

IN THE SUPREME COURT OF TEXAS

=====
No. 97-0707
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DENA KRISTI READ, PETITIONER

v.

THE SCOTT FETZER COMPANY D/B/A THE KIRBY COMPANY, RESPONDENT

=====
ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS
=====

Argued on March 5, 1998

JUSTICE ABBOTT, joined by JUSTICE OWEN, dissenting.

Kirby retained control over *where* the work was to be performed, not over *who* was to perform that work. Failure to require background checks of potential dealers relates to who is a dealer, not where the dealer works. As a result, the requisite relation between the control retained and the alleged injury is missing. Because the Court holds to the contrary, I dissent.

I agree with the Court's analysis of *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985), that "a general contractor, like Kirby, has a duty to exercise reasonably the control it retains over the independent contractor's work." ___ S.W.2d at ___. I also agree with the Court's synopsis of *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 23 (Tex. 1993), that in determining whether a duty exists in a retained-control case, the "focus is on whether [the] retained control was specifically related to [the] alleged injury." ___ S.W.2d at ___. I disagree with the Court's application of this law to the relevant facts of this case.

As noted, Kirby's Distributor Agreement and Independent Dealer Agreement collectively require dealers to sell vacuum cleaners in the homes of potential customers. Kirby's contract with its distributors also provides that Kirby "shall exercise no control over the selection of . . . Dealers. The full cost and responsibility for recruiting, hiring, firing, terminating and compensating independent contractors and employees of Distributor shall be borne by Distributor."

Ms. Read claims that her injury is related to the selection of Carter as a dealer without a background check. This injury is specifically related to the control that Kirby abrogated — control over the selection of dealers. In essence, the Court rewrites Kirby's Distributor Agreement and Independent Dealer Agreement to require Kirby to assume control over dealer selection. Because the injury is not related to the control retained by Kirby, the *Tidwell* test is not met and Kirby owed no duty to Ms. Read under the circumstances of this case.

GREG ABBOTT
JUSTICE

OPINION DELIVERED: December 31, 1998