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TRACY NEFF,  
Plaintiff

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IN THE DISTRICT COURT

vs.

DALLASCOUNTY, TEXAS

DISTRICT CLERK  
DALLAS CO., TEXAS  
DEPUTY

LANDMARK EDUCATION  
CORPORATION AND DAVID GRILL,  
AN INDIVIDUAL,  
Defendants

162nd JUDICIAL DISTRICT

**PLAINTIFF'S RESPONSE TO LANDMARK'S  
MOTION FOR SUMMARY JUDGMENT**

NOW COMES Plaintiff Tracy Neff, and files this Response to Defendant Landmark Education Corporation's Motion for Summary Judgment. Tracy Neff relies in support of her Response on the evidence indexed as Exhibit "A" to this Motion, which index is incorporated herein by reference, together with all pleadings and discovery on file, and would show unto the court as follows:

**I.**

**TRACY NEFF WAS BRUTALLY RAPED AND  
SODOMIZED BY DEFENDANT DAVID GRILL**

This law suit<sup>1</sup> arises out of the brutal sexual assault of Plaintiff Tracy Neff by Defendant David Alan Grill ("Grill") which occurred in the early morning hours of February 3, 1995. Tracy Neff encountered Grill on the evening of the assault at a facility owned and operated by Defendant Landmark Education Corporation ("Landmark"), where Grill asked Neff to go to his apartment at 1117 South Akard so that he could "share" with her some traumatic events in his life. Deposition of Tracy Lynn Neff, Exh. "A-10" hereto, hereafter "Neff Depo" at p. 238-39. After arriving at the Akard Street apartment, Grill began drinking heavily and according to his testimony, he consumed at least a half bottle of Scotch Whiskey. Deposition of David Allen

<sup>1</sup> Defendant Landmark has moved for Summary Judgment on only one issue—proximate cause—as to Plaintiff's negligence and negligent hiring and retention claims against Landmark. Defendant has also moved for Summary Judgment on Intentional Infliction of Emotional Distress. However, Landmark's Motion does not address Plaintiff's claims under the following additional theories pled by Plaintiff: Assault and Battery, Breach of Fiduciary Duty, Sexual Exploitation by a Mental Health Services Provider under Civil Practice and Remedies Code Chapter 81, Sexual Assault under Penal Code § 21.001, Fraud, Negligent Misrepresentation and Violations of the Texas Deceptive Trade Practices Act. Therefore, these causes of Action are not addressed specifically herein.

Grill, Exh. "A-7" hereto, hereafter "Grill Depo" at p. 228-229. Neff has testified that Grill first forced her to perform oral sex [Neff Depo at p. 245] and then led her to his bedroom. Neff Depo at p. 271. Once in Grill's bedroom, Grill brutally raped Neff with a dildo, and thereafter anally sodomized her. Neff Depo at p. 293-304.

Grill was so intoxicated that he has no memory of the assault. Grill Depo at p. 228-229. He does not deny that the assault took place. Grill Depo at p. 291-292. Further, Grill has judicially confessed to sexual assault, and specifically to "knowingly causing the penetration of the sexual organ of [Neff] ... without any consent..." See Judicial Confession, "Exh. A-8" hereto.; Grill Depo at p. 245.

The following day, Tracy Neff reported the assault to the Dallas Police Department, and underwent a rape examination at Parkland Memorial Hospital which confirmed that a sexual assault had taken place. See Police Report, Exh. "A-5", Parkland Report Exh. "A-6". Subsequently, Tracy Neff underwent surgery to repair the damage done by Grill to her vagina. See Godat Records Exh. "A-7". Further, Tracy Neff has sustained severe and permanent documented psychological injuries, for which she is seeking recovery in this law suit.

## II.

### **LANDMARK EDUCATION CORPORATION NEGLIGENTLY HIRED AND RETAINED DAVID GRILL, WHICH WAS THE REASON TRACY NEFF MET GRILL IN THE FIRST PLACE**

At the date and time of the incident, Grill was employed by Defendant Landmark Education Corporation as the Center Manager of Landmark's Dallas facility. Deposition of Arthur Schrieber, Exh. "A-11" hereto, hereafter Schrieber Depo at p. 91. Long before Tracy Neff ever met David Grill, Landmark knew or should have known that Grill was a danger to himself and to others who were students in their programs.

#### **A. Landmark Education Corporation Provided Interactive Group Therapy to Tracy Neff and Purported to Teach a "Breakthrough" in the Way Plaintiff Thought about the World**

Landmark is in the business of providing large group therapy self-help seminars to persons such as Tracy Neff. Landmark presents a seminar called the "Landmark Forum" which is their "basic" or introductory seminar. Schrieber Depo at p. 91. The Forum is based on "technology" developed by Werner Erhart, who presented the programs under the name EST until December, 1984. Schrieber Depo at p. 89. Persons are asked to fill out a "forum information sheet" prior to attending the Forum, and list what "issues" they would like to address in their Forum experience. Participants are also asked whether they have had any mental health problems, or inpatient alcohol and/or drug treatment, and are asked to sign an "informed consent" before enrolling in the program. Schrieber Depo at p. 106. In the words of Landmark's own literature, the Forum is a truly earth-shattering experience for a participant:

