

ORAL ARGUMENT — 3/5/98
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READ V. SCOTT FETZER COMPANY

MITHOFF: Kristi Read was brutally raped in her home in 1993. She was raped by a Kirby dealer who had been placed there as part of a marketing scheme on the part of Kirby to sell vacuum cleaners. The dealer was placed there because there was no requirement of a background check before dealers were placed into the home.

I want to talk about two issues: the duty of Kirby; and the gross negligence of Kirby. This court has reviewed I know the history that led us to where we are and has reviewed the history of the several assaults and the rape that preceded the rape of Kristi Read.

This court has reviewed the sorted history of Mickey Carter, the dealer, who raped Kristi Read. I will not spend time reviewing those facts, but I did want to spend a moment talking about the decision of the North Dakota SC which preceded by almost a year the rape of Kristi Read, then move to the issues of duty and of gross negligence.

Almost a year before Kristi Read was raped in 1992, the North Dakota SC decided a case involving a rape - a rape by a Kirby dealer. She was raped in 1983. She brought a damage suit. She won. The case finally reached the North Dakota SC in 1992. The North Dakota SC told Kirby: "You have a duty to Linda McLean. Kirby markets its products through in-home demonstrations and sales," they noted. And in fact, the contract in that case like the contract in this case requires in-home sales. The contract the evidence has shown was enforced to the extent of terminating dealers who violated that provision. The only way that these vacuum cleaners could be sold through a dealer was through an in-home demonstration.

The court says: "When potential purchasers admit Kirby dealers into their homes to demonstrate Kirby products for sale, there is a foreseeable and unreasonable risk of harm to those potential customers if those dealers have past history of crimes and violence." This was told to Kirby one year before the rape of Kristi Read.

ENOCH: If I understand though, you have a couple of levels here. You have the Kirby manufacturer that then distributes the vacuum cleaners through distributors, who then hire the salespeople. Are we arguing that it's the distributor's responsibility to do the background check on the people that they hire, the salespeople, or are you arguing that Kirby is responsible for doing background checks on the distributor, or are you arguing that Kirby has the duty to have a background check on the people that are hired by somebody that Kirby allows to sell their vacuum cleaners on their behalf?

MITHOFF: Kirby's requirement is limited. Kirby's only requirement under the North

Dakota court and the Austin court is to require a background check be made by the distributor of the dealer that he hires. In other words, the court goes on to say for example that, "Kirby took no steps to minimize that risk by contract or otherwise." Kirby in its contract, as the court is aware of, requires the in-home demonstration.

ENOCH: So the sole argument that's being made here is the only thing that Kirby should have done that it did not do was as a part of its agreement with its distributor, the distributors would do background checks?

MITHOFF: That's correct, that that be required by the distributor.

ENOCH: But you're not requiring that Kirby do any background checks on the salespeople?

MITHOFF: That's correct. That would be too burdensome, and that would be unreasonable. And that was not the burden imposed by the North Dakota court nor was it the burden imposed by the Austin court. The Austin court said two things would discharge the duty: Either requiring by way of a contract that is Kirby required by way of contract that the distributors do the background check; or alternatively, the CA suggested even a warning from Kirby to the distributor might discharge that duty.

ABBOTT: Currently there is a contract between Kirby and its distributors, correct?

MITHOFF: That's correct.

ABBOTT: And so all they needed to do was to add one sentence to that contract?

MITHOFF: That's all they needed to do. They could xerox the copy and type it at the bottom.

ENOCH: Are you aware of any other cause of action where the contract between two people, the failure to include a provision or the additional provision, it creates some sort of negligent duty to some third party? Give me an example of where: If I contract with someone to drive my car as a trucker, and I don't put in the contract: "Don't be negligent in driving this truck," then I am negligent to the victim in an accident for the sole basis of I didn't have a provision in a contract?

MITHOFF: Several points about this case and how this case can be distinguished for example the example you pose. First of all a couple of observations about the duty generally. The duty of Kirby arises because of the affirmative conduct of Kirby. This is not a mere failure to warn, such as trouble for example in the *Golden Spread* case, where the *Golden Spread Council* merely because it came into some information does it have a duty to warn someone about hiring that scout master. This is an affirmative duty that arises because of the affirmative conduct of Kirby. Kirby

engages in a scheme to market in which they place these salesmen into the homes where they know there is a risk of serious injury if there is no background check. That's the first point. The second point is, the duty of Kirby is an independent duty. This is not a duty that depends on whether or not the distributor is negligent. This is not a vicarious liability situation, such as that urged by Kirby in its briefs. This is independent liability. And third, this is liability that depends upon and arises from the traditional notions of analysis such as *Golden Spread* articulated, the same *Greater Houston Transportation* weighing of factors that was utilized in the *Golden Spread* case. So it is that starting point. Then the factors that have to be taken into account in that weighing process are 1) the right of control. Here Kirby has a right of control over the method of sale, a right of control in fact that it is so specific and so absolute and so complete that the mere failure of any distributor or any dealer to sell in accordance with that term will cause an immediate termination of the contract.

ABBOTT: Let's assume we're dealing with a different type of situation, not a situation where Kirby, the manufacturer of the product requires that their distributors and dealers sell home to home. But in our commerce we have a lot of situations where manufacturers sell to a middle man who sells to the ultimate distributor. In those situations where we're dealing with a manufacturer who doesn't prescribe how the product is to be sold, I take it in those situations, you do not contend there should be a duty?

MITHOFF: That's correct. I totally agree. I think the two factors, to focus specifically on your question, are these: 1) the control of the specific method of saying to the point of canceling the contract if you do it in a violation; and 2) the serious risk of injury. I think those two factors alone are sufficient.

OWEN: What if you're a landowner and someone has leased your land and has an apartment complex on it, and you have a contract with them to manage it, do you have to include in that contract that, "the manager of the apartments will do background checks on maintenance people, security people, yard people?" Would that duty follow if we were to adopt what you are urging us to?

MITHOFF: Only if there were a) a right of control that was specific and detailed; and 2) if there was foreseeable risk of injury.

OWEN: Right of control of what?

MITHOFF: The factor that sets this case apart from so many of the traditional *Retinger*(?) cases or premise cases in our view is the affirmative action of Kirby. Kirby put into motion this scheme of marketing. In other words, this is not a mere failure to warn. This is not for example like so many of the premises cases where...for example the recent *Celanese*(?) case this court decided just last week where there's a general obligation to follow safety rules and there is a question of whether or not the general contractor has a duty to remind the independent contractor...

