Mengistu's required training session that

Chevron could have used to evaluate safety during its inspections. This evaluation sheet could have been used to improve safety on the premises to which the negligence arose.

Chevron required Mr. Mengistu to attend its training course. During Chevron's multi-day training course, Chevron trained Mr. Mengistu on a myriad of safety issues including "locks on beverage cooler doors" and "robbery deterrence decals" and "video-robbery deterrence." Chevron has the contractual right to require the attendance of Mr. Mengistu and/or his employees to attend Chevron's mandatory training sessions at least one time a year and also has the contractual right to fire employees if they do not appear. Chevron can use this authority to improve security on the premises.

Furthermore, many of the contractual provisions on just the first two pages of the contract and cited by Chevron on page 2 of its motion for summary judgment (CP. at Pg. 109) match following the provisions quoted in the *Pagarigan* case:

[T]o maintain an adequate supply of petroleum products; to provide qualified and neatly dressed attendants to render first-class service to customers; to maintain the premises in a clean condition, including the restrooms, lawns, shrubs, and driveways; to use pumps and containers which bore Phillips' identification marks for handling Phillips' products; to keep the sidewalks and drives unobstructed...

Pagarigan, 16 Wn. App. at 35-36.

[T]hey are directed to the operation of the station and the business of selling Phillips petroleum products. In addition, the record demonstrates that Phillips actually did oversee the station through direct inspection and supervision under the sanction of termination on 10-days' notice.

Id. at 37.

This Court should deny Chevron's motion for summary judgment, and follow the holdings in *Pagarigan*, *Jackson*, and *Equilon*, because Chevron had the contractual right control the conduct to which the negligence arose.

VI.
CONCLUSION

For the foregoing reasons, this court should reverse the trial court's orders of summary judgment for the Respondents.

DATED this 2nd day of March 2011.

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Respectfully submitted,

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