

IN THE SUPREME COURT OF TEXAS

No. 97-0707

DENA KRISTI READ, PETITIONER

v.

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

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

Argued on March 5, 1998

JUSTICE GONZALEZ delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE ENOCH, JUSTICE SPECTOR, JUSTICE BAKER, and JUSTICE HANKINSON joined.

JUSTICE HECHT filed a dissenting opinion.

JUSTICE ABBOTT filed a dissenting opinion, in which JUSTICE OWEN joined.

A customer who was raped by a door-to-door vacuum cleaner salesman brought a negligence action against the manufacturer and the distributor, who operated as an independent contractor. Based on favorable jury findings, the trial court rendered judgment for the plaintiff for actual and punitive damages. The court of appeals affirmed the actual damages part of the judgment and reversed and rendered the punitive damages award. 945 S.W.2d 854. The question presented is whether a company that markets and sells its products through independent contractor distributors and exercises control by requiring in-home demonstration and sales, owes a duty to act reasonably in the exercise of that control. We hold that the company does owe such a duty. Accordingly, we affirm the court of appeals' judgment.

I Facts

The Scott Fetzer Company d/b/a The Kirby Company (“Kirby”) manufactures vacuum cleaners and related products. These products are sold only to independent distributors who are governed by a uniform distributor agreement. Each distributor is required to establish a sales force by recruiting prospective door-to-door salespeople called “dealers” for the exclusive in-home demonstration, installation, sale, and service of Kirby Systems. Specifically, regarding noncommercial sales to the general public, the Kirby “Distributor Agreement” provides:

3. *Exclusively Consumer End-User Sales.* . . . [A]ll Kirby Systems purchased by Distributor hereunder are purchased solely and exclusively for resale by in person demonstration to consumer end-users pursuant to [Kirby’s] marketing system, unless [Kirby] otherwise expressly authorizes in writing. Distributor further agrees to use his best efforts to conduct the in person demonstration in the home of the consumer end-user.

. . .

A violation of the “Exclusively Consumer End-User Sales” provision will likely result in [Kirby] terminating this Agreement . . . and/or taking any other action which it believes appropriate under the circumstances.

Further, regarding the in-home dealers, the “Kirby Independent Dealer Agreement” reads, in pertinent part, as follows:

3. Dealer fully understands that in order to protect and maintain The Kirby Company’s trade name, reputation and competitiveness in the marketplace, Kirby Systems must be sold exclusively to consumer end-users by in-home demonstration.

4. Dealer certifies and agrees that any Kirby System consigned to Dealer will only be sold to consumer end-users after a personal demonstration which will be conducted in the home of the consumer end-user.

Additionally, Kirby enforces its contractual requirements through yearly reviews during which divisional supervisors verify that distributors are complying with the these requirements as well as others in the agreements.

In 1992, Leonard Sena, a Kirby distributor and owner of Sena Kirby Company of San Antonio (the “Sena Company”), recruited Mickey Carter to be one of his dealers. Carter’s relationship with the Sena Company was that of an independent contractor subject to the “Kirby Independent Dealer Agreement,” which required him, also, to sell Kirby systems to consumer end-users through in-home demonstrations.

In applying for employment, Carter listed three references and three prior places of employment. Had Sena checked, he would have found that women at Carter’s previous places of employment had complained of Carter’s sexually inappropriate behavior. Sena also would have found that Carter had been arrested and received deferred adjudication on a charge of indecency with a child, and that one of the previous employer’s records indicated that Carter had been fired because of that incident. Further, Sena would have found that these records also contained witness statements, a confession, Carter’s guilty plea, and the indictment charging him with the offense. Sena did not check.

Not long after being hired, Carter scheduled an appointment with Kristi Read for a demonstration. Before that scheduled appointment, Carter went to Read’s home and met with her for several hours. He also brought doughnuts one morning, and then followed Read to a playground, where he spoke with her some more and played with her daughter. That afternoon, Carter returned to Read’s home, where he sexually assaulted her.

Read and her husband sued Kirby, Sena, and Carter for negligence and gross negligence. The claims against Carter were nonsuited before trial. The trial court submitted the case to the jury with a broad form negligence question. The jury found the Sena Company and Read each ten percent negligent, and Kirby eighty percent negligent. The jury also found Kirby grossly negligent. The trial

court rendered judgment against Kirby for \$160,000 in actual damages and \$800,000 in punitive damages.

