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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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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.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT

REPLY BRIEF OF APPELLANT

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I. REPLY TO RESPONSE STATEMENT OF THE CASE

Respondent's Statement of the Case omits some significant facts, which casts doubt on their characterization of events.

First of all, in discussing the encounter between Michael Robinson and Sandra Hatfield, Respondent ignores that Sandra Hatfield refused Robinson's sales pitch because of her prior negative experience with ADT services. CP 598 (p. 7). The prior account also involved a door-to-door salesman from Puget Sound Protection (PSP). CP 604 (pp. 30-31). Therefore, contrary to PSP's protestations otherwise, a clear inference exists that Robinson obtained Maria Hatfield's number from prior PSP records. On p. 3, Respondent offers that Maria Hatfield "allowed" Michael Robinson to come into her house. This ignores Maria Hatfield's testimony about Robinson's persistent efforts and intimidation of her until she opened her door. Brief of Appellants, pp. 12-14.

On p. 5, Respondent disregards that PSP general manager Clyde Stephenson agreed that a background check would have revealed Robinson's history. Stephenson would not have hired Robinson if he had known of his convictions for drug possession and door-to-door scamming. CP 467-468 (pp. 45-48). Consequently,

the inference exists that, if PSP had bothered to screen Robinson, he never would have received the job.

Finally, Respondent tries to whitewash the trial court's basis for dismissing the case, stating that the court determined that Plaintiffs did not support "an actionable negligence claim against PSP" Respondent's Brief, p. 5. Actually, the court seemed to accept the respondent's narrow view of foreseeability, and dismissed the case on that basis (VRP 29):

The argument is that the employer is responsible for employee's 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 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).

II. ARGUMENT

A. Robinson's Conduct Constituted a Foreseeable Occurrence that Fell Within the Scope of the Risk Created by Negligent Hiring and Retention of a Door-To-Door Salesperson.

PSP, at pp. 3-5, accurately quotes from Washington cases that discuss foreseeability. However, PSP wholly fails to consider or discuss foreseeability as it relates to the risks posed by companies that operate by dispatching employees to the home of customers or potential customers. Those cases, consistent with

Washington law, set out a broadly encompassing view of foreseeability. For example, the Arizona Court of Appeals, in *McGuire v. Arizona Protection Agency*, 125 Ariz. 380, 609 P.2d 1080, 1082 (1980), stated the following:

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 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 the possible loss is certainly foreseeable.

The court in *Welsh Manufacturing, Division of Textron, Inc. v. Pinkerton's, Inc.*, 474 A.2d 436 (R.I. 1984) analyzed foreseeability in an analogous context. In that case, the plaintiff hired the defendant to provide security services at its manufacturing plant. The defendant hired a 21 year-old sailor as a part-time weekend security employee. The employee had conspired with one of his neighbors to obtain a job at Pinkerton's, for the purpose of assisting the neighbor in stealing valuable commodities stored on premises to which Pinkerton's might assign him.

The employee facilitated three thefts from the plaintiff's premises. The third occurred after the employee had quit Pinkerton's, and involved losses of over \$180,000.00. *Welsh*, at 438. After a verdict for the plaintiff, the defendant appealed. In

affirming, the Rhode Island Supreme Court discussed foreseeability

in the context of proximate cause, at 444, as follows:

Pinkerton's challenges the propriety of the trial justice's submission of the issue of proximate cause to the jury. This challenge would relate to all alternative theories of negligence and is based upon Pinkerton's assertion that Lawson's criminal intervening act broke the chain of causation. We reject this challenge. We have enunciated the test for proximate cause in terms of foreseeability.

