ORAL ARGUMENT — 1/12/99
97-1187
MELLON MORTGAGE CO V. HOLDER

SCHICK: Mellon seeks reversal of the decision of the 14th CA for two reasons: Mellon had no duty to the respondent, Holder; and 2) because Mellon's conduct could not be and was not the legal cause of any injury to Holder. Questions to be answered by this appeal, we believe, are as follows. Will landowners understand with certainty and a measure of predictability their duties to others? And how far must landowners go to protect others with no connection to the property whatsoever from random acts of violence? This appeal we believe gives this court an opportunity to restate the principles it articulated in *Timberwalk v. Cain*, and with respect to proximate cause in *Union Pump* and in *Bossley*.

The facts are as follows. This case arises from a traffic stop made by an on-duty Houston police dept. officer at 3:30 a.m., on Sunday. He stopped Ms. Holder and after some discussion persuaded her to follow him in his squad car, she in her car, to the 3rd and top floor of the Mellon parking garage, which is an open-air structure parking garage. There after some discussion of 30 minutes to an hour, Officer Potter raped Ms. Holder.

This lawsuit was brought in a Harris County DC, summary judgment was granted to both Mellon and the City of Houston, which was a defendant. One of the issues at that time was the applicability of a city ordinance. The CA affirmed the DC's finding that the ordinance had no applicability to the facts before it. And that particular issue is not now before this court. The CA reversed the summary judgment from the DC with respect to the issues of negligence and gross negligence on the part of Mellon.

Several facts about this parking garage I would like to emphasize before proceeding with the argument with respect to duty. First, this parking garage was not a public parking garage. It was used exclusively for the employees of the Mellon Mortgage Co, which had its building caddy-corner to the parking garage structure itself. And during times when employees were parking their cars in that garage, in other words, during regular business hours Monday - Friday, there were armed security patrols that would randomly look at both the garage and the outside of the building occupied by Mellon and its employees.

No violent personal crime had ever occurred in this parking garage before 3:30 a.m. on that Sunday in 1992. Mellon had recognized its obligation under the law to invitees, its employees who would be walking in that parking garage and had provided security. But it had no actual knowledge whatsoever, and there is none in the summary judgment record, with respect to violent personal crime in that garage or even in the area. And as this court stated in *Timberwalk* there is no obligation on the part of a landowner to investigate, to seek out what the crime statistics are in the area around its property. Moreover, this garage was well lighted at night.

Our argument is as follows: First, Mellon breached no duty to Holder. A landowner's duty as this court has repeatedly emphasized depends on the status of the plaintiff at the time the injury occurs. Here, regardless of status there is no duty. The status of Ms. Holder at the

time that this brutal assault occurred was either trespasser or licensee. There is no debate that she certainly was not an invitee. So that issue and any concern this court has in terms of making a distinction between an invitee and a licensee does not exist in the facts before the court. Instead, the question is, Is she a trespasser, and if so, what duty is there? Or is she a licensee, and if so, what duty is there? And finally, we will get to the issue of proximate cause. We believe that Holder was a trespasser.

HANKINSON: How can she be a trespasser under Texas law when she would have to be on the property for her own purposes, pleasure or convenience? Isn't that a requirement of trespasser status?

SCHICK: No, I don't believe that it is. I believe that the trespasser status is dependent upon the perspective of the landowner, and if the landowner does not expect anyone and has not given anyone lawful authority to be on the premises, then whether she's there voluntarily or involuntarily...

HANKINSON: Well isn't there also though Texas law that if a landowner knows that unauthorized people are coming on their property and does nothing to prevent that or stop it, then consent can be implied under the law?

SCHICK: Absolutely.

HANKINSON: And don't we have evidence in this record that there were people coming into the garage, perhaps homeless people or other people, who were in the garage - in the staircase in the garage, and in the garage at night, and they were not Mellon employees, and they were not authorized to be there and Mellon was aware of that?

SCHICK: There is evidence that there were vagrants that may have occupied over weekends in the stairwells.

HANKINSON: And Mellon did nothing to prevent access after hours or on the weekend to those unauthorized people?

SCHICK: Yes, that is correct with respect to the garage itself.

