

Negligent Hiring and Subcontractors: A Case Study

By Kevin J. McCarthy, Esq.

One bright Sunday morning, Jane Doe, who was in her early twenties, went to spend a day with her parents. Jane's mother showed her a newspaper ad for carpet cleaning by a national retailer at an extraordinarily low price. The family had had their carpets cleaned regularly by another service, and was very particular about letting people into their home. However, because of the reputation of this national retailer for both quality and customer service, they thought that there would be no problem. Jane's mother called the telephone number in the ad, and was greeted by someone who identified himself as a representative of the national retailer. After some discussion, they made arrangements to have several carpeted areas cleaned. Jane's mother asked Jane if she would be able to be there when the cleaners came. Jane said she would. She and her mother agreed that because of the reputation of this retailer, there should be no danger in Jane being in the home alone with the cleaners.

Unbeknownst to Jane and her mother, the carpet cleaners who came were not employees of the national retailer. They were neither hired, supervised, nor controlled by the national retailer. This was true despite the fact that the men were dressed in uniforms identical to those of the national retailer's employees; drove a truck with the name of the national retailer on it; used equipment that featured the national retailer's name; had charge receipts with the name of the national retailer; and accepted the national retailer's credit card. In fact, the two men were employees of a subcontractor hired by the national retailer. The subcontractor had not done background or criminal checks on the men before hiring them. One of the men had a long record of criminal violence convictions and at least three separate drug charges.

The Assault

After the men completed their work, one of them asked Jane to come down to the basement to inspect the work and sign off on it. Once they were in a secluded area of the basement, the man—a three-time-convicted-violent felon—savagely raped Jane and then warned her not to tell anyone.

As soon as the men left, Jane called her mother at work and told her what happened. Her mother told her to stay where she was, and that she would hurry home after calling her father and the police.

Jane's mother arrived just as the police were pulling up. For the next two to three hours, Jane and her mother answered the officers' questions. The police then instructed Jane to go to the hospital to be examined. At the hospital, Jane went through the stressful experience of having her genital area examined by a physician in order to establish that she had been subjected to forcible intercourse. Despite all of the skill and understanding that the medical team attempted to use, for Jane, the examination rivaled the rape that she had just experienced. Jane then went to a rape crisis center where the counselor warned her that she could have emotional problems for the indefinite future because of the assault. She was also told that she could still be in danger, at least until the perpetrator was apprehended. Finally, the counselor warned her that she might have contracted HIV. At this point, Jane was near hysteria, and her ordeal was far from over.

The Police Investigation

Jane then was instructed to go to police headquarters so that the investigating detective could take her statement. When she responded that she had already given a statement, she was told that the earlier statement had been to a patrol officer, and that

it was necessary for her to meet with the detective, who would take a more detailed statement. Reluctantly, Jane and her family went to the police station.

The detective introduced himself to the family and then said that he wished to speak to Jane alone. He then took her to an interrogation room where, for the next hour and a half, he attempted to get Jane to recant her story and withdraw any charges.

The detective suggested that women consciously or unconsciously turn men on, encourage them, give them the idea that they want to engage in sex, and then yell “rape” when they are embarrassed after the experience. He went so far as to suggest that if she pressed charges and the defendant was not convicted, she could be charged criminally. With all this pressure, Jane told the detective that she would do anything to get out of the police station and go home. The detective then wrote out a statement for Jane recanting the story she had previously given to the officer. At that point, the detective allowed Jane to leave.

It was not until Jane’s father spoke with her at home that he realized what the detective had put his daughter through. When her father found out what had happened, he immediately called the police and complained about the detective’s behavior. A different detective soon came to Jane’s home and re-interviewed her. He apologized for the conduct of the other detective and told her that he would immediately seek a criminal indictment against the rapist.

The Criminal Process

The perpetrator was charged with rape and various lesser offenses. However, the criminal trial did not begin for more than a year. The defendant was released on bond and failed to return to court for his arraignment or trial. He managed to evade

law enforcement for the next fourteen months until he was picked up on other charges. After the perpetrator was re-arrested, the prosecutor notified Jane that the trial was finally set and that it would be necessary for her and her family to be witnesses. After living in fear for more than a year, wondering whether the defendant was going to come back and carry out his threats, Jane was initially happy to be a witness.

However, she soon realized that the prosecutor was not putting much preparation into her case. Jane's pretrial interview with the prosecutor was surprisingly brief. Interviews of the other family members took even less time. When the trial began, Jane's worst fears materialized: the state's attorney failed to get critical evidence admitted, medical witnesses were examined in a way that made one think they were talking about a sprained ankle rather than a life-threatening rape, and the court completely excluded expert testimony regarding DNA evidence. As a result, the jury returned a verdict of "not guilty" as to rape, and guilty only as to a fourth degree sex offense (the touching of a person's private parts without his or her consent). This verdict was an additional insult on top of what Jane had already suffered.

The Civil Justice Process

At the urging of her family, Jane sought legal advice in order to evaluate what could be done not only to hold the defendant accountable, but also to lessen the possibility of somebody else being assaulted under similar circumstances. This author agreed to represent Jane in a civil lawsuit. After initial discussions with Jane, we developed a general approach to the case. First, in order to protect Jane, we would limit as much as possible her involvement in the suit and her face-to-face contact with all of the defendants and their attorneys. Second, we would try to maximize the

involvement of the criminal defendant throughout the case to not only make him aware of the damage he had caused Jane, but also to cajole him into blaming the national retailer. Finally, we would attempt to expose the charade that the retailer had created that allowed this attack to happen.

