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66477-8

No. 66477-8

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

PAUL L. DEWS,

Plaintiff/Appellant,

v.

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

Defendant/Respondent

REPLY BRIEF OF APPELLANT PAUL L. DEWS

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I. INTRODUCTION: RESPONDENTS' INTRODUCTION IS INACCURATE

Appellant's introduction states that at Roadrunner Chevron there was a history of shoplifting and two instances of illegal beer sales and no violent crime before November 22, 2008.

Not so!

The Federal Way Police Department Spreadsheet of reported crimes at 2125 SW 356 Federal Way- (the location of Roadrunner Chevron) from 2004-2010 paints an entirely different picture. (CP, at 223-230)

1. WHAT WAS THE CRIMINAL ACTIVITY AT THAT LOCATION?

- a. In 2004 - There was a robbery at the Chevron Roadrunner address at 1:26AM on June 6, 2004.
Remember Roadrunner is the only business open after 11pm at that address.
- b. In 2005 - There was a weapons offense at Chevron Roadrunner.

- c. In 2006 - Robbing near midnight on July 24, 2006 at Roadrunner and an assault at that address at 3:18 AM on January 23, 2006 2 vehicle thefts at Roadrunner.
- d. In 2007 - Jan 27, 2007 at 3: 18AM at the Roadrunner address an assault, 2nd degree theft on October 5, 2007.
- e. In 2008 - Before the incident in this case an assault on March 2, 2008 in addition to 5 thefts reported at that address. This is not just some slight shoplifting unbeknownst to the owner or cashier at the Roadrunner. This was confrontational shoplifting done in the open.
- f. At 8:44AM on December 22, 2008 there was a report of a theft. At 11:19PM there was a robbery 2nd at the Roadrunner Chevron.
- g. In 2009 at 1:14AM on January 14 there was an assault 4 at Roadrunner Chevron. At 40 minutes after midnight on July 17, 2009 there was a reported theft 2 at the Roadrunner Chevron address.
- h. In 2010 on October 16 at 1:57 AM there was a reported homicide at 2125 SW 356 St- the Roadrunner Chevron address. On October 18th there was a robbery 1

reported at the same address and on October 19, 2010 a malicious mischief crime also at the same address.

- i. Mr. Mengistu the owner testified that he was robbed at gun point in October 2010. C.P. 218 (p. 50 L 3-22). It is also interesting that Mr. Mengistu observed people taking things even when he is working there. (C.P. 219 (p. 55 L 17,19))

Defendants argue that the court cannot consider subsequent criminal activity after the event in their lawsuit. Not so!

Subsequent criminal activity proves foreseeability not notice. It is much more than “a history of shoplifting and alleged illegal sale of beer on 2 occasions. Subsequent criminal activity in this instance is not offered to prove notice but prove foreseeability. If defendants contend that violent crimes were not foreseeable and there is evidence that violent crimes occurred both before and after the assault on the plaintiff then it is surely evidence of foreseeability.

In the Introduction appellants state that dismissal was appropriate because:

“1. The sudden unprovoked assault was not eminent or reasonably

foreseeable.” NOT SO! Hernandez told Ms. Johnson he would kill her if she called the cops. (CP, at 271,272). She nevertheless called 911 and came around the counter to follow Hernandez. (CP, at 264). The owner Mr. Mengistu said it was wrong for her to have done so. (CP, 219 (p. 54 L 1-11)).

An assault was reasonably foreseeable because Ms. Johnson had had a confrontation earlier with a customer during the beer rush. (CP, 202, 203). There were large crowds of drunken people hanging around the gas pumps Friday and Saturday nights. (CP, at 202). There were three bars in the area that closed just before 2 a.m. and people would rush to Roadrunner to buy alcohol. (CP, at 202).

“(2) The deli mart took reasonable steps to protect its customers.” No it did not. All Roadrunner claimed to have “at least fourteen security cameras operating that night” Forget about not monitoring them. They have not answered the question of why a seasoned employee was not on duty as promised or not locking the doors and selling beer through the window which was feasible but not employed. When defendants suggest that the only feasible security measures is the 14 video cameras (Roadrunner brief p. 32), or short of keeping plaintiff off the property, “it is not clear

what Deli mart could have done.” Defendants miss the boat. There is a locked door after 1 a.m. and sell alcohol through the window. They could have monitored the video. Mr. Mengistu knowing that Amanda Johnston was alone for the first time after he promised her a co-worker could have monitored the video from his home. Mengistu could have called her. He could have made certain the outside videos were operational. See further steps defendants could have taken at pages 31-33 of appellants brief.