HANKINSON: Then why doesn't that rise to the level of there being implied consent in this record or at least a fact issue about whether or not there was implied consent on the part of Mellon to allow unauthorized people after hours to have access to the garage?

SCHICK: First, because there is no actual knowledge on the part of Mellon. It was circumstantial evidence at best.

HANKINSON: Now we're dealing with the summary judgment record?

SCHICK: Yes.

HANKINSON: So why wouldn't that raise a fact issue at least?

SCHICK: It does not raise a fact issue because there is no implied permission given to anyone to use the garage itself. The summary judgment record was that Curtis Oblinger, who gave his deposition in this case, had traveled in to the parking garage on 5 or 6 occasions in the garage area itself and saw no cars using the garage. There was nothing in the garage. It was on Monday mornings occasionally that he would see some evidence that a vagrant or someone drinking beer may have been in the stairwell. But this court has recognized that there may be implied permission given with respect to a trespasser who now becomes a licensee on one part of the premises, but another part of the premises still remains open and there has been no implied permission given to any potential trespasser.

HANKINSON: So you ask us to split the hair this way in terms of saying there may have been implied consent to be in the stairwell but not in the garage proper?

SCHICK: I don't believe that implied consent was even given with respect to the stairwell. But I think that this court can make a distinction as to parts of the property, yes.

HANKINSON: And that's what we would have to do in order to say that there was no fact issue on the question of implied consent?

SCHICK: I don't think that you have to go to that extent, because I don't believe that there has been on this summary judgment record, the kind of evidence that would lead to a conclusion that there was implied consent.

HANKINSON: But we don't have to reach a conclusion, and we don't have to decide that the proof was by a preponderance of the evidence, and we don't have to have it be overwhelming. All that has to happen is that a fact issue be raised. It's a very low threshold.

SCHICK: Yes, that is correct. But I don't believe that even the facts that are presented in the summary judgment are sufficient to lead this court to conclude that there was a fact issue at all with respect to what Mellon in its mind could look to in terms of foreseeability. As I understood the court's majority opinion in the *Timberwalk* case, Justice Hecht suggested that foreseeability is the first question that we look at and then we go to duty. And I think even as we parse through whether an individual moves from trespasser status to licensee status, we still have to look at foreseeability. And I don't believe on this record there is sufficient factual evidence to suggest that there was a fact question whatsoever with respect to implied permission to use any part of the premises.

HANKINSON: Do you disagree with the legal authority cited by Justice Spector in her concurring opinion to *Timberwalk*? Do you recall her citing to Prosser on Torts and so on talking about the fact that the nature and use and type of property and so on is a factor to be considered in looking at foreseeability?

SCHICK: I don't disagree that there may be distinctions in types of property. For

example: between residential property and business property. But I think that all of those are captured in the *Timberwalk* five-part analysis, and the concern about those issues are wrapped up in the five areas of testing that one is to look to for foreseeability.

BAKER: Is it ultimately material on whether the respondent was a trespasser or licensee? As I recall, the standard of conduct is the same for both, but there's an exception for the licensee and is that where your argument is going?

SCHICK: No. My position is, it makes no difference whether Holder is called a trespasser or a licensee. I recognize that it is probably repugnant to everyone in this room to refer to the victim of a crime as a trespasser. My problem is, I think that by legal definition she is a trespasser because she has no lawful authority...

BAKER: Well does the court have to decide that to decide the case?

SCHICK: Absolutely not.

BAKER: Is it your view that *Timberwalk* and the factors having to do with foreseeability are the bottom-line issue?

SCHICK: Yes, I believe that they are. And I don't think that this court has to go any further than to rearticulate those factors in the *Timberwalk* case to come to the conclusion that there was no foreseeability. There was no actual knowledge on the part of Mellon of a likelihood of serious crime that would lead this court to go to the next step, which is to parse through what might be the duty, whether she was a trespasser or a licensee.

HANKINSON: It seems that Mellon by its actions with respect to its employees did have a concern about security in that garage. I mean if that were the case and the only factor that we were to look at was whether or not a particular type of violent crime had occurred in the immediate vicinity of the garage why did Mellon have any duty to do anything for its employees then?

