
NO. 36890-1-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TERESA RUCSHNER, individually and as Guardian ad Litem for
MARIA HATFIELD, a minor,

Plaintiff-Appellant,

vs.

ADT SECURITY SYSTEMS, INC.; PUGET SOUND PROTECTION,
Washington corporation; and MICHAEL L. ROBINSON, III,

Respondents.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
HONORABLE SERGIO ARMIJO

BRIEF OF APPELLANT

STEPHEN L. BULZOMI
JAMES W. MCCORMICK
MESSINA BULZOMI CHRISTENSEN
Attorneys for Petitioner

5316 Orchard St. W.
Tacoma, WA 98467-3633
(253) 472-6000

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APPENDIX

1. Excerpt from 2002 ADT/PSP Agreement.
2. Authorization and Release for the Procurement of a Consumer and/or Investigative Consumer Report by Kroll Background America, Inc., Executed by Michael Robinson.

I. ASSIGNMENT OF ERROR

The trial court erred in entering its June 9, 2006 order granting the defendant Puget Sound Protection, Inc.'s Motion for Summary Judgment and dismissing Appellant's claims against Puget Sound Protection.

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court err in dismissing Appellant's claims against Puget Sound Protection (PSP) where: a) PSP hired Michael Robinson to conduct door-to-door security system sales, despite his unfitness to work in the security field; b) PSP did not investigate Michael Robinson's criminal background, despite contractually agreeing to do so and despite the industry standard requiring such background checks; c) a check of Michael Robinson's background would have revealed his criminal and drug history to PSP; d) PSP would not have hired Michael Robinson if it knew of his criminal and drug history; e) Michael Robinson met Maria Hatfield while performing a sales call at her home; f) Michael Robinson obtained her phone number from company records and called her repeatedly; g) Michael Robinson returned to Maria Hatfield's home and engaged in nonconsensual sex with her?

III. STATEMENT OF THE CASE

A. Statement of Facts

1. Introduction

This case involves claims that Respondent PSP negligently hired, retained and supervised its employee, Defendant Michael L. Robinson, II. As a result, Robinson was able to meet 14 year old Maria Hatfield, to call her repeatedly on the phone, and to later returned to her home and force her to have sex with him on June 21, 2004.

2. **PSP's Contract with ADT Required PSP to Conduct Background Checks on Employees. PSP Hired Michael Robinson Without Checking His Background Check. A Background Check Would Have Revealed Robinson's History and Unfitness for Security Work and PSP Would Not Have Hired Him.**

PSP acted as an authorized dealer for ADT Security Systems, Inc. (ADT). PSP generated sales for ADT. It also installed alarm systems for ADT. Once PSP made the sale and installed the alarm, ADT did monitoring. CP 459 (pp. 13-14).

PSP generated sales with a door-to-door sales staff. CP 458 (pp. 6-9); 460 (p.14). A team leader took a crew of salespeople out in a company van and distributed them in a neighborhood. The salespeople went door-to-door trying to sell ADT services. The team leader acted as a closer if

necessary. CP 444 (p. 18); 458 (pp. 7-9); 460 (p. 16); 461-462 (pp. 20-22).

ADT and PSP executed three dealer agreements, dated 1998, 2002 and 2004. CP 727-800, 801-838, 839-910. In both the 2002 and the 2004 agreements PSP warranted “that all of its employees utilized to perform services under this Agreement have successfully passed a drug screen and a criminal background check . . . “ CP 834, 875. The provision in the 2002 contract read as follows¹ (CP 835: Appendix 1):

17.6.3 Background Screens. Authorized Dealer represents and warrants that all of its employees utilized to perform services under this Agreement have successfully passed a drug screen and a criminal background check, and, if applicable, have current drivers’ licenses. Authorized Dealer agrees that it shall produce certification satisfactory to ADT upon ADT’s request that Authorized Dealer has complied with the terms of this paragraph. Authorized Dealer consents and authorizes ADT to conduct a reasonable background check of Authorized Dealer and any non-ADT personnel utilized by Authorized Dealer in the performance of the services hereunder, if ADT so elects. Authorized Dealer shall cooperate with and provide to ADT such information as ADT shall reasonably [sic] in carrying out such background checks.

¹ The 2004 agreement contained the background screening provision as well. CP 875-876. In this agreement, ADT added the following language: “Non-compliance in any manner by any Authorized Dealer with this paragraph shall entitle ADT to terminate this Agreement immediately and without opportunity to cure by Authorized Dealer.” CP 875-876.

PSP required applicants to fill out an “Authorization and Release for the Procurement of a Consumer and/or Investigative Consumer Report” to be conducted by Kroll Background America, Inc. Robinson executed the form. CP 421; 685; Appendix 2.

PSP general manager Clyde Stephenson explained that PSP did not actually use the authorizations and have Kroll investigate applicants. Instead, he declared that the Kroll authorization served as a “deterrent.” Stephenson conceded that PSP had set up an account with Kroll to do background investigations. CP 457 (pp. 3-4), 467 (pp. 42-43). However, he believed that PSP did not ask Kroll to investigate sales persons because of the cost and because of employee turnover.² CP 467-468 (pp. 45-47). Stephenson explained as follows (CP 468 (p. 46)):

Q So the cost is a deterrent to doing background checks?

A It's not – it's really not that. It's – well, you know – well, I guess it would be. I mean, it – it doesn't – mix [sic] – it didn't make mathematical sense to do a background check on everybody before you hire them because you don't even know if they're going to come back for the first day of training.

² Stephenson had previously told the Washington State Department of Corrections that PSP ran “intermittent” background checks on employees. CP 717.

Q And there's no policy to do a background check on the person once they have been through the training, is there?

A No.

Q Is that for the same reason, because of the cost?

A No. Because there's no reason to do a background check on them once they're there.

The PSP employment packet also required the applicant to sign an affidavit consenting to drug screening examinations as a condition of employment. Stephenson called these provisions a "fail safe" "deterrent." CP 462-463 (pp. 24-27). However, PSP never actually used the drug screening consent. CP 462 (pp. 24-25).

PSP hired Michael Robinson on August 26, 2003. CP 672-674, 685. He worked as a door-to-door salesman, six days a week. PSP paid him strictly on commission, \$200 per sale. . CP 441 (p. 6); 458 (p. 6), 465 (p. 34). When Robinson applied for his job at ADT, no one asked him about his criminal background. CP 442 (p. 10). In filling out his application, Robinson answered screening questions as follows (CP 450 (pp. 43-44); 685):

Q Now, when you were interviewed at Puget Sound Protection – I am going to refer you to exhibit one again. This appears to be your employment file and your hiring documents.

It appears on one of these pages that has page 18 at the top – will you take a look at this please, and at the bottom tell me whether or not it asks you if you've been convicted of a crime.

A It says: Have you ever been convicted of a crime or convicted in a military court? I marked no. Have you ever been sanctioned or had your license suspended or revoked? I marked no. Are you currently under investigation or pending charges? I marked no.

Q Now, why did you indicate no when it asked if you had any prior convictions?

A Because I wanted the job.

Stephenson testified that PSP would not hire a felon. CP 462 (pp. 24-25); 468 (p. 48). Stephenson agreed that a background check would have revealed Robinson's criminal history. He would not have hired Robinson if he had known of Robinson's convictions for drug possession and door-to-door scamming. CP 467-468 (pp. 45-48).

PSP sales manager Robert Crane confirmed that prospective PSP employees had to fill out the Kroll authorization. He did not know what use, if any, PSP made of the form. CP 471 (pp. 4-5), 473 (pp. 13-14).

PSP owner Charley Johnson did not know whether PSP conducted background checks as the contract with ADT required. He said that the decision about whether to do background checks on employees rested with

Stephenson. CP 560-561 (pp. 16-18). Johnson agreed that he did not want Stephenson to hire persons with felony records. He also would not want to hire someone who did marijuana and drugs to work at PSP. CP 564-565 (pp. 31-34). He agreed that PSP did not know of Michael Robinson's background because they did not check it when they hired him. CP 566 (p. 40).

Stephenson contended that it "would be a pretty good waste of money no matter how much it was . . ." to run background checks. CP 467-468 (pp. 42-47). ADT management disagreed. David Smiley worked as the regional director for the western United States for ADT. CP 480 (p.5) He acknowledged that the ADT/PSP contract required PSP to conduct background checks of its employees. CP 485 (p. 25). He agreed that the provision essentially mandated that PSP assumed a duty to conduct background checks for the safety of its customers, the public and its own employees. CP 486 (p. 26).