This is the age of breakthroughs—of extraordinary leaps in science, in technology, in understanding that have vastly elevated our quality of life. The Landmark Forum is such a breakthrough, but a breakthrough in what is possible for people—a breakthrough in living. *The Landmark Forum is a means of gaining insight into fundamental premises that shape and govern our lives—the very structures that determine our thinking, our actions, our values, the kind of people that we can be. In the Landmark Forum, you get at the heart of who you are—examining the basis of your identity, your personality, your formulas for living*, relating and achieving success. The Landmark Forum is an invitation to move beyond the limits you have set for yourself, the constraints you have imposed on your own life, breaking through to new levels of performance and ability. Based on original theories and models of thinking, The Landmark Forum challenges old assumptions and creates new tools to access those issues that are most basic, most urgent to each of us. *It is designed to bring about a fundamental shift in what is possible in our lives.*

See “The Landmark Forum, An Exceptional Opportunity,” Exh. “A-2”

Some persons find this type of self-examination very difficult and rigorous. Schrieber Depo at 121-123. Further, mental health professionals who have examined the program have advised that it is not recommended for anyone taking anti-depressants, anyone enrolled in therapy, or anyone who has had drug or alcohol counseling. Schrieber Depo at p. 111-114.

**B. Landmark Negligently Allowed Grill to Interact with, and Manipulate, Vulnerable Women Including Plaintiff Tracy Neff**

Despite \$48 million in annual revenue in 1997, Landmark has a paid staff of only approximately 275 persons worldwide. Schreiber Depo at 149. Landmark presents their seminars through the widespread use of an “assistants program”—meaning that graduates of the Forum are encouraged to volunteer their time to present the work to others. The viability of a Landmark Center is directly related to the size and strength of its volunteer base.

Grill was hired on March 1, 1991 as the “center manager” of Landmark’s Dallas facility. Grill Depo at p. 148. When Grill was hired, Grill was told that he would be responsible for running the day to day operations of the Dallas center [Grill Depo at p. 125], and was told that the only qualification for a Dallas center manager for Landmark was to be “willing to do what it takes... to get the job done.” Grill Depo at p. 134. During the time he was manager of the Dallas facility, he turned the center around, from being the worst of all of Landmark’s facilities, to being the number one center in terms of profitability and revenue. Grill Depo at p. 144-146. In order to do this, he “brought in music” so that the volunteers would have fun, and made it a point to socialize with participants in the Landmark programs. Grill Depo at p. 145-46.

Grill was expected to make participants feel welcome at the center, and made it a point to meet all participants personally. [Grill Depo at p. 134-137] It was while engaged in this “meet

and greet” function that Grill first met Tracy Neff, on the Sunday of her attendance at the Forum. Neff Depo at p. 164.

In her original application to be a Forum participant, Tracy Neff clearly set forth that she was in a vulnerable mental condition. Neff Depo at p. 26. She stated she was uncomfortable with herself, having recently separated from her husband. Id. at p 27. Neff listed her goal as to “become comfortable with myself and allow people to get close to me, to be comfortable with my father and be able to discuss his homosexuality with him and . . . to find the courage to complete medical school...” Neff Application, Exh. “A-15”. Tracy Neff also disclosed in her application that she was “gang raped eleven years ago and used drugs and alcohol [sic] to escape the reality of what happened to me; I completed a program and learned to deal with it. . .” Id. In the course of his duties as center manager, Grill read Tracy Neff’s application containing all of this personal information about her vulnerable mental state at the time she enrolled to take the Landmark Forum. Grill Depo at p. 261.

Through her participation in the Landmark programs, Tracy Neff increasingly came into contact with Grill. After initially meeting Grill at the Landmark facility on December 18, 1995 -- the last night of her Forum [Neff Depo at p. 164] -- Tracy Neff knew that Grill was the head of the Dallas center. Neff Aff., Exh. “A-16” Further, she had an understanding that because Grill was in management for Landmark, he had mastered the Landmark programs and philosophies of dealing with life. Neff Aff., Exh. “A-16”. Neff Depo at 202-203 . Although Tracy Neff did not have any personal interaction with Grill between December 18, 1994 and January 1, 1995, she did see him at the Landmark facility, and other persons communicated to her that Grill was the “most self-expressed” person involved with Landmark in the Dallas area, and that he was the best example of the Landmark philosophies about how to live life without guilt. Neff Aff. , Exh. “A-16”; Neff Depo at 202-203.

On January 1, 1995, Neff attended a party at the home of a high-level Landmark volunteer, at which only Landmark staff, graduates and participants were in attendance. Neff Depo at p. 390. In a private room upstairs, Neff and Grill had sexual intercourse, which Neff has testified made her feel extremely uncomfortable. Neff Depo at pp. 159-60; 390-92. The following day, Grill telephoned Neff, and she told him that she was not comfortable with what had happened.<sup>2</sup> Grill urged her to “complete” with what happened at the New Year’s Day event by “sharing” with him at a face-to-face meeting. Thereafter, Grill explained to Neff that the Landmark philosophy encouraged guilt-free living, and that Neff should not be ashamed to express herself sexually with Grill. Neff Depo at 202-203. Tracy Neff believed what Grill was saying because he was held out to her as a living example of the teachings and philosophies of Landmark.