SCHICK: Well, but Judge it does. Its employees are invitees and some predictability is necessary on the part of landowners.

HANKINSON: But what you're saying is basically we don't have to worry about this because there is no violent crime, so they couldn't be responsible either to their employees. And yet they have security guards, and people patrolling. Which is great. I think that all of us who have worked in big cities and gone into a parking garage are very happy to see security guards in these parking garages.

SCHICK: But I think Mellon did have a duty to its employees. As invitees, they know they are on the premises. Their cars are in the garage and when cars are in the garage, they certainly pose a risk to vandalism or to auto theft. And Mellon as a landowner knows from this court's pronouncements elsewhere that as to invitees it owes a duty of ordinary care and it does that by making sure that those things are protected. But from this court's pronouncements it knows that it

does not have a duty with respect to trespassers or licensees except not to act wilfully, wontedly, or with gross negligence. And if those standards are changed, then landowners are left in a quandary of who am I to protect? When I leave my home for a vacation am I somehow responsible when an on-duty Houston police officer drags a woman into my parking garage because I've left it unlocked? That's the problem. And I think that this court should maintain the classifications of premises occupiers of invitee, licensee and trespasser because it does afford landowners some predictability, some understanding of what their duty is.

ABBOTT: In that regard considering the *Timberwalk* standards, does it matter whether a person is a trespasser, invitee or licensee?

SCHICK: Given *Timberwalk* probably not. One of the things that Justice Owen suggested in the *Lefmark* case was that if the burden that society is going to place on a landowner to protect the property is a very high burden, then maybe this court should require a very high level of foreseeability. That may be a higher level of foreseeability in a case such as the one your honors articulated than even what it was in *Timberwalk*.

ABBOTT: Considering your position, is your position one such that the status of the person is immaterial as long as *Timberwalk* is applied and as long as *Timberwalk* is applied, do you prevail?

SCHICK: I think *Timberwalk* still tells us that foreseeability is the starting place of the analysis. And we use the five factors articulated in that opinion to look at foreseeability. And if there's a determination of some level of foreseeability, then we go to what status did this person, the injured person, occupy at the time to determine what the duty was at that time under those circumstances so that it is still relevant.

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RESPONDENT

MORRIS: In this first case of the New year, this newly constituted court confronts an issue which the CA, I think correctly said had never been directly addressed by this court. And that is, the common law duty that a landowner that clearly has control over the premises owes to prevent foreseeable criminal conduct on its property when a criminal brings an innocent member of the public engaged in lawful pursuits onto those premises and commits a violent crime.

OWEN: What if this had been a vacant lot instead of a parking garage?

MORRIS: Then it would be an entirely different situation. Because in *Timberwalk*, the court said, You have to have an unreasonable risk of harm and the foreseeability of crimes stems from that unreasonable risk of harm to impose the duty in the first instance. And we have that here and we have the summary judgment evidence that establishes it.

HANKINSON: What evidence does raise a fact issue on foreseeability in this case?

MORRIS: We think the fact issue is raised by consideration of the five factors in *Timberwalk*.

HANKINSON: But what is your specific evidence that fits those five factors?

MORRIS: There's 190 violent crimes from January 1, 1990 until the date of this crime within a ¼ mile radius of that garage. So it's clearly in a high crime area. We have the two Mellon memos demonstrating property crime. We have the one Mellon memo from Mr. Hiller where he advised the person in charge of the garage that there was a drastic increase in crime in the surrounding area in the last 6 months. We asked him on deposition: Did that include violent crimes? He said, Yes, there were rumors of a knife-point robbery right across the street. So we have the know or should have known standard as far as foreseeability, which is the test. We have the actual knowledge of the property crimes. We have the Mellon memo that deals with drastic crime in the neighborhood with the rumors even circulating among the Mellon employees that that is a violent crime. We have the additional evidence that the ladies were afraid to go into that garage at night without an armed escort. You take the frequency, the proximity, the similarity, the publicity, you combine those in this case with our summary judgment evidence and you could not have a stronger summary judgment record that indicates an unreasonable risk of harm with the nature of that structure and how it was conducted to go with the foreseeability factors that this court articulated in *Timberwalk*.