Smiley confessed he did not know that PSP had decided not to conduct employee background checks. CP 486-487 (pp. 29-30). ADT encouraged their dealers to work with Kroll to do so. Other ADT Authorized Dealers used Kroll. Such background checks were not a cost prohibitive task that would put PSP out of business. CP 487 (pp. 31-33).

Smiley conceded that ADT did not want its Authorized Dealers to employ someone with a criminal record for running a door-to-door scam, for marijuana possession and for theft. CP 489 (pp. 38-39). Smiley felt that Michael Robinson's background rendered him unfit to work for an ADT Authorized Dealer. CP 489 (pp. 39-40).

Ronald Book worked as a territory manager for ADT. He believed that ADT dealers got a special price through Kroll to do background investigations on employees. He thought that Kroll charged \$50. CP 542 (p. 32). He found Kroll's charges reasonable. He encouraged dealers to use Kroll for that reason. CP 543 (p. 34).

Book told the Washington State Department of Corrections that the distributors "are contractually obligated to run background checks on all employees and conduct drug testing." Smiley confirmed this report and added that the distributors also had to preform intermittent background checks on employees. CP 717.

Stephenson's aversion to hire felons conforms with ADT policy. Book testified that the background check seeks to find out whether an applicant has had criminal activity in the past, because the past may give information about how the applicant may act in the future. CP 540 (pp. 24-25). A background check enabled a dealer to assess the risk that an

employee might pose to the public or customers. The choice of what to do with that risk rested with the dealers. CP 541 (pp. 26-27). Book's supervisor, David Smiley, agreed. He conceded that a person like Michael Robinson could conceivably pose a risk to the public or customers, or some of the homes that he visits. That risk justified performing a background check in the first place to protect those people from someone like Robinson. CP 485 (pp. 22-23); 489 (pp. 40-41).

3. Michael Robinson's Criminal History and Behavior While Working at PSP.

Michael Robinson had a significant criminal history, including the following:

- In February, 2003, he engaged in a door-to-door scam which resulted in the issuance of 15 counts of first degree criminal impersonation. CP 693-699. Robinson had gone door-to-door in Lakewood asking for donations to a Black College Fund sponsored by Lakes High School. Police caught him after five or six days. He had contacted approximately 50 different homes, acquired checks from residents and cashed them at the bank. Authorities charged Robinson with 15 counts of criminal impersonation and 15 counts of 3rd degree theft. Robinson was convicted of 3 counts of each offense. CP 714.
- On July 17, 2003, Robinson stalked a woman at the K-Mart in Puyallup and stole her purse. The court issued a bench warrant for his arrest on October 17, 2003. CP 705. This offense resulted in a felony conviction for second degree theft, on March 23, 2004.³ CP 441 (p. 9) 692, 712.

³ The charges were pending when PSP hired him in August of 2003.

- June 17, 2003, Robinson was convicted of possession of drug paraphernalia. CP 715.
- On April 4, 2003, Robinson was convicted of possession of marijuana. CP 714.

As a result of the March 23, 2004 conviction for second degree theft, the court imposed community custody supervision upon Robinson. CP 526 (pp. 26-27); 715. Robinson also received probation for his convictions for criminal impersonation and theft in the third degree. CP 700-701. Robinson's failure to appear for a hearing or pay fines related to his conviction for possession of drug paraphernalia caused that court to issue a bench warrant for his arrest on June 14, 2004. CP 704.⁴

Robinson's tenure with PSP included incidents of misconduct. On at least two occasions, Robinson screamed and cursed at a fellow employee. CP 443 (pp. 14-15) 677. Crane had to discipline both employees as a result. CP 471 (pp. 4-5), 476 (pp. 23-25). Later, Robinson's behavior escalated to the point where Crane had to impose a "no contact restraining order" on him. CP 476 (p.25), 678. The other employee felt threatened by Robinson. CP 678-679. These incidents did not inspire ADT to investigate Robinson's background.

⁴ The warrant listed Robinson's place of employment as Puget Sound Protection.

4. Circumstances of Nonconsensual Sexual Contact .

Approximately two months before June 21, 2004, Michael Robinson was part of a PSP crew working in the Parkland/Spanaway area. He knocked on the door of the Hatfield home. CP 444 (p. 19).⁵ Sandra Hatfield, Maria's mother, answered the door. She told Robinson that she would not do business with ADT. She had a bad previous experience with the company⁶. She closed the door on Robinson. CP 598 (p. 7). After Robinson finished soliciting the rest of the block, he went to the beginning of the street to wait for pick up by the company van. CP 444 (p. 20).

Maria felt badly that her mother had acted rudely. She opened her window and apologized to Robinson. During the conversation, Robinson introduced himself and asked Maria her age. Maria told him she was 14. CP 583 (pp. 25-26). Robinson told Maria that he thought that they should hang out sometime. Maria told him no. He was way too old at 20 years old. The conversation made her uncomfortable. She refused to give Robinson her phone number. She rebuffed his second attempt to get her phone number. CP 583 (pp. 26-27).

⁵ Robinson wore a blue shirt that said ADT and Puget Sound Protection on it when he did his sales calls. CP 441 (p. 8).

⁶ Sandra Hatfield had an old ADT sign in her yard from her previous service with the company. CP 911.

A few weeks later, Robinson called Maria Hatfield. She asked Robinson how he got her number but he ignored her.⁷ He again asked her to hang out. She refused, because of their age difference. CP 583 (pp. 29-30).

Robinson continued to call and ask her to hang out. Maria refused repeating that she thought he was too old for her. She began to feel threatened. CP 584 (pp. 31-32). Nonetheless, Robinson persisted in calling. Maria told him that there was no point for him to call because her answer would always be the same. She even hung up on him a couple of times. CP 585 (pp. 33-34).

About two months after he met Maria, Robinson called again. He wanted to hang out the next day. He said “My name is Michael. I met you a couple of months ago. I am the ADT guy.” He said she asked him to call her the next day. CP 446 (pp.26-27).

On June 21, 2004, at about 11:00 o’clock a.m., Robinson called once more. On that occasion, he told Maria that he planned to come over

⁷ Sandra Hatfield had to call PSP for service during the time she used ADT’s services. She believed PSP had their phone number in her system. She offered this fact as a response to question about how Robinson acquired Maria’s phone number. CP 604 (pp. 30-31). Maria found it “creepy” that he had found her number. CP 584 (p.30).

to the house today.⁸ Maria told him “No, you can’t.” Robinson insisted that they should hang out. CP 585 (pp. 35-36).

Robinson arrived at Maria’s home between 1:00 and 2:00 p.m. She had been watching television. She heard the front doorbell ring. She looked out her bedroom window and saw Robinson which scared her. CP 536 (pp. 37-40). She started to “freak out” because she did not want him there. CP 911.

Maria’s neighbor, Robert Leger, was working in his yard at this time. Robinson came over and asked to use Leger’s phone. When Leger asked why, Robinson said he needed to contact or pick up “Casey.” After Leger pointed out that no “Casey” lived in the Hatfield home, Robinson said that he had come to pick up Maria. Leger got a phone and brought it to Robinson. Robinson dialed without asking Leger for the number. He spoke in a harsh, sharp tone into the phone, saying “Maria pick up the phone” two to three times. He then gave Leger back the phone and went over to the Hatfield house. CP 619 (pp. 9-12); 919, 921.

Maria sat in her room as the telephone began to ring. She did not want to answer. Robinson walked around the house pounding on the

⁸ Maria Hatfield thought that the incident occurred on June 22, 2004. CP 585 (p. 35). Police records indicate that it happened on June 21, 2004. CP 911.

windows yelling for Maria to come to the door. CP 911. After she went into the kitchen, she heard him knocking on the sliding glass door in the kitchen and then the door in the kitchen. The phone kept ringing. Finally, Maria answered the phone. Robinson said that he had come to the house and that Maria needed to let him in. Maria said that she could not do so. CP 587 (pp. 41-42). . Robinson said, "It's Michael, I am at your house." He said, "You need to let me in." Maria said no, she could not. Then Robinson said, "Let me in or I'll find my own way in." CP 588 (pp. 45-46), 912.