Thus, Grill was able to use the cloak of the philosophies of Landmark, as well as the actual and apparent authority as the center manager, to manipulate and coerce Tracy Neff into the

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<sup>2</sup> Significantly, Tracy Neff had never given Grill her telephone number. Clearly, Grill had used his position as center manager in order to access personal information about where to contact Neff to arrange the face-to-face encounter of January 2, 1995. Neff Depo at p. 176-178.

situation where he was able to rape her. Affidavit of Rick Ross Exh. "A-4" hereto; Over the approximate month prior to the sexual assault, Tracy Neff continued to see Grill and interact with him at the Dallas Landmark facility, and continued to be told that Grill was the best example of the Landmark philosophies.

C. **Landmark Education Corporation was Negligent in Hiring Grill in a Position Where He Could Manipulate Vulnerable Women Such as Plaintiff Tracy Neff**

As tragic as the assault on Tracy Neff has been, the greater tragedy is that Landmark could have easily prevented the incident through proper personnel procedures and actions. Certainly, Grill's well-documented misdeeds<sup>3</sup> prior to February 3, 1998 made it clearly foreseeable to Landmark that Grill was capable of rape or other behavior while intoxicated which would seriously injure another person. See Affidavit of Joel Brockner, Ph.D., Exh. "A-3" hereto.

1.) **Grill had an Extensive Past Criminal Record Evidencing Reckless Behavior, and Involvement with Alcohol and Drugs**

Grill had an extensive criminal arrest history prior to being hired by Landmark in a position of authority. In 1976, Grill was arrested by Palm Beach County, Florida, Sheriff's office for felony possession of marijuana, possession of narcotic equipment, and possession of synthetic narcotics. Grill Depo at p. 27. On April 30, 1979, Grill was arrested by the Pompano Beach Police Department and charged with misdemeanor possession of marijuana, the felony of carrying a concealed weapon and three separate traffic offenses. Grill Depo at p. 57-58. On November 22, 1987, Grill was arrested by the DelRay Beach, Florida, Police Department for disorderly conduct and resisting arrest. Grill Depo at p. 62-63. This incident occurred when Grill told law enforcement officials that their mothers and daughters "gave good head," all of which Grill thought was "fun." Grill Depo at p. 64.

2.) **Prior to Being Hired By Landmark, Grill had No Qualifications For Dealing With Women in a Vulnerable Position**

Prior to the time Landmark picked Grill to lead its Dallas operation, Grill had never held any job which would qualify him to deal in a position of authority and responsibility with vulnerable persons such as Tracy Neff in the context of the types of programs presented by Landmark. Grill's application shows that he worked from 1973 until 1983 for Kelly's Custom

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<sup>3</sup> Where a master is charged with hiring or retaining in his employ an incompetent servant, the servant's character is then in issue and may be proven by evidence of reputation or of specific conduct for the purpose of showing that the master knew or by exercising ordinary care should have known of the servant's incompetence. *Estate of Arrington v. Fields*, 578 S.W.2d 173, 179 (Tex. Civ. App. – Tyler 1979, writ ref'd n.r.e.); *Porter v. Nemir*, 900 S.W.2d 376, 380 (Tex. App. – Austin 1995, no writ); *See also* Tex. R. Civ. Ev. 405(b). Evidence of sexual encounters with other women, and of other bad acts are admissible to show the reckless and manipulative behavior of an employee charged with sexual misdeeds. *See, e.g., Porter* at 382.

Trim, where he helped build exotic custom cars. See Grill Application, Exh. "A-1"; Grill Depo at p.97-98. Grill testified that he left that job, although if Landmark had called his references, his boss would probably say he was fired. Grill Depo at p. 102. After a four month gap, Grill went to work in November, 1983 for J. Vitolo Construction and listed his job as "ran construction project." Grill's application showed he stopped working for Vitolo Construction in 1989, but he listed no other employment from that time until the time of his application with Landmark. See Application Exh. "A-1."

When asked to list special skills which would qualify Grill as a center manager, Grill listed that he was a "carpenter." Grill Application at Exh. "A-1."; Grill Depo at 97-98.

Grill had applied at Landmark three years before he was finally hired in January 1991. The first time he applied he had been turned down because he "owed too much money." Grill Depo at p. 84. However, after a sexual relationship with Landmark center manager Cindy DiCosimo, she recommended to Landmark that he be hired. Grill Depo at p. 92-93.

Prior to working at Landmark, Grill considered himself addicted to cocaine. Grill Depo at p. 33. Further, Grill says that he had taken his life in his own hands by abusing alcohol and drugs on "countless" occasions prior to his employment with Landmark. Nevertheless, Landmark apparently did no background check and did not check any of Grill's references. Deposition of Patricia Dillon, Exh. "A-12" hereto, hereafter Dillon Depo. Instead, Landmark put Grill in charge of their Dallas facility, where he would be in a position of responsibility, leadership and authority over women such as Tracy Neff who were in vulnerable states of mind.