BAKER: Do you agree or disagree with Mellon that whether the respondent was an licensee or trespasser ultimately becomes immaterial because of the foreseeability analysis?

MORRIS: I agree with what Mr. Schick said the first time, but I think he misspoke their position. I agree that when you have unreasonable risk and you have foreseeability in a third-party criminal situation, that those premise liability distinctions are irrelevant and should be irrelevant. Because the duty here is the general duty to prevent foreseeable criminal conduct on your property. And if that is the duty, then it's a duty of ordinary care under the circumstances with a properly charged jury.

BAKER: You do agree that she was not an invitee?

MORRIS: I agree.

BAKER: And isn't the rule the same on licensee and trespasser to conduct level of gross wonting or gross negligence, is that right?

MORRIS: It is in the start, but there is an exception in a licensee case.

BAKER: I understand that. So that's where this case goes, isn't that right?

MORRIS: I respectfully disagree with that. The court does not impose the premise liability distinctions which we have suggested it should not. But if the court were to impose those distinctions, then the question is: Is she a licensee? And we think the court directly decided that. I

think Mr. Schick misstated the test for a trespasser in Texas. Texas has never adopted the restatement, which has the privilege analysis. I think Justice Hankinson was right when she said, that under the definition of trespasser in Texas if you have implied permission to go onto the premises, you are not a trespasser. And the evidence here indicates that implied permission. And what I think Mr. Schick erred in is exactly what Justice Hudson erred in his dissent, and that's combining the licensee analysis, which is implied consent, which they knew about from seeing those vagrants with newspapers rolled up. And it's not circumstantial. And there were admissions by Mr. _____ that they knew unauthorized people were going on there and did nothing to prevent that. That's a different analysis. You can get a licensee status by their knowledge and their toleration, and that's different from a foreseeability analysis, which we have for purposes of duty and which we have for purposes of proximate cause.

BAKER: Well then is your argument that the exception of actual knowledge coupled with the foreseeability analysis is the bottom line to decide this case?

MORRIS: It's twofold. Once the licensee is reached on the implied admission, then clearly the actual knowledge of the condition of the garage would create an unreasonable risk is sufficient to create a fact issue and resolve the case.

Independently, if there's an unreasonable risk and there's a foreseeability of harm, then we say there's a duty analysis independent of the premise liability classifications.

ABBOTT: You're urging us to not get into the classifications in this case?

MORRIS: That's correct. What I am asking the court to do is to say that in the case of third-party criminal liability, that the premise liability distinctions do not apply because the control on that is unreasonable risk in the first path(?) and foreseeability.

ABBOTT: The first step would be the *Timberwalk* test?

MORRIS: That's correct.

ABBOTT: And regardless of what category a person would otherwise fall into: licensee, whatever, and then after the *Timberwalk* test is applied let's assume that the *Timberwalk* test is passed, that a sufficient number of the standards are breached what do you propose should be looked at next?

MORRIS: Then it would be ordinary care under the circumstances with a properly charged jury. And that's what we've asked the court to look at...

ABBOTT: You say ordinary care under the circumstances. What defines the circumstances, which traditionally were defined by the classification of plaintiff?

MORRIS: They would be defined as follows, and our proposed charge is you would ask a question: Was the negligence of Mellon, if any, a proximate cause of the harm or injury in a

particular circumstance? And it would be define negligence as Justice Hecht defined it for this court in *Timberwalk*, and then you would further define in accordance with the standards that impose a duty as well as the _____ factors, which are set forth in that Nebraska SC decision that we passed out to the court, and that would be the best one _____ to resolve premise liability cases. Those are the principal distinctions in the majority of courts that have reconsidered this since 1959.

This court granted two petitions for review. Let me address our issue of the premise liability distinction. It should be laid to judicial rest, and across-the-board we should do away with them and apply a duty of ordinary care under the circumstances. The SC in 1959 described the premise liability categorization system as a _____ morass that is more filled with exceptions than a rule. We then have for you the *Rollin* case, which was the first case, which was California in 1968, to abolish those distinctions. And then we had the latest case, which was the Nebraska SC in 1996. And we have two law review articles that deal with that that integrate all the cases in-between. They tell us that 37 states have reconsidered those classifications since 1968 and 23 of them have abolished the distinctions in whole or in part and 11 states have in effect abolished them entirely.