OWEN: But you know that tenants are going to be in close contact with maintenance people and yard people and security people?

MITHOFF: If there was evidence of a foreseeable risk and if the owner and operator engaged in an affirmative conduct that set that in motion, then there very well could be a duty.

ENOCH: The contract of Fetzer to their distributor does not contain this clause that would impose a duty on the distributor to do background checks on their salespeople?

MITHOFF: That's correct.

ENOCH: Absent that clause, then the distributor has no duty to do background checks on the salespeople?

MITHOFF: The distributor may in fact have a duty. That was not the issue in this case, and the duty of Kirby is not dependent on the duty of the distributor. The duty of Kirby is an independent duty.

ENOCH: If the issue in this case is "but for the lack of this clause this event would not have happened," then why would the distributor have any duty at all?

MITHOFF: Two points. As to the testimony of Sena himself, he said: "Had there been such a requirement, he would have followed it." So that causal connection was made, and I believe undisputed.

ENOCH: Under your analysis though, could that be the basis for excluding his liability? Sena's responsibility for hiring this fellow, would that relieve him of any responsibility in your mind?

MITHOFF: No. And in fact the jury's verdict put 80% on Kirby, and 10% on the distributor.

ENOCH: I am trying to think of a scenario where two parties enter into an agreement to perform some sort of activity, and it's the absence of a requirement in the contract that is the groundwork for creating a duty to third parties that can be breached under negligence theories. And it's the absence of this notion of "I'm going to let you sell my vacuum cleaners, but in exchange for selling my vacuum cleaners you must set up a set of door-to-door sales program." And because under that contract I don't require you to do a background check on your salespeople that somehow creates a negligence duty because one of these salespeople commits a tort? The distributor would have that duty. "I hired the fellow. I needed to do the background check." If that's the notion what is the absence of the provision in the contract or the existence of the provision in the contract have to do with the distributor's failure if he has a duty to do the background check?

MITHOFF: It goes back to the question that Justice Abbott asked, and that is, in a contract in which there is no affirmative duty imposed and no affirmative requirement imposed to sell in a particular way in a specified manner, that is, I'm selling to you and you can sell in any manner that you so choose, then this same duty may not arise.

ENOCH: But without the contract provision if I make as a part of my plan that I send a person to your home to sell you the product, the duty comes from "I'm sending them to your home to do the product; I need to do a background check if they are going to be in your home." That's where the duty comes from. It's not from some sort of contract over here that says that's the way we're going to do the program. It comes from "because I sent them to you," that's where the duty comes from?

MITHOFF: That's correct. I think it's that affirmative act that initiates the duty. There are other factors obviously.

ENOCH: So the fact that Kirby had it in the contract or didn't have it in the contract with a dealer has nothing to do with whether or not there's a duty. The duty is because this person's being sent to your home, and that's where the duty comes from?

MITHOFF: Are you suggesting that if the dealer had been sent in the absence of some written contract would the duty still arise?

ENOCH: In fact, that's the way it does arise. The way it does arise if this salesman was sent to this home and he did a horrible act, the duty arises because the business people sent this man. This was their idea to do this, and if they are going to send them to your private home they've got a duty to do the background check. And the duty arises because that's the way they do business. It has nothing to do with whether there's a contract out there between a dealer and a distributor or anybody else. It's because they sent them to the home and that's how the duty arises. So my question is, how does the absence of a provision in the contract affect the outcome in this case at all?

MITHOFF: Because the testimony is undisputed that a) had Sena been required to do a background check, he would have done it; and b)...

ENOCH: But Sena had a duty to do the background check anyway because Sena was sending these salespeople to this home.

MITHOFF: The contract specifically provided that the only way these sales could be made were in the manner described. The dealer is sent to the home only because of that contract, because Kirby imposes that requirement. And this is why the contract is important. Because Kirby imposes an affirmative requirement, a duty arises for Kirby that does not mean that the distributor does not have its own independent dealer. And that's the reason that it's important to distinguish between a vicarious liability situation and an independent liability.

BAKER: Do I understand your viewpoint is that because of the contractual requirement of in-home sales this is a contractual duty that gives this duty to Kirby to require background checks? And I think that's where Judge Enoch's questions are going. Are you arguing for a contractual basis for the duty or a tort basis for the duty?

MITHOFF: The duty arises from the traditional analysis under tort. It is not a contractual duty.

BAKER: And so back to his question, whether there's a requirement for a background check or not in the contract has nothing to do with the cause of action that you say should exist based on the duty you would impose on Kirby here, is that correct?

MITHOFF: No, the absence of a requirement for a background check being imposed by Kirby has everything to do with the absence of any _____.

BAKER: But your earlier argument indicated that Mr. Sena as the distributor in this area has the same duty to do a background check, which he did not do, which is imposed by the fact that Mr. Sena is hiring the salesperson and he sends them into the homes; is that correct?

MITHOFF: Sena may have some duty of care.

BAKER: Why isn't it the same as Kirby?

MITHOFF: Because the party in the superior position to have knowledge of this risk is Kirby. It's undisputed in the evidence that not only did Kirby as an entity but its highly placed personnel, who had the superior knowledge, they knew of the series of rapes, they knew of the series of assaults...

BAKER: That's because of *McLean*?

MITHOFF: There were assaults before *McLean*.

BAKER: But is it correct in the record that the only two sexual assaults were *McLean* and this case that are documented in the record?

MITHOFF: The only rape. There were assaults on women, but the only rape.

BAKER: Do I understand that in the record there is evidence that after *McLean*, Kirby sent things to its distributors suggesting and requesting that they conduct background requirements and also in matters involving additional training and things of that nature?

MITHOFF: What Kirby did under the evidence was in a training manual insert a warning

about background checks. The evidence showed that that manual is available only if purchased, and available only in Cleveland if the distributor happened to attend that meeting and purchased the manual. But Kirby was told as early as 1992, that only by requiring its distributors to investigate potential dealers can Kirby reduce or eliminate the unreasonable risk. And they go on to suggest that that risk can be reduced or eliminated by contract or otherwise. So the answer is yes there were steps taken, but they were clearly inadequate, clearly not intended to reach the ultimate dealer, clearly could have been communicated directly with the signature of the distributor attesting to the fact that he had received that notice in a contract.

OWEN: And once that contractual duty is in place, I would assume that Kirby would have a duty to monitor complaints?

MITHOFF: They would have, I suggest, the same right that they have here to terminate a contract if for example...

OWEN: But they would have to monitor to see if they've got a contractual obligation. They have taken control under our case law, don't they have an obligation to follow-up?