**B. Landmark was Negligent in Retaining Grill, after his Record of Reckless, Drunken and Abusive Behavior**

Grill's abuse of alcohol, drugs and women did not end with his employment at Landmark, but such reckless activity continued in a well-documented pattern up until the time Tracy Neff was assaulted.<sup>4</sup>

**1.) Grill Evidenced a Pattern of Behavior that was Reckless, Alcoholic and Abusive Toward Women In 1991, 1992 and 1993 That Was Known to Landmark**

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<sup>4</sup> It can reasonably be inferred that Landmark kept Grill on staff because he was a "producer." By memo dated January 1993, Grill's supervisor Ingrid authorized a salary increase for Grill, noting that he did "122% of Forum Target, 105% Adv. Target, 141% of Seminar Target, 40% of TCC Target, 108% of SEL Target. DFW revenue was \$338,000, with at 19% operating surplus [and had] 100 persons in 'Assistants Program.'" [Personnel file Exh. "A-1" hereto ] In fact, over the course of his employment with Landmark, Grill was given a total of four salary increases based on performance. [id.] Grill testified that he took the center from worst in the nation to number one, in terms of profitability and revenue. Grill Depo at 144-146.

Sometime before August 1992, when Grill had only been on staff for Landmark for approximately a year, Grill had a confrontation with chief executive officer Harry Rosenberg at a gathering of Landmark insiders at Dave's Bar in San Francisco. Grill Depo at 45-46. In this confrontation, Grill was so intoxicated from drinking martinis that he told Rosenberg (or his sister, Joan, the director of the Centers Division of Landmark Education and also directly above Grill in the chain-of-command) to "fuck himself." Grill Depo at p. 46, 232.

By memorandum dated September 16, 1992, Landmark manager Tirzah Cohen placed Grill on probation on probation because Grill had

- (1) falsified enrollments;
- (2) embezzled money from Landmark;
- (3) had sexual relationships with 13 Landmark participants;
- (4) frequently driven while drunk; and,
- (5) engaged in inappropriate behavior with graduates while intoxicated.

See Personnel File, Exh. "A-1" hereto. Grill had conversations with Cohen and his supervisor Ingrid Cain in August, 1992 wherein he admitted each of the items listed in the Cohen memorandum. Grill Depo at p. 154. With regard to his sexual relationships with participants, Grill was told that such behavior was absolutely inappropriate, and Grill had to meet with each of his thirteen known sexual partners in the presence of a Landmark management employee in order to "complete" with them about his inappropriate behavior.<sup>5</sup> Grill Depo at p.172-73.

Although a memorandum in Grill's file indicates he successfully completed the term of his 1992 probation, Grill testified that he was "on probation" "most of the time" he was employed by Landmark for getting "in trouble." Grill Depo at 150.

Sometime in 1993, Grill kicked in the door to a hotel room at the Reunion Hyatt Regency in Dallas, Texas in order to get into a hotel room where one of his sexual partners was located. The following day, Grill's supervisor at Landmark telephoned him about the incident, and told him that his behavior needed to be appropriate for a center manager at all times and in all places. Grill Depo at 262-263.

## **2.) Grill's Pattern of Behavior that was Reckless, Alcoholic and Abusive Toward Women Escalated In 1994**

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<sup>5</sup> Knowledge of prior sexual relationships with program participants was enough to give Landmark knowledge of the possibility of the sexual assault of Tracy Neff. *Porter v. Nemir*, 900 S.W.2d 376 (Tex. App. – Austin, 1995, no writ) (knowledge that unlicensed drug treatment counselor had inappropriate sexual relationship with a prior patient made sexual assault of subsequent program participant foreseeable to his employer, despite that the sexual assault of the plaintiff in that case (1) began as a consensual relationship, (2) occurred off-premises and after-hours).

a.) Mindie Dodson Complaints

In February, 1994, a woman named Mindie Dodson came to work under Grill's supervision in Dallas. Deposition of Mindie Dodson, Exh. "A-14", hereto, hereafter Dodson Depo. On her first day of work, Grill took her to a bar and ordered a bottle of Cuervo. While drinking the tequila, he told Mindie that he thought she was beautiful, he wanted to marry her, and that he had previously torn up a photograph submitted with her application when he found she was a lesbian. Dodson Depo at p. 33-36. Shortly thereafter, Dodson complained to Landmark human resources director Fred Lange during which she told him she was having a hard time dealing with Grill's sexual harassment. Dodson Depo at p. 157.

On numerous occasions, Mindie Dodson observed what she considered to be violent behavior on the part of David Grill, including (1) having him slam his fist down in front of her face [Dodson Depo at p. 57]; (2) seeing him repeatedly pound on a copy machine because it wouldn't work [Dodson Depo at p. 61-62]; (3) having him get in her face and yell five times "I hate your guts and I don't trust you." [Dodson Depo at p. 60-62] Mindie also observed Grill drive drunk "most nights." [Dodson Depo at p. 67-68] David Grill himself does not deny that these things took place. Grill Depo at p. 214-217.

