

TABLE OF CONTENTS

	<u>Page</u>
I. <u>INTRODUCTION</u>	1
II. <u>RESPONSE TO ASSIGNMENTS OF ERROR</u>	1
III. <u>RESPONSE TO STATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	2
IV. <u>STATEMENT OF THE CASE</u>	2
V. <u>ARGUMENT</u>	5
A. The Trial Court Properly Dismissed the Plaintiff’s Negligence Action Against PSP Because PSP Did Not Violate Any Duty to Maria Hatfield That Proximately Caused Her Injuries	5
B. The Trial Court Properly Dismissed the Plaintiff’s Negligence Action Against PSP Because PSP’s Actions and Inactions Were Not a Proximate Cause of Mr. Robinson’s Criminal Conduct Toward Her	6
C. The Trial Court Properly Dismissed the Plaintiff’s Negligence Action Against PSP Because PSP Did Not Have a Duty to Control Mr. Robinson When He Assaulted Ms. Hatfield.....	11
VI. <u>CONCLUSION</u>	21

TABLE OF AUTHORITIES

Page

TABLE OF CASES

Washington Cases

<i>Baumgart v. Grant County</i> , 50 Wn. App. 671, 750 P.2d 271 (1988)	7
<i>Betty Y. v. Al-Hellou</i> , 98 Wn. App. 146, 988 P2d. 1031 (1999), <i>rev. denied</i> , 140 Wn.2d 1022 (2000)	9, 10, 15, 21
<i>Blenheim v. Dawson & Hall, Ltd.</i> , 35 Wn. App. 435, 667 P.2d 125, <i>rev. denied</i> , 100 Wn.2d 1025 (1983)	11
<i>Bratton v. Calkins</i> , 73 Wn. App. 492, 870 P.2d 981, <i>rev. denied</i> , 124 Wn.2d 1029 (1994)	11
<i>Carlsen v. Wackenhut</i> , 73 Wn. App. 247, 868 P.2d 882 (1994)	15
<i>C.J.C. v. Catholic Bishop of Yakima</i> , 138 Wn.2d 699, 985 P.2d 262 (1999).....	15, 16
<i>Dickinson v. Edwards</i> , 105 Wn.2d 457, 716 P2d. 814 (1986)	12
<i>Hertog v. City of Seattle</i> , 138 Wn.2d 265, 979 P.2d 400 (1999)	7
<i>Hunsley v. Giard</i> , 87 Wn. 2d 424, 553 P.2d 1096 (1976)	6
<i>Kelley v. Howard S. Wright Construction Co.</i> , 90 Wn.2d, 323, 582 P.2d 500 (1978).	20
<i>Kuehn v. White</i> , 24 Wn. App. 274, 600 P2d. 679 (1979)	12
<i>Marshall v. Bally's Pacwest, Inc.</i> , 94 Wn. App. 372, 972 P.2d 475 (1999)	5, 6
<i>Niece v. Elmview Group Home</i> , 131 Wn.2d 39, 929 P.2d 420 (1997)	11

<i>Peck v. Siau</i> , 65 Wn. App. 285, 827 P.2d 1108, <i>rev. denied</i> , 120 Wn.2d 1005 (1992)	11, 13, 14
<i>Schooley v. Pinch's Deli Market</i> , 134 W. 2d 468, 951 P.2d 749 (1998)	6, 8
<i>Scott v. Blanchet High Sch.</i> , 50 Wn. App. 37, 747 P.2d 1124 (1987), <i>rev. denied</i> , 110 Wn.2d 1016 (1988)	11
<i>Seeberger v. Burlington Northern Railroad</i> , 138 Wn.2d 815, 982 P.2d 1149 (1999)	14
<i>Stoneman v. Wick Construction Co.</i> , 55 Wn.2d 639, 349 P.2d 215 (1960)	7
<i>Thompson v. The Everett Clinic</i> , 71 Wn. App. 548, 860 P.2d 1054 (1993), <i>rev. denied</i> , 123 Wn.2d 1027 (1994) .	11, 12
<i>Walters v. Hampton</i> , 14 Wn. App. 548, 543 P.2d 648 (1975)	7

