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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GREG WILBERGER, as personal
representative of the Estate of Brooke
Wilberger, decedent,

Plaintiff - Appellant,

v.

CREATIVE BUILDING
MAINTENANCE, INC., a Delaware
corporation,

Defendant - Appellee.

No. 09-35665

D.C. No. 6:06-cv-00714-AA

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, Chief District Judge, Presiding

Argued and Submitted May 7, 2010
Portland, Oregon

Before: KLEINFELD, BEA and IKUTA, Circuit Judges.

The district court properly applied a foreseeability analysis to Wilberger's
negligence claim, as required by *Fazzolari v. Portland Sch. Dist. No. 1J*, 734 P.2d

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

1326, 1336 (Or. 1987). Even assuming that Joel Courtney's intervening criminal act did not bar liability to Creative Building Maintenance (CBM) in all circumstances, *cf. Buchler v. State ex rel. Or. Corr. Div.*, 853 P.2d 798, 804–05 (Or. 1993), Wilberger's claim fails under Oregon's general foreseeability principles, *see Washa v. Or. Dep't of Corr.*, 979 P.2d 273, 282 (Or. Ct. App. 1999). It is undisputed that CBM had no relationship to the victim. There is no evidence that CBM had any clients in Corvallis, where the abduction occurred, or that Courtney was in Corvallis for any reason related to his employment with CBM. Even if CBM should have been aware of Courtney's twenty-year-old criminal convictions, CBM could not have reasonably foreseen that, by hiring Courtney and giving him access to a van, Courtney would encounter the victim in Corvallis and engage in criminal conduct resulting in the victim's death. *See id.* at 283. We therefore uphold the district court's determination that CBM is not liable for negligence here. In light of our conclusion, we need not reach Wilberger's claim that the district court erred in making a credibility determination regarding Jose Lomeli.

AFFIRMED.