The best way to limit Jane's involvement in the case was to reach an agreement either with defense counsel or the court regarding the scope and length of her deposition. The parties easily reached such an agreement. The parties also agreed to hold Jane's deposition in an all-glass conference room. This arrangement allowed her parents and siblings to be seated outside of the room but within her line of site, thus allowing Jane to gain emotional strength from their presence. A problem Jane had had at the criminal trial was that her family had been sequestered so that she felt all alone when she testified.

We then met with the criminal defendant—who was unrepresented—and arranged to take his deposition (both the subcontractor and the national retailer had refused to provide him a gratuitous defense). The perpetrator vigorously maintained that Jane had consented, so there was little point in deposing him about the particulars of the assault. In speaking with the perpetrator before the deposition, we had suggested to him that he had been betrayed and abandoned both by the subcontractor and the national retailer when they fired him and refused to pay for his legal defense. During the deposition, we went step-by-step through his extensive criminal record, including three sexual offense charges, two armed robbery convictions, and three gun convictions. With respect to the three sexual offenses, he maintained that they were

not rapes because the women had consented and only had changed their stories when they had been caught by their husbands.

We then turned to his hiring by the subcontractor. He testified that prior to hiring him, the subcontractor had asked about his criminal record, and that he had admitted the record in detail. The subcontractor had asked him for references, and he had responded that he had none because he had been incarcerated for most of the last ten years. His only work experience during that period was making vanity license plates in a prison shop. The perpetrator eventually became so caught up in blaming everything on the subcontractor and the national retailer that he began to volunteer particularly valuable information (e.g., that he told everyone he worked for the retailer, that he thought somehow he was an employee of the retailer, and that he was even paid by the retailer).

After these depositions, we obtained, through discovery, all the advertising, employment policies, subcontracts, and financial information from the national retailer regarding its rug cleaning operation. From the advertising, we were able to show that on a weekly basis, the retailer bombarded the public with offers to do rug cleaning. The print advertising contained both visual images and written copy. The copy stated that the national retailer trained the cleaners, guaranteed all work, and stood behind its reputation for quality and service. In the ads' visual images, people were pictured using the national retailer's cleaning equipment, and wearing the national retailer's uniform.

In the local yellow pages directory, the listing for the national retailer contained about twenty departments, including a rug cleaning department. Each department had

a separate telephone number. Of course, the number for the rug cleaning department was that of the subcontractor. We enlarged this page from the directory for later use as a trial exhibit.

In the documents describing the national retailer's employment policies, there was information regarding the hiring of employees whose job it would be to go into customers' homes. These materials described detailed information that had to be obtained from prospective employees about previous employment and criminal history.

The subcontractor's contracts with the national retailer told a different story. None of these contracts required background checks. They also did not provide for any monitoring by the national retailer of the activities, training, or even hiring of the carpet cleaners. However, these contracts did provide for the national retailer's strict monitoring of all receipts from the carpet-cleaning business.

Having obtained these important documents, we next took the depositions of increasingly higher level managers from the national retailer. We went through the same series of questions with each manager. For example, we asked: who was responsible for establishing the employment policies; whose decision was it that the retailer would not be involved in the hiring, supervision, or monitoring of the subcontractor's employees; whose decision was it that the national retailer would not be involved in setting the criteria for hiring employees, namely, doing background, previous employment, and criminal records checks; and what was done to ensure that any complaints about either quality of service or incidents of criminal activity were reported to the national retailer. We even asked each level of management: "Wasn't it a fact that the only thing that the national retailer contributed to the rug cleaning operation was

a list of its customers and a scenario in which customers were led to believe that they were dealing with the national retailer?” Several management employees of both the retailer and the subcontractor admitted that it was their intention to create a situation in which customers would be enticed to have their carpets cleaned by relying upon the national retailer’s reputation. The contract set the price for the national retailer selling its reputation at between six and eight percent of the carpet-cleaning profits, depending on the volume of business in the area.

The managers also acknowledged that the national retailer had instituted vigorous background, previous employment, and criminal background investigations on potential employees whose job would entail working in customers’ homes. The retailer did this because it recognized that the incidence of crime was much higher in customers’ homes than in its stores. Further, the managers agreed that the national retailer did not demand the same vigilance from its subcontractors. Finally, each manager testified that the decision to not impose the same high standards on its subcontractors had been made by higher level management.

After the managers’ depositions, we scheduled the deposition of the national retailer’s president. In response, we were flooded with memorandum after memorandum attempting to stop the deposition. When we finally appeared in court on a motion to protect, we simply showed the judge the lower management deposition testimony. We wanted to depose the president because we had been told that ultimate responsibility rested on his shoulders. Much to the chagrin of the legion of lawyers who had been retained by the national retailer to oppose this deposition, we

were granted permission to travel to the president's office and videotape the deposition, with the principal restraint being that the deposition was limited to half a day.

The president's deposition can most accurately be characterized as a three-hour exercise in *no information and bad attitude*. The president made it clear that he: had just found out about the deposition a few days before it was scheduled; had no personal knowledge of the case; had not bothered to question any of his subordinates; did not bother himself with any of the details of the subcontracting operation; did not supervise it in any way; and did not even know what, if any, supervision those under him provided. The deposition ended with a series of questions asking the president whether he was aware of prior criminal acts involving rug cleaners, both in his company and in other companies. For each incident, we asked the president, "With knowledge now of this incident, will this have any effect on your corporate policies?" To each of these questions, he responded, "This is a matter on which we have not made any corporate decision as of this time." He repeated this response ten times.

With this ammunition supporting Jane's case, the outcome was assured before the trial even began. Finally, Jane was compensated for her injuries, and more importantly, the criminal defendant, the subcontractor, and the national retailer were all held responsible. After more than three years, the jury told Jane that they recognized that she had been wronged not only by the perpetrator, the subcontractor, and the national retailer, but also by the police and the criminal justice system.

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