Mindie Dodson also observed Grill engaging in sexually inappropriate behavior, directed toward herself and toward other women. Grill would specifically go through applications to certain Landmark programs, and Grill told Mindie Dodson he was "looking for a wife" in the program applications. Dodson Depo at p. 80. During a Landmark function in Atlanta, Georgia, Grill stated that a female participant would be a "good fuck," which was overheard by the participant's boyfriend.<sup>6</sup> Dodson Depo, p. 85-86. Grill acknowledged that this occurred. Grill Depo at p. 259. Further, while Mindie Dodson was on staff, Grill showed her two people having sex on computer screen. Dodson Depo at p. 47-50. In May of 1994, Grill showed Mindie Dodson a copy of Playboy magazine (his subscription was sent to the Landmark facility) and said "I wonder what you'd look like in here." Dodson Depo at p. 52, Grill Depo at p. 264. After May, 1994, Dodson and Grill traveled to Oklahoma City, Oklahoma, on Landmark business, and Grill booked a single hotel room for them to stay in.<sup>7</sup> Dodson Depo at p. 78. After these incidents, Grill told Ms. Dodson that he knew he was going to be charged with sexual harassment. Dodson Depo at p. 56.

Grill had a cocaine abuse problem prior to his association with Landmark [Grill Depo at p. 32-33] and had a relapse one weekend at while at Landmark headquarters in San Francisco. Grill Depo at p. 35. Further, Grill told Mindie Dodson that he had told "his boss" at Landmark. Dodson Depo at p. 63-64. Grill confirmed that he probably told his supervisor at Landmark, Pat Dillon. Grill Depo at p. 34.

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<sup>6</sup> Grill's supervisor, Patricia Dillon, acknowledged that she was aware of the incident in Atlanta. Dillon Depo at p. 278.

<sup>7</sup> Grill apparently still sees nothing inappropriate in this action. Grill Depo at p. 206-207.



Also in May of 1994, Mindie Dodson observed Grill screaming at Landmark management employee Jerry Baden, only two inches from his face, in a disagreement over the proper way to set up a seminar room. Dodson Depo at p. 107.

In June, 1994, Ms. Dodson's tolerance for Grill's abusive behavior was at end. In that month Dodson initiated a conference call with Baden, a Landmark Forum leader who was Dodson's primary contact with management, in which Mindie told Baden that Grill was drunk a lot, was hung over a lot, threw up in the shower every morning, was going out a lot at night, had tried to make Mindie's life miserable after he found out she was a lesbian, and had showed her the sex on the computer and nude women in Playboy. Dodson Depo at p. 58-59.

When Grill's behavior did not improve, Dodson was forced to quit her work with Landmark in late June or early July of 1994. Before she left Dallas, however, she had an in-person interview with Grill's supervisor, Patricia Dillon, and a telephone conversation with Fred Lange, Landmark's head of human resources, about Grill's behavior. See Dillon Depo at p. 252; Dodson Depo at p. 90-94. Dodson told Dillon that Grill frequently came to work hung over, that his behavior was inconsistent, about the Playboy incident (discussed supra), about Grill's violent behavior in the center, and about the Oklahoma hotel room incident (discussed supra). Dodson Depo at p. 90-92. Dodson told Lange about Grill's drunkenness, and mood swings, as well as violent behavior. Grill was, again, put on probation (where he'd spent most of his career at Landmark) but no other substantive action was taken. Dillon Depo at p. 253-262.

#### **b.) Robin Adelson Complaints**

Soon after Mindie Dodson left, Robin Adelson, a high-level Landmark volunteer and former Dallas staff member sent a letter directed to Landmark chief executive officer Harry Rosenberg dated July 14, 1994. See Exh. "A-1"; Deposition of Robin Adelson, Exh. "A-13" hereto, hereafter Adelson Depo, at p. 44. The letter states that Grill was coming to work with an "obvious hangover, including the 'shakes,' [and that he was] irascible to key assistants and staff, screaming loud enough for guests to hear." The letter also alluded to the Playboy incident (discussed supra) and accused Grill of making lewd and/or disrespectful comments to participants, graduates, assistants and staff. Importantly, the letter suggests that interviews be done of people working near Grill. [See personnel file, Exh. "A-1."] However, although Grill's Landmark supervisors say that they went over the allegations contained in the letter with Grill, nothing substantive was done in the way of investigation or by way of remedy. Dillon Depo at p. 272-273.

By letter dated August 5, 1994, Robin Adelson sent a second letter to corporate management at Landmark, this time directing her letter to Patricia Dillon and sending copies to Harry Rosenberg and Joan Rosenberg. Adelson Depo at p. 27. This second letter, co-authored with Landmark volunteer Vickie Bishop, stepped up the tone and tenor of the complaints that Grill's behavior was completely out of control. The letter put Landmark management on notice that Grill was frequently drunk "beyond verbal and motor control", had mentioned to a Landmark staff member that he frequently vomited in the shower, was having wild mood swings, was making erratic decisions, had memory lapses, displayed sexist and bigoted outbursts, was

womanizing and had a violent temper. The letter alleges that Grill had no respect for women. The letter goes on to advise Landmark management that Grill was “ongoingly dat[ing]” Landmark students, searching for them via their applications, and “ha[d] problems with powerful women, avoid[ed] intimacy, [was] sexist, volatile, lie[d], bullie[d] and manipulate[d people].” [See Personnel file, Exh. “A-1”]

In response, Grill’s supervisor Patricia Dillon merely reiterated her same old warning, but otherwise took no response. See Dillon Depo at p. 248, 265-67, Dillon memo of 2/28/95. Within two (2) months of Landmark’s receipt of this letter, Grill reviewed Tracy Neff’s application and began his sexual pursuit of her. Grill Depo at p.261.