“(3) there is no evidence that the assault would not have occurred “but for” the deli-mart’s alleged failure to take reasonable steps.” Yes there is; simply locking the door and serving through the window would do it. See also Appellants brief pages 31-33.

“(4) Mr. Dews was not the deli-mart’s invitee at the time of the assault.” Yes, he was. (CP, at 286).

“(5) Mr. Hernandez was not an employee of the deli-mart at the time of the assault.” TRUE.

“(6) The actions of deli-mart employee Amanda Johnson were not a proximate cause of the assault.” THAT IS A JURY QUESTION. See Appellant’s brief pages 29-31.

II. STATEMENT OF ISSUES

The parties cannot even agree on the issues on appeal.

Appellant's statement of issue as to deli mart:

a. APPELLANT'S STATEMENT OF THE ISSUES

"Is a gas station mini mart liable for a criminal assault or a business invitee what it has provided inadequate help late at night, in a high crime area and the assault is committed by a former criminal employee?"

Every statement in the issue is true:

Appellant is a business invitee , a promised co-employee was not on duty, many crimes had been committed including evident crime late at night at the minimart and the crime was committed by a former criminal employee so that appellants statement of the issue is correct.

Compare Appellants statement of the issue with

Defendant minimart's statement of the issues plural:

b. ROADRUNNER'S STATEMENT OF THE ISSUES

“1. Was the sudden unprovoked assault by Hernandez imminent or reasonably foreseeable to the Deli Mart?” Yes because it was not as through this was the ravings of a madman doing an irrational act. Hernandez told the clerk Amanda Johnson if she called the cops he would kill her. She approached close to Hernandez after he took the beer and was leaving the store which even the defendant said she should not have done. It is who foreseeable because there is a lot of shoplifting including the taking of beer which is confrontational during the beer rush after 1:45AM.

“2. Did the Deli Mart take reasonable steps to protect its customers?”- No. The only step listed by the defendant was to put in “14 security cameras” at least two of which were inoperable. The defendant failed to provide extra help as was promised and failed to lock the door and sell alcohol through a window after 1:15AM.

“3. Was any alleged failure by the Deli Mart to take reasonable steps approximate cause of any injuries to Mr.

Dews?” Yes. The failure to provide another co-worker as promised which was a reasonable step would have prevented the occurrence. The failure to lock the door at 1:15AM and sell alcohol through the window would have prevented the incident.

“4. Did the Deli Mart even have a duty to Mr. Dews to protect him from the assault by Mr. Hernandez? Yes. Mr. Dews was a business invitee. In their first motion for summary judgment defendant claimed that Mr. Dews only brought knitting to his girlfriend the clerk and made no purchases. When the Dews declaration proved that he purchased cigarettes and Mountain Dew, they said too much time had expired between the purchases and the incident. Not so! The time was reasonably related to the occurrence. Dews said he was trying to protect his girlfriend who the assailant threatened to kill.

“5. Should the causes of action based on employment (negligent hiring, negligent supervision, and respondeat superior) be dismissed especially since Mr. Hernandez was not employed by any defendant at the time of the incident and there is no evidence that the actions of

Ms. Johnson had anything to do with the attack?” No.

There was negligent hiring of Hernandez; he was a violent criminal on probation and no background check made.