The court of appeals affirmed the actual damage award. The court held that Kirby had a duty to take reasonable precautions to prevent the assault on Read due to the peculiar risk involved when a person with a history of crime, violence, or sexual deviancy conducts in-home sales. 945 S.W.2d at 868. The court also held that because Kirby required in-home demonstrations, the company exercised sufficient control over the sale of its products to end-users to justify imposing a duty of reasonable care in selecting the persons who performed the demonstrations. *Id.* Finally, the court of appeals reversed the punitive damage award, holding that there was legally insufficient evidence to meet the *Moriel* standard. *Id.* at 870; (citing *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994)). We affirm the court of appeals' judgment.

II Duty: Right of Control

Read's pleadings allege that Kirby has a "duty to take reasonable precautions to minimize the risk to its customers from coming into contact with Kirby dealers who have criminal and/or psychiatric records." Kirby and some of the amici curiae characterize Read's pleadings and arguments as seeking to impose vicarious liability on a general contractor for the torts of an independent contractor or as seeking to establish a master-servant relationship between Kirby and Carter. However, we understand Read's position to be that Kirby was negligent through its own conduct of creating an in-home marketing system without adequate safeguards to eliminate dangerous salespersons from its sales force. The duty is not based on a notion of vicarious liability, but upon the premise that Kirby is responsible for its own actions.

In *Redinger v. Living, Inc.*, 689 S.W.2d 415 (Tex. 1985), we held that a general contractor,

like Kirby, has a duty to exercise reasonably the control it retains over the independent contractor's work. Here, by requiring its distributors to sell vacuum cleaners only through in-home demonstration, Kirby has retained control of that portion of the distributor's work. Kirby must therefore exercise this retained control reasonably.

In concluding that Kirby must act reasonably, we require no more and no less than is required of other general contractors in similar situations. *See Redinger*, 689 S.W.2d at 418. We recognized the direct liability of a general contractor for failure to reasonably exercise the control it retained over an independent contractor when we adopted Section 414 of the Restatement (2d) of Torts. *Id.* Through its contract with Sena, Kirby retains control of specific details of the work by requiring the “in-home” sales of its vacuum cleaners.

Kirby argues that it owes no duty because it has successfully divorced itself from the independent dealers. Kirby notes that it has no contract with the dealers, only with the distributors. Moreover, Kirby's contract with its distributors provides that: “[Kirby] shall exercise no control over the selection of Distributor's . . . Dealers The full cost and responsibility for recruiting, hiring, firing, terminating and compensating independent contractors and employees of Distributor shall be borne by Distributor.”

Kirby also relies heavily on the fact that Read stipulated that Carter was an independent contractor. The stipulation provided that “[a]n independent contractor is a person who, in pursuit of an independent business, undertakes to do specific work for another person, *using his own means and methods* without submitting himself to the control of such other persons with respect to the details of the work, and who represents the will of such other person only as to the result of his work and not as to the means by which it is accomplished.”

We do not question Carter’s status as an independent contractor, but this status is not a defense to Read’s claim. As previously noted, it is undisputed that Kirby directed its distributors that its Kirby vacuum cleaners be marketed solely through in-home demonstration. It was Kirby’s retention of control over this detail that gave rise to the duty to exercise that control reasonably. That Kirby’s agreement with the distributors allowed the distributors to independently contract with dealers does not excuse Kirby from the duty to act reasonably with regard to the detail — required in-home sales — over which it did retain control. *See Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 23 (Tex. 1993) (noting that in determining whether duty exists in retained control case, focus is on whether retained control was specifically related to alleged injury).

Finally, Kirby (and various amici curiae) argues that if Kirby has a duty in this case, all companies or individuals that employ independent contractors will be subject to the same duty. As we noted earlier, Kirby misunderstands the claim Read is making. Read merely asserts that Kirby, having retained control over vacuum cleaner sales by requiring in-home demonstrations, has a duty to exercise its control reasonably. This is a well-established duty. *See Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 528 (Tex. 1997); *Exxon Corp.*, 867 S.W.2d at 23; *Redinger*, 689 S.W.2d at 418; RESTATEMENT (SECOND) OF TORTS § 414 (1965).¹ Because Kirby did in fact retain control by requiring in-home sales, Kirby had a duty to exercise that retained control reasonably.

¹ As an aside, we note *McLean v. Kirby Co.*, 490 N.W.2d 229 (N.D. 1992). In *McLean*, Urie, a Kirby distributor, hired Molachek as a dealer. *Id.* at 232. Molachek had a history of violent crimes and was charged with sexual assault at the time he was hired. *Id.* Within a month of hire, Molachek raped Linda McLean. *Id.* Relying on the “peculiar risk” doctrine of Section 413 of the Restatement (2d) of Torts, the Supreme Court of North Dakota upheld the judgment against Kirby. *Id.* at 242. As a result, Kirby has put warnings in its training manuals of the need to do a “thorough criminal background check” on potential dealer candidates, had discourse with some distributors about the need to do reference checks, and instructed that if “red flags” come up in the process, the distributors should do further background checks.