She believed Robinson would find his own way in if she did not let him in. She felt it would be safer to keep him from getting angry. She felt terrified and beside herself. CP 600 (pp. 13-14). Maria thought if she just let Robinson in for a minute, she could get him to leave. CP 912. Maria opened the door a crack and Robinson pushed it open and came in. Robinson hugged her and she pushed him off. CP 588 (pp. 47-48).

Robinson walked in, went into the kitchen and asked for a soda. She gave him one and he drank it. He grabbed Maria's legs and pulled her close to him. She tried to push off of him but he had a firm grip. Robinson pulled her down to sit on his lap. She tried to get up but

Robinson held her very tightly so she could not move. She struggled to separate herself, but Robinson overpowered her. CP 589 (pp. 49-51).

Robinson essentially dragged Maria into her bedroom and laid down on her bed. She told him to get out of the room. Robinson claimed that he had lost his keys in her bed. He grabbed onto Maria's wrists and pulled her down on top of him. He held her there. Robinson then flipped Maria over and got on top of her. CP 590 (pp. 53-56).

Robinson proceeded to have sex with Maria. She told him "no" and she was crying. After she finally realized she couldn't get him off of her, Maria turned her head and pretended that it was not happening. CP 591 (pp. 57-60). Afterwards, as Maria cried, Robinson said, "That wasn't so bad, was it?" He also told Maria, "You know this was all your fault, don't you?" Maria did not reply. Robinson said that he had to go to work and he picked his keys up off the floor and left. As Robinson left, he grabbed another soft drink and went out the front door. CP 592 (pp. 62-64), 912.

After Robinson left, Maria continued to cry on her bed. Eventually she got up and went over to a friend's house. She told her friend what happened. CP 593 (p. 65). With the friend's urging, she told her mother what had happened. Her mother took her right to Mary Bridge Hospital.

CP 593-594 (pp. 68-69), 599 (pp.11-12). As a result of the encounter with Robinson, Maria Hatfield suffered bruises on her arms, legs and face. CP 590 (p. 55), 912.

Robinson returned five days later. He offered to smoke marijuana with Maria, who declined. He asked if it was okay to smoke in the back yard and Maria agreed. At that point, someone knocked on the door. Maria left to answer. When Robinson got up to investigate, police arrested him. CP 447-448 (pp.32-36), 711.

Robinson pleaded guilty to third degree rape and unlawful possession of marijuana with intent to deliver. CP 922-929.

5. Expert Testimony

a. Plaintiff's Expert Joseph Chernicoff

Plaintiff retained Joseph Chernicoff as a liability expert witness. He works as the owner and principal of The Chernicoff Group, a security support organization located in Las Vegas, Nevada. Mr. Chernicoff has substantial experience in security related fields. CP 643-645. Mr. Chernicoff's opinions include the following:

- The security industry maintains a special relationship with its customers, potential customers and the public in general. The relationship occurs because the industry exists to protect the physical safety of its clients, their homes and property. The industry exists to prevent or minimize the occurrence of crime

against customers, potential customers and the public at large. CP 656-657.

- An axiom in the security industry provides that security or crime prevention services requires employment of trustworthy, honest and personally stable people. In the course of providing security services, personnel and companies gain access to personal and private information about customers, potential customers and the public. That information, if it fell into the wrong hands, can facilitate the commission of crimes. Accordingly, the standard of practice in the security industry, including companies that provide and market home security services, requires careful screening of the backgrounds of employees. This includes those employees that supply security services and sales people who sell such services. CP 657.
- A person employed as a door-to-door salesperson, particularly one who sells security products door-to-door, can exploit temptation and opportunity for criminal misconduct. Opportunity exists because a person encountered in the doorway of their own home becomes especially vulnerable to criminal misconduct. In addition, a door-to-door encounter gives the criminal actor the opportunity to gather and collect information for later illicit use. CP 657-658.
- It is well known and understood in the security industry that a person's past behavior can provide critical and accurate information about their likely behavior in the future. Accordingly, safe security practice involves careful screening of the background of persons hired to work in the security industry. In particular, this includes investigation of a prospective employee's criminal history. Safe security practice requires such a background check to prevent endangering clients and the public by placing unsuitable persons in a position where they can harm others. CP 658.
- A person with a criminal background, including convictions, warrants and arrests, and/or history of illegal drug use, is unequivocally unfit for work in the security industry, especially in door-to-door sales or other unsupervised encounters with the public. CP 658.

- Safe and standard hiring and employment practices in the security industry requires security companies such as PSP to conduct criminal, consumer and drug background screens on all employees and applicants. CP 658-659.
- The ADT/PSP dealer agreements, with provisions that require PSP to conduct drug screens and criminal background checks, reflect common and safe hiring practices for employers in the security industry. CP 659.
- Safe, standard and common hiring practice in the security industry required PSP to conduct a criminal history check and drug screen on Michael Robinson. CP 659.
- PSP failed to follow safe and standard security industry hiring practice when it hired Michael Robinson without conducting a criminal history and drug screening test upon him. CP 660.
- Kroll or any other reasonably competent background investigating company could have quickly, efficiently and inexpensively investigated Michael Robinson's background and discovered his criminal history. This rings especially true in Washington, where one can readily find such information over the internet for a minor fee. Even if Kroll or another company charged a fee for a background investigation, security industry employers commonly require the applicant to pay the fee themselves. If costs prevented an issue to PSP, nothing prevented it from requiring Robinson to cover the modest expense of a background investigation. CP 660-661.
- Clyde Stephenson's description of requiring PSP applicants to fill out the Kroll background investigation form as a deterrent fell far short of any reasonably safe practice for hiring employees in the security industry. CP 661.
- Robinson lied in his PSP application. PSP breached the standard of care by failing to verify the veracity of any information on his

application and to uncover his record which rendered him unfit for the security industry. CP 661.

- PSP breached the standard of care by employing Robinson while he had pending warrants for his arrest. PSP also breached the standard of care by continuing to employ Robinson after the conviction of a felony which occurred subsequent to his hiring. CP 661.
- Robinson's criminal record and history of drug use made him unequivocally unfit for employment in any aspect of the security industry, especially in door-to-door sales. CP 662.
- Robinson's criminal record and history of drug use indicated that he had a high probability of committing further crimes. CP 662.
- It was more-probably-than-not foreseeable that Robinson would commit a crime against a customer or potential customer of PSP or ADT because of the general field of danger Robinson created for those with whom he came into contact. Chernicoff based this opinion upon Robinson's known criminal background, including a history of door-to-door scamming, theft, drugs and violent crime. He also based the opinion upon Robinson's failure to accept responsibility for the crimes for which he was convicted and refusal to comply with the terms and conditions of the sentences imposed upon him for those crimes. CP 662-663.
- PSP placed Robinson in the field to sell security accounts, and put him into contact with his foreseeable victim, Maria Hatfield. PSP put Robinson in the position which allowed him access to the victim's address, telephone number and information about the occupants and the premises. CP 663.
- PSP did nothing to supervise Robinson in his efforts to sell door-to-door accounts. It is likely that Robinson did access the Hatfields' old ADT account to gain information about the family which he used to contact and stalk Maria Hatfield. CP 663.

- If PSP had conducted a criminal background check, it would have discovered Robinson's criminal history, warrants and untruthfulness on his application. This would have demonstrated his unfitness for work in the security industry in general, and for PSP in particular. If PSP had not hired Robinson, he would have had no opportunity to use his position to contact and access Maria Hatfield. CP 663-664.

b. Defendant's Expert Raymond White

Defense retained Raymond White to act as an expert liability witness. He runs White Security in Bothell, Washington. CP 494 (p. 4).

He offered the following opinions:

- He would not hire someone to work in his security business who had a felony conviction for theft. CP 509 (pp. 62-63).
- Conducting a background check would reveal a prospective employee's criminal history. CP 510 (p. 66).
- White would not hire somebody convicted of door-to-door fraud to work for him selling door-to-door or to maintain or install any of his security systems. If he did not feel comfortable with a person going into his home, he would not want such a person to go into his customers' homes. CP 510 (p. 68).
- He agreed that he had a duty to send safe persons into his customers' homes. CP 510 (p. 69).
- If he were aware of Michael Robinson's criminal history he probably not hire him. CP 511 (pp. 70-72).
- The customers' safety is number one in any industry, business or job, including the security industry. CP 511 (pp. 72-73).