Decisions of Other Jurisdictions

<i>D.R.R. v. English Enterprises CATV</i> , 356 N.W.2d 580 (1984)	19
<i>McLean v. The Kirby Co.</i> , 490 N.W.2d 229 (N.D. 1992)	17
<i>McGuire v. Arizona Protection Agency, Inc.</i> , 125 Ariz. 380, 609 P.2d 1080, 1082 (1980)	19
<i>Read v. Scott Fetzer Co.</i> , 990 S.W. 2d 732 (Tex. 1990)	17
<i>Tallahassee Furniture Company, Inc. v. Harrison</i> , 583 So.2d 744 (Fla. 1991)	17
<i>Underberg v. Southern Alarm</i> , 284 Ga. App. 108, 643 S.E.2d 374 (2007).....	18, 19

RULES

CR 56	1
-------------	---

I. INTRODUCTION

The trial court dismissed Plaintiff's claims against Puget Sound Protection ("PSP") that arose from actions of one of its employees who was not on-duty at the time of the incident alleged. The Plaintiff agreed with dismissal of the other corporate defendants¹, and subsequently obtained a judgment by default against Michael Robinson. Although the only defendant who remained in the case was Mr. Robinson, the default judgment was entered against "defendants." Consequently, Respondents' filed a cross-appeal solely as to the inclusion of "defendants" as the Judgment debtors. Plaintiff has agreed to correct the judgment by removing the inadvertent plural reference, and that stipulation resolves the cross-appeal in this matter.

The trial court properly determined that Plaintiff's allegations against PSP did not present a triable negligence claim, and properly entered a judgment of dismissal under CR 56.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court properly dismissed Appellant's Claims against Puget Sound Protection by summary judgment because the

¹ Plaintiff voluntarily dismissed Security One, Inc., and agreed that ADT Security Systems, Inc. should be dismissed by summary judgment. Dismissal of PSP's parent company, American Security Services, LLC, is not a separate issue in this appeal.

Plaintiff's proffered evidence did not establish an actionable claim for negligence.

III. RESPONSE TO STATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court correctly dismiss claims against Puget Sound Protection, Inc. arising from the intentional actions of an off-duty employee approximately two-months after he spoke briefly with the victim from outside her home when he was in her neighborhood soliciting business for Puget Sound Protection, Inc.?

IV. STATEMENT OF THE CASE

On June 22, 2004, Michael Robinson engaged in unlawful sexual contact with 14 year old Maria Hatfield² while visiting her in her home. His social visit with Ms. Hatfield was a personal one, and did not take place during his hours of work for PSP. Plaintiff attempted to link Mr. Robinson's actions to PSP because Robinson met Ms. Hatfield briefly a few months earlier, in the Spring, when she called out to him from her home while he was working in her neighborhood as a sales representative for PSP. According to Plaintiff, PSP should be liable for whatever Robinson did after this brief conversation with Maria Hatfield.

² Maria Hatfield was born August 21, 1989, and is no longer a minor.

In early 2004, Mr. Robinson spoke briefly with Maria's mother, Sandra Hatfield, to solicit an agreement for ADT security-monitoring services offered through PSP. Sandra Hatfield was not interested in PSP's security services and told Mr. Robinson to leave. He did so. CP 598. According to Maria³, as Robinson headed down the street she called to him from her bedroom window. After she spoke with him briefly he left, but she claimed he returned 5 to 10 minutes later and spoke with her again while he waited for a ride in a PSP van. CP 583. Mr. Patterson testified that Maria gave him her telephone number, and told him she was 17. CP 444. Maria denied doing so. CP 583. There was no evidence Mr. Robinson obtained her telephone number from PSP⁴. Robinson called Maria a few weeks later, on his own time and with his own telephone. CP 445; 584.

Approximately two months later, Mr. Robinson called Maria again. On June 22, 2004, he visited her in her home, on his own time. Maria allowed him to come into the house, and eventually she and Robinson engaged in sexual relations. Robinson claimed the sexual

³ Mr. Robinson's version of events was significantly different from that provided by Maria Hatfield. For purposes of this Appeal, PSP accepts Maria's version as correct.