The failure of Landmark to address the erratic, violent behavior of David Grill was clear negligence on the part of Landmark. Given Grill’s record, Landmark’s failure to deal substantively with the problems, and Landmark’s choice to retain Grill in a job where he was in a position of leadership and authority over vulnerable women such as Tracy Neff, was clearly negligent management by Landmark. Affidavit of Joel Brockner, Ph.D., hereafter Brockner Aff., Exh. “A-3” hereto.

### III.

#### **THE SEXUAL ASSAULT OF TRACY NEFF WAS FORSEEABLE BY LANDMARK EDUCATION CORPORATION**

Landmark has moved for summary judgment on Plaintiff Tracy Neff’s negligence claims against Landmark by alleging that Landmark could not have foreseen that their negligence in hiring and retaining Grill might result in Grill’s assaultive behavior. Apparently, Landmark’s position is that, because they were not aware of any prior rapes by Grill, they had no reason to suspect a rape might occur in this case.

The Texas Supreme Court has held that prior sexual assaults are not a prerequisite for determining whether a particular sexual assault is foreseeable. *Nixon v. Mister Property Management*, 690 S.W.2d 546, 550 (Tex. 1985) (reversing a summary judgment in favor of a defendant who claimed a rape on his premises was not foreseeable). “It is not required that the particular [incident] complained of should have been foreseen. All that is required is ‘that the injury be of such a general character as might reasonably have been anticipated;’ and that the injured party should be so situated with relation to the wrongful act that injury to him or to one similarly situated might reasonably have been foreseen.” *Nixon* at 550, citing *Carey v. Pure Distributing Corp.*, 133 Tex. 31, 124 S.W.2d 847, 849 (1939). Thus, there is no requirement that Landmark should have been able to foresee rape, only that the general character of injury be reasonably foreseen. *Id.*

Certainly, given Grill’s well-documented history of alcoholic, sexist, abusive, violent erratic and irresponsible behavior, together with his particular history of dating program participants, Landmark officials could have reasonably foreseen that Grill was likely to engage in behavior that would put participants in a great degree of risk, including but not limited to irresponsible behavior while intoxicated, sexual harassment, violence and sexual assault. See

Affidavit of Joel Brockner, Ph.D., Exh. "A-3." Further, by placing Grill in a position where persons in a vulnerable state of mind would be particularly susceptible to a high degree of undue influence and suggestion from Grill, Landmark could have reasonably foreseen that Grill would manipulate vulnerable women such as Tracy Neff into a position where he could sexually assault them, particularly if he was intoxicated. Affidavit of Rick Ross, Exh. "A-4."

As a matter of Texas law, "Individuals... who have been sexually abused as children are especially vulnerable to sexual exploitation by a counselor." *Porter v. Nemir*, 900 S.W.2d 376, 386 (Tex. App. – Austin 1995, no writ). Tracy Neff had been sexually abused, and Landmark and David Grill knew about the prior assault because Tracy put that information in her initial Forum information sheet, which was reviewed by Grill and Tracy's Forum leader. See Neff Application, Grill Depo at 261. Tracy had come to Landmark with the express purpose of dealing with this complex emotional problem. Neff Application. In a situation-- such as in the context of the programs presented to Neff by Landmark-- where persons are in turmoil due to self examination, Landmark had a "heightened obligation to hire and retain" competent employees because their programs treat a psychologically fragile clientele. *Porter* at 386. Where a person in authority in such a situation has even dated one prior program participant, that individual's employer has reason to know that the person is incompetent and must investigate the situation in order to ascertain whether program policies are being violated and program participants are at risk. *Id.*

Landmark was aware that Grill had had a sexual relationship with at least thirteen participants prior to September 16, 1992. See Grill Depo at p. 161. Further, Robin Adelson's letters put Landmark on notice that Grill was "ongoingly dating participants" in Landmark's programs. Clearly, Landmark had notice that their Dallas leader would engage in inappropriate dating and sexual relationships with program participants. *Porter* at 386.

It is interesting that Landmark should claim it could not foresee that a volatile and dangerous situation was developing, when clearly it was obvious to everyone else involved. Grill himself stated on numerous occasions that he knew he was going to get in trouble for sexual inappropriateness. Dodson Depo at p. 50-52. Further, Robin Adelson's letter dated August 5, 1994 contains the following statements:

... as an ongoing participant in this work for years, it would be dishonest for me not to say that I'm also wondering how such blatantly unprofessional behavior could be totally unknown to you, especially given the incidents that gave rise to David's having been on probation. If it is know to management, is it being ignored or overlooked? ... There is no corporation in the world that would allow managment to interact with employees the way David does and not be n court eventually ... Given David's ongoingly sexually inappropriate interactions with and about women, it is a miracle that no suit has been brought for sexual harassment ...