Amanda Johnson was not properly trained and not properly experienced and Amanda Johnson’s actions when Hernandez was leaving with the beer exacerbated the situation which resulted in the assault on Dews. Even defendants conclude that she should not have rushed upon Hernandez as she did which caused him to panic; drop the beer and stab Dews.

c. APPELLANT STATEMENT OF THE ISSUE AS TO
CHEVRON

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

That is a correct stated issue. Chevron retained the right to control the actions of Roadrunner. Chevron had the

authority to change the terms of the contract of Roadrunner deli-mart, Chevron. Chevron prescribed training of deli-mart personnel. Chevron controlled the Chevron image at Roadrunner. Chevron required Roadrunner to adequately staff the premises, Chevron had the authority to send undercover agents to evaluate Roadrunner. Chevron required Mr. Mengistu to maintain safety and cleanliness of the premises. During Chevron's mandated Retail Training Program, Chevron instructed Mr. Mengistu on how to handle safety on the premises by training and providing information regarding "video-robbery deterrence" "locks on alcohol beverages cooler doors" and issuing "Chevron retail security Site Risk Rating Tool." The contract provided among other things:

"Retailer shall at all times during the term of the contract cause the premises to comply with Chevron consent and future image standards for branded retail outlets as set forth in Chevron Hallmark 21 Retail Image Guidelines."

Contrast the above with Chevron's statement of the issues.

d. CHEVRON'S STATEMENT OF THE ISSUES

“1. Does Chevron owe a duty of care to Dews where it had no right and exercised no control over security or employment decisions?” Wrong. Chevron did have the right of control whether it exercised it or not is not the test. Chevron required Mr. Mengistu to attend training that included security measures.

“2. Does Chevron control over image standards and logos create an apparent agency with the deli-mart when it had no right to control security, employees or day-to-day operations?” Appellant takes issue with the allegation contained in the issue. Chevron had the right of control. In addition, Chevron held out to the world that this was a Chevron gas station.

“3. Is Chevron vicariously liable for the actions of deli-mart or Mr. Hernandez when it had no right to control decisions regarding security and employment?” Disagree. It had the right to control through its contract and made all

who saw the gas station even in its name. Roadrunner deli-
mart Chevron.

III. STATEMENT OF THE CASE: THE PARTIES DISAGREE ON THE FACTS

Defendants argue that the court cannot consider subsequent criminal activity after the event in their lawsuit. Not so! Subsequent criminal activity proves foreseeability not notice. It is much more than “a history of shoplifting and alleged illegal sale of beer on 2 occasions.

Defendants also argue that the court ought not to consider subsequent criminal activity, defendants are wrong. Subsequent criminal activity in this instance is not offered to prove notice but prove foreseeability. If defendants contend that evident crimes were not foreseeable and their crimes occurred both before and after the assault on the plaintiff then it is surely evidence of foreseeability.

As to ER 407- subsequent remedial measures- defendants argue that plaintiff cannot show that defendant locked the doors after 1:00 AM and served alcohol through the window after he was

robbed at gun point defendants cite only the first part of ER 407.

They did not include:

“This rule does not require the inclusion of evidence of subsequent measure when offered for another purpose such as proving ownership, control, or feasibility of precautionary measures if controverted or impeachment.”

The defendants claimed that they took “reasonable steps” to protect its customers. They claimed to have “at least fourteen security cameras operating that night”- Forget about not monitoring them. They have not answered the question of why a seasoned employee was not on duty as promised or not locking the doors and selling beer through the window which was feasible but not employed. When defendants suggest that the only feasible security measures is the 14 video cameras (Respondent Roadrunner brief p. 32), or short of keeping plaintiff off the property, “it is not clear what Deli mart could have done”. Defendants miss the boat. There is a whole lot Chevron Deli Mart could have done. To begin with they could have locked the door after 1 AM and sell alcohol through the window. They could have monitored the video. Mr. Mengistu knowing that Amanda Johnston was alone for the first time after he promised her a co-

worker could have monitored the video from his home. Mengistu could have called her. He could have made certain the outside videos were operational.

IV. ARGUMENT: REBUTTAL TO RESPONDENT

ROADRUNNER

a. THE FEDERAL WAY POLICE DEPARTMENT SPREADSHEET IS ADMISSIBLE EVIDENCE

Respondents, without citing any authority, assert that the Federal Way Police Department Spreadsheet is inadmissible. Respondent Roadrunner brief p. 11.

RCW 5.44.040: Certified Copies of Public Records as Evidence.

Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be

admitted in evidence in the courts of this state.

Also see ER 803 and CR 44(a)(1).

Respondents maintain that the spreadsheet is irrelevant.