"The test in these cases must be whether the intervening act could reasonably have been foreseen as a natural and probable result of the original act of negligence of the defendant." [Citation omitted]

We are of the opinion that Lawson's succumbing to temptation and his participation in the criminal thefts might be found by a rational trier of fact to be reasonably foreseeable result of Pinkerton's negligence in taking reasonable steps assure its employees' honesty, trustworthiness, and reliability. When considering foreseeability in respect to the issue of proximate cause, this court observed in a somewhat analogous case that "it was for the jury to determine what dangers a race track operator should have perceived and what cautions and safeguards it should have taken for the benefit of its paying patrons ***." [Citation omitted] In the case at bar, it was similarly for the jury to determine what dangers, including criminal conduct, Pinkerton's should have perceived and what precautions and safeguards it should have taken for the benefit of its client, from whom it received a fee for the purchase of security. This foreseeability would be as applicable to the \$180,000.00 robbery, by which time Lawson had ceased to work for Pinkerton's, as to the earlier thefts since Lawson later admitted to furnishing the robber with information helpful to implementing the third crime. See *McGuire v. Arizona*

Protection Agency, 125 Ariz. 380, 609 P.2d 1080 (App. 1980).

The respondent essentially proposes that to prove foreseeability one must show that a defendant anticipated the exact sequence of events that caused harm. Longstanding Washington law rejects this notion. See, *Berglund v. Spokane County*, 4 Wn.2d 309, 319-320, 103 P.2d 355 (1940). There, our Supreme Court stated:

[R]espondent contends, in effect, that negligence can be predicated only upon ability to foresee the exact manner in which injury may be sustained. That is not the correct test. The formula applicable to a finding of negligence is whether or not the general type of danger involved was foreseeable.

“The courts are perfectly accurate in declaring that there can be no liability where the harm is unforeseeable, if ‘foreseeability’ refers to the general type of harm sustained. It is literally true that there is no liability for damage that falls entirely outside the general threat of harm which made the conduct of the actor negligent. The sequence of events, of course, need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbable and highly unexpected, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability, provided other requisites of legal causation are present.”

In the case at bench, the general type of harm at issue involved physical assault or property damage to homeowners from unsuitable persons hired by the respondents to conduct door-to-door

sales at the homes of potential customers. Perhaps PSP could not have anticipated the exact manner in which Robinson perpetrated his deed. Nonetheless, because that harm fell within the general field of risk created by PSP's conduct, foreseeability exists as a matter of law.

PSP, at pp. 9-10, urges that this court should follow the case of *Betty Y. v. Al-Hellou*, 98 Wn.App. 146, 988 P.2d 1031 (1999). In that case, the defendant developer hired a convicted child molester to help rehabilitate vacant apartments in Tumwater. During the course of this work, a sex offender became acquainted with the 14 year old boy who lived in the same block of apartments. Eventually, the sex offender took the boy to his residence in Tacoma and raped him.

The trial court dismissed and the Court of Appeals affirmed. The court contrasted *Carlsen v. Wackenhut Corp.*, 72 Wn.App. 247, 868, P.2d 882 (1994) and *Peck v. Siau*, 65 Wn.App. 285, 827 P.2d 1108 (1992), as follows at 149-150:

In *Carlsen*, we held that the employer of a part-time security guard at the Tacoma Dome could be liable for the guard's alleged assault of a young concert-goer. The question was whether the employer adequately investigated the guard's background before hiring him. Although duty was not discussed, the case illustrates the kind of situation where the employer owes a duty. The assault occurred on the work premises; the guard was on the job when he

contacted the victim; and the victim approached the guard for information because of his position. In short, the guard's job enabled and was closely connected to the assault. *Carlsen*, 72 Wn.App., at 256.

In *Peck*, the students sued the school district for negligently retaining a teacher who made an inappropriate sexual approach to the student. We held that there was insufficient evidence that the school knew of or should have known that the teacher was unfit for the position. Again, although duty was not an issue, the case illustrates facts that can give rise to a duty. The teacher was hired specifically to work with young people, and the contact with the victim not only occurred on the work premises but was made possible because both the employee and the victim were required to be on the work premises. *Peck*, 65 Wn.App., at 287.

Here, Al-Hellou was not hired to work with potential victims, the rape did not occur on the work premises, and most importantly, the job duties did not facilitate or enable Al-Hellou to commit the rape. Thus, the task, premises, and instrumentalities entrusted to Al-Hellou were not what endangered the victim.