Personnel File, Exh. "A-1." Given the clear notice that Adelson, Dodson and others gave to Landmark, the only reason the company did not foresee the events giving rise to this law suit is

because they were ignoring the clear signals that something was severely wrong with Grill and that someone was going to get hurt.

IV.  
**LANDMARK'S NEGLIGENT HIRING AND RETENTION  
OF GRILL WAS THE CAUSE IN FACT OF THE  
SEXUAL ASSAULT ON TRACY NEFF**

Landmark has understandably attempted to distance itself from the assault of Tracy Neff by its employee, David Grill, by arguing Landmark's negligence in hiring and retaining Grill cannot be the cause in fact of the assault because the assault did not take place on Landmark property, during business hours, and was not expressly done to further Landmark's business. Landmark's arguments confuse two legal principles: (1) Plaintiff argues that Landmark is responsible for the negligence and intentional acts of its employee Grill under the doctrine of respondeat superior because Grill was acting within the course and scope of his actual and apparent authority as an employee of Landmark at the time of the sexual assault, and (2) Plaintiff asserts that Landmark's own independent acts of negligence in hiring and retaining Grill was also a proximate cause of Tracy Neff's injuries. Landmark relies heavily on *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472 (Tex. 1995) for the proposition that Landmark's negligent hiring and retention were too remote from the rape to have constituted legal cause in fact. Landmark also cites two cases which have held that an employer cannot be held responsible for the assault of an employee under respondeat superior because an employee ordinarily does not commit an assault within the course and scope of his employment. *Mackey v. U.P. Enterprises, Inc.*, 935 S.W.2d 446 (Tex. App. – Tyler 1996, no writ); *Dieter v. Baker Service Tools*, 739 S.W.2d 405 (Tex. App. -- Corpus Christi 1987, writ denied).

A. **Grill's Actions in Manipulating Neff Were Within His Actual and Apparent Authority as Dallas Center Manager**

If David Grill's actions were within the course and scope of his actual and apparent authority as an employee of Landmark, then Landmark's causation arguments must fail because it is undisputed that the actions of David Grill in assaulting Tracy Neff were the cause of here damages. Under the doctrine of respondeat superior, the principle is vicariously liable for the actions of the agent. *Dieter*, 739 S.W.2d at 408. There is ample summary judgment proof to indicate that David Grill was acting within the course and scope of his employment whenever he socialized with graduates and participants of the Landmark programs:

After Grill kicked in a hotel room door to gain access to the room of a woman with whom he was having a sexual relationship, he was told by Landmark management that he was required to be an example of the Landmark philosophies at all times and in all places. Grill Depo at 262-263.

David Grill considered it his job to make things “fun” to participate in Landmark in Dallas, and made it a point to socialize with Landmark participants. Grill Depo at 144-146.

Landmark apparently considered it within their authority to discipline Grill for having sexual relations with program participants, and put Grill on probation for this behavior in September of 1992. Personnel file. Grill Depo at p. 154, 172-173.

By memorandum dated February 28, 1995, Grill’s supervisor Patricia Dillon memorialized a conversation with Grill in July of 1994, wherein Grill “was clear that the behavior outlined in the letter was inappropriate for a Center manager [and] agreed that his actions as a manager from that point on would be consistent with that of a Center Manager of LEC *at all times both in and out of the center.*” Exh. “A-1”

In the same February 28, 1995 memorandum, Dillon states that she “[w]arned [Grill] that if there was another complaint of his behavior *either inside or outside the center* that he would be terminated.” [emphasis added] Exh. “A-1”

In a memorandum dated October 5, 1994 Patricia Dillon outlined conversations she had had with Grill regarding the allegations contained in the Robin Adelson letters (discussed *supra*) “With regard to both letters, Joan [Rosenberg] and she had a conference call with David and went over each point of the letters. We specifically requested that he not try to find out who sent them. David is now causing Center Manager *at all times, in all places, inside and outside the center.* I requested that David stop yelling and stop drinking... He no longer has alcohol around the graduates...” Exh. “A-1”

Because Grill was acting within the course and scope of his actual and apparent authority as a Landmark employee at all times and in all places, including while engaging in sexual relationships with program participants, Landmark is vicariously liable for Grill’s negligent and intentional acts. Certainly, it cannot be argued that Grill’s acts were not a proximate cause of Tracy Neff’s injuries.

**B. The Negligence of Landmark in Hiring and Retaining Grill was a Cause in Fact of Neff’s Injuries**

An entirely separate issue raised by Landmark’s Motion is whether the independent acts of negligence on the part of Landmark in hiring and retaining Grill were the cause in fact of Tracy Neff’s assault.<sup>8</sup> Negligent retention involves “the master’s own negligence in ... retaining in his employ an incompetent servant whom the master knows or by the exercise of reasonable

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<sup>8</sup> Defendant’s reliance on *Mackey v. U.P. Enterprises, Inc.*, 935 S.W.2d 446 (Tex. App. – Tyler 1996, no writ) is misplaced because the Plaintiff in that case was not proceeding under a theory of negligent retention and hiring. The act complained of by Plaintiff in this case is not merely a vicarious liability claim, but also that Defendant Landmark engaged in its own independent acts of negligence by hiring and retaining Grill when it knew or should have known of his propensity to harm Tracy Neff and others similarly situated.

care should have known was incompetent or unfit.” *Porter v. Nemir*, 900 S.W.2d at 385. Cause in fact in a negligent hiring and retention case merely requires that the negligent act or omission of the employer was a “substantial factor” in bringing about the injury and without which no harm would have occurred. *Nixon v. Mister Property Management*, 690 S.W.2d 546, 549 (Tex. 1985).