On the *Nixon* case, Justice Spears said, He would carve out an exception for trespassers (if they were to be called trespassers that were brought onto the property unwillingly, because that would be manifestly unjust to tag them with that label under those circumstances), and he would reserve judgment on the abolition of those standards until we had more information. Well 13 or almost 14 years later, we submit we have that additional information.

ENOCH: Talking about the distinction between a trespasser, licensee and invitee. Do you agree or disagree that the landowner in the first instance still should have knowledge or should reasonably know about a defective condition on the premises that causes the injury?

MORRIS: Absolutely.

ENOCH: Using the *Timberwalk* analysis should Mellon have knowledge that there's a defect on its property that poses a risk of harm to others?

MORRIS: Under the foreseeability analysis it needs to know or should know of the unreasonable risks created by its property condition.

ENOCH: It needs to know there's a defect in this property that raises this unreasonable risk of injury?

MORRIS: Actual knowledge is not required.

ENOCH: Or, should know?

MORRIS: Or should know.

ENOCH: Let's take this parking garage. It may be in, as you say, a high crime area,

crime committed all around it. But the argument is, well it's well lighted, no crime has occurred on this property. Is there a defective condition in the property as it exist that Mellon should have known of?

MORRIS: Yes.

ENOCH: What was that defective condition?

MORRIS: That defective condition is is that that garage on that location at that time completely unrestricted to any type of injury created on an unreasonable risk of crime.

ENOCH: What tells me that if I've had no crime? I walk out and I put up a 10 ft. chain link fence to keep people out, and there's never been any crime in there although there's crime happening right across the street all the time presumably because there isn't a 10 ft. fence. And then all of a sudden there's a crime because somebody climbed the fence and committed a violent crime. Is that notice that my property is defective because crime has been happening all around my property, but not on my property?

MORRIS: Yes. The 10 ft. fence obviously will be a critical factor in your alternative hypothesis. But when you have a garage and you know that vagrants are going in there and using it where they could create harm to themselves, when you know people are going in there to drink on the weekends and you do nothing about it, and you know, then it isn't a one-bite rule on that premises. It is clear and that close-by is sufficient under the *Timberwalk* test. And here, we have a dangerous condition; 190 violent crimes have occurred in a ¼ mile radius here.

ENOCH: I'm really focusing on this defective condition of the property. If a landowner's duty is predicated on a should have known of a defective condition how could any landowner ever know that they've got a defective condition on the property because the only way they would ever learn or should know of the defective condition was the fact that a crime occurred on their property? I could put up a 10 ft. fence. I could have it well lit. I could have it locked with huge locks. I can do everything. But your argument would be, the moment the crime occurred on the property, then my property must be defective?

MORRIS: No, that is not our argument. The argument is is that this garage created an unreasonable condition. In fact, Mellon admitted, the man in charge, that he knew that this garage was inherently susceptible to criminal activity because the nature of it. When you know that and then you know reasonably or should have known under a foreseeability test a crime in that neighborhood and then we have the summary judgment evidence that this particular location created a special temptation.

ENOCH: Would a 10 ft. fence around it, locked on weekends make the property not defective?

MORRIS: Yes, in my judgment it would.

ENOCH: But if a crime occurred on that premises with that fence, would that make the property defective?

MORRIS: No.

ENOCH: Well how does a landlord know which it is? This landlord said, I put up all these lights, and it's vacant on weekends.

MORRIS: There is no summary judgment evidence that those lights helped. In fact, to the contrary. Those lights in our judgment and with summary judgment evidence on the unreasonable risk are like a porch light drawing moths. A criminal can go in there and if you have a roof on it, then you can use that light to actually perpetuate a crime. It is an attraction. It is not when you have an unlimited access - pedestrian-wise and vehicle wise into that garage - and they say it's a private garage, there is nothing to suggest that was a private garage. There were "No trespass'" signs, there were "No keep out" signs, there was "No private property do not enter" signs. There was nothing.

ENOCH: But could the lights have been the reason that the crime was occurring all around, but not in the garage?