- One can easily determine whether a person is under the supervision of the Washington State Department of Corrections by going to the internet. CP 513 (pp. 78-79).
- White did not believe that anyone would hire Michael Robinson if they had information about his criminal background. CP 514 (pp. 83-84).

B. Procedural History

Sandra Hatfield filed suit on behalf of her daughter, Maria, on June 22, 2005. CP 1-8. The complaint named ADT, PSP, Security One, Inc. and Michael Robinson. ADT answered on August 26, 2005. CP 9-18. PSP answered on September 2, 2005. CP 19-24. Robinson never answered.

Plaintiffs filed an amended complaint on October 6, 2005, adding PSP's parent company, American Security Services, LLC. CP 31-40. American Security Services answered on October 28, 2005. CP 49-55.

The court dismissed defendant Security One pursuant to the stipulation of the parties on February 10, 2006. CP 56-58.

Defendant ADT moved for summary judgment of dismissal on April 14, 2006. CP 59-232. PSP moved for summary judgment of dismissal on April 21, 2006. CP 233-260. Plaintiffs opposed the motions. CP 435-999.

In reply, ADT established that it had no involvement in the management of PSP, nor the hiring or supervision of Robinson. CP 1000-1002, 1006-1007. Plaintiffs therefore did not dispute ADT's motion for dismissal. Verbatim Report of Proceedings (VRP) 2.

Oral argument occurred on June 9, 2006, before the Honorable Sergio Armijo, in Pierce County Superior Court. The court expressed concern that Robinson had finished his business activities when Sandra Hatfield told him to leave. VRP 10. The court also queried whether Maria Hatfield's acts in calling to Robinson could "bring him back into his scope of employment?" VRP 13.

The trial court also commented that it believed the record showed that PSP would not hire a person if they had committed a felony. The court appeared to believe that PSP would treat misdemeanors differently. VRP 14-15.⁹ The trial court also inquired about whether a special relationship under Restatement (Second) of Torts § 315 (1965) applied. VRP 16-17, 25. Ultimately, the trial court dismissed the case, as follows (VRP 28-29):

⁹ If by misdemeanors, the court referred to the door-to-door charity scam that Robinson ran, it would not have made any difference to PSP in rejecting Robinson as a potential employee. General manager Stephenson testified that he would not have hired Robinson if he knew about the door-to-door scam. CP 468 (pp. 46-47).

THE COURT: All inferences are in favor of the non-moving party, for plaintiff, but my conclusion with this case – and I'm sure someone else will have a second chance at this thing – is you have a situation here where an individual has marijuana and impersonating, door belling, doing scamming. He goes to the house and offers his services and he's told to leave. He leaves and I would imagine the next 10, 20 minutes – I don't know, the time is not given – but he's still hanging around but he's trying to get a ride, a ride from his employer. The young girl, Maria, is out the door, out the window, come on over, let's talk. From there they strike up a conversation and someone said – someone said weeks I thought it was a couple of months, two months later, a month later, whatever it is, he comes over and sexually assaults the girl, because she's a minor. She's a minor. What happened in there? I don't know.

The argument is that the employer is responsible for employees' actions and we come back to duty, foreseeability. Are we going to hold employers responsible for the acts of the employee? Is this within the scope of foreseeability? Is this something that can happen or should, to be protected? I've thought about it and the answer is no. It's a hard case and I just don't see why the employer is responsible for the acts of Mr. Robbins[sic].

The trial court signed an order dismissing PSP. CP 1038-1040.

This left only Michael Robinson as a party to the lawsuit.

Given the trial court's summary judgment ruling, the plaintiffs faced the prospect of trying the case against Robinson alone. He had not participated in the case, beyond giving a deposition. CP 439-454.

Consequently, the plaintiffs moved to stay the trial and for certification pursuant to RAP 2.3(b)(4). The court granted the motion. ADT and PSP

moved to vacate the order on June 29, 2006. CP 1053-1058. The plaintiffs opposed this motion. CP 1059-1076. The trial court granted the motion and vacated the order on July 21, 2006. CP 1084-1086.

Plaintiff filed a notice of discretionary review to the Court of Appeals, on June 27, 2006. CP 1045-1052. Plaintiff filed the motion for discretionary review in this court on July 13, 2006. The court denied the motion in a ruling dated October 6, 2006. CP 1101-1107. Plaintiff moved the court to modify the commissioner's ruling on November 6, 2006. This court denied the motion to modify on January 9, 2007.

Sandra Hatfield died. Plaintiff petitioned to have Maria Hatfield's maternal aunt, Teresa Rucshner, appointed as substitute guardian ad litem. The trial court granted that motion, on February 23, 2007. CP 1087-1097. The trial court entered an order of default against Michael Robinson on February 23, 2007. CP 1098. The court issued its certificate of finality on February 27, 2007. CP 1099.

Plaintiff moved for entry of judgment on default against Michael Robinson on June 12, 2007. CP 1108-1522. The court entered judgment on the default on October 5, 2007. CP 1523-1532. Plaintiff filed a notice of appeal to this court on October 23, 2007. CP 1533-1537. Defendants

PSP, ADT and American Security filed a notice of cross appeal on November 6, 2007. CP 1538-1552.

IV. ARGUMENT

A. The Standard of Review

An appellate court reviews an order of summary judgment de novo and performs the same inquiry as the trial court (citation omitted). A court should only grant summary judgment if the evidence viewed in a light most favorable to the non-moving party shows the absence of a genuine issue of material fact, and that the moving party deserves judgment as a matter of law. *Mohr v. Grant*, 153 Wn.2d 812, 821, 108 P.3d 768 (2005); CR 56(c).

B. PSP Negligently Hired, Retained and Supervised Michael Robinson, Which Enabled Him to Harm Maria Hatfield.

To prove negligent hiring and retention of an employee in Washington, a plaintiff must demonstrate that (1) the employer knew, or in the exercise of ordinary care, should have known of its employee's unfitness at the time of hiring (citation omitted) and (2) the negligently hired employee proximately caused the resulting injuries. *Carlsen v. Wackenhut*, 73 Wn.App 247, 252-253, 868 P.2d 882 (1994).

In *Carlson*, the plaintiff attended a rock concert in the Tacoma Dome. The Tacoma Dome had hired Wackenhut to provide security. Wackenhut hired Futi to work security. Futi lied on his employment application stating that he had no criminal record. In fact, he had several convictions and outstanding arrest warrants. At the concert, plaintiff and a friend sought help from Futi, who looked like a security guard. He enticed the plaintiff to go under the bleachers, threw her down and tried to rape her.

Plaintiff claimed that the defendant negligently hired and supervised Futi. The trial court dismissed the plaintiff's lawsuit. The Court of Appeals reversed. The court stated, at 256:

Past Washington decisions tend to employ a type of balancing test to determine if the given employment warrants the extra burden of a background check (citation omitted). ("One may normally assume that another who offers to perform simple work is competent. If, however, that work is likely to subject third persons to serious risk and great harm, there is a special duty of investigation.") (Quoting Restatement of Agency § 213, at 465 (1936); see also *Welsh*, 474 A.2d at 440 ("[t]he greater the risk of harm, the higher degree of care necessary to constitute ordinary care."))

Applying this rule, the Court of Appeals stated, at 256:

Although Futi's job was not high paying, the circumstances of his employment put him in a position of responsibility. A jury might well conclude that it was

reasonable for concert patrons to look upon Futi as one authorized to perform security functions and that, therefore, Wackenhut should have more extensively examined Futi's background before hiring him. The need for such a determination by a jury seems especially compelling in light of the limited information and inconsistencies in Futi's application for employment. This additional investigation might well have disclosed Futi's prior juvenile records.

The court rejected the defense argument that Futi's criminal background did not indicate a propensity for sexual violence as follows, at 256-257:

Wackenhut argues, finally, that even if it had performed a check of Futi's criminal record, nothing in that record indicated a propensity for sexual violence. Carlsen responds to that robbery (only one of Futi's four convictions) involves the use of a threat of force which is indicative of a propensity toward violence. We agree with Carlsen that robbery is a crime of violence. Upon discovery of a prior robbery conviction, a prospective employer would be on notice that a prospective employee has a propensity for violent behavior. In short, we conclude that, although Wackenhut did not have actual knowledge that Futi was potentially dangerous, a trier of fact could find that the corporation breached its duty of ordinary care by not doing more to determine if Futi was fit to work in the job he performed for Wackenhut.