ER 401 definition of “relevant evidence:” “relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Clearly then the unbiased spreadsheet by the Federal Way Police Department for District 22 within its jurisdiction is clearly relevant on the issue of criminal history at Roadrunner and the adjoining area.

The respondents also claim that crimes that are “post incident activities” are completely irrelevant. Roadrunner respondents brief p. 11. However going by the definition of “relevance” in ER 401, subsequent criminal activity is certainly relevant to show foreseeability although it would not be relevant to show notice to the defendants because it is subsequent.

Foreseeability is important so showing all

the surrounding circumstances of a beer rush after the 3 bars closed with a drunken crowd at the gas pump with confrontational shoplifting with a single female clerk at 2 a.m. in the morning certainly sets the stage for violent criminal activity. The court in *Wilbert v. Metropolitan District Park of Tacoma*, 90 Wn.App. 304, 950 P.2d 522 (1998) stated: “Ordinarily foreseeability is a jury question and a criminal act can be held unforeseeable as a matter of law only “if the occurrence is so highly extraordinary or improbable as to be wholly beyond the range of expectability.” *Johnson v. State*, 77 Wn.App 934, 942, 894 P.2d 1366, *review denied*, 127 Wn.2d 1020 (1995). But the “pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated.” *Mcleod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953). Thus, a school district may be liable for the rape of a student by other students in a darkened, unsupervised room because acts of indecency in the room were foreseeable, even though the specific act of rape was

not. *Mcleod*, 42 Wn.2d at 323-24.

b. THE RESPONDENT'S CITE CASES THAT ARE FACT SPECIFIC AND INAPPLICABLE ON FORSEEABILITY OF CRIMINAL CONDUCT

The Respondents assert in their motion for summary judgment that this Court has never found a criminal act of a third party to be foreseeable. A quick look at the following proves otherwise. The Respondents assert that the six cases it cited in its motion for summary judgment foreclose the issue of foreseeability in this case. The trial court unfortunately agreed. A closer look at these cases shows that they do not foreclose the issue of foreseeability in this case.

The Courts in *Craig* and *Kim* held that there was no duty or special relationship between the plaintiff and defendant. *Jennifer Craig v. Washington Trust Bank*, 976 P.2d 126, 127 (1999) (“We agree with the trial court under these facts that no special duty results from the location and nature of the Bank's business.”); *Kim v. Budget Rent a car*

systems, 15 P.3d 1283, 1290 (2001)(“Under the facts of this case Budget did not owe a duty of care to plaintiff.”). Here, the Appellant was a business invitee to which the Respondents owed a duty of care so these cases are inapplicable.

Raider, Wilbert, and Tortes held that violent criminal activity may be unforeseeable if the defendant had no reason to know that this particular assailant had a propensity for violence or if there was not a sufficient level of crime on the premises. *Raider v. Greyhound Lines, Inc.*, 975 P. 2d 518 (1999); *Wilbert v. Metropolitan Parks Dist.*, 950 P.2d 522 (1998)(holding that a fight between customers at a club did not make a murder in retaliation – two hours later – foreseeable because the defendant had no reason to know of the assailants propensity for violence) *Tortes v. King County*, 84 P.2d 252 (2003)(held that a purely racially motivated double-homicide was unforeseeable). Here, there were numerous reasons for the Respondents to know of the propensity for violence from the large crowds of drunken people for the beer rush and

the level of criminal activity at Roadrunner to make foreseeability at least a jury question.

Fuentes held that carjacking in the enormous airport parking garage did not necessarily make carjacking at the car-rental facility pick-up point foreseeable. *Fuentes v. Port of Seattle*, 82 P.3d 1175 (2003). Here, unlike *Fuentes*, the assault of the Appellant occurred at the same location of the prior criminal activity on the premises.

Thus, the cases cited by the Respondents do not foreclose the question of foreseeability. Foreseeability should be decided by the jury in this case

c. REBUTTAL TO RESPONDENT CHEVRON

1. ADEQUATE PERSONNEL

Chevron requires Roadrunner to “provide personnel numbers adequate to handle available business.” (CP, at 128) Here, Chevron claims to not be in control of Road Runner’s staffing policy merely because there is a general idea that Road Runner is an

independent contractor. (CP, at 2, 4). If Chevron requires this staffing provision, Roadrunner is acting under Chevron's direction with regard to providing adequate personnel, independent contractor or not.