MITHOFF: There is no suggestion in either the North Dakota opinion or the Austin CA that there was any continuing duty to monitor. But we would not so argue.

OWEN: But under our independent contractor law once the duty is taken on in a contract don't you have the obligation to perform that duty in a reasonable fashion? Once you have the control, you have to exercise it in a reasonable manner isn't that correct? I am talking about Kirby saying, "I contractually obligate you to do something in a safe fashion." And doesn't under our existing case law once Kirby's contract requires that wouldn't they have some obligation to monitor and follow-up to ensure that their dealers are doing background checks?

MITHOFF: I think their duty would be very narrow. I think they could write a contract that says, "As a part of our agreement, you, distributor, are required to conduct a background check." Failure to conduct that background check like the failure to conduct the sales in the way we deem appropriate...

OWEN: But you would have to monitor it to know that there was a failure, that's my question?

MITHOFF: I don't think there's a duty to monitor is my answer. If it came to the attention of Kirby that someone was violating the contract and they failed to do anything by way of canceling the contract or terminating the distributor, then I think in that instance the duty would arise.

OWEN: Stepping back. You are very tied to your case and your facts, and I understand that, but we need to take a larger view. Stepping back, a lot has been said about requiring

background checks. As a practical matter where can an employer go to get a comprehensive background check on someone? Is there one place or two places? Where would you go if you wanted to find out if someone had a criminal record?

MITHOFF: You can write to the DPS and for \$17.25 get a background check.

OWEN: Will that tell you every place in Texas that someone has been arrested?

MITHOFF: It is my understanding that it will have a statewide record. Yes. You don't have to go to each and every courthouse in order to determine whether or not someone has been arrested or charged...

OWEN: Will that contain arrest or would it only contain convictions? If you're a private citizen and you call the DPS what will they tell you?

MITHOFF: Convictions for certain. Other sources obviously. And the sources that turned out to be the most important sources in this case were personal references. It's significant I suggest in this case that the most telling information about Mickey Carter, about the incidences of sexual conduct...

OWEN: I'm talking about if there aren't any personal references and you ask for some and there aren't any, but you want to check a criminal background where can you feasibly do that?

MITHOFF: DPS.

OWEN: And they give you convictions. Do they give you anything else?

MITHOFF: I can't say with any certainty whether you can obtain arrest or not. I know that I have obtained it in cases. Whether that is ordinarily publically available or not, I cannot represent. But that is certainly the first source. But as I say personal references are important simply because in this case it uncovered some very interesting information. Prior employers are an important source.

ENOCH: In this record it's filled with a lot of information about this individual. But it wasn't clear in the record that this information was even remotely available to Kirby or to the distributor" psychological reports and psycho analysis and reports and counseling in the army and that sort of thing. The record is replete. Other than the references it apparently listed in some neighbors saying, "I don't like this guy, he's strange." All this other stuff. Is this stuff just readily available to private employers or someone who just wants to have a babysitter and call on the phone?

MITHOFF: To cite specifically to the record, one of the personal references called gave specific evidence about his own knowledge of this man masturbating in front of several women, several instances of masturbation in front of women. This personal reference was able to report that

the couple, Mickey Carter and his wife, were evicted from an apartment complex because of sexual misconduct, including masturbation and stalking. I will respectfully suggest that that information alone from a personal reference would probably be enough to clue a reasonable businessman that perhaps this man ought to be looked at further.

ENOCH: From your point of view then, could a duty be crafted so narrowly that the duty here is that Kirby needed to have a provision in its contract that required its distributors if there's a reference list, then call would that satisfy all the obligation that Kirby would have?

MITHOFF: I don't know that this court or any court can specify the exact application form. But at a minimum, I would suggest there is plenty of evidence out there about industry use in the industry. Banks have done it for years. Security guards have done it for years. Trucking firms have done it for years. At a minimum 3 references from prior employers, 3 references from personal friends. One of the issues is whether you can get an authorization from the applicant.

GONZALEZ: As a condition of employment?

MITHOFF: Absolutely. It's done all the time.

ENOCH: But your point is, the liability of Kirby is because there's something missing out of their contract. If we are going to give some guidance to people who require in-home sales for their products, then it seems to me we can't simply say, "the contract needed required background checks." You're talking about a contract. So it seems to me we ought to give some guidance to what language needs to be in this contract to avoid liability when the distributor fails to do whatever it is they are required to do. We're not talking about employers' duty. We are talking about someone who contracts with someone else. You must this in your contract, "get 3 references and you must call those references," and that satisfied your obligation of the contract, or you call 3 references and you call your local police department and that satisfies it. At what point has the contract provision met what you understand the duty to be for Kirby?

MITHOFF: I think Kirby would discharge its duty by simply stating, "It is your duty, meaning distributor, to conduct a background check," and if they want to go further and say "a background check that may include but not be limited to 3 personal references, 3 personal friends, prior employers and criminal background check," that would be even better. But I think to answer your question correctly Kirby could discharge its duty simply by saying in the contract, "you are hereby required distributor to conduct a background check that is adequate prior to the time a dealer is placed into the home."

HANKINSON: As I understand your argument, you are saying that it is the contract which is the evidence of affirmative conduct on the part of Kirby that gives rise to the duty under traditional notions of tort law in Texas?

MITHOFF: It's part of the evidence.

HANKINSON: This is not a contract claim. This is a tort claim with that contract being some of the evidence of the affirmative conduct by Kirby that gave rise to the duty?

MITHOFF: That's correct.

HECHT: You say the only duty was to put a requirement in the contract, that the distributor had a duty to do a background check. And that Kirby did not have the duty to monitor that for enforcement, but to enforce it if knowledge of the breach came to its attention?

MITHOFF: That's correct.

HECHT: Did Kirby in this case have any knowledge prior to the rape that the distributor was not conducting background checks?

MITHOFF: The evidence as I recall from Mr. Sena was that sometimes he conducted background checks and sometimes he did not. Now whether Kirby actually knew of Mr. Sena's particular practice, I am not sure. One point on that very question though that I think is significant is the evidence that did come to Kirby's attention at one time about a child molester. There was evidence I believe in 1991 that one of the distributors was a child molester. And when that came to the attention of Kirby there is no question that they had the right to control the activity because they immediately terminated the distributor. When he moved and tried to get another job with another distributor they terminated him.

HECHT: But my question is, if there had been a provision in this distributor's contract it wouldn't have done any good because Kirby didn't have any knowledge that it was being breached in order to enforce it?