⁴ Sandra Hatfield speculated that Mr. Robinson obtained the number from PSP, but there was no evidence PSP had the Hatfield telephone number, or that Robinson obtained that number from PSP. CP 604.

contact was consensual, but Maria claimed it was not. Regardless, Maria was too young to consent, and Robinson pled guilty to a third-degree rape charge. CP 446-447; 590.

PSP had hired Robinson on August 26, 2003, to work as a door-to-door sales representative, selling security monitoring services provided by ADT. CP 672-674. PSP sales representatives traveled in teams to neighborhoods to solicit sales by going door-to-door. If the resident expressed interest in the services, the “team leader” was called to meet with the homeowner, and possibly make an agreement. CP 441-442.

When Robinson filled out the PSP employment application, he certified that he had never been convicted of any crime, and he signed an authorization to allow PSP to obtain a “Consumer and/or Investigative Consumer Report” about him. In fact, Robinson lied about his background; he had misdemeanor convictions for possession of marijuana and drug paraphernalia, and for criminal impersonation⁵ and theft. Robinson also had been arrested recently after stealing a purse from a shopping cart. CP 441. PSP did not purchase a Consumer Investigative

⁵ The criminal impersonation and theft charges arose out of Robinson’s solicitation of donations for a charity that did not exist. CP 714-715.

Report regarding Mr. Robinson, which might have revealed his misdemeanor convictions and recent arrest⁶.

Plaintiff argued that PSP should have discovered Robinson's criminal history and declined to hire him for the sales-team position. If it had rejected his application, Plaintiff contends, Mr. Robinson would not have been in front of the Hatfield residence where Maria spoke to him in the spring of 2004, and the sexual assault a few months later would not have occurred.

The trial Court determined that Plaintiff's allegations did not support an actionable negligence claim against PSP, and dismissed PSP from the suit.

V. ARGUMENT

A. **The Trial Court Properly Dismissed the Plaintiff's Negligence Action Against PSP Because PSP Did Not Violate Any Duty to Maria Hatfield That Proximately Caused Her Injuries.**

To prove actionable negligence, a plaintiff must establish the existence of a duty, a breach of this duty, and a resulting injury. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 378, 972 P.2d 475 (1999).

⁶ PSP manager Clyde Stephenson explained that PSP did not have the financial resources to perform background checks on each of its sales representatives, most of whom were employed for only a short period of time, or might not even show up in the first place. Instead, PSP relied upon the deterrent effect of the authorization form.

Existence of a duty is a question of law, and foreseeability of harm determines the extent of that duty. “Foreseeability plays a large part in determining the scope of a defendant’s duty.” *Hunsley v. Giard*, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976).

[Negligence] necessarily involves a foreseeable risk, a threatened danger of injury, and conduct unreasonable in proportion to the danger. If the defendant could not reasonably foresee any injury as a result of his act, or if his conduct was reasonable in light of what he could anticipate, there is no negligence, and no liability.

Id.

“Foreseeability is used to limit the scope of duty owed because actors are responsible only for the foreseeable consequences of their acts.” *Schooley v. Pinch’s Deli Market*, 134 W. 2d 468, 477, 951 P.2d 749 (1998). Foreseeability will be decided as a matter of law where reasonable minds cannot differ.” *Id.* As discussed below, PSP breached no duty to Ms. Hatfield, and nothing PSP did or failed to do was a proximate cause of Mr. Robinson’s actions toward Ms. Hatfield.

B. The Trial Court Properly Dismissed the Plaintiff’s Negligence Action against PSP Because PSP’s Actions and Inactions Were Not a Proximate Cause of Mr. Robinson’s Criminal Conduct Toward Her.

For legal responsibility to attach to negligent conduct, the claimed breach of duty must be a proximate cause of the resulting injury. *Marshall v. Bally’s Pacwest, Inc.*, 94 Wn. App. 372, 378, 972 P.2d 475 (1999).

Proximate cause is properly determined as a matter of law where reasonable minds could not differ. *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400, 406 (1999).

The proximate cause of an injury is that cause, which, in a natural and continuous sequence, unbroken by a new, independent cause, produces the event, and without which the event should not have occurred. If an event would have happened regardless of the defendant's negligence, that negligence is not a proximate cause of the event.