2. UNIFORMS

Chevron claims they are not in control of Roadrunner's insignias on uniforms because Roadrunner is required to use "Chevron approved uniforms." (CP, at 128) While this may or may not relate to Chevron controlling insignia use, Chevron has the right to insist on its use and it is certainly the case that Chevron controls what Roadrunner is doing as a business, and so there is no independent contractor application with regard to uniform use.

3. CHECK OFF LISTS

Chevron is incorrect in their assertion that there is no indication that the chart on CP 141 is a

check-off list for site visits to maintain Chevron station standards. The Chart provides guidelines with which to judge the conditions of the “security camera,” “pump,” “payment” systems, “advertising [display],” customer related “interfaces,” “full service selling” apparatuses, and “money order machine interface.” The Chart also includes Chevron instructing retailer’s what to change and plan for. “Note: Chevron in its sole discretion may make reasonable changes to this chart. (...) But should Chevron add any such functions, they will be associated with the tier level for them listed above, unless Chevron advises the Retailer otherwise.” (CP, at141).

4. FOLSOM CASE

Chevron asserts that the court in *Folsom v. Burger King*, 135 Wash.2d 658, 958 P.2d 301 (1998) buttresses their position that Chevron owed no duty of care to Mr. Dews. (Respondent Chevron

Brief at p. 10). Chevron gives ground that Folsom addressed a duty of care to employees, but cites another case the *Folsom* court used as a guideline to make the assertion that they owed no duty of care. The *Folsom* court also cited another case which has better application to this matter, *Martin v. McDonald's Corp.*, 213 Ill.App.3d 487, 572 N.E.2d 1073 (1991). In *Martin* the court held that "once McDonald's Corporation assumed the duty to provide security protection to plaintiff's, it had the obligation to perform this duty with due care and competence, and any failure to do so would lead to a finding of breach of duty." (*Martin*, at 614).

Chevron assumed a duty to provide security when they made it part of their CP 141 checklist to check the condition of the security camera, and included a contract provision that Roadrunner would adequately staff the station.

When citing *Folsom*, Chevron referred to *Hayman v. Ramada Inn, Inc.*, 86 N.C.App. 274, 357 S.E.2d 394 (1987), one of the *Folsom's* court's

guidelines, to assert that where a franchisor “did not control day-to-day operations [it was] not liable for injury to guest resulting from third party assault.” (*Hayman*, at 672, Respondent Chevron Brief at p. 11). However, in *Hayman* the Ramada Inn’s involvement was limited to checking the franchise’s “construction, furnishing, and advertising” of the facility.” (*Hayman*, at 278).

5. *D.L.S v. MAYBIN*

Chevron asserts that *D.L.S. v. Maybin*, 130 Wash.App. 94, 121 P.3d 1210 (2005) resolves the Apparent Agency issue in a light favorable to them. In *Maybin*, a young woman of 15 years old was employed at a McDonald’s. The young woman became involved in a relationship with her manager where drugs and sex were involved. The young woman’s parents sued McDonald’s Corporation, and not just the franchise. The appellate court affirmed McDonald’s Corp.’s motion for summary

judgment because the young woman's position was that she did believe she worked for McDonald's Corp. because of the omnipresent logo, and other such factors, but in a deposition for trial she stated that she knew she worked for the independent franchisee. (*Maybin*, at 99). Thus, did the *Maybin* court state "ordinarily, such a question would be for the jury, but here the undisputed evidence can be interpreted only one way." (*Maybin*, at 100).

Objective reasonableness is the test that, in this case, determines that Chevron is a franchisor, and could be understood by business invitees under the Apparent Agency Rule, to provide security or adequate employees at Chevron stations.

V. CONCLUSION

For the reasons stated in appellants opening brief and reply brief, appellants request that the court reverse the trial courts

grant of summary judgments in this case and remand the matter
for trial on the merits.

DATED this 12th day of May, 2011.

Respectfully submitted,

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COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

PAUL L. DEWS,

Plaintiff,

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

Defendants.

No. 66477-8

CERTIFICATE OF SERVICE

I hereby certify that on the date below indicated, I caused to be served copies of the
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