MITHOFF: Well it would have done all the good in the world under the evidence here, because Mr. Sena said, "if there had been such a requirement, he would have followed it." That's the evidence.

PHILLIPS: Does this duty arise under the peculiar risk doctrine under the restatement?

MITHOFF: The duty arises in our view and in our reading of the CA's opinion under the traditional notions of foreseeability. Can this court reach the same conclusion by invoking the peculiar risk doctrine, §413? The answer is yes. But the court does not have to adopt or invoke that provision.

PHILLIPS: Under foreseeability, the court in *Greater Houston Transportation* was looking at a somewhat similar duty on part of a cab company that had independent contractors said

that, "One prior event in an entire city over a period of years did not make a second event foreseeable." Are you hanging your hat on the foreseeability based on a prior event and several similar events, or on the general nature of this business? If we are going just on foreseeability, we are not going to say this particular risk of one type of business contracted in one way, but this is a particular application of a general duty, then how does the foreseeability arise?

MITHOFF: The foreseeability arises under the analysis of all of the factors articulated in *Greater Houston Transportation v. Phillips*. Specifically in this case focusing on risk of injury analysis, it arises 1) because of the prior instances of assault; and 2) I would suggest, at least in part, a decision from the SC of another state which tells Kirby one year before this woman is raped, "You have a duty." And I would suggest that as a matter of law if a company is put on notice from the SC of another jurisdiction "This is serious, this risk is foreseeable and you have a duty," that at least is some indication that perhaps the company is on notice of foreseeability of risk.

GONZALEZ: Briefly summarize your two prongs of gross negligence and the facts in this case that support it?

MITHOFF: Let me say at the outset that I recognize and we recognize that punitive damages should be rarely assessed. The teaching of *Moriel* and *Ung*, is that this court and correctly so is not going to impose or recognize punitive damages except in the rarest case. So what is the case for imposition of punitive damages? From an objective examination, which was the area that the Austin court hung up on, the test that Chief Justice Phillips' articulated in *Ung* as I understand it was "Was there a likelihood of serious injury?" I think that where the CA got off track was the emphasis on statistical probability rather than on the emphasis of the nature of the conduct or the condition. Rape is not a pot hole in the road. The focus as I understand it Chief Justice Phillips to be and this court to be in *Ung* in that case was we had a prior incident, the trailer came lose because it ran through the pot hole, there was no injury, there was unfortunately a second incident where death occurred. My reading of what the court said in *Ung* was, "Pot holes give rise to a risk perhaps of property damage, perhaps a spring in your suspension system, but they don't give rise to serious injury." Otherwise, that test makes no sense. If you follow the reasoning of the CA in Austin that statistically how can we tell that this particular woman was going to be raped on this particular day? Or, there is an 80-year history and there are only a few rapes and a few assaults, there are 12,000 dealers, statistically this is just not very likely. That analysis though leads us I think in the wrong direction. Assume for example, an airline company that knowingly puts a pilot into the cockpit drunk. The president of the airline is standing there. They do a breathalyzer test in the pilot's lounge. He says, "We're in a hurry go on." He knowingly puts a drunk pilot in the cockpit. I don't think anyone would argue that was not gross negligence, and yet, under this analysis from Austin, we could say there are thousands of pilots who fly thousands of routes over a 30-year history there has only been 3 crashes, so is there a likelihood of serious injury?

OWEN: Do you do a breathalyzer test on every pilot before they get on every plane?

MITHOFF: No. I was trying to draw an example of an unquestioned characterization of knowledge.

OWEN: But are you grossly negligent if you don't do a breath check on every pilot?

MITHOFF: I think an airline certainly has an obligation to ensure that its pilots are in a sober condition, whether a breathalyzer test has to be utilized or not. I suppose if he was stumbling down drunk, and the president said "go ahead anyway," that would still be gross negligence.

OWEN: In this case was there any evidence that they knew this particular salesman had propensities?

MITHOFF: They did not know about this particular salesman. They did know that if you did not do a background check that people with criminal history, sexual assault history could become employed, and they did know when the North Dakota SC told them, "rape is serious, rape is foreseeable, you have a duty to do your duty," I suggest then to move to the subjective part of the test. Particularly when they are told almost a year in advance that Kirby personnel had particularized knowledge at some point, I would suggest, that punitive damages are appropriate.

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RESPONDENT

KUTIK: I am here on behalf of the Scott Fetzer Company and its incorporated division, the Kirby Company. To have gross negligence, you first have to have negligence. And to have negligence, you have to have a breach of a duty that's recognized under Texas law. The CA below was right in reversing gross negligence finding. But it was wrong in upholding the negligence finding, because in doing so it created a new duty based upon the expansive reading of two exceptions to the general rule that employers of independent contractors are not libel.

OWEN: What is so burdensome on requiring an employer of independent contractor to do background checks on salespeople?

KUTIK: The problem with a mere requirement in a contract is as you perhaps suggest in your questions to counsel, how do you enforce that contract? What do we do to these people? What do we say to these people in terms of this is what you have to do to the contract, and this is the objective standard that we are going to apply, that you've either met the contractual requirements or you haven't met the contractual requirements?

PHILLIPS: Didn't we exonerate *Boys Scouts of America* on an attempt to protect the scouts that in the case before us turned out to be _____?

KUTIK: That's true. Even the CA on the very day they decided this case, in the *Guidry*

case said, "You have to do background checks on people." You're talking about a significant burden. For example, if you are going to apply the \$17 test to go to the DPS and you apply that to all the people who apply to Kirby, that's \$9 million in the Kirby distribution network.

GONZALEZ: How about just the mere checking of references? What would they have found in this case, and had they done so, would that have not been a red flag on Kirby?

KUTIK: If they would have checked references this is what we believe they would have found. With respect to the employers, 3 of the employers in their records indicated reasons for leaving, either voluntary resignation, quitting, or firing for missing too many days. Two employers were asked specifically, "What was the reason for leaving?" One of them said, "We can't divulge the information," and the other just didn't. So checking the employers in this case wouldn't have raised any red flags in terms of misconduct, deviate conduct, what have you.

GONZALEZ: How about the person that had personal knowledge that he had been masturbating so many times in front of women?

KUTIK: There is no evidence in this record, and certainly they could have asked him the question, "If you were asked for a reference what would you have said? Nobody asked him that question. He said, "Yes, I did have this knowledge." And as you know, many people who give personal references don't give out bad facts about people because they are afraid of being sued for slander, libel, and so forth. So to just rest on the reference check would have done it in this case that's not necessarily so. And as Justice Enoch suggested in his questions, certainly the information that was provided to the jury in this case was information well beyond any information that Kirby or Mr. Sena more specifically could have obtained military records and so forth 4-6 weeks we don't believe is a reasonable period of time to do a background check on someone.