Stoneman v. Wick Construction Co., 55 Wn.2d 639, 641, 349 P.2d 215 (1960).

Proximate cause is comprised of two elements: Cause in fact and legal causation. "Factual causation requires a sufficiently close connection between the complained of conduct and the resulting injuries. *Walters v. Hampton*, 14 Wn. App. 548, 555-556, 543 P.2d 648 (1975). "Where inferences from the facts are remote or unreasonable factual causation is not established, as a matter of law." *Id.*

Legal causation is determined by policy considerations as to how far the consequences of defendant's acts *should* extend, and whether liability should attach as a matter of law, given the existence of cause in fact. *Baumgart v. Grant County*, 50 Wn. App. 671, 674, 750 P.2d 271 (1988). Legal causation is dependent on "considerations of logic, common sense, justice, policy, and precedent." *Id.* The focus is whether

“as a matter of policy, the connection between the ultimate result and the act of defendant is too remote or insubstantial to impose liability.” *Schooley v. Pinch’s Deli Market*, 134 Wn. 2d 468, 477, 951 P.2d 749 (1998).

Regardless of whether PSP had any duty to not hire Mr. Robinson, in light of his misdemeanor history involving marijuana possession and theft, there was no proximate cause connection between the failure to discover Mr. Robinson’s criminal history and his contact with Maria Hatfield months later. It is not foreseeable that hiring Robinson would lead to the eventual alleged rape of Maria Hatfield. Plaintiffs could not show that not completing an investigative/background check on Robinson caused a continuous, unbroken sequence of events that resulted in the alleged rape.

Foreseeability is especially nonexistent where conducting a background check would have shown only that Robinson had been convicted of criminal impersonation, theft, and possession of marijuana, none of which have anything to do with the crime of rape or crimes of violence. Similarly, discovery of the pending purse-theft charge would not make Mr. Robinson’s alleged rape of Maria Hatfield foreseeable to PSP.

In *Betty Y. v. Al-Hellou*, 98 Wn. App. 146, 988 P2d. 1031 (1999), *rev. denied*, 140 Wn.2d 1022 (2000), this Court held that an employer's duty is limited to foreseeable victims, and then only "to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering" others, and that an employer may be liable for harm caused by an incompetent or unfit employee only if (1) the employer knew, or in the exercise of ordinary care should have known, of the employee's unfitness before the occurrence; and (2) retaining the employee was a proximate cause of the plaintiffs injuries.

In *Betty Y.*, the plaintiff sued a developer which employed a laborer who sexually assaulted a 14 year old child. The laborer, Al-Hellou, was working on an apartment renovation project in the child's neighborhood. The employer had actual knowledge of the laborer's child-molestation conviction. The child, "J.M.Y.," lived in an apartment on the same block where Al-Hellou was working, and met Al-Hellou at the apartment building being rehabilitated. After J.M.Y. asked Al-Hellou for a cigarette, the two began talking. Over a period of 10 days, J.M.Y. swept up the apartment where Al-Hellou was working approximately 5 times; each time Al-Hellou paid him \$20. On the last day J.M.Y. swept up Al-Hellou asked J.M.Y. if he wanted to go to the mall. J.M.Y. agreed, and the two met at the building Al-Hellou was renovating. Al-Hellou then

took J.M.Y. to his residence in Tacoma and raped him. Al-Hellou pleaded guilty to 3rd degree child rape. The Court held that the developer did not owe a duty to the child, as the “tasks, premises, and instrumentalities” it entrusted to the laborer were not what endangered the child.

This Court reasoned that Al-Hellou was not hired to work with potential victims, the rape did not occur on the work premises, and the job duties did not facilitate or enable Al-Hellou to commit the rape. “Thus, the tasks, premises, and instrumentalities entrusted to Al-Hellou were not what endangered the victim.” 98 Wn. App. at 150. “Nothing about the job premises made it more likely that Al-Hellou would be put in contact with potential victims.” *Id.* The Court noted:

[T]he fact that the contact occurred on the work premises was fortuitous. **It could have just as easily occurred on the street**, on a playground, or any other public place in the area.... Although the job may have put Al-Hellou in some incidental contact with tenants, it did not necessarily bring him in contact with tenants or children.”