Carlsen demonstrates that the trial court erred in dismissing Maria Hatfield's claim. As in *Carlsen*, the employee at issue (Robinson) had an extensive criminal background. As in *Carlsen*, the employer did no investigation to learn of his background. As in *Carlsen*, an investigation

would have revealed the background. Robinson's conviction for violent purse snatching parallels Futi's conviction for robbery, demonstrating a propensity for violence. No one disputes that PSP would not have hired Robinson if it had investigated and learned of his criminal history. CP 467-468 (pp. 45-48). The trial court simply erred.¹⁰

Further support comes from *Underberg v. Southern Alarm, Inc.*, 284 Ga.App. 108; 643 S.E.2d 274 (Ga.App. 2007). That case bears striking similarities to the case at bench. In that case, the plaintiff suffered harm after a former salesman for ADT security dealer kidnapped her at gun point. The plaintiff sued the dealer for negligent hiring and supervision. The trial court dismissed the case, but the Court of Appeals reversed. 643 S.E. 2d, at 375.

The defendants, ADT Security Services South, Inc., and its authorized dealer, Southern Alarm, Inc., provided security services. Southern Alarm hired salesmen to work as part-time employees to sell

¹⁰ The defense will undoubtedly cite and argue *Betty Y. v. Al-Hellou*, 91 Wn.App. 146, 988 P2d. 1031 (1999). In that case, the plaintiff claimed that an employer negligently supervised an employee who sexually assaulted a boy he met while working for the defendant. Although the employer knew the employee was on probation for sexually assaulting a child, the court held that the employer did not owe a duty to the boy to prevent the assault because the employee was not hired to work with potential victims, the assault did not occur on the work premises and the employee's job duties did not facilitate or enable the employee to commit the assault. This case does not apply because Robinson's duties with PSP facilitated his meeting with Maria Hatfield and his subsequent telephone contact and return to her home.

ADT Security Services. Southern Alarm took these employees in a van to large neighborhoods where they conducted door-to-door sales of ADT Security Services. The employees “turned over constantly” and worked on commission. 643 S.E. 2d, at 376.

South Alarm’s agreement with ADT stated that Southern Alarm “represents and warrants that all of its employees utilized to perform services under this Agreement have successfully passed a drug screen and a criminal background check.” Nonetheless, Southern Alarm hired Bert Fields as a promotions representative without conducting any background investigation. However, the ADT regional director testified that ADT required the background checks because they wanted to “filter out anyone that should not be selling security systems and putting folks at risk that should not be in a home.” 643 S.E.2d, at 378. Southern Alarm performed background checks on promotions representatives until turnover in those positions became too great. *Id.*

The plaintiff attended an event and filled out a form and placed it in a booth operated by Southern Alarm and ADT. It contained her name, address, and telephone number and asked whether should wanted to have someone contact her about installing a security system. Later, on two occasions, Fields knocked on her door and asked to come in and speak

with her about an ADT system. She declined both times. Fields left an ADT form. He came to her home a third time when she was not there. She also reported that Southern Alarm's name and telephone number appeared on her caller identification system a lot and that South Alarm was the only ADT franchise that tried to contact her. 643 S.E.2d , at 377.

On the day of the kidnapping, she came home and went into her bedroom. She noticed Fields standing in the doorway. He pulled a gun, bound her with duct tape and kidnapped her. The trial court dismissed her case. The Georgia Court of Appeals reversed. It stated the issue as follows, at 377 (*italics the Court's*):

The question is not only whether Southern Alarm owed a duty but whether it breached that duty. These are questions of fact that a jury must resolve. "The appropriate standard of care in a negligent hiring/retention action is whether the employer knew *or should have known* the employee was not suited for the particular employment." Stated differently,

a defendant employer has a duty to exercise ordinary care not to hire and retain an employee the employer knew or should have known posed a risk of harm to others where it is reasonably foreseeable from the employee's "tendencies" or propensities that the employee could cause the type of harm sustained by the plaintiff.

The court ruled that the nature of the employer's security work enhanced its duty of ordinary care in investigating employee's background, as follows, at 377-378 (citations omitted):

Moreover, "[w]hether or not an employer's investigative efforts were sufficient to fulfill its duty of ordinary care is dependent upon the unique facts of each case." Thus in *C.K. Security Systems v. Hartford Accident & Indem. Co.*, it was held that a security service offering the use of its employees to patrol premises for the purposes of protecting persons and property "may have been duty bound to exercise a greater amount of care to ascertain [whether] its employees were" suited to perform the services in question. Here, a jury could find that Southern Alarm owed a heightened duty to ascertain whether individuals it hired, even briefly, to enter homes of unsuspecting persons for the purpose of selling security systems were suited for this purpose. Generally, the determination of whether an employer used ordinary care in hiring an employee is a jury issue. In the case at bar "[w]e cannot say that the evidence adduced was sufficient to demand a finding as a matter of law that the defendant had exercised due care in screening the employee in question."

The court also found that the dealer agreement, requiring Southern Alarm to perform background checks, gave rise to a duty. The defendants argued that promotions representatives like Fields were independent contractors, so no duty to screen them arose under the agreement. The court dismissed the argument as follows, at 378:

We need not resolve the issue of Fields' employment status, however, because of the deposition testimony of Timothy W. Breeden, southeast regional director for the ADT

authorized dealer program, showed that even if promotions representatives were considered independent contractors, a jury question still exists as to whether they were properly screened. Although Breeden testified that he was unsure whether background checks had to be performed on independent contractors, he also testified that an individual who was empowered to sell ADT systems on behalf of an authorized dealer and had been given ADT promotional materials and sales contracts “probably” would be required to undergo one. In addition, when asked why ADT requires background checks, Breeden testified:

A. Obviously, we want to filter out any one that should not be selling security systems and putting folks at risk that should not be in a home....

Q. Would you agree that ADT would object to an individual with a prior conviction of kidnapping being provided training and materials and allowed to go door to door attempting to sell ADT security systems?...

A. Yeah...if the dealer had knowledge of that, absolutely, we would object to that.

Q. And the reason ADT requires background checks is so the dealer will have that type of knowledge, correct?

A. That’s correct.

Based upon this evidence, the Court of Appeals ruled that the issues of duty and breach constituted matters incapable of summary adjudication. *Id.*, at 378.

The defense also contended that failure to investigate Field's background did not proximately cause the plaintiff's harm. The court ruled that a genuine issue of material fact remained. The court framed its analysis of causation as follows, at 379:

In the case at bar, it is undisputed that the act was not committed within the tortfeasors working hours. Therefore, the issue of whether the abduction of Underberg was committed under the "color of employment" or, on the other hand, under the circumstances "wholly unrelated" to Field's employment. Southern Alarm and ADT urge us to hold, as a matter of law, that the incident was "wholly unrelated" because the master-servant agency relationship had ended and because Fields did not use his association with Southern Alarm and ADT as a ruse to gain entry into her home on the date he abducted her.

In resolving this issue against the defendant, the court quoted *Tallahassee Furniture Co. v. Harrison*, 583 S.2d 744 (Fla.App. 1991) as follows, at 379 (italics the court's):

[T]here *can* be a cause of a casual connection between an employment-related contact in a home by an unfit or dangerous employee and injury inflicted on the occupant by a later, non-employment related entry into the home. Whether the employment-related contact and the later event in which the injuries occur are so separated by time or other circumstances that the former cannot be reasonably be said to be a substantial factor in producing the result complained of depends upon the facts in each case. The issue of proximate cause is generally one for the jury, unless reasonable persons cannot differ, in which case, it becomes a matter of law for the court.

The court also looked to *McGuire v. Arizona Protection Agency*, 125 Ariz. 380, 609 P.2d 1080 (1980) to resolve causation. In that case, a security company employee with a history of criminal behavior installed a burglar alarm in the plaintiff's home. After he installed the alarm and left his employment with the defendant, he returned to the plaintiff's home, disconnect the alarm and robbed the home. The *Underberg* court quoted from *McGuire*, as follows at 380:

In light of the sensitive nature of the work and the temptations and opportunity attendant thereto, defendant owed a duty to plaintiff to employ a responsible and trustworthy person without a criminal proclivity that can reasonably be determined, to install the alarm systems.