Even in cases where the intentional acts of an employee have been held not to have been committed within the course and scope of the employee’s job, nevertheless a Plaintiff can still prevail on a negligent hiring and retention theory. *Dieter v. Baker Service Tools*, 739 S.W.2d 405 (Tex. App. – Corpus Christi 1987, writ denied) (reversing summary judgment for an employer on a negligent hiring claim although an assault was held not to have occurred within the course and scope of the employee). In *Dieter* (*supra*, and cited by Landmark) the Corpus Christi court of appeals held that liability for negligent hiring and supervision is not dependent upon a finding that the employee was within the course and scope of his employment when the tortious act occurred. *Id.* at 407.

Further, there is no requirement that the intentional act occur on the premises of the employer, or within the working or business hours of the employee.<sup>9</sup> Retention of an incompetent employee can be the cause in fact of a sexual assault which occurs off the premises and after the business hours of the defendant employer, where the employee gained the confidence and trust of the sexual abuse victim “through the cloak of responsibility” as an employee of the defendant employer. *Porter v. Nemir*, 900 S.W.2d at 386.

There is ample evidence that Grill manipulated Tracy Neff and sexually assaulted her through the use of his position within Landmark. Tracy Neff met Grill at the Landmark Center,

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<sup>9</sup> Defendant Landmark’s reliance on *Doe v. Boys Clubs of Greater Dallas*, 907 S.W.2d 472 (Tex. 1995) for the proposition that there is no cause in fact in the present case is misplaced. In *Doe*, a Boys Club volunteer had been assigned to the club as part of his community service obligations secondary to a DWI conviction. After the volunteer met two young boys at the club, he became friends with the boys’ grandparents, and visited their home on at least ten occasions. On several overnight camping trips over a three year time period, the volunteer sexually assaulted the boys. The Supreme Court rightly held that the failure of the Club to investigate the volunteer’s criminal record could not constitute the cause in fact of the assaults because (1) full disclosure of the criminal record would not have prevented the volunteer from being at the club, and (2) the grandparents were specifically told that the club did not endorse relationships between boys and volunteers outside the supervision of the club. In the case at bar, thorough investigation of Grill’s behavior would have disclosed that he had a propensity to engage in reckless, violent and abusive behavior, to date participants of Landmark’s programs and engage in sexually inappropriate behavior. Certainly, if Grill’s problem behaviors had been addressed properly by Defendant Landmark, Grill should never have been allowed to manipulate Tracy Neff under the cloak of Landmark authority. Further, Tracy Neff met Grill at the Landmark Center, where he was the manager, and was never around Grill outside the ever-enveloping context of Landmark and its programs. The night of the rape, Grill first approached Neff at the Landmark facility.

and knew he was the center manager, a position of trust and authority within Landmark. Neff Affidavit, Exh. "16." Neff was told that Grill was the highest example of the Landmark philosophies. Neff Affidavit, Exh. "16." Although Tracy Neff felt uncomfortable having sexual relations with Grill, he told her that it was acceptable behavior under the Landmark philosophies. Neff Affidavit. On the night of the sexual assault, Neff encountered Grill at the Landmark facility. Neff Affidavit, Exh. "16." Grill manipulated Tracy Neff back to his apartment by telling her he needed to share with her, which is a Landmark "buzz word." Neff Affidavit. Further, the Landmark program fostered dependence by Tracy Neff on the suggestions of leaders like Grill, such that Neff was easily manipulated into the situation of rape. Rick Ross Affidavit, Exh. "A-4"

Despite Landmark's attempts to distance themselves from Grill's atrocious acts, it was undisputedly the fact that Landmark allowed Grill to be in a position of leadership around vulnerable women such as Tracy Neff that was the cause in fact of the sexual assault of Tracy Neff. See, Affidavit of Joel Brockner, Exh. "A-3." This Court should deny summary judgment on this issue and allow the claim to proceed to trial on the merits.

#### V.

#### **LANDMARK INTENTIONALLY INFLICTED EMOTIONAL DISTRESS ON TRACY NEFF**

With regard to the intentional infliction of emotional distress claims, Landmark merely claims that because Landmark did not "authorize or direct" the assault on Tracy Neff, that Landmarks' behavior cannot, as a matter of law, be extreme and outrageous. Tracy Neff would assert that, given Grill's record of violence, alcoholism and reckless behavior, Landmark's behavior in repeatedly ignoring such behavior and thereby intentionally putting program participants at risk was, indeed, behavior that should be regarded as "atrocious, and utterly intolerable in a civilized community." *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993).

WHEREFORE, PREMISES CONSIDERED, Tracy Neff respectfully prays that Landmark's Motion for Summary Judgment be denied.

Respectfully submitted,

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BY: 

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**CERTIFICATE OF SERVICE**

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