The facts in the case at bench contrast dramatically with *Betty Y*. In this case, PSP dispatched Robinson into family neighborhoods to approach homeowners to sell them security services. As part of a sales call, Robinson contacted the Hatfield residence and encountered Maria Hatfield. Thus, the contact occurred at Robinson's "work place," because his "work place" consisted of the premises of any homeowner he chose to approach. PSP directly facilitated such contacts by driving him to neighborhoods where he made sales calls, helping him close sales, and paying him if he

succeeded. Thus, Robinson's duties directly enabled and facilitated the contacts which occurred at his work premises, the Hatfield home.¹

Further, the assault occurred at the same "work place" where Robinson first encountered the Hatfield family. Also, before Robinson returned to the premises, he telephoned Maria Hatfield at home and identified himself as "the ADT guy." (CP 446, pp. 26-27.)

These facts contrast dramatically with *Betty Y.*, where the perpetrator fortuitously encountered the 14 year old victim. In that case, the actual assault occurred in another city, after the perpetrator asked the victim to "go to the mall." *Betty Y.*, at 148. Thus, *Betty Y.* does not apply to the case at bench. The court should disregard PSP's overreaching argument that it does.

PSP, at pp. 15-16, also fails in its attempts to distinguish *C.J.C. v. Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999). PSP correctly observes that a "special relationship" existed between PSP and Robinson. This relationship gave rise to a duty. Notwithstanding this concession, PSP disputes the existence of a "proximate causal connection between Robinson's employment with

¹ PSP, at p. 15, somewhat disingenuously suggests that "the assault did not occur on the PSP premises . . ." "No sales calls occurred there, so naturally a salesman would have no opportunity to harm a customer there. PSP's distinction therefore establishes nothing.

PSP and his subsequent assault on Maria Hatfield.” The defendant in *C.J.C.* made the same argument, based on the fact that a church worker molested the plaintiffs off of church premises and outside of church activities. Our Supreme Court found a duty existed anyway, because the defendants brought the perpetrator into contact or association with the victim, where it knew or should have known that the perpetrator was likely to commit intentional misconduct. *C.J.C.*, at 723-724.

As in *C.J.C.*, evidence establishes that PSP knew or should have known of Robinson’s proclivities. The evidence also establishes that PSP brought Robinson to Hatfield’s neighborhood and facilitated their encounter at the Hatfield home. Consequently, *C.J.C.* supports Hatfield’s case.

B. PSP’s Negligent Hiring and Retention of Michael Robinson Constituted a Proximate Cause of Maria Hatfield’s Injuries.

PSP’s duty regarding Michael Robinson extended to those with whom he could come into contact within the scope of his employment.

PSP, at p. 14, suggests “[t]here is no Washington law that restricts or prevents an employer from hiring an individual from hiring an individual who has a prior history of criminal convictions to work as a door-to-door salesman.” This assertion begs the question,

because Washington law indisputably imposes a duty on every employer to avoid negligent hiring and retention of an employee. This theory requires proof 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, and (2) the negligently hired employee proximately caused the resulting injuries. *Carlsen v. Wackenhut*, 73 Wn.App. 247, 252-253, 868 P.2d (1994).

Having ignored applicable Washington law, PSP asserts that it "had no knowledge that Robinson had a prior history of misdemeanor convictions." Respondent's brief, p. 15. This argument makes no difference, because Washington law does not require actual knowledge. Rather, a plaintiff can establish a duty by demonstrating that the "employer knew, or in the exercise of ordinary care, should have known of its employee's unfitness at the time of hiring." *Carlsen*, at 252, citing *Peck v. Siau*, 65 Wn.App. 285, 888, 827 P.2d 1108 *review denied*, 120 Wn.2d 1005 (1992).²

PSP studiously disregards the following facts:

1. That in February of 2003, Robinson engaged in a door-to-door scam for which he faced charges of 15 counts of first degree criminal impersonation. Robinson was convicted of 3 counts of first degree criminal impersonation and 3 counts of third degree theft. CP 6393-6999, 714.

² Although PSP cites and argues *Siau*, it ignores the case's explanation that the knowledge prong of the duty embraces constructive as well actual knowledge.