HANKINSON: You say that the CA based its decision on an expansive reading of two provisions of the restatement. I read the CA decision as its first basis to be an application of the *Greater Houston Transportation* balancing test as opposed to an adoption of §413 of the Restatement. Would you agree with that?

KUTIK: No. First, one of the basis that they relied upon was §414, the retained control exception.

HANKINSON: I understand. That's the second basis and I'm talking about the first one now where they applied the *Greater Houston Transportation* balancing test. They do discuss §413, but then they go through the steps of *Greater Houston*.

KUTIK: The court had a section in its opinion labeled "Peculiar Risk." The court said, "We need not adopt the peculiar risk doctrine." But the court said, "We're going to apply traditional notions to duty to determine whether the peculiar risk exception applies. We believe that's a de facto

recognition of the peculiar risk doctrine."

HANKINSON: Assuming that the court did go through that *Greater Houston Transportation* analysis in doing it, do you agree that it did that?

KUTIK: Yes.

HANKINSON: Where did it break down in its application of the *Greater Houston Transportation* test?

KUTIK: In three ways. First, unforeseeability. As Justice Phillips indicated, if you look at the facts of that case where you had a person who was shot with a gun in a taxi cab, there had been one incident in 20,000 instances. In our case similarly there had been 1 incident in millions and millions of distributors. We believe that that shows that just because not doing adequate background checks may have people who have criminal backgrounds go in the home doesn't necessarily mean it's foreseeable.

ABBOTT: How many women have to be raped before we establish a foreseeable duty?

KUTIK: I think the responsibility of this court is to make sure that there are duties that protect against this from happening. And there are duties that do that presently. Those duties are first, the duty of Kirby to hire competent distributors; and secondly, the duty of distributors to hire competent dealers. In this case as far as Kirby is concerned, Mr. Sena had an exemplary record. He had 25 years in the Kirby business, 17 years as a distributor without one incident whatsoever. In fact, he had hired someone who rose to be the number 1 distributor in the world. So Mr. Sena was somebody who Kirby thought, "Hey, he's a good distributor." Mr. Sena had a policy. He said he had a policy to check background checks. The problem was, he didn't do anything to verify that his policy was carried out. And counsel indicated, he said, "well if Kirby would have required me to do it, I would have done it." More specifically the question was in this case, "if you would have heard about the *McLean* case what would you have done?" He said, "I would have changed my procedure to make sure, to have the documentation to make sure that background checks which I thought were being done, were in fact done." That was a problem in this case. He had delegated to somebody and he did not fulfill his duty to hire competent dealers. And that's why I believe if you follow traditional motions of Texas law certainly the distributor may be liable in this case. But certainly as same, Kirby is not.

Following up in terms of the analysis, on a specific matter on terms of foreseeability, there is no evidence that anyone could have predicted that Mr. Carter would have had these problems.

HANKINSON: Mr. Mithoff tells us that once the North Dakota SC told Kirby they had a duty that was all that Kirby needed to know to foresee this type of injury?

KUTIK: I don't believe that's true. Mainly because the mere appreciation that there is a risk that there may be generalized understanding that there may be crimes doesn't mean that foreseeability of these acts will happen is true. Where you have a situation as in this case where you have their own expert, Dr. Ferrera saying, "Even after the fact, after knowing everything I know, after seeing all the materials that no reasonable employer, no reasonable background check would have obtained, he couldn't have predicted that Mr. Carter would have done what he did." A man by the name of Mark Stegy, who was the probation department's sex offender counselor, a man who had prior experiences of door-to-door vacuum cleaner salesmen, he said, "I knew what Mr. Carter did." And contrary to the implication in the brief, he knew that Mr. Carter was going alone into homes, and he didn't have a problem.

GONZALEZ: I thought they said that the probation officer testified that he would not have been comfortable with Carter going door-to-door, and his impression was that he was never alone at a home. He was always accompanied with 2-3 other people.

KUTIK: There is one probation officer who testified to that, Mr. Malasak, I believe. But the individual I'm talking about is Mr. Stegy, who was the probation department's sexual sex offense counselor.

GONZALEZ: How about the other probation officer, what did he say?

KUTIK: Mr. Kopack, I'm not sure I recall what his testimony was. But going on to the motions of duty, certainly if you apply for example the analysis this court used in *Golden Spread*, in that case *BSA* didn't know about Mr. Estes, the true bleeder. In this case, Kirby didn't know about Mr. Carter. In fact, *BSA* actually approved Estes. In this case, we didn't know.

PHILLIPS: *BSA* did have a procedure. This court held that they were not libel. And one of the reasons mentioned in our opinion is they did keep a list. And when information got to them that somebody was on the list, then that list was communicated to the regionals.

KUTIK: Certainly as counsel has pointed out, in the one instance that we obtained information that there was an individual who had been convicted of child molestation, I should point out that that was not during the time he was working as a dealer, but when we had information that there was a distributor who was convicted of child molestation, we terminated his contract.

GONZALEZ: He would have to be convicted? How about other sexual assaults?

KUTIK: We learned that there was a problem. We terminated the contract. Then we learned that he was operating as a dealer in a distributorship. And we said to that distributor, "This fellow should not be a dealer."

PHILLIPS: You would have to have a much more formal program?

KUTIK: Correct. But I don't think you need a formal program. Certainly if we have information that someone is incompetent or someone is not doing what they should in terms of having quality safe people in their homes, then certainly we would take action and Kirby should take action.

PHILLIPS: What's in place at Kirby or Scott Fetzer right now to make sure that no other distributor hires Mr. Carter?

KUTIK: What Kirby has done, and Kirby continues to do, is to counsel and train distributors to be careful in their selection of dealers.

PHILLIPS: Has Carter's name been sent out to the distributors?

KUTIK: I don't know if Carter's name has been sent out, but certainly this case has been discussed worldwide with the Kirby distributors.

GONZALEZ: Mr. Mithoff said that only if you bought a manual from Cleveland or in that particular area was this warning to Kirby distributors given?

KUTIK: That's not true. Certainly there was a manual, which had a warning in 16 different places about doing background checks. But there were also different seminars that were done. There is a seminar for new distributors and area distributors that takes place every year. Kirby invites them to Cleveland and has them trained. Kirby also in the time period that we are talking about went around the country and did what's called PMT "Professional Management Training" seminars where they invited distributors to come and to learn the latest techniques, the latest word and how to operate a good distributorship. And at all those seminars, the discussions of recruiting and interviewing and so forth was done.