Ultimately, the *Underberg* court found evidence to establish causation, which it characterized as follows, at 380:

We apply the reasoning of *Tallahassee Furniture Co.* and *McGuire* to the case at bar. Circumstantial evidence exists from which a jury can infer that Fields' contact with Underberg was employment-related. Promotions representatives were encouraged to contact friends and neighbors on their own time to sell ADT security systems. Underberg and Fields resided in the same small town, and the policy empowered him to contact her. Also, Underberg filled out a form with personal information that she placed in a box earmarked for Southern Alarm and/or ADT. Southern Alarm and ADT argue that we may not consider this evidence because Underberg was not positive that the box belonged to Southern Alarm and Payne testified that Southern Alarm did not participate in the event in which Underberg left the information. It is true that "[i]n passing

upon a motion for summary judgment, a finding of fact which may be inferred but it not demanded by circumstantial evidence has no probative value against positive and uncontradicted evidence that no such fact exists.” In the case at bar, however, there is additional evidence of a causal link between Southern Alarm, Fields, and Underberg; namely, Underberg repeatedly saw Southern Alarm’s name and telephone number on her caller identification system during the times Fields solicited her business. Southern Alarm was the only ADT franchise that tried to contact her. The repeated telephone contacts by Southern Alarm demand a finding the company was aware of her name and address. A jury can infer that Southern Alarm had given this information as a potential lead to Fields.

The court ultimately concluded that a jury must determine whether Fields acted under the color of his employment and reversed. *Underberg*, at 380.

The *McGuire* court recognized that security work involves peculiar vulnerabilities, which justify placing a burden upon the employer to screen employees. In reversing, the court observed at 609 P.2d 1082:

Unquestionably the defendant may be found negligent in knowingly employing a wanted felon or a felon with a long record to install the burglar alarm. If it could be negligence to employ such a person, then it could be negligence where this is not known to the employer, but should have been known, especially in light of the sensitive nature of the work, the temptations inherent therein and the opportunities presented. The risk is there and possible loss is certainly foreseeable.

The case at bench involves policy consideration and issues identical to those discussed in *Underberg* and *McGuire*. Like the employers in those cases, PSP hires people to do work of a sensitive nature in the homes of its customers. These sales encounters give rise to the same “temptations inherent therein and opportunities presented” present in *Underberg* and *McGuire*. Like those cases, PSP hired a person with a criminal record to provide security services at the homes of unwitting members of the public. In both cases, as in the case at bench, the employee created criminal acts against the victim at his own time at the victim’s home.

Underberg presents the most striking similarities to the case at bench, as illustrated by the table below:

	Hatfield	Underberg
ADT Dealer	X	X
ADT Contract required employee screening	X	X
No screening occurred because of financial concerns	X	X
High employee turnover	X	X
Door-to-door sales	X	X

Crews brought to neighborhoods in a van	X	X
ADT executives acknowledged risks of hiring dangerous criminals to work conducting door to door sales	X	X
Criminal used contacts through ADT dealer to get access to victim	X	X
Assault occurred at home	X	X
Criminal had background of violent crime	X	X

Carlson, Underberg, McGuire and Tallahassee Furniture all convincingly demonstrate that the trial court erred in dismissing this case. This court should reverse and remand.

C. PSP Owed and Breached a Duty under Restatement (Second) of Torts § 315.

In Washington, it is well established that where a “special relationship” exists, a duty to protect the against the intentional or criminal acts of third parties may arise. *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 721, 985 P.2d 262 (1999). The Restatement (Second) of Torts § 315 (1965) sets forth this duty as follows:

There is no duty so to control the conduct of a third party 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 the other which gives the other a right to protection.

The employer/employee relationship meets the § 315 (b) requirement of a "special relationship" giving rise to a duty. *Niece v. Allenview Group Home*, 131 Wn.2d 39, 44, 929 P.2d 420 (1997); *C.J.C., supra* 721. When a § 315 special relationship exists, a general duty arises to use reasonable care to protect from the tortious acts of others.¹¹ *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 203-205, 943 P.2d 286 (1997). Once the duty arises, it protects from "a universe of possible harms." The concept of foreseeability defines the limits of the duty. *Niece, supra* at 50.

In *C.J.C., supra*, the court analyzed whether a church and its officials had a special relationship with either its workers or the children of the congregation which gave rise to a duty to take reasonable measures to prevent harm intentionally inflicted on the children by a church worker. In one of the consolidated cases, a church worker molested the plaintiffs off of church premises and outside of church activities. Our Supreme Court

¹¹ *Niece* suggests that this duty can give rise to causes of action regarding negligent hiring, retention, and supervision. *Niece*, at 48. Therefore, an analysis of Restatement § 315(b) liability and negligent hiring, retention and supervision overlap to some extent.

found that a duty existed nonetheless, relying upon *Marquay v. Eno*, 139 N.H. 708, 662 A.2d 272 (1995). Citing *Marquay* with approval, our Supreme Court in *C.J.C.* stated the following at 723-724 (emphasis added):

The court recognized that a principal's negligent failure to control an agent **is not necessary limited to conduct performed within the scope of employment or during work hours, so long as there is a causal connection between the plaintiff's injury and the fact of the agency relationship.** *Marquay*, 139 N.H. at 719-721. The court reasoned that, under such circumstances, liability exists not because of when (or where) the injury occurs, but because **"the actor has brought into contact or association with the [victim] a person the actor knows or should know to be particularly likely to commit intentional misconduct..."** *Marquay*, 139 N.H. 719 (quoting Restatement (Second) of Torts § 302B cmt.e, para., D.) Accordingly, employers have been found liable for criminal conduct by off-duty or former employees where such conduct was consistent with the propensity of which the employer knew or should have known, and the association between the victim and employee was occasioned by the employee's job. *Marquay*, 139 N.H. 719-720 (citing cases).

We find the rationale adopted in *Marquay* persuasive when analogized to the circumstances presented here. In particular, we find the conjunction of four factors present in the case before us decisive to finding the existence of a duty is not foreclosed as a matter of law: (1) the special relationship between the church and Deacon Wilson; (2) the special relationship between the church and the plaintiffs; (3) the alleged knowledge of the risk of harm possessed by the church; and (4) the alleged causal connection between Wilson's position in the church and the resulting harm. Under these circumstances, we simply do not agree with the church that its duty to take protection action was arbitrarily relieved at the church door. Where a protective special

relationship exists, a principal is not free to ignore the risk posed by its agents, place such agents into association with vulnerable persons it would otherwise be required to protect, and then escape liability simply because the harm was accomplished off premises or after hours. Under these facts, the focus is not on where or when the harm occurred, but on whether the church or its individual officials negligently caused the harm by placing its agent into association with the plaintiff when the risk was, or should have been, known.

The Supreme Court concluded that the church and its pastor owed a duty of reasonable care to affirmatively act to prevent the harm in view of their relationship to the plaintiffs, their relationship to the tortfeasor, and given prior knowledge of the tortfeasor's proclivities they allegedly possessed. The questions of causation and foreseeability presented jury issues. *C.J.C.*, at 727.

C.J.C. demonstrates the trial court's misplaced focus in this case. The court expressed concern that Robinson no longer acted in his employer's interest once Sandra Hatfield rejected his sales pitch. VRP 10, 13, 28-29. The court concluded that because Robinson had returned two months later to attack Maria, that the employer had no responsibility. VRP 29. This "when or where" reasoning conflicts with *C.J.C.*

Under *C.J.C.*, the trial court needed to decide whether PSP "negligently" caused the harm by placing its agent into association with the plaintiffs when it knew or should have known the risk. *C.J.C.*, at 724.

The undisputed facts establish that PSP did exactly that. PSP did not screen Robinson as safe industry practice and its contract with ADT required. CP 657-660; 835. If PSP had done so, it would have learned of Robinson's past. If PSP had learned of Robinson's past, it would never have hired him. CP 467-468 (pp. 45-48), 663-664. If PSP did not hire Robinson, then he could not have used his job to meet Maria Hatfield, obtain her phone number, gained information about her home, and returned there and harm her.

This court should reverse the trial court's mistaken dismissal of the case.