It has also been suggested that two other cases support the position that Kirby owed no duty in this case. In *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287, 290 (Tex. 1996), we held that the Boy Scouts of America owed no duty to screen the criminal history of adult volunteers. In *Greater Houston Transportation Co. v. Phillips*, 801 S.W.2d 523, 527 (Tex. 1990), we held that a cab company owed no special duty to admonish its cab drivers not to carry guns. These cases are inapposite. Neither involved any issue of retained control over specific aspects of the details of the work performed by an independent contractor. See *Golden Spread Council*, 926 S.W.2d at 290; *Phillips*, 801 S.W.2d at 526. Rather, we decided both cases solely on a straightforward common-law duty analysis, balancing the risk, foreseeability, and likelihood of injury against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. See *Golden Spread Council*, 926 S.W.2d at 289-90; *Phillips*, 801 S.W.2d at 525. By contrast, today's holding is premised on the duty emanating from Kirby's retained control over the details of the work. This duty derives solely from the retained control, not from any balancing analysis. See *Redinger*, 689 S.W.2d at 418.

III Breach of Duty

In the court of appeals, Kirby argued only that it did not have a duty. It did not challenge the jury finding of breach of duty. 945 S.W.2d at 868 n.14. That issue is not before us, thus we express no opinion about it.

IV Proximate Cause

Kirby, however, does argue that no evidence or factually insufficient evidence supports the jury's finding that Kirby's negligence proximately caused Read's injuries. We do not have jurisdiction to conduct our own factual sufficiency review, but we may ensure that the courts of

appeals adhere to the proper legal standard of review. *See Jaffe Aircraft Corp. v. Carr*, 867 S.W.2d 27, 29 (Tex. 1993) (stating that although this Court has no jurisdiction to determine factual sufficiency of evidence, we may determine whether intermediate appellate courts properly follow applicable legal standards). Because the court of appeals relied on the proper standard for its factual sufficiency analysis, Kirby's factual sufficiency argument is without merit.

Regarding the legal sufficiency of the evidence, we must determine if more than a scintilla of evidence supports the jury's affirmative finding of proximate cause. *See Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996). Proximate cause consists of two elements: cause-in-fact and foreseeability. *Id.* at 118; *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995). We therefore must examine the record to determine whether there is legally sufficient evidence to support an affirmative finding on each of these elements.

The cause-in-fact element of proximate cause is met when there is some evidence that the defendant's "act or omission was a substantial factor in bringing about injury' without which the harm would not have occurred." *Id.* (quoting *Prudential Ins. Co. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995)). Here, Sena testified that although he had not done a background check on Carter, he would have if Kirby had directed him to. There was evidence that Sena would have learned about Carter's past problems if he had performed a background check. Sena testified that he would not have hired Carter as a Kirby dealer if he had learned about Carter's history. We conclude that there is legally sufficient evidence to support a cause-in-fact finding.

The other element of proximate cause is foreseeability. In the context of proximate cause, foreseeability requires that a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission. *Doe*, 907 S.W.2d at 478. Foreseeability in the context of

causation asks whether an injury might reasonably have been contemplated because of the defendant's conduct. *Id.* Foreseeability does not permit simply viewing the facts in retrospect and theorizing an extraordinary sequence of events by which the defendant's conduct caused the injury. *Id.* Rather, the question of foreseeability "involves a practical inquiry based on 'common experience applied to human conduct.'" *Id.* (quoting *City of Gladewater v. Pike*, 727 S.W.2d 514, 518 (Tex. 1987)); *see also, e.g., Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992).

Sending a sexual predator into a home poses a foreseeable risk of harm to those in the home. Kirby dealers, required to do in-house demonstration, gain access to that home by virtue of the Kirby name. A person of ordinary intelligence should anticipate that an unsuitable dealer would pose a risk of harm. *See Doe*, 907 S.W.2d at 478. We hold that there is more than a scintilla of evidence that the risk of harm created by Kirby's in-home sales requirement was foreseeable.

V Punitive Damages

The court of appeals held that there was legally insufficient evidence to support the gross negligence finding. 945 S.W.2d at 870. For the reasons stated in the court of appeals' opinion, we agree.

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For the above reasons, we affirm the court of appeals' judgment.

Raul A. Gonzalez
Justice

OPINION DELIVERED: December 31, 1998