But you also have to understand that by contract Kirby does not have the right to control the hiring process. So what this court would be saying is, "You have to rewrite your contract because of this particular situation, this rape in this case."

GONZALEZ: Do I hear you correctly to say that because Kirby has no authority to control the hiring process that any distributor could hire any serial killer, and Kirby says, "Well you're independent contractors..."

KUTIK: No, that's not it at all.

GONZALEZ: Didn't you just argue that you cannot control the process of hiring and who they hire?

KUTIK: What I said is by contract, we do not have the right to control. Certainly we

have the right to insist that the distributors act in a competent fashion.

SPECTOR: I thought you just said that you have terminated two distributors that had hired people who were unacceptable?

KUTIK: The record shows that Kirby terminated two people. First, they terminated the distributor who was convicted of the child molestation charge. Then when we found out that he was working as a dealer in the distributorship, we asked that distributor to look at that individual and to take the appropriate action, which we thought was termination. When that didn't happen, we said at that point, "We're going to terminate your contract." Kirby doesn't have the right to control. Certainly Kirby has the right to say, "You've done something, which in our judgment makes you incompetent. At that point in time, we can terminate you." And they did. And those are the duties that apply in this case.

ABBOTT: I have difficulty in comprehending not just in this case, but in all foreseeability cases. It seems like foreseeability is always brought down to numbers. If in every Kirby distributorship in the nation there was at least one person every year who is raping someone, I think it would be foreseeable to Kirby (I don't think anyone would even come in here and argue that it was not foreseeable to Kirby) that this is going to take place. So how do we determine how many rapes have to take place before this type of conduct is foreseeable?

KUTIK: I am not sure I can give you a number. I'm not sure there is a number.

ABBOTT: And because of that is tort law going to have to focus on something other than numbers? In other words, since we can't say, "You've got to have 100 rapes before it's foreseeable," that would be a silly rule. Can we not ask, "two may be enough in some circumstances, or 100 may not be enough in other circumstances?"

KUTIK: It's a matter of judgment. It's a matter of looking at the facts including statistics to determine whether you believe that a reasonable person would feel that it was likely that the injuries would occur. I don't think you can say that millions and millions of demonstrations, whatever Kirby is doing or not doing out there, the fact is millions and millions and millions of demonstrations have been done over 80 years, and there's only been one other incidence before this one.

GONZALEZ: I am listening very carefully to your language, and you say there's been no other conviction, but there have been other sexual assaults.

KUTIK: Let me go through the incidents. First there was the *McLean* case, then there was the *Bennett* case. The *Bennett* case unfortunately for them was not part of this record. It was a motion limiting the right. It's not really part of this record. But in that case, the assault that occurred was by someone who was a former Kirby dealer. The testimony of Kirby's president said,

"Well he was familiar with a man by the name of Rodmacker." Mr. Rodmacker had hired his brother. There were charges brought against the brother, later dropped. Mr. Windfeldt concluded, and I believe fairly, that the charges were dropped perhaps the incident didn't occur.

GONZALEZ: How about the case was settled by the insurance company?

KUTIK: That may well be true. The other incident was Mr. Windfeldt read about an alleged assault, and the paper talked about the person being involved with Kirby. The fact of the matter is, as Mr. Windfeldt testified, that person again was a former Kirby dealer. And he felt it was unfair that people were labeling these folks with the Kirby name and that wasn't right. So those are all the incidences in the record in terms of what Kirby knew and didn't know in this record.

ABBOTT: Well they did know something else. Kirby was told that this was a serious risk and that it was foreseeable, and our presumption has to be that Kirby just decided to ignore the North Dakota SC?

KUTIK: That's not true. Because what Kirby did as indicated by the testimony of their general counsel is to put in its training manuals discussion as what to do.

ABBOTT: Would that be for people who were newly trained?

KUTIK: Yes.

ABBOTT: So that obviously didn't get to Mr. Sena?

KUTIK: If Mr. Sena didn't get the materials, Mr. Sena also didn't go to the distribution or the other seminars, the PMT seminars as well as the other seminars, that's true. But Kirby did do something. And I guess the evidence here was, did they have a duty to do it? And we believe they didn't have a duty to do it. Certainly they had a duty to tell people about this, and they tried.

PHILLIPS: Why did they have a duty to tell people?

KUTIK: They had as part of their responsibility to talk about making sure people were competent, and they did. The fact of the matter is, in terms of a particularized duty, I don't believe there is one. But I think they acted reasonably in responding to this. I think the thing that is perhaps most troubling about the CA's decision is that there is no _____ to the duty. It is undefined. And to the extent it is undefined that makes it unworkable as far as trying to impose a duty is concerned.

PHILLIPS: If that happened in North Dakota and the North Dakota SC had come down with this opinion and Kirby had done nothing, if they had bought every copy of the North Dakota Reporter they could and burned it, might the result in this case have been different?

KUTIK: No. Certainly they have a duty in North Dakota, and certainly they have a duty in terms of making sure that their people are competent. They did that.

PHILLIPS: How did they discharge their duty of making sure that independent contractors or their independent contractors are competent? What's the extent of that duty?

KUTIK: I think what they do is normally before they have any experience with a person they will be area distributors or dealers. In their conduct as area distributors or dealers they are going to become aware of complaints that people have about them. And they do monitor complaints. And that's what they have done traditionally.

PHILLIPS: And if they put an incompetent salesperson in the force, knowing they allow that to happen, there is a duty to users, buyers of Kirby products?

KUTIK: If Kirby knows that a distributor has a salesperson out there who poses a risk, then I agree that Kirby should take action to terminate that distributor.

PHILLIPS: And would have a responsibility to an ultimate consumer?

KUTIK: Yes, because they would have knowledge potentially that that distributor was incompetent. And as they did in the incident relating to Oregon, the child molester case, they did have knowledge and they did take action. In contrast to this case where there was absolutely no information with respect to Mr. Sena that he was doing anything other than acting in exemplary fashion - 17 years as I indicated before - without incident whatsoever. Practically no complaints in the history of his distributorship about anything much less about attacks in homes.

SPECTOR: If Kirby has a complaint that a salesperson has stolen property from a homeowner what happens?

KUTIK: First, Kirby asks the distributor to investigate it and to report back. If in Kirby's view, the distributor has not taken the appropriate action, Kirby will make its own judgment as to whether the action is appropriate and terminate or not.