MORRIS: That would be possible, but that would still be a foreseeable condition at that garage given its unique nature, and given the unreasonable risk and the foreseeability of crime in the neighborhood was a special temptation, which creates a duty to prevent foreseeable criminal conduct and harm to people engaged in their lawful pursuits. A landowner would know that if I've got property and I control it, I have a duty to act reasonably to prevent foreseeable criminal conduct on that property. And that's about as definitive as you can get. Then you put the appropriate instruction on how you define what that duty is.

OWEN: Assume with me all the facts are the same except this is a surfaced parking lot that Mellon uses during the day, and that during the day there's a security guard there to protect its employees. And it knows that from time to time homeless people have slept on the surface of the parking lot. It knows about the crime in the area. What duty does Mellon owe to the general public to ensure that crime does not occur on that surfaced parking lot in the evenings, at night or on the weekends?

MORRIS: I would have to know more facts. If that surfaced parking lot created an unreasonable risk of harm...

OWEN: The facts are exactly the same as in this case except it's a surfaced parking lot, not a parking garage.

MORRIS: Then I would think that if it was surfaced and without those conditions, then I think you have a closer question. But I think you could still have a duty under those circumstances. If you have allowed something to exist that has created an unreasonable risk...

OWEN: What is unreasonable risk about allowing homeless people to sleep on your surface parking lot?

MORRIS: Here we have a use of the property that is creating the unreasonable risk. Now homeless people by themselves may not create the unreasonable risk. That's why I say it's hard...

OWEN: Assume all the facts are the same, exactly the same that they saw all that they saw in the surface parking lot that they saw in the parking garage and that the criminal statistics in the area are the same. What duty does Mellon owe to the general public at 3:30 a.m. or on weekends?

MORRIS: I think they have a duty at all times if they control that property to act reasonably to prevent foreseeable criminal conduct on that property. I don't think we can assume all the facts are the same when you have a parking garage where people can drive into, and have a car hidden, I think you have a clear increased foreseeability in terms of duty, violence and proximate cause because of the nature of the structure that you just flat wouldn't have if you had a surface parking lot where people could drive down and see what was going on. I think part of the allure of this garage was the ability for Calvin Potter or anybody under a general danger analysis to drive up, be hidden, and have the light to do what he wanted to in isolation and in secret. And that's why we think that garage created a new special temptation that a surface parking lot more likely than not would not. But there are circumstances under which, depending on the crime history, etc., it might. So we think the analysis really boils down to is there an unreasonable risk of harm, and is there a foreseeable risk of conduct under the traditional test? And we think we have met that with our summary judgment evidence.

We have all the Mellon admissions, the admission that they knew that the property, their garage, was inherently susceptible to criminal activity. They knew of the property crime, their people were afraid to go into the garage without armed escorts. They knew there were rumors of the property across the street where there was a knife-point robbery. And so all of that meshes together to say, that we have fact issues in this record that this garage...

BAKER: Do I understand from your earlier comments in response to Judge Enoch's questions that in your view the submission of a case under your theory, the knowledge would be knew or should have known, because you are advocating submitting this under ordinary negligence submission as opposed to premises liability? So really the bottom line is, you want the court to go as far as saying we're going to have an ordinary negligence situation when you have this problem as opposed to basing it on a premises liability theory and the usual submission?

MORRIS: Yes.

BAKER: Which basically means that everybody is an invitee in your viewpoint?

MORRIS: Only under circumstances where you have third-party criminal liability...

BAKER: But to get where you want to go they have to fall under an invitee definition at least under traditional, is that right?

MORRIS: Under traditional, yes, there would have to be a duty that would have arose out of an unreasonable risk of harm...

BAKER: And they knew or should have known?