2. On June 17, 2003, Robinson was convicted of possession of drug paraphernalia. CP 715.
3. On April 4, 2003, Robinson was convicted of possession of marijuana. CP 714.
4. Robinson received probation for his convictions of criminal impersonation and theft in the 3rd degree. CP 700-701.
5. A background check would have revealed Robinson's criminal history. CP 468 (pp. 47-48).
6. If Clyde Stephenson had known of Robinson's conviction of criminal impersonation, he would not have hired him. CP 468 (p. 47).
7. PSP, in its 2002 and 2004 agreements with ADT, warranted that "all of its employees utilized to perform services under this agreement have successfully passed a drug screen and criminal background check . . ." CP 834, 875.
8. PSP required its applicants to fill out the authorization for the background investigation to be conducted by Kroll Background America, Inc. (Kroll). Robinson executed this form. CP 421, 685. ADT encouraged its dealers to work with Kroll to investigate potential employees.
9. Other ADT dealers used Kroll. These background checks did not constitute a cost prohibitive task that would put PSP out of business. CP 487 (pp. 31-33).
10. ADT dealers received a special price through Kroll to do these investigations, which may have cost as little as \$50. CP 542 (p. 32).
11. If PSP found the price of the investigations cost prohibitive, it simply could have passed it on to an applicant. CP 660-661.

These facts demonstrate that PSP should have known, in the exercise of ordinary care, of Robinson's unfitness at the time of hiring. *Carlsen*, at 252.

Instead, PSP rendered itself wilfully ignorant of the background of its employees. PSP confusingly declares it used the threat of a background investigation and drug screening examination as a supposed "fail safe" "deterrent." CP 462-463 (pp. 24-27). The trier of fact could find such an approach negligent.

Given PSP's screening practices, any determined liar with a criminal background could find a job with PSP, as did Michael Robinson. PSP's curious policies fall far short of meeting safe practice in the security industry. CP 656-664. This court should join other jurisdictions in rejecting such a "head in the sand" approach to screening employees sent to do the employer's work at the homes of customers.

The court in *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 911 (Minn. 1983) stated the underlying reasoning, as follows:

The rationale employed in those cases, as well as in similar cases involving deliverymen or others who gain access to a dwelling by virtue of their employment, is that since plaintiff comes in contact with the employee as a direct result of the employment, and since the employer receives some benefit, even if only a potential or indirect benefit, by the contact between the plaintiff and the employee, there exists a duty on the employer to exercise reasonable care for the protection of a

dwelling occupant to retain in employment only those who, as far as can be reasonably ascertained, pose no threat to such occupant.

In *McLean v. Kirby Company*, 490 N.W.2d 229 (North Dakota 1992), the Supreme Court of North Dakota analyzed the liability of the employer of a door-to-door vacuum cleaner salesman who committed an assault on a perspective customer. After surveying the cases including *Ponticas*, the court stated the following, at 238:

These decisions demonstrate that there is a foreseeable risk of harm to the occupant when an employer allows an employee to enter a dwelling without first investigating the employees' 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 unfit employee without a prior investigation of the employee's fitness to enter into dwellings.

These cases demonstrate that a failure to investigate does not exculpate an employer of a sales person sent to the home of potential customers. Actually, the duty requires investigation, and the employer faces liability for failing to conduct such an investigation. In the case at bench, an investigation would have revealed Robinson's prior convictions for his door-to-door scams and his drug use. With such knowledge, PSP would never have hired him. PSP simply never investigated. The court should refuse PSP's request for relief based upon its failure to act.

C. PSP Cannot Distinguish Authority Cited in Appellant's Opening Brief.

PSP unsuccessfully attempts to distinguish cases Appellant cites in her opening brief. For example, in trying to brush off *C.J.C. v. Catholic Bishop of Yakima, supra*, PSP argues “[i]t is undisputed PSP was aware of Robinson’s criminal history” Brief of Respondent, p. 16. While the evidence in *C.J.C.* established that the defendant had actual knowledge of the propensities of its agent, the court did not rule that the law required such actual knowledge to establish liability. Instead, the court merely cited that knowledge as one of the four factors it considered in imposing liability. Respondent, while quoting from *C.J.C.* at 724, did not quote the entire passage. The court continued, at 724, as follows (emphasis added):

Under these circumstances, we simply do not agree with the Church that its duty to take protective action was arbitrarily relieved at the church door. Where a protective special relationship exists, a principle 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 plaintiffs when the risk was, **or should have been**, known.