ABBOTT: Kirby requires its distributors to train its dealers?

KUTIK: They require training to take place. Certainly they suggest and urge that training take place.

ABBOTT: And they suggest exactly what that training is to be. The training has to be familiarization with the product and familiarization with how the appliance is to be sold to ensure quality control things of that nature, correct?

KUTIK: Certainly they do provide information about how to do demonstrations. Kirby does talk to their distributors about making sure people understand about consumer laws and things like that.

ABBOTT: And they want to make sure that everyone selling the Kirby product is not going to be doing so in a way that's going to be undermining the Kirby name and the Kirby product?

KUTIK: As a general proposition that's true, yes.

ABBOTT: And in the course of prescribing exactly what that training is what would be the difficulty in expressing to all the distributors that it's important that we don't have any criminals working for us?

KUTIK: Again, Kirby doesn't train every distributor every year. In the course of training people coming up through the ranks Kirby does do as you suggest.

ABBOTT: When did they start doing that? When did they start telling them to be sure they don't hire any criminals?

KUTIK: They included the specific warnings in reaction to the *McLean* case. They talked to people about checking references and so forth before that. Quite frankly, I'm not sure that's in the record.

ABBOTT: So what you're saying then is that Kirby has in fact assumed the duty that you're saying should not be placed upon them?

KUTIK: No, what I am suggesting is that what Kirby has tried to do is to make sure that it has competent distributors in the field.

ABBOTT: But it seems as though Kirby has already assumed the duty in some instances that is being urged by the plaintiffs in this case that be imposed upon Kirby?

KUTIK: My understanding is they are saying that they are required to do a background check. And again, the problem with making that requirement is what are we to require them to do? Even their own expert, Mr. Young said, "He couldn't say that there was a way that you could say in every case or in any case that you would get a clean bill of health from someone." And that was the issue that the Kirby executives struggled with: What are we to tell these people to do? And what they ultimately ended up doing was putting the warnings in their manuals and talking to them about doing reference checks, and if you have red flags that come up, you do further background checks, follow your common sense.

ENOCH: As I understand Mr. Mithoff's argument, the duty that's being talked about

here is simply that Kirby must in its contract with its distributors have a requirement for background checks. Do you agree that that's the issue here that Kirby has a duty to put a provision in their contract to the distributors to do background checks, because that provision is not in that contract, that's a breach of this duty?

KUTIK: I understand that that's his argument today. Certainly, when I read the CA's opinion and one of our major problems with the CA's opinion, I couldn't tell what the duty was. I couldn't tell whether it was a duty to warn, to instruct, or duty to require. But the fact of the matter is even if it's a duty to require it has the problems which I indicated before, which is how do you enforce that? I disagree strongly with Mr. Mithoff when he says, "Well all you have to do is put it in the contract and forget about it." Well of course, you can't do that, because then we would be undertaking a specific duty to make sure that these people were doing what we told them to do.

ENOCH: You do agree with Mr. Mithoff, the issue here is not that Kirby didn't do background checks on these salespeople, that's not an issue in this case?

KUTIK: That's correct. Kirby did not do background checks on the dealers.

ENOCH: The only issue in this case is whether or not Kirby had an obligation in its contract with its distributor to require the distributor to do the background check?

KUTIK: As a matter of tort law, yes. I think that's the way they've stated the issue.

ENOCH: Now under the argument that because the salesman is required to go to the home to do the selling that in and of itself creates the duty to do a background check on somebody. Somebody has to do this background check because there is this requirement for them to go into the home. Isn't that the underlying theory that's going on here, because they required them to go to the home, somebody's got an obligation to do a background check?

KUTIK: Even for employers in this state, the duty to do background checks is unclear. It's only been imposed in very narrow situations where you have a vulnerable group that's being protected. And I would submit that homeowners are not necessarily a vulnerable group.

GONZALEZ: You're saying housewives in homes are not vulnerable to predators like Carter?

KUTIK: They're as vulnerable for example: someone who goes shopping at a late night convenient store.

GONZALEZ: But this is their home. They are inviting somebody that has the badge and _____ of Kirby into their home.

KUTIK: And they can exclude that person as well. There's nothing quite frankly I believe that the _____ of Kirby means that you don't take precautions that a normal person would take to be safe in your home.

ABBOTT: It's come up several times about the enforcement of this duty. Leaving aside whether or not any enforcement would be required, again in Kirby's relationship with its dealers in a contract and perhaps extra contractual, there are certain standards that Kirby imposes upon its distributors. How does Kirby monitor whether or not those standards are being complied with? And why would it be so much more difficult for them to monitor whether or not they do the background checks than it is for them to monitor if the other standards are being complied with by distributors?

KUTIK: How they do it is they have people called divisional supervisors, and they go around and they have a checklist, and they check out to determine whether for example they have a sales group; whether they have service facility, they look at the complaints. That's the type of things they look at. In terms of what would be different. How would we determine whether they've done what they should do? Do we look to make sure that there is a document which says: I've called all the employers? Do we look to see whether there's a document that says yes I've called all the personal references; yes, I've done a background check. That's the problem. We don't know what the objective standard would be for someone to do a "reasonable background" check, as their own expert testified. It's not a thing that you can do on a generalized basis. It's something that has to be looked at on a case-by-case basis. And the problem with having the requirement in is that you basically are affecting Kirby to look at every application that's granted in terms of having the person move into the dealer sales portion to determine whether that was adequate or that was reasonable. And that's the problem we have with this duty as suggested by Mr. Mithoff.

HANKINSON: You're first complaining about the CA's analysis under *Greater Houston Transportation* list, the foreseeability. And you said there were two other criticisms that you had. Would you tell us what those are?

KUTIK: The first relates to their notion on social utility. And in fact they said, "well you know this relatively _____ social utility." I'm not sure what they mean by that. Is it because it's a profit making entity? Is it because it's an independent contractor relationship? There is social utility of those things. Is it the fact that it is a direct selling organization, which is an \$18 billion industry in the United States involving millions and millions of people. There is social utility to direct sales, and to this type of industry.

The final things that I had a problem with is the issue of burden, and we've talked about that a little bit in terms of the workability of the duty. They would probably suggest if they stood up here and said, "Well in terms of whether they met their duty or not to monitor whether people were doing it right or not, that's for the jury to decide." That's cold comfort to people like Kirby and others in the direct selling industry and others who provide in-home services. What are we supposed to tell these people to do, and how do we make sure that that duty is discharged? And

those are the principal problems I have with the court's analysis.