Betty Y. v. Al-Hellou, 98 Wn. App. at 150-51 (emphasis added).

In the instant case, the fact that Robinson, standing outside the Hatfield home, came into contact with Maria was fortuitous, and nothing about his job or duties facilitated or enabled him to commit the alleged rape.

C. The Trial Court Properly Dismissed the Plaintiff's Negligence Action Against PSP Because PSP Did Not Have a Duty to Control Mr. Robinson When He Assaulted Ms. Hatfield.

Washington case law consistently holds that an employer cannot be held vicariously liable for an employee's intentional sexual misconduct. In *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997), the Supreme Court stated: "Vicarious liability for intentional or criminal actions of employees would be incompatible with recent Washington cases rejecting vicarious liability for sexual assault, even in cases involving recognized protective special relationships." *Id.* at 55. *See, e.g., Bratton v. Calkins*, 73 Wn. App. 492, 870 P.2d 981, *rev. denied*, 124 Wn.2d 1029 (1994); *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993), *rev. denied*, 123 Wn.2d 1027 (1994); *Peck v. Siau*, 65 Wn. App. 285, 827 P.2d 1108, *rev. denied*, 120 Wn.2d 1005 (1992); *Scott v. Blanchet High Sch.*, 50 Wn. App. 37, 747 P.2d 1124 (1987), *rev. denied*, 110 Wn.2d 1016 (1988); and *Blenheim v. Dawson & Hall, Ltd.*, 35 Wn. App. 435, 667 P.2d 125, *rev. denied*, 100 Wn.2d 1025 (1983). These cases all hold employers are not vicariously liable for intentional sexual misconduct by an employee.

In order to hold an employer vicariously liable for the tortious acts of its employees, it must be established that the employee was acting in furtherance of the employer's business and that he or she was acting within the course and scope of employment when the tortious act was

committed. *Henderson v. Pennwalt Corp.*, 41 Wn. App. 547, 552, 704 P.2d. 1256 (1985).

In particular where an employee commits an assault in order to effect a purpose of his or her own, the employer is not liable. *Kyreacos v. Smith*, 89 Wn.2d. 425, 429, 572 P.2d. 723 (1977).

Thompson v. The Everett Clinic, 71 Wn. App. 548, 551, 860 P.2d 1054 (1993), *rev. denied*, 123 Wn.2d 1027 (1994).

The test for determining whether the employee was within the course of his/her employment is stated as “whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment; or by specific direction of his employers; or as sometimes stated *whether he was engaged at the time in the furtherance of the employer’s interest.*”

Thompson, 71 Wn. App. at 552, *quoting Dickinson v. Edwards*, 105 Wn.2d 457, 467, 716 P.2d. 814 (1986) (emphasis in original).

“ Where the servant’s intentionally tortious or criminal acts are not performed in furtherance of the masters business, the master will not be held liable as a matter of law *even though the employment situation provided the opportunity for the servant’s wrongful acts or the means for carrying them out.*”

Thompson, 71 Wn. App at 553, *quoting Kuehn v. White*, 24 Wn. App. 274, 278, 600 P.2d 679 (1979) (emphasis in original).

An employer is not liable for negligently supervising an employee whose conduct was outside the scope of the employment unless the employer knew, or in the exercise of reasonable care, should have known the employee presented the risk of danger to others.

Thompson, 71 Wn. App. at 555, citing *Peck v. Siau*, 65 Wn. App. 285, 294, 827 P2d. 1108, *rev. denied*, 120 Wn.2d 1005 (1992).

In *Thompson*, a patient brought action against a doctor and his employer, a medical clinic, stemming from the doctor's sexual contact with the patient during a medical exam. The trial court entered summary judgment against the patient and the patient appealed. The Court of Appeals held that the doctor's tort of sexual assault was not attributable to the clinic and the clinic did not breach a duty to exercise ordinary care in the hiring or supervision of the doctor absent the Clinic's prior knowledge of the doctor's behavior.