D. PSP, in Executing its Agreement with ADT, Assumed a Duty to Screen Employees, Which it Breached by Failing to Investigate Robinson.

An affirmative duty assumed by a contract may create a liability to persons not party to the contract where failure to properly perform the duty results in injury to them. *Kelley v. Howard S. Wright Constr.*, 90 Wn.2d 323, 334, 582 P.2d 500 (1978); *Leija v. Materne Brothers, Inc.*, 34 Wn.App. 825, 828, 664 P.2d 527 (1983); *Manson v. Foutch-Miller*, 38 Wn.App. 898, 902, 691 P.2d 236 (1984). Violation of such a contract provision presents a jury question, *Manson*, at 903.

In *Kelley*, a general contractor contractually assumed responsibility for certain safety practices and programs on a job. Our Supreme Court held that the contractual assumption of safety responsibility created a duty to an employee of a sub-contractor who suffered injury on the work-site. *Kelley*, at 334. In *Leija*, the court held that a road construction contractor assumed a duty to the traveling public by contractually agreeing to comply with standard specifications for road and bridge construction. *Leija*, at 829.

In *Underberg, supra*, the ADT dealer agreement contained an employee screening provision virtually identical to the one at issue in the case at bench. The court held that this provision raised a question of fact regarding Southern Alarm's duty to perform background checks.

Underberg, 643 S.E. 2d, at 378, *see also, D.R.R. v. English Enterprises*, 356 N.W. 2d 580 (Ct. App. Iowa 1984).¹² Likewise, PSP assumed a duty to perform background screenings in its contract with ADT. CP 717, 835, 874-875. This clause facilitated investigation of whether applicants had a criminal background, because the past would give information about how the applicant may act in the future. CP 540 (pp.24-25). Such a check

¹² Homeowner raped by cable installer who had criminal history. The contract between the cable dealer and franchisee required franchisee to give polygraph tests to cable installers. The contract created an issue of fact whether plaintiff was intended beneficiary and whether breach occurred which injured plaintiff.

allows assessment of the risk that an employee might pose to the public or the customers. That risk justified performing the background check in the first place. CP 485 (pp.22-23); 489 (pp.40-41); 541 (pp.26-27).

Therefore, the dealer screening provision imposed a duty upon PSP screening provisions imposed a duty upon PSP to investigate the background of its employees to protect the safety of potential customers. CP 656-659. ADT executive David Smiley agreed. CP 486 (p. 28) PSP breached this duty when it hired Michael Robinson without conducting a criminal history and drug screening upon him as the contract required. CP 660. If PSP had done so, it would have discovered Robinson's history and refused to hire him. CP 467-468 (pp. 45-48), 663-664.

The trial court erred in disregarding PSP's breach of its contractual duty. This court should reverse.

E. Michael Robinson's Behavior Was a Foreseeable Occurrence.

The trial court expressed doubt about whether Michael Robinson's actions toward Maria Hatfield fell within the scope of foreseeability. VRP 29. To the extent this doubt contributed to the dismissal of the case, it constituted error.

Foreseeability defines the limits the scope of the duty owed. 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.” *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989). A court may find intentional or criminal conduct foreseeable unless it is “so highly extraordinary or improbable as to be wholly beyond the range of expectability.” *Niece*, supra, at 50. Thus, the class of persons protected by a duty includes all those foreseeably put at risk by a defendant’s negligent conduct. In effect, the defendant’s conduct creates “a general field of danger,” and all persons within the “field” belong to the protected class. *Schooley v. Pinch’s Deli Market*, 80 Wn.App. 862, 868-869, 912 P.2d 1044 (1996); *affirmed*, 134 Wn.2d 468, 951 P.2d 749 (1998).

Foreseeability does not turn upon the unusualness of the act that resulted in injury to the plaintiff. Rather, the court must analyze whether the result of the act falls within the ambit of the hazards covered by the duty imposed upon the defendant. *Rikstad v. Holmberg*, 76 Wn.2d 265, 269, 456 P.2d 355 (1969). Likewise, foreseeability does not depend upon anticipation of a particular sequence of events resulting in an injury. The matter in which the risk culminates and harms may seem unusual,

unprobable and highly unexpected from the point of the view of the actor at the time of the conduct. Nonetheless, if the harm suffered falls within the general danger area, liability may exist. *Berglund v. Spokane County*, 4 Wn.2d 309, 320, 103 P.2d 355 (1940).

Under Washington law, no doubt exists that Maria Hatfield's injury foreseeably resulted from PSP's negligence. Joseph Chernicoff explained that the entire security industry exists to prevent or minimize the occurrence of crimes against the public, including customers and potential customers. CP 656-657. Common knowledge in the security industry holds that a person's past behavior provides critical and accurate information about their likely future behavior. Accordingly, safe practice involves screening and investigations of a prospective employee's criminal history to protect clients and the public from unsuitable persons. CP 658. Specifically, given Robinson's background, he presented a foreseeable risk to customers or potential customers of PSP. Robinson's behavior towards Maria Hatfield clearly fell within the scope of the duty, which establishes foreseeability. CP 662-663.

Cases from other jurisdictions support this conclusion. In *Underberg*, supra, the Georgia Court of Appeals did not find the assault perpetrated by the off-duty former employee up on the home owner an

unforeseeable occurrence, in part because the background checks ADT required had the purpose of protecting the public. 643 S.E. 2d at 378. In *McLean v. The Kirby Company*, 490 N.W. 2d 229 (1992), a home owner suffered a sexual assault at the hands of a vacuum cleaner salesman. The North Dakota Supreme Court found that the failure to screen the salesman created a foreseeable risk of harm to a home owner, and concluded as follows, at 238:

[T]here is a foreseeable risk of harm to the occupant when an employer allows an employee to enter the dwelling without first investigating the employee's fitness to enter. A dwelling is "a place traditionally associated with safety, privacy, and sanctity." (citation omitted). An employer is subject to liability for negligently hiring an employee without prior investigation of the employee's fitness for entry into dwellings.

In *McGuire*, the Arizona Court of Appeals observed that employing a felon to install burglar alarms raised foreseeable risks of loss. 609 P.2d 1082 as follows:

Unquestionably, a defendant may be found negligent in knowingly employing a wanted felon or a felon with a long record to install a burglar alarm. If it could be negligent to employ such a person than it could be negligence where this is not known to the employer but should have been known, especially in light of the nature of the work, the temptations inherent therein and the opportunities presented. The risk is there and the possible loss is certainly foreseeable.

These cases and common sense clearly demonstrate the existence of a foreseeable risk of harm to innocent residents where an employer hires a dangerous criminal to provide in-home services. The trial court erroneously adopted a truncated view of foreseeability that conflicts with longstanding Washington law. This court should reverse.

F. PSP’S Negligence Constituted a Proximate Cause of Maria Hatfield’s Injuries

Proximate cause generally presents a question of fact. *Hertog v. City of Seattle*, 138 Wn.2d 265, 282, 979 P.2d 400 (1999). Proximate cause consists of two elements: cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 777-779, 689 P.2d 77 (1985). Cause in fact refers to the “but for” consequences of an act., the physical connection between an act and an injury. Legal causation rests on policy considerations as to how far the consequences of the defendant’s acts should extend. It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. *Id.*

The evidence establishes cause in fact in the case at bench. *Read v. Scott Fetzer Company*, 990 S.W. 2d 732, 42 Tex. Sup. J.264 (1998) illustrates. In that case, a door to door vacuum cleaner salesman raped a customer. The customer sued, claiming that the vacuum cleaner company

had not properly screened the employee, who had a criminal history. The evidence established that if the local dealer had performed a background check, it would have learned about the salesman's past problems. The dealer testified that he would not have hired the salesman if he knew about his history. The Supreme Court of Texas concluded that this constituted legally sufficient evidence to support cause in fact. *Read*, 990 S.W. 2d, at 737.

Identical evidence exists in the case at bench. Stephenson agreed that a background check would have revealed Robinson's history. He would not have hired Robinson if he had known of that history. CP 467-468 (pp. 45-58). Obviously, if ADT had never hired Robinson, he never would have solicited the Hatfield's home and met Maria. As in *Read*, this evidence proves cause in fact.