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REBUTTAL

MITHOFF: Let me return to the weighing test of *Greater Houston Transportation* and cover those points, because I don't think that we have covered every point in that weighing test. First of all, the likelihood of serious injury, I think that's almost a given. Low burden on Kirby, all we're requiring is either a statement in the contract or a warning in a document that is mailed and a mandatory document to each distributor.

ENOCH: Is in-home sales what creates the likelihood of serious injury?

MITHOFF: In-home sales combined with prior knowledge of rapes and assaults, yes.

ENOCH: It is a likelihood of serious injury if you are involved in an enterprise that involves your employees or your independent contractors going to a private home, that's the likelihood of serious injury?

MITHOFF: Putting a person without a background check with a criminal history into a home creates a likelihood of serious injury.

ENOCH: If I'm in the business that requires my employee or independent contractor to go to a private home, I am in a business that has the likelihood of serious risk?

MITHOFF: Absent any precautions to check the background of that person, yes.

ENOCH: The mere failure of doing a background check on all of the people that go to private homes to perform a service creates a likelihood of serious risk?

MITHOFF: If a person is going into the home to perform a service and if there is knowledge or foreseeability from prior rapes or assaults...

ENOCH: The likelihood of a serious risk is what I am looking at. I am looking at knew or should have known about this risk. I am just talking about the likelihood of serious risk. The likelihood of serious risk arises from a business enterprise that relies on people going to a private home to provide a service, and that enterprise does not do background checks, that creates a likelihood of serious risk?

MITHOFF: I think it does. I think anyone who is allowed into the home during the day with family members present to perform a service where there has been no requirement for background check to weed out the criminals and sexual offenders creates a likelihood of injury, yes.

ABBOTT: Is there any evidence in the record, the practice is undertaken by any other type of organization that does home visitation sales?

MITHOFF: I don't believe that was a part of the record in this case. I think as a matter of common knowledge and common experience, we know for example that a security guard who may guard private residences from time to time certainly undergo background checks. But it was not a part of specific testimony.

PHILLIPS: Is there anything short of a trial and appeals up to the highest courts of the various states that would flush out how this weighing under *Greater Houston Transportation* is to be conducted so that somebody would know the extent of their responsibility in engaging in an independent contractor business?

MITHOFF: In another setting or in any setting?

PHILLIPS: Lots of businesses have to go in a home and have the potential to go into a home. We have one percent of our population I think now that's incarcerated. There's a number of people who have criminal records. Pretty large in this country. And on most of the people, we have some hope that they will be released, get a job, and reenter society. There are a lot of considerations that are weighing here. You say we don't look at this peculiar risk. It's not unique to one type of business. This is just across the spectrum we're going to do this way.

MITHOFF: I think that the weighing test is probably the best test. I mean if you look at a business and you measure the social utility for example, we know the social utility of the Boy Scouts is high. We know the social utility of the Red Cross is high. If the Red Cross is sending someone into the home to take care of a flood victim, we know the social utility is high. I think that part of the teaching from *Golden Spread* is that this court declined an opportunity to make a broad pronouncement in that case, and said instead, "We need to weigh these factors in each case." And if someone in advance of trial wants to measure the duty, I would respectfully suggest this court's opinion in *Greater Houston Transportation* and *Golden Spread* provides that guideline. Is the burden on the party low? Is the expense relatively low? Is the social utility relatively low?

BAKER: On the social utility issue, following up on Judge Enoch's question again, is the home sales the factor that gives rise to the duty? And you answered yes, plus the background check situation. If I understand what you're saying, the implication is that this duty imposed goes way beyond the factors and the issues in this particular case. And that you're asking the court to fashion a duty that if there's a situation of in-home sales that you must have a requirement for background checks. And so it seems to me that the social utility question is a heavy factor here because this cuts across real estate salespeople, Avon ladies, Mary Kay, anyone of those industries that have in-home sales would be subject to this duty. And so, where is the social utility when you go beyond the particular facts of this case? How does that match up on that factor?

MITHOFF: I think it's going to be a sliding scale. I think it's going to be higher in some areas than in others. The two extremes I suppose are the ones I suggested a moment ago: in-home sales where the only motive frankly is to sell a product, which is not a bad motive, but it's frankly the only motive. We get calls at home at night from people soliciting. I think most people would agree that that's fairly low utility from a social standpoint.

BAKER: Of course if you get a phone call and the person is not there this issue doesn't even arise. I am asking you about cases where real estate agents or salespeople for Avon or whatever always come to the home to make the sale. And so the duty you suggest would be imposed across the board on any type of activity like that in this state if we follow your request?

MITHOFF: It again is a duty that would vary with the degree of invasion of the home. Avon as I understand it comes to the door and rings the bell. It is in our view the fact that the person has to go into the home, preform a service in the middle of the day when young mothers and others may be alone with their children that gives rise to this duty.

BAKER: And so it would apply to real estate sales?

MITHOFF: If in fact there is a real estate person and there is evidence of prior problems. The nature of the reason this harm arises is that the salesmen typically are men. The purchasers typically are young mothers. So I'm not suggesting that there may not arise a duty on the part of the real estate agent at some point.

BAKER: Don't those same factors apply in real estate sales?

MITHOFF: They may.

BAKER: So would you impose this same duty on the real estate industry in Texas?

MITHOFF: I would go through this same weighing test in *Greater Houston Transportation*. I would ask about the social utility. I would ask about the expense or the burden.

OWEN: From there we know from this case that in-home sales women are susceptible to being raped. Do we now say that that's foreseeable for the Rainbow vacuum cleaner people and plumbers and electricians, and the cable vision people if they know about this case, they know that that's a possibility. Do we now say that it's a foreseeable duty and they have to do background checks on their people?

MITHOFF: I think with respect to anyone who goes into the home to provide a service, particularly during the day when young mothers or young children may be in the home, that there should be a duty to require a background check at a minimum to make sure...

OWEN: Even without that you don't have to have specific knowledge of prior incidences. Since we now know that women are susceptible?

MITHOFF: Certainly. I mean if this court were to announce a decision in this state just as North Dakota has that would increase the awareness. Part of the duty we impose obviously is a little easier to accept more knowledge there is about problems of prior injuries. But the duty originates because there are people being placed in the home to provide a service without any check on criminal background or sexual offender background. And, yes, that would apply to a television repairman. It would apply to anyone who has to go into the home and spend some considerable amount of time in the home performing a service where young mothers and young children are likely to be present.