Here, PSP cannot be held liable under a vicarious liability theory. Similarly, PSP is not liable for negligence in hiring or retaining Mr. Robinson because there is no legally recognized duty in Washington that required PSP to conduct a criminal background check on Robinson prior to or after hiring him. Moreover, even if there were such a duty, the alleged failure to conduct a background check was not a proximate cause of the alleged rape in the circumstances of this case.

It was not reasonably foreseeable that hiring an individual to work as part of a door-to-door sales team without conducting a background check first would result in a homeowner's teenage daughter speaking to

the salesman from a window; allowing him into the house a few months later; and being raped by the salesman.

The harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant. . . . The test of foreseeability is an objective test. . . . Foreseeability is a matter of what the actor knew or should have known under the circumstances; it turns on what a reasonable person would have anticipated.

Seeberger v. Burlington Northern Railroad, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999).

There is no evidence that PSP at the time of hiring knew, or in the exercise of ordinary care should have determined, that Michael Robinson was unfit for employment as a door-to-door salesman. There is no Washington law that restricts or prevents an employer from hiring an individual who has a prior history of criminal convictions to work as a door to door salesman. There is no legally recognized cause of action in Washington that imposes liability on an employer for hiring such an individual.

In *Peck v. Siau*, 65 Wn. App. 285, 827 P2d. 1108 (1992), a high school student with whom a school librarian had sexual contact brought action for damages against the school district and the student's teacher. The Court affirmed the trial court's dismissal of the claims, holding that

the employer was not liable absent evidence that it knew or had reason to know of the librarian's potential for such misconduct.

PSP had no knowledge that Robinson had a prior history of misdemeanor convictions. But even if PSP had obtained such knowledge, Robinson's criminal history was not violent, did not involve any sexual misconduct, and would not have provided notice to PSP that Robinson was dangerous, or violent, or a potential rapist. PSP's hiring of Robinson was not a proximate cause of the alleged June 2004 rape.

Plaintiff also relies upon *Carlsen v. Wackenhut*, 73 Wn. App. 247, 868 P.2d 882 (1994), but that decision's facts are readily distinguishable from those in this case. In *Carlsen*:

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.

Betty Y. v. Al-Hellou, 98 Wn. App. at 149. Here, in contrast, the assault did not occur on the PSP premises or while Robinson was working for PSP. Instead, as was the case in *Betty Y.*, the fact that Robinson met Maria while working for PSP was merely fortuitous.

Plaintiff also relies on *C.J.C. v. Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999), in support of her assertion that PSP owed a duty of care to protect Maria from Robinson's assault. In that

case, a church deacon molested two young girls in the congregation. Although a church elder had previously been warned of the deacon's abuse of another child, the deacon was entrusted with various church positions providing him with extensive contact with and authority over children.

The court concluded the church owed a duty of care to the plaintiffs because of the special relationship between a church and the children of the congregation. The court stated:

[W]e 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.

138 Wn.2d at 724.

Only one of the enumerated factors listed by the C.J.C. court is potentially present here—a “special relationship” (employer-employee) between PSP and Robinson. There was no relationship between PSP and Maria Hatfield. It is undisputed PSP was unaware of Robinson's criminal history, and there was no proximate causal connection between Robinson's employment with PSP and his subsequent assault on Maria

Hatfield. Thus, the fact the *C.J.C.* court declined a summary judgment in favor of the church is not dispositive here.

The out-of-state case law cited by Hatfield is similarly inapposite. In *Read v. Scott Fetzer Co.*, 990 S.W. 2d 732 (Tex. 1990), a vacuum cleaner salesman with several previous instances of sexual misconduct sexually assaulted a customer during a sales call, after demonstrating a vacuum cleaner in the customer's home. In concluding the employer could be held liable for the assault, the Court explained, "Sending a sexual predator into a home poses a foreseeable risk of harm to those in the home."

In *McLean v. The Kirby Co.*, 490 N.W.2d 229 (N.D. 1992), a vacuum cleaner salesman raped a customer during a sales call after being admitted to her home to perform a sales demonstration. He had previously been convicted of assault and weapons charges, and a charge of criminal sexual misconduct was pending against him.