MORRIS: And they knew or should have known under the foreseeability, under the foreseeability test. But the foreseeability test is only one component of that duty analysis in the first instance. You have all the others of the balancing, and the social utility of the garage, etc. You would have to go through that analysis to get to the duty in the first instance in any case. But in this case, as the CA said, every one of the greater Houston duty analysis weighs heavily in favor of finding a duty here. A $20 chain could have stopped the vehicular ingress into that garage on this particular case. But the second analysis is, if the court doesn't say in this type of case that the ordinary care of the circumstances is appropriate, then we think the CA was right that there's clearly evidence of implied permission by Mellon for unauthorized people on that garage. And therefore, under §330 of the Restatement defining licensees, other people that came in even not knowing that those other people were licensees had been doing that also achieve a status of a licensee. And under a licensee test, Mellon clearly knew the condition of its garage. This was not any type of latent defect. They knew that it was inherently susceptible to criminal activity.

BAKER: But wouldn't you then be saying they knew of the condition of its garage and the fact that there wasn't a $20 chain across the entrance creates the dangerous condition?

MORRIS: Yes. They knew of the condition of the garage. There's no question about that. They knew the garage was inherently susceptible to criminal activity. They knew they had done nothing to stop unauthorized people from coming onto that garage. And we think that's sufficient, particularly under a licensee analysis to render a duty on behalf of Mellon.

For these reasons, we ask the court to grant the relief asked for in Ms. Holder's petition for relief.

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REBUTTAL

SCHICK: Ordinary care should not be the duty owed by a landowner to victims of criminal conduct for a number of reasons. First, as I thought Justice Enoch was articulating through his questions, it invites a hindsight analysis: what do we know now based on a crime that occurred last night that we could have done differently to have prevented it? And it is unfair to place that kind of a burden on landowners. Second, it is unfair to place that ordinary duty care on them because the question is, As to whom do I owe an ordinary duty of care? I know I owe it to my invitees. I know I owe it to those persons who I expect to be on the premises, who I invite to be on the premises, and perhaps even I may owe it as to licensees who I have given my implied or express permission to over time. But certainly I should have no duty of ordinary care with respect to those to whom I have not given any implied permission or to those who are trespassing. And if that duty is placed on landowners, then what we are telling the public and every property owner whether it is residential property or business property in a large metropolitan area is, you must be aware of all potential areas

of crime on your building or as the New York court said in a case they examined where a 16 year old was abducted off the street and taking into a vacant building. We must now guard all of the nooks and crannies everywhere in the area, and if we can't guard against them, now we are going to have to post some kind of a security guard there because...

ABBOTT: Let's assume the *Timberwalk* test is satisfied. If that test is satisfied why would it matter if they were an invitee or a licensee or trespasser? Don't you think that the duty owed would be the same?

SCHICK: No, I don't believe that the duty owed would be the same. Because I don't believe that *Timberwalk* requires that kind of heightened level of foreseeability that would be required that my duty as a landowner is only one of ordinary care. That was the circumstance that the court was considering in the *Timberwalk* case. The injured party in that case, as you well know, was an invitee. And the court went through the 5-step analysis. I don't believe that this court did articulate to any specific _____ in that case what the duty might be if the occupier of the premises was something different. And there might be an even higher level of foreseeability required.

ABBOTT: But under *Timberwalk* if that test is satisfied, basically we have a situation where a landowner recognizes let's say the probability of that type of crime occurring on the premises. And if that occurs, if the landowner knows there is a probability of crime occurring, what does it matter if the person who is the victim of the crime is an invitee or licensee or even a trespasser?

SCHICK: It seems to me that it would matter in terms of what action or lack of action was taken in response. If they know that under *Timberwalk* that your analysis assumes that the landowner knows that there is a great likelihood, a high likelihood of crime, and of the specific type of crime, and it may well be that your honor once that is met, then the gross negligence standard has been met or at least there's a fact issue as to gross negligence. But maintaining the class distinctions, I think, helps the landowner know for predictability purposes better than the weighing that we can do as lawyers and a district judge can do in the 5-factors that are set out by the court in *Timberwalk* what its duties are to various types of occupiers on its premises.

HANKINSON: Do you agree with Mr. Morris's characterization of the changing in the law that's occurred that 37 states have reconsidered?

SCHICK: Yes, but I don't believe that 37 states have actually eliminated...

HANKINSON: I think he said 37 have reconsidered and of that 23 have abolished in part, and 11 have abolished it in its entirety. Does that kind of sound like it's in the ballpark for you as far as what the state of the law is?

SCHICK: Yes.