Thus, *C.J.C.* supports liability in the present case because PSP could have, and would have, known of Robinson's background and propensities had it bothered to inquire.

PSP somewhat vaguely attempts to distinguish *Read v. Scott Fetzer Co.*, 990 S.W.2d 732 (Tex. 1990). Apparently, PSP believes that the case does not apply because the employee at issue was "a sexual predator." Brief of Respondent, p. 17. When one reads the case, it becomes readily apparent that the court's analysis had nothing to do with the specific prior crimes involved in the employee's background. Rather, the defendant argued that it owed no duty because it lacked control over its "independent contractor" door-to-door vacuum cleaner salesman. *Read*, at 735-736. The court also rejected the defendants' arguments disputing proximate cause, as follows, at 737:

The cause-in-fact element of proximate cause is met when there is some evidence that the defendants' "act or omission was a substantial factor in bringing about the injury' without which the harm would not have occurred." [Citation omitted.] Here, Sena testified that although he had not done a background check on Carter, he would have if Kirby had directed him to. There was evidence that Sena would have learned about Carter's past problems if he had performed a background check. Sena testified that he would not have hired Carter as a Kirby dealer if he had learned about Carter's history. We conclude that there is legally sufficient evidence to support a cause-in-fact finding.

Contrary to PSP's protestations, *Read* clearly applies to the case at bench. As in *Read*, evidence shows that the employer (PSP) would have learned about the employee's (Robinson's) problems if it had performed a background check. As in *Read*, PSP would not have hired Robinson if it had learned about his history. CP 467-468 (pp. 45-48). Thus, *Read* supports a finding of cause-in-fact. Simply put, if PSP had bothered to check Robinson's background, it never would have hired him and he never would have met Maria Hatfield.

PSP follows a similar approach in trying to dismiss *McLean v. The Kirby Co.*, 490 N.W.2d 229 (N.D. 1992), by pointing out that the vacuum salesman employee in that case had prior convictions for "assault and weapons charges, and a charge of criminal sexual misconduct was pending against him." Brief of Respondent, p. 17. Similar to the case at bench, the employer hired this salesman without performing any background investigation. Like *Read*, the employer argued it owed no duty because the salesman acted as an independent contractor. The court found a duty notwithstanding this relationship, at 233-234 as follows:

This court has also recognized the duty described in Restatement (2d) of Torts § 413. [Citation omitted.] "Where there is a foreseeable risk of harm to others unless precautions are taken," it is the duty of one who employs another to do work to exercise reasonable care in selecting a contractor "and to provide, in a contract or otherwise, for such precautions

as reasonably appear to be called for.” *Prosser and Keeton on Torts* § 71, p. 510 (5th ed. 1984).

* * *

Kirby markets its products through in-home demonstrations and sales. When potential purchasers admit Kirby dealers into their homes to demonstrate Kirby products for sale, there is a foreseeable and unreasonable risk of harm to those potential customers if those dealers have past histories of crime and violence. Only by requiring its distributors to investigate potential dealers before hiring them can Kirby reduce or eliminate this unreasonable risk of harm to potential purchasers of its products. We conclude that the trial court did err in refusing to rule “that no duty existed as a matter of law.”

This passage reveals that the court did not focus upon the specifics of the employee’s criminal background. Rather, the court emphasized that the employer’s duty arose from its method of doing business by sending salespersons into the homes of customers, creating a foreseeable risk of harm from unsuitable employees. PSP’s attempt to shrug off *McLean* therefore fails. PSP concedes that Michael Robinson, like the employee in *McLean*, had a background that rendered him unsuitable for approaching customers in their homes.

PSP unsuccessfully attempts to distinguish *Tallahassee Furniture Company, Inc. v. Harrison*, 583 So.2d 744 (Fla.App. 1991); *review denied*, 595 So.2d 558 (Fla. 1992). PSP again implies that the court’s decision turned upon the nature of the employee’s checkered

past. Actually, the employer never asked the employee to fill out a standard application form, which inquired about criminal, drug use and psychiatric histories. The employer's representatives testified that they could assume that if the employee had filled out the application, he would have furnished the information requested. Further, if the employer had known of the prior criminal record, drug addiction and psychiatric illness, it would not have hired the employee. *Tallahassee*, 538 So.2d at 749. The court ultimately affirmed the jury verdict for the plaintiff. Identical evidence exists in the case at bench. CP 467-468 (pp 45-48). *Tallahassee* supports reversal of the dismissal of this case.