And, in *Tallahassee Furniture Company, Inc. v. Harrison*, 583 So.2d 744 (Fla. 1991), a furniture deliveryman, under the influence of drugs, gained entrance to the Plaintiff's home through an alleged follow-up visit and attacked the Plaintiff. The assailant had a long history of violence and psychiatric disorders, but the employer had not asked him to complete the defendant's standard employment application, which asked

whether the applicant had a criminal history, a history of drug addiction, or any psychiatric disorders. Moreover, the defendant learned the assailant had a felony conviction and was using illegal drugs. The Court held that the Plaintiff had a claim based on negligence in hiring and retention. 583 So.2d at 754.

In each of these cases, the employer knew or should have known of the employee's propensity for violence, and/or the assault occurred when the employee was admitted to the victim's home while on the job. Neither of these factors is present here. None of Robinson's convictions showed a propensity for violence, and the assault occurred months after Robinson's brief visit to (but not inside) the Hatfield residence.

Plaintiff also relies upon *Underberg v. Southern Alarm*, 284 Ga. App. 108, 643 S.E.2d 374 (2007). The Georgia Court of Appeals reversed a summary judgment where a "violent felon"⁷ was hired to work as a sales representative. The evidence indicated the felon used his employer's telephone to call the victim, and later kidnapped her from her home. The Court held that Georgia law allowed a cause of action for negligence in hiring and retention, where it was "reasonably foreseeable" from the employee's tendencies that the employee could cause the type of

⁷ The man had been sentenced to life in prison for burglary and kidnapping, and was paroled before he was hired.

harm sustained by the plaintiff.” *Underberg*, 643 S.E.2d at 377. Even then, the Court required that the harmful conduct either have occurred during the employee’s work hours, or that it occur “under the color of employment.” *Id.* at 379. The Georgia Court found evidence that the employee’s visit to the victim was employment- related. *Id.* at 380.

Apart from the fact that Washington law differs from that of Georgia regarding liability for an employee’s actions, *Underberg*, is inapposite because there was no evidence Mr. Robinson’s social call to Sandra Hatfield had any connection whatsoever to the brief contact he had with her mother, two months earlier, where she clearly terminated any opportunity to sell her security monitoring services.

Plaintiff also cites *D.R.R. v. English Enterprises CATV*, 356 N.W.2d 580 (1984), where a cable television installer who had worked in the victim’s home used a master key obtained through his employment to reenter the apartment and attack the victim, and that the employer’s possession of the master key created a special relationship that created a special duty owed by the cable company to the tenant. 356 N.W.2d at 584. No such facts or special relationship is present in the instant case.

Similarly, in *McGuire v. Arizona Protection Agency, Inc.*, 125 Ariz. 380, 609 P.2d 1080, 1082 (1980), the Court allowed Plaintiff to assert a claim where the alarm company hired a felon to install an alarm

system, and after the felon was terminated he returned, disconnected the alarm system he had installed, and burglarized the Plaintiff's home.

Finally, Plaintiff contends PSP owed her a duty of care based upon a provision in the contract between PSP and ADT stating that PSP "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." Hatfield bases her argument on the Washington Supreme Court's decision in *Kelley v. Howard S. Wright Construction Co.*, 90 Wn.2d, 323, 582 P.2d 500 (1978). In that case, the court concluded a contract between the owner of a construction site and a general contractor created a duty of care owed by the contractor to an employee of a subcontractor. The court broadly stated, "[A]n affirmative duty assumed by contract may create a liability to persons not party to the contract, where failure to properly perform the duty results in injury to them."

In this case, any obligation owed by PSP to ADT to perform a criminal background check cannot create liability to Hatfield. As ADT territory manager Ronald Book explained:

We don't really specify to the dealer what to look for in a background check or what would exclude someone—or what should exclude someone from employment. We don't, as far as I know, have any guidelines as far as what to look for in a background check. I mean that's up to the

dealer individual operation and their individual HR standards.

CP 540; 543. Clyde Stephenson, PSP's general manager, testified that PSP would not hire someone who had been convicted of a felony. CP 462. At the time he was hired, Robinson had not been convicted of a felony.