Legal causation exists as well. A logical nexus flows from PSP's failure to screen Robinson and his subsequent contact with, and attack upon, Maria Hatfield. Further, the evidence supports inferences that Robinson obtained Maria Hatfield's phone number by investigating PSP's records. Sandra Hatfield told Robinson that she had previously used ADT services. CP 598 (p. 7). PSP serviced that account. CP 604 (pp.30-31). Maria Hatfield refused to give Robinson her phone number. CP 583 (pp.

27-28). Nonetheless, Robinson started to call her and identify himself as the “ADT guy.” CP 446 (pp. 26-27); 584-585 (pp. 31-34). Thus, there exists a logical inference that Robinson acquired her phone number through his relationship with PSP and ADT. CP 663.

Finally, the fact that Robinson committed his assault outside of work hours does not sever the causal connection. The same happened in *Underberg, McGuire and Tallahassee Furniture Company*. In none of those cases did the termination of the employment relationship or the passage of time break the causal connection as a matter of law. Instead, in each, the courts focused upon how the assailant’s work facilitated contact with and access to the victim. In each, the court declared that the jury must decide causation. The same should occur here. The trial court erred in dismissing this case as a matter of law and should reverse the decision.

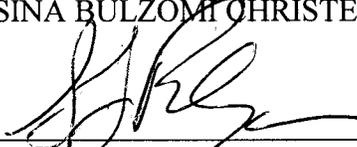
V. CONCLUSION

The trial court erred in dismissing this case. This case should reverse and remand for all issues.

DATED this 13 day of March, 2007.

MESSINA BULZOMI CHRISTENSEN

By


STEPHEN L. BULZOMI 15187
JAMES W. McCORMICK 32898
Attorneys for Plaintiff

AUTHORIZED DEALER AGREEMENT

by and between

ADT SECURITY SERVICES, INC.

and

**AMERICAN SECURITY SERVICES, LLC
d/b/a SALT RIVER PROTECTION,
d/b/a PUGET SOUND PROTECTION**

Dated as of February 9, 2002

EXHIBIT # L

17.6 Employees.

17.6.1 Actions of Employees. All persons employed by Authorized Dealer are the employees and agents of Authorized Dealer and not of ADT. Authorized Dealer shall be solely responsible for the acts, negligence and omissions of its employees and agents, and shall have sole responsibility for their supervision, direction and control.

17.6.2 Employee Benefits. Authorized Dealer understands and agrees that as an independent contractor engaged in its own business, it is not, and shall never become eligible for, nor entitled to participate in, any plans or arrangements that ADT or any of its affiliates maintain for the benefit of ADT's employees, including, without limitation, pension, profit sharing, health, welfare benefit or other fringe benefit plans, if any. Further, Authorized Dealer is not entitled to worker's compensation benefits from ADT or any of its affiliates and is obligated to pay its own federal and/or state income or other tax on any moneys earned pursuant to this Agreement. Upon ADT's request, Authorized Dealer shall provide to ADT evidence that is satisfactory to ADT which shows that Authorized Dealer is adequately covered by worker's compensation insurance.

17.6.3 Background Screens. Authorized Dealer represents and warrants that all of its employees utilized to perform services under this Agreement have successfully passed a drug screen and a criminal background check, and, if applicable, have current drivers' licenses. Authorized Dealer agrees that it shall produce certification satisfactory to ADT upon ADT's request that Authorized Dealer has complied with the terms of this paragraph. Authorized Dealer consents and authorizes ADT to conduct a reasonable background check of Authorized Dealer and any non-ADT personnel utilized by Authorized Dealer in the performance of the services hereunder, if ADT so elects. Authorized Dealer shall cooperate with and provide to ADT such information as ADT shall reasonably in carrying out such background checks.

17.7 Status of Representations and Warranties. Authorized Dealer and Owner shall cause their respective representations and warranties contained in this Agreement and in any exhibit attached hereto to be true and correct on and as of each Closing Date and at all times during the term of this Agreement, and at all times between such dates, in all respects.

17.8 Applicable Law, Jurisdiction and Venue. This Agreement shall be construed and enforced in accordance with the laws of the state of Colorado applicable to agreements wholly executed and wholly performed therein. Any action or proceeding brought by either party against the other arising out of or relating to this Agreement shall only be brought in a court of competent jurisdiction located in Arapahoe County, Colorado. Authorized Dealer and Owner hereby irrevocably consent to the in-personam jurisdiction of such courts for purposes of any such action or proceeding, and Authorized Dealer and Owner further agree hereby to waive the procedures for service of process set forth in Rule 4 of the Colorado Rules of Civil Procedure and hereby agree and consent that service of process via reputable courier at the addresses set forth in

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Page 2 of 2

POOR QUALITY ORIGINAL



AUTHORIZATION AND RELEASE FOR THE PROCUREMENT OF A CONSUMER AND/OR INVESTIGATIVE CONSUMER REPORT

(PLEASE PRINT OR TYPE)

I, the undersigned consumer, do hereby authorize ADT SECURITY SERVICES, INC. ("ADT"), by and through its independent contractor, KROLL BACKGROUND AMERICA, INC. ("KBA") located at 1908 Church Street, Suite 400, Nashville, TN 37203 to procure a consumer report and/or investigative consumer report on me.

These above-mentioned reports may include, but are not limited to, information as to my character, general reputation, personal characteristics and mode of living, disclosed through employment and education verifications; personal references; personal interviews; my personal credit history based on reports from my credit bureau; my driving history, including my traffic tickets; a social security number verification; present and former addresses; criminal and civil history/records; any other public records.

I understand that I am entitled to a complete and accurate disclosure of the nature and scope of any investigative consumer report of which I am the subject upon my written request to KBA, if such is made within a reasonable time after the date hereof. I also understand that I may receive a written summary of my rights under 15 U.S.C. § 1681 et. seq. and Cal. Civ. Code § 1786.

I further authorize any person, business entity or governmental agency who may have information relevant to the above to disclose the same to ADT by and through KBA, including, but not limited to my and all courts, public agencies, law enforcement agencies and credit bureaus, regardless of whether such person, business entity or governmental agency compiled the information itself or received it from other sources.

I hereby release ADT, KBA and my and all persons, business entities and governmental agencies, whether public or private, from my and all liability, claims and/or demands, by me, my heirs or others making such claim or demand on my behalf, for providing a consumer report and/or investigative consumer report hereby authorized. I understand that this Authorization/Release form shall remain in effect for the duration of my employment with said Company.

I understand that this Authorization/Release form shall remain in effect for the duration of my affiliation with ADT. Additionally, I give permission to investigate any incidents of misconduct, including but not limited to sexual harassment, of which I have been accused and/or for which I am alleged to have been involved during my affiliation.

Further, I certify that the information contained on this Authorization/Release form is true and correct and that my participation in the ADT Authorized Search Program may be performed based on my false, omitted or fraudulent information.

Signature: Michael Lawrence Robinson 8/26/03

Other Names Used (alias, maiden, nickname) YEARS USED

Current Address: 501 E 7561 Tacoma, WA 8/26/03

Former Address: Street/P. O. Box City State Zip Code County State

Social Security Number: 606-18578 Telephone Number: (360) 556-1863

Driver's License Number: B2345678 State of Issuance: WA Date of Birth: 5/29/77 Gender: M

- Have you ever been convicted of a crime or convicted in a military court martial? Yes No
Have you ever been sanctioned or had your license suspended or revoked? Yes No
Are you currently under any investigation or pending charge? Yes No

Please provide me with a copy of my background investigation report. Yes No

This information will create an identity history for the credit we had about information during the course of our background search.

A Kroll Background America, Inc. An Equal Opportunity Employer

EXHIBIT # E

NO. 36890-1-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TERESA RUCSHNER, individually and as Guardian ad Litem for
MARIA HATFIELD, a minor,

Plaintiff-Appellant,

vs.

ADT SECURITY SYSTEMS, INC.; PUGET SOUND
PROTECTION, a Washington corporation; and MICHAEL L.
ROBINSON, III,

Respondents.

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STATE OF WASHINGTON
DEPUTY

COURT OF APPEALS
DIVISION II

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
HONORABLE SERGIO ARMIJO

AFFIDAVIT OF FILING BRIEF OF APPELLANT

STEPHEN L. BULZOMI
JAMES W. MCCORMICK
MESSINA BULZOMI CHRISTENSEN
Attorneys for Petitioner

5316 Orchard St. W.
Tacoma, WA 98467-3633
(253) 472-6000