PSP, at p. 18, argues that *Read, McLean* and *Tallahassee Furniture* all involved instances where "the employer knew or should have known of the employee's propensity for violence, and/or the assault occurred while the employee was admitted to the victim's home while on the job." Brief of Respondent, p. 18.³ PSP also asserts that "none of Robinson's convictions showed a propensity for violence . . ." However, the decisions of the *Read, McLean* and *Tallahassee Furniture* courts did not turn on the degree of violence in

³ The assault in *Tallahassee Furniture* did not occur during the employee's work hours. When the employee had delivered furniture to the plaintiff previously, she had given him a television. He returned to her home under the pretext of seeking a receipt for the donated television, so "they" would not think he had stolen it. *Tallahassee Furniture*, at 755-756.

the employee's past. Rather, they turned on the fact that the employee's background rendered him unsuitable for employment as a salesperson or delivery person to the homes of customers. Identical facts exist in the case at bench. CP 467-468 (pp. 45-48).

PSP also urges that *Underberg v. Southern Alarm*, 284 Ga.App. 108, 643 S.E.2d 374 (2007) does not apply for two reasons. First, it claims that Georgia law "regarding liability for an employee's actions" differs from Washington law. Next, PSP disputes that Robinson's "social call" on the date he attacked Maria Hatfield had "any connection" to "the brief contact he had with her mother, two months earlier . . ." These arguments fail.

First of all, the *Underberg* court, in stating the employer's duty with respect to negligent hiring and retention, cited *Munroe v. Universal Health Svcs.*, 277 Ga. 861, 863, 596 S.E.2d 604 (Ga. 2004). *Munroe* cites the Restatement (Second) of Agency, § 213 (1958), to support its statement of duty for negligent hiring and retention.⁴ *Munroe*, 596 S.E.2d at 605-605. Washington has long invoked § 213 of the Restatement of Agency. *La Lone v. Smith*, 39 Wn.2d 167, 171, 234 P.2d 893 (1951); *Betty Y. v. Al-Hellou*, *supra*; *Peck v. Siau*, *supra*; *Carlson v. Wackenhut*, *supra*. Therefore,

⁴ The court also relied upon a Georgia statute, O.C.G.A. § 34-7-20.

Washington and Georgia employ the same approach to negligent hiring and retention.

Further, as in *Underberg*, the evidence shows that Robinson's contacts after the initial sales call, including the day of the incident, directly resulted from the initial sales call. No one can dispute that Robinson never would have encountered Maria Hatfield had PSP not droved him into her neighborhood to canvass homes for sales pitches. When Robinson called Maria after the initial contact, he identified himself as "the ADT guy." CP 446 (pp. 26-27). Maria never gave Robinson her phone number. CP 583 (pp. 26-27). Maria asked Robinson how he got her phone number, but he would not tell her. CP 583 (pp. 29-30). Sandra Hatfield previously had a PSP account. CP 604 (pp. 30-31). The inference exists that Robinson gained access to the Hatfields' phone number from the old PSP/ADT account.

Therefore, ample evidence links Michael Robinson's improper conduct with Maria Hatfield to the initial sales call on behalf of PSP. PSP not only disregards the facts, it violates the rule that the non-moving party on a summary judgment motion receives the benefit of all favorable factual inferences. *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963).

D. PSP Assumed a Duty to Screen Employees Within its Contract With ADT.

PSP cannot dispute that its contract with ADT required it to represent and warrant “that all of its employees utilized to perform services under this Agreement have successfully passed a drug screen and criminal background check . . . ” CP 835. Instead, PSP engages in misdirection, arguing that Clyde Stephenson testified that PSP would not hire a convicted felon. PSP further asserts that ADT Territory Manager Ronald Book argued that ADT did not specify how PSP would conduct background checks. Respondent’s Brief, pp. 20-21.

This hair splitting makes no difference, because Stephenson agreed that he would not have hired Michael Robinson had he known of Robinson’s drug background, and his conviction for the door-to-door scam. Stephenson also conceded that a background check would have revealed Robinson’s criminal history. CP 467-468 (pp. 45-48).

Thus, whether one considers Robinson a convicted felon, or a convicted door-to-door scammer, if PSP had bothered to investigate him, it would have learned that his background precluded his employment with the company. If PSP had not hired Robinson, then

he could not have met and later injured Maria Hatfield, which establishes cause-in-fact.

Book's testimony misses the point, as explained by his superior, ADT Regional Director David Smiley. Smiley testified that the contractual provision required PSP to conduct background checks of its employees as part of the Authorized Dealer Agreement. He also explained that this assumption of duty existed to protect the safety of PSP's customers, the public and its own employees. CP 485-486 (pp. 25-26). Accordingly, contrary to PSP's protestations, the facts show that PSP did contractually assume a duty, for the specific benefit of customers and the public, including Maria Hatfield.

In a telling omission, PSP does not dispute or refute the extensive Washington authority that establishes that a contractual undertaking may establish a duty to third parties. Brief of Appellant, pp. 41-43. Under the law and the facts, the duty exists. The trial court erred in disregarding this duty and dismissing the case. This court should reverse.

III. CONCLUSION

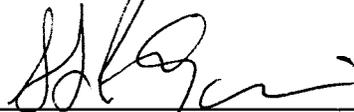
PSP cannot dispute that it acted negligently in failing to screen Michael Robinson's background before it hired him. It also cannot dispute that it would have learned of Robinson's background and

refused to hire him had it bothered to investigate. PSP's failure allowed Michael Robinson to encounter Maria Hatfield at her home, and return later to harm her. The trial court erred in dismissing the case. This court should reverse and remand.

DATED this 2 day of July, 2008.

MESSINA BULZOMI CHRISTENSEN

By

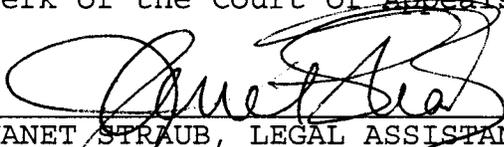


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On July 3rd, 2008, I filed, via Legal Messengers, the original Reply Brief of Appellant with the Clerk of the Court of Appeals.

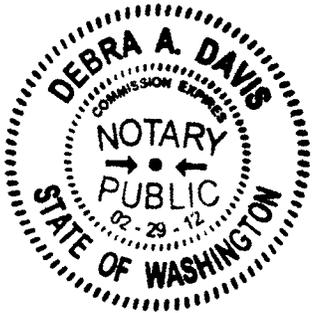


JANET STRAUB, LEGAL ASSISTANT

SIGNED AND SWORN to before me on the 3rd day of July, 2008, by Janet Straub.



Notary Public in and for the State of Washington, residing at Tacoma.
My appointment expires 2/29/12

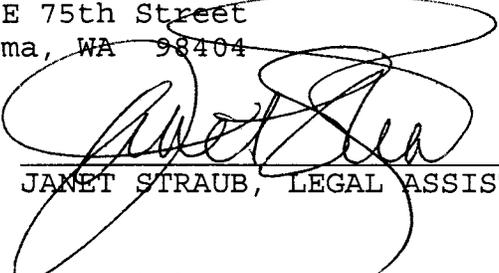


That on July 3rd, 2008, I delivered, via legal messenger, a copy of Reply Brief of Appellant for service upon:

Thomas R. Merrick, Esq.
Merrick Hofstedt & Lindsey PS
3101 Western Ave Ste 200
Seattle, WA 98121

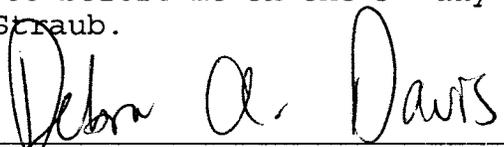
and via regular mail upon:

Mr. Michael L. Robinson, II
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SIGNED AND SWORN to before me on the 3rd day of July, 2008, by Janet Straub.



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