Thus, even if PSP had conducted a background check, this would not necessarily have prevented the company from hiring Robinson. PSP's failure to perform a "background check" was not a "cause-in fact" of Maria Hatfield's injury, and the contractual provision requiring a background check cannot provide a basis for imposing liability on PSP in this case. And, whether or not a cause in fact relationship were established, legal causation cannot be established in the circumstances of this case. *Betty Y.*, 98 Wn. App. at 150.

VI. CONCLUSION

PSP violated no duty to Maria Hatfield in connection with its employment of Michael Robinson. Most importantly, PSP's employment of Michael Robinson was not a proximate cause of Plaintiff's assault by Robinson. The trial court's judgment dismissing the claims against PSP should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of May, 2008.

MERRICK, HOFSTEDT & LINDSEY, P.S.

By 

Philip R. Meade, WSBA #14671

Thomas R. Merrick, WSBA #10945

Of Attorneys for Respondents PUGET
SOUND PROTECTION, INC. and ADT
SECURITY SYSTEMS, INC.

MERRICK, HOFSTEDT & LINDSEY, P.S.

3101 Western Ave., Suite 200

Seattle, WA 98121

Telephone: (206) 682-0610

Facsimile: (206) 467-2689

L:\220004\Appeal\PRMP650

COURT OF APPEALS, DIVISION II
OF THE STATE WASHINGTON

TERESA RUCSHNER, individually)
and as Guardian ad Litem for)
MARIA HATFIELD, a minor,) No. 36890-1-II
)
Appellants,) DECLARATION OF
) SERVICE
v.)
)
ADT SECURITY SYSTEMS, INC.;)
PUGET SOUND PROTECTION, a)
Washington corporation; and)
MICHAEL L. ROBINSON, III,)
)
Respondents.)

I, Philip R. Meade, state:

On this day I caused a copy of BRIEF OF RESPONDENT
/CROSS-APPELLANT PUGET SOUND PROTECTION, INC. to be
deposited in the United States mail for delivery via regular first-class mail,

with sufficient postage prepaid to:

Stephen L. Bulzomi
James W. McCormick
Messina Bulzomi Christensen
5316 Orchard Street W
Tacoma, WA 98467-3633

Michael L. Robinson, II
501 East 75th Street
Tacoma, WA 98404

AND to:

Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Declarant is a resident of the State of Washington and over the age of eighteen (18) years. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 14th day of May, 2008 at Seattle, Washington.



Philip R. Meade

FILED
COURT OF APPEALS
DIVISION II

08 MAY 16 PM 12:43

STATE OF WASHINGTON

BY _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE WASHINGTON

TERESA RUCSHNER, individually)
and as Guardian ad Litem for)
MARIA HATFIELD, a minor,) No. 36890-1-II
)
Appellants,) DECLARATION OF
) SERVICE
v.)
)
ADT SECURITY SYSTEMS, INC.;)
PUGET SOUND PROTECTION, a)
Washington corporation; and)
MICHAEL L. ROBINSON, III,)
)
Respondents.)

I, Philip R. Meade, state:

On this day I caused a copy of BRIEF OF RESPONDENT
/CROSS-APPELLANT PUGET SOUND PROTECTION, INC. to be
deposited in the United States mail for delivery via regular first-class mail,

with sufficient postage prepaid to:

Stephen L. Bulzomi
James W. McCormick
Messina Bulzomi Christensen
5316 Orchard Street W
Tacoma, WA 98467-3633

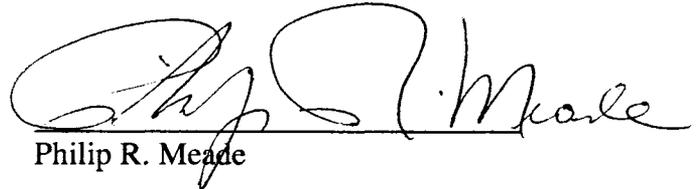
Michael L. Robinson, II
501 East 75th Street
Tacoma, WA 98404

AND to:

Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Declarant is a resident of the State of Washington and over the age of eighteen (18) years. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 14th day of May, 2008 at Seattle, Washington.


